

**ORIGINAL**Decision No. 68504

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Investigation on the Commission's )  
 own motion into the operations, )  
 rates and practices of BEN SMITS. )

Case No. 7843

Karl K. Roos, for respondent.Timothy E. Treacy, for the Commission staff.O P I N I O N

By its order dated February 18, 1964, the Commission instituted an investigation into the operations, rates and practices of Ben Smits, an individual, hereinafter referred to as respondent, for the purpose of determining whether respondent, by any means or device, assisted or permitted any corporation or person to obtain transportation of any property over the public highways within this State at rates less than the minimum rates established or approved by the Commission in violation of Section 3668 of the Public Utilities Code.

A public hearing was held before Examiner Mooney on May 7, 1964, at Los Angeles.

Respondent was issued Radial Highway Common Carrier Permit No. 19-55501, which permit has been under suspension at the request of respondent for the period December 12, 1963 to October 26, 1964. Respondent reported no revenue from for-hire transportation for the first six months of 1963. For the last six months of 1963, he reported a total gross revenue of \$5,509, which does not include income from the transactions here under investigation. The Commission's records show that respondent was served with copies of Minimum Rate Tariff No. 14 and Distance Table No. 4, with supplements and additions thereto. Respondent's counsel was afforded the

opportunity at the hearing to review the Commission's records concerning service of tariffs upon respondent.

A representative of the Commission's staff testified that he visited respondent at his home in Artesia on October 29, 1963 and reviewed respondent's records for the period April 1, 1963 through July 30, 1963. He stated that during said period respondent transported 85 shipments of hay from farmers in the Bakersfield area to customers in the Los Angeles-Artesia Area. The witness testified that the method of handling the shipments was as follows: Alvin Kuiper, by telephone, would furnish respondent with the name of a farmer in the Bakersfield area from whom respondent could obtain hay; respondent would pick up the hay in his equipment and transport it to the Bernie Sierdsma Wholesale Hay lot in Artesia; the hay would remain on respondent's equipment until it was sold by Sierdsma; when a buyer was found, Sierdsma would instruct respondent where to deliver the hay; respondent would be paid by Sierdsma and not the ultimate customer; after Sierdsma paid respondent, respondent would pay Kuiper. The representative stated that he prepared Exhibits 1 and 2 and that they are true and correct photostatic copies of a billing statement from Kuiper to respondent dated August 6, 1963, and a billing statement from respondent to Sierdsma dated August 5, 1963, respectively. Both documents, he explained, cover the same 15 loads of hay which were transported between July 10, 1963 and July 30, 1963.

The representative testified that respondent did not advertise that he bought and sold hay, employed no salesmen, maintained no supply of hay on hand to meet future demands of customers and had no investment in the buy and sell business other than in transportation equipment. He stated that respondent had one tractor and two flat bed

trailers, had no terminal facilities and would park his equipment when not in use on Sierdsma's lot in Artesia.

A Commission staff rate expert testified that she took the documents in Exhibits 1 and 2 and formulated Exhibit 3, which shows for each of the 15 loads of hay the difference between the sale price received by respondent and the purchase price paid by respondent, the minimum rate and charge for the transportation performed by respondent and the resulting undercharge. The witness stated that the total undercharge for the 15 shipments is \$482.46.

Respondent contended that the transactions in issue were not an illegal "buy and sell" arrangement. Kuiper and Sierdsma presented testimony in support of this position. Each of the three witnesses stated that his company is independent and not associated in any manner with the companies operated by the other two.

Kuiper testified that he has been licensed by the Department of Agriculture of the State of California for the past four years to operate as a hay dealer. He stated that he buys hay from farmers located generally in Kern County, takes title to the hay at time of purchase and pays the grower when he receives a weight ticket which is usually five to ten days after purchase. He further testified that he sells hay to respondent who picks it up from the grower at roadside and that he is paid by respondent when the hay is weighed or within a week to ten days thereafter.

Sierdsma testified that he has been issued a license by the Department of Agriculture of the State of California to operate as a commission merchant. He explained that when respondent's equipment arrives at his lot, he finds a buyer for the hay. He stated that payment by the buyer is made to him and that he pays respondent weekly. The witness testified that he does not take title to the hay.

Respondent testified as follows: Kuiper does not tell him where to take the hay after he purchases it, and Sierdsma does not tell him where to obtain the hay; Sierdsma deducts a commission from the price paid by the ultimate buyer; payment is made to Kuiper when all of the hay on a farm has been picked up, and this may require several weeks if a large quantity is involved; the Department of Agriculture informed him that since he buys hay from a licensed commission broker, the Department does not require him to obtain a license. Respondent stated that he did not recall informing the staff representative that payment was made to Kuiper after he had first received payment from Sierdsma; however, he did state that payment to Kuiper for the hay covered by the staff exhibits was not made until after he had billed Sierdsma for the hay. Respondent also testified that he had dealings with other hay dealers in addition to Kuiper.

Counsel for respondent pointed out that the Order Instituting Investigation includes a notice to respondent to produce at the hearing the documents from which Exhibits 1 and 2 were copied. He offered the documents at the hearing and made a motion for immunity for his client under Section 3741 of the Public Utilities Code from any penalty should the Commission find the transactions in issue to be a device. Section 3741 provides in part that ". . . no person shall be prosecuted, punished, or subjected to any penalty or forfeiture for or on account of any act, transaction, matter or thing concerning which . . . he has . . . produced documentary evidence before the commission . . ." Counsel for the Commission staff argued that the staff case is based on the staff's investigation, testimony and evidence and not on respondent's testimony or evidence and that Section 3741 does not provide immunity in such circumstances.

After consideration the Commission finds that:

1. Respondent operated pursuant to Radial Highway Common Carrier Permit No. 19-55501 during the period covered by this investigation. Said permit has been under suspension at the request of respondent for the period December 12, 1963 to October 26, 1964. ✓

2. Respondent was served with appropriate tariffs and distance tables. ✓

3. Respondent contributes nothing to the transactions covered by Exhibits 1 and 2 except the transportation of property. ✓

4. Alvin Kuiper decides what type of hay to purchase and what to pay the grower.

5. Sierdsma Hay Company finds the buyer and sells the hay, paying the respondent some lesser amount than that paid by the ultimate purchasers.

6. The purported "buy and sell" transactions were not in truth and in fact bona fide sales but were mere shams and devices employed by respondent to circumvent and violate the law, and such transactions constituted for-hire carriage within the regulatory jurisdiction of this Commission.

7. The motion by respondent for immunity from any penalty should the transactions in issue be found to be for-hire transportation should be denied.

8. Respondent charged less than the lawfully prescribed minimum rate in the instances set forth in Exhibit 3, resulting in undercharges in the amount of \$482.46. ✓

Based upon the foregoing findings of fact, the Commission concludes that:

1. Respondent violated Section 3668 of the Public Utilities Code by means of a device whereby shippers obtained transportation

or property between points within this State at less than the minimum rates established by the Commission.

2. The Commission has promulgated regulations based on statutory authority (Sections 3701 et seq. of the Public Utilities Code) which require highway permit carriers to maintain and keep certain records, including records of the transportation of hay. The privilege against self-incrimination does not apply to records which a statute or a valid regulation require to be kept. (See Davis, Administrative Law, Vol. 1, pages 203-207.) The documents from which the photostatic copies in Exhibits 1 and 2 were made are respondent's only records of the transportation of hay herein under investigation. Section 3741 of the Code does not provide any immunity when the privilege against self-incrimination does not exist. The motion by respondent for immunity from any penalty will be denied.

The order which follows will direct respondent to review his records to ascertain all undercharges and overcharges that have occurred since January 1, 1963 in addition to those set forth herein. The Commission expects that when undercharges have been ascertained, respondent will proceed promptly, diligently and in good faith to pursue all reasonable measures to collect the undercharges. The staff of the Commission will make a subsequent field investigation into the measures taken by respondent and the results thereof. If there is reason to believe that respondent or his attorney has not been diligent, or has not taken all reasonable measures to collect all undercharges, or has not acted in good faith, the Commission will reopen this proceeding for the purpose of formally inquiring into the circumstances and for the purpose of determining whether further sanctions should be imposed.

O R D E R

IT IS ORDERED that:

1. Respondent shall pay a fine of \$1,500 to this Commission on or before the twentieth day after the effective date of this order.

2. Respondent shall cease and desist from using fictitious "buy and sell" transactions, such as those disclosed herein, as a device for evading the minimum rate orders of this Commission.

3. Respondent shall examine his records for the period from January 1, 1963 to the present time, for the purpose of ascertaining all undercharges that have occurred.

4. Within ninety days after the effective date of this order, respondent shall complete the examination of his records required by paragraph 3 of this order and shall file with the Commission a report setting forth all undercharges found pursuant to that examination.

5. Respondent shall take such action, including legal action, as may be necessary to collect the amounts of undercharges set forth herein, together with those found after the examination required by paragraph 3 of this order, and shall notify the Commission in writing upon the consummation of such collections.

6. In the event undercharges ordered to be collected by paragraph 5 of this order, or any part of such undercharges, remain uncollected one hundred twenty days after the effective date of this order, respondent shall institute legal proceedings to effect collection and shall file with the Commission, on the first Monday of each month thereafter, a report of the undercharges remaining to be collected and specifying the action taken to collect such undercharges, and the result of such action, until such undercharges have been collected in full or until further order of the Commission.

7. The motion by respondent for immunity from penalty under Section 3741 of the Public Utilities Code is denied.

The Secretary of the Commission is directed to cause personal service of this order to be made upon respondent. The effective date of this order shall be twenty days after the completion of such service.

Dated at San Francisco, California, this  
19<sup>th</sup> day of JANUARY, 1965.

Frederick B. Holloff  
President

John J. [unclear]

George A. Grover

William B. [unclear]

Commissioners