

ORIGINAL

Decision No. 75062

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Investigation on the Commission's
own motion into the operations,
rates, and practices of SUMNER &
SON TRANSPORT, INC. and LEWIS FOOD
COMPANY. }

Case No. 8806
(Filed May 21, 1968)

Karl K. Roos, for LFC, Inc., formerly Lewis Food
Company; W. Harold Sumner, for Sumner & Son
Transport, Inc.; respondents.
Janice E. Kerr, Counsel, and E. E. Cahoon, for
the Commission staff.

O P I N I O N

This matter is an investigation on the Commission's own motion into the rates, operations and practices of Sumner & Son Transport, Inc. (Sumner), and Lewis Food Company (Lewis) for the purpose of determining whether Sumner may have violated Sections 3664, 3667 and 3737 of the Public Utilities Code by refunding or remitting to Lewis a portion of the minimum rates and charges established by the Commission in the form of moneys paid to Antonio Aguirre, an employee of said shipper.^{1/}

Public hearing was held before Examiner Mooney in Los Angeles on August 13, 1968, on which date the matter was submitted.

It was stipulated that during the period of time covered by the investigation herein, Sumner conducted operations pursuant to radial highway common carrier, highway contract carrier and city

^{1/} The name of Lewis Food Company was changed to LFC, Inc., during the first half of 1968.

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carrier permits, and that it was served with appropriate minimum rate tariffs and distance tables. Sumner has a terminal in Los Angeles. It has two office employees and employs five drivers. It operates two tractors, 17 trailers and a small van. Its gross operating revenue for the year ending March 31, 1968, was \$597,333. A motion was made by counsel for Lewis to dismiss his client as a respondent herein.

On various days during October and November 1967 and April 1968, two representatives of the Commission's Field Section visited Sumner's place of business and examined its records for the period December 1, 1966 through September 30, 1967, pertaining to transportation performed for Lewis, a manufacturer of animal food. During the review period, Sumner obtained over 70 percent of its income from the Lewis account.

The testimony of the two staff representatives was as follows: Aguirre was employed by Lewis as a full-time employee for approximately 13 years until September 1967 when he resigned for health reasons; while employed by Lewis, Aguirre was in charge of the company warehouse, preparing shipments and loading trucks and supervising numerous people; Aguirre was also employed by Sumner to work for it after he completed his normal work day at Lewis during most of the period between December 1966 and September 1967 and was paid \$75 per week; true and correct photostatic copies of the 37 canceled weekly payroll checks issued to Aguirre by Sumner during said period are included in Exhibit No. 3; the total amount of said checks is \$2,775; they were informed by the president and vice president of Sumner that Aguirre was hired to prepare and assemble master bills and subdocuments for the Lewis account at the office of the traffic consultant engaged by Sumner to handle the billing for

said account; Exhibit No. 4 includes a summary of the number of documents prepared for the Lewis account during the period in issue and shows that the total number of individual documents prepared was 551 and the average number per week was 15; Sumner's traffic consultant informed them that Aguirre came to his office once a week and occasionally twice to type the documents; they were further informed by the president of Sumner that the typing was the only duty performed by Aguirre and that he was considered to be an independent contractor; the vice president of Sumner became affiliated with said respondent in December 1965, and his brother, who subsequently died, was at that time the majority stockholder of Lewis; Sumner transported shipments for Lewis prior to hiring Aguirre and continued to have the account after Aguirre left its employment; there was no indication that Aguirre had any control over the selection of carriers to handle shipments for Lewis or that any of the money paid to Aguirre went back to Lewis; Aguirre is now employed by a plastic products company.

The staff does not claim that Sumner billed Lewis less than applicable minimum charges for any of the transportation performed by it for said shipper during the review period nor that Lewis paid less to Sumner than the amount billed. It is the staff position that the payments by Sumner to Aguirre constituted a device whereby Sumner refunded part of the minimum charge. An independent traffic consultant called by the staff testified that if his firm had typed the documents assertedly typed by Aguirre, he would have charged approximately \$32.50 per month for this service. (Aguirre was paid \$75 per week by Sumner.)

Testimony on behalf of the two respondents was presented by Aguirre, the president and vice president of Sumner, and the

president of Lewis. The traffic consultant engaged by Lewis was called as a witness by the staff. Both the president of Sumner and its traffic consultant stated that, when they were interviewed by the staff investigators, they were not entirely knowledgeable of the duties performed by Aguirre for Sumner and that for this reason the information they furnished the investigators was inaccurate.

Following is a summary of the testimony by the five witnesses:

At the time Aguirre was hired by Sumner, both the president and vice president were away from said respondent's office for extended periods of time; the president was in the northern part of the State soliciting business and the vice president was involved in personal problems which required his attention; because of this, Sumner was in need of additional help in the office but could not afford a full-time dispatcher who would have cost between \$800 and \$1,000 per month; Sumner approached Aguirre regarding part-time employment at \$75 per week (approximately \$300 per month); Lewis was not aware of this and did not receive any of the money paid to Aguirre either directly or indirectly; Aguirre was to go to the office of Sumner's traffic consultant and prepare and rate the billing for the Lewis account at said office; because he could not arrive there until after he completed his 7 a.m. to 4:30 p.m. work day at Lewis and did not have the required experience, this was discontinued after one or two visits; Aguirre did go to Sumner's office approximately three evenings a week and occasionally on Saturdays and averaged 20 hours work per week there; he was not required to keep regular hours; the work he performed included matching and tracing multiple lot documents and hand tags for the Lewis account and also tags for other accounts, setting up a system for dispatching and routing equipment, preparing billing

for various accounts and assisting in other office duties; his work was quite satisfactory and substantially reduced the backlog which had built up in billing and other paper work; when the vice president returned to his regular duties, Sumner's business had increased due to the efforts of its president, and Aguirre was kept on due to the increased workload in the office resulting therefrom; when Aguirre resigned, the vice president took over his duties, and it requires a substantial amount of overtime work on his part to handle them; Sumner had the Lewis account prior to Aguirre's part-time employment by said carrier; Lewis had equipment of its own and shipments which its own equipment could not handle were given to Sumner; Aguirre had absolutely no control in the selection of for-hire carriers for Lewis; this selection was made by the president of Lewis; the former president of Lewis had selected Sumner; since Sumner had provided satisfactory service, the new president continued to use Sumner; about July 1, 1968, all operating properties of Lewis, including the trade name and good will, were sold to National Can by LFC, Inc. (formerly Lewis Food Company).

Discussion

The issue before us is whether the payments by Sumner to Aguirre constituted an unlawful rebate or commission or a device whereby Lewis obtained transportation at less than minimum rates. We are of the opinion that this has not been established on the record before us.

Payments to an employee of a shipper where the purpose is to obtain the shipper's business constitute an unlawful rebate or commission, even though the shipper had no knowledge of them and received no benefit therefrom.^{2/} However, Public Utilities Code

2/ Investigation of Cascade Refrigerator Lines, Inc., 62 Cal.P.U.C. 42 (1963).

Section 3667 does not prohibit all transactions between a carrier and such employee where payments are reasonable compensation for services to the carrier outside the scope of employment by the shipper.^{3/}

There is nothing in the record to rebut the testimony by various witnesses on behalf of respondents that Aguirre had no control over the selection of for-hire carriers to transport freight for Lewis; that Lewis had no knowledge of Aguirre's part-time employment by Sumner; that said part-time employment was performed by Aguirre outside the scope of his employment by Lewis; that none of the money paid by Sumner to Aguirre either directly or indirectly benefited Lewis; that Sumner had the Lewis account before and after its arrangement with Aguirre; and that Sumner received no advantage in its relationship with Lewis because of its employment of Aguirre. With respect to the question of whether the reasonable value of the services performed by Aguirre for Sumner was in fact \$75 per week, the record does not establish with certainty that it was not. In the circumstances, on this record there is no basis for our concluding that the payments by Sumner to Aguirre were unlawful.

The investigation will be discontinued. However, it by no means follows that it was improvidently instituted. Whenever it is brought to our attention that any payment has been made by a carrier to an employee of a shipper, a most thorough inquiry will be conducted. Such payments are inherently suspicious, and the carrier making them must be prepared to demonstrate affirmatively that they were legitimate. Furthermore, both Sumner's president and its

^{3/} Investigation of Clawson Trucking Co., Inc., 62 Cal.P.U.C. 105 (1963) and Investigation of Plywood Trucking Co., Inc., 62 Cal. P.U.C. 153 (1964).

traffic consultant are placed on notice that the Commission does not take lightly that they furnished certain information to Commission personnel as being accurate when in fact they knew at the time there was doubt about its accuracy.

Since the investigation will be discontinued, it is unnecessary for us to rule on the motion by counsel for Lewis to dismiss his client as a respondent herein.

Findings and Conclusion

Upon consideration of the evidence, the Commission finds that:

1. During the period covered by the staff investigation (December 1, 1966 through September 30, 1967), Sumner operated pursuant to radial highway common carrier, highway contract carrier and city carrier permits.
2. Sumner was served with appropriate tariffs and distance tables.
3. Sumner transported freight for Lewis before, during and after the period investigated.
4. During said period, Sumner employed Aguirre, an employee of Lewis, part time and paid him \$75 per week.
5. Said part-time employment of Aguirre by Sumner was outside the scope of his employment by Lewis and without the knowledge of Lewis.
6. It has not been established on this record that the amount paid by Sumner to Lewis was unreasonable compensation for services performed or that said employment was unlawful.
7. Lewis has changed its name to LFC, Inc., and all of the operating property formerly operated by Lewis, together with its trade name and good will, have been sold.

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The Commission concludes that the investigation herein should be discontinued.

O R D E R

IT IS ORDERED that the Commission investigation in Case No. 8806 is discontinued.

The effective date of this order shall be the date hereof.

Dated at San Francisco, California, this 10th day of DECEMBER, 1968.

William Symons, Jr.
President

Augustine
John P. Monahan
Commissioners

Commissioner William M. Bennett, being necessarily absent, did not participate in the disposition of this proceeding.