

Decision 82 01 80 January 19, 1982

ORIGINAL

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Investigation on the Commission's)
own motion into the operations,)
rates, charges, and practices of)
Peter K. Greene, dba P. K. Greene)
Trucking, an individual.)

OII 94
(Filed July 22, 1981)

Peter K. Greene, for himself, respondent. ✓
Alberto Guerrero, Attorney at Law, and
Paul Wuerstle, for the Commission staff.

O P I N I O N

This is an investigation on the Commission's own motion into the operations, rates, charges, and practices of Peter K. Greene (Greene), dba P. K. Greene Trucking, for the purpose of determining whether Greene failed to: (1) enter into written subhaul agreements with dump truck carriers engaged by him, as required by paragraph 3 of General Order (GO) 102-F, and (2) pay dump truck subhaulers within the time period specified in Item 210 of Minimum Rate Tariff (MRT) 7-A, Item 460 of MRT 20, and paragraph 4 of GO 102-F.

Public hearing was held before Administrative Law Judge Arthur M. Mooney in San Francisco on September 25, 1981, on which date the matter was submitted.

Background

At the time of the staff investigation referred to below, Greene:

1. Held dump truck, highway contract, and agricultural carrier permits and a Senate Bill 860 highway common carrier certificate;

2. Had been served with MRTs 7-A, 15, 17, and 20 and had adopted MRT 2, Exception Rating Tariff 1, and Distance Table 8 as his common carrier tariffs;
3. Employed eight fulltime and one parttime drivers and also three fulltime and two parttime office personnel;
4. Operated nine tractors, one end dump trailer, two sets of bottom dump trailers, three sets of double flat bed trailers, and two flat bed trailers; and
5. Maintained an office and terminal in Martinez.

His gross operating revenue for the 12-month period from July 1, 1979 through June 30, 1980 was \$758,252 of which approximately 8% was attributable to subhauling for other carriers. Most of the transportation business handled by Greene is physically performed by subhaulers.

GO, Tariffs, and Rules

GO 102-F sets forth rules governing bonding requirements in connection with subhauling. MRT 7-A names minimum distance and hourly rates and rules for dump truck transportation in northern and southern California. MRT 20 names minimum zone rates for dump truck transportation in northern California.

Paragraph 3 of GO 102-F provides that every subhaul agreement shall be reduced to writing by the overlying carrier and presented to the subhauler within five days after commencement of any subhaul service. It sets forth the information that must be included in the agreement and requires all parties to sign the agreement and retain a copy for not less than three years. Paragraph 4 of the GO, Item 210 of MRT 7-A, and Item 460 of MRT 20 each provide in essence that the prime carrier shall pay the subhauler on or before the 20th day of the calendar month following the completion of the shipment. These rules were in effect at the time of the investigation, and the provisions have not been changed for dump truck carriers in any subsequent reissues.

Staff

During the last two weeks of August and the first two weeks of September 1980, a representative of the Commission's staff visited Greene's place of business and examined his transportation and related records. The representative testified that the investigation was the result of a complaint from a single subhauler and that while it was in progress, he received a complaint from another subhauler. He stated that Greene and his staff were cooperative during the examination.

The representative testified that his investigation disclosed that during the period April through June 1980 Greene engaged over 40 dump truck subhaulers and that there were no written subhaul agreements for seven of them as required by paragraph 3 of CO 102-F. The witness stated that his review also disclosed that most of the payments by Greene to his dump truck subhaulers during the period May through July 1980 were made after the 20th of the month following completion of shipment deadline for such payments specified in the applicable rules. He asserted that a substantial number of these payments were from 10 to 16 days late.

With respect to the late payments, the representative testified that he made a handwritten copy of Greene's check register and a summary of subhaul payments by Greene for the May through July 1980 period and that copies of these documents are included in Exhibit 2. Over 300 checks were issued by Greene during the three months. The witness pointed out that, as shown on the copy of the check register, all checks were listed numerically but the issue dates for many of the checks were out of sequence. As an example of this, the following issue dates are shown for 17 of the checks:

<u>Check Nos.</u>	<u>Issue Date</u>
5523-5525	June 2
5526-5529	May 20
5530-5531	June 3
5532-5535	May 20
5536-5538	June 4

All of the checks dated May 20 were for subhaul services completed in April, and as the rules provide, payment was required to be made to the subhaulers by May 20. While the May 20 issue date shown on the subhaul payment checks would indicate that this was done, the June issue dates on the prior and subsequent numbered checks indicate that this was not so. The representative explained that he included in Exhibit 2 signed statements he obtained from six of the subhaulers verifying that they were paid by Greene after the deadline date specified in the applicable rules. He asserted that although he did not obtain similar statements from all subhaulers engaged by Greene during this period, this was a sufficient sampling to authenticate that the late payments did in fact occur.

The representative testified that at the conclusion of his review, he advised Greene of his findings and that Greene agreed with them. He stated that Citation Forfeiture F-1912 was then prepared. This document set forth the violations and provided for a \$500 fine. Greene was given the opportunity to concur in the citation or deny it. The witness stated that Greene denied the citation in writing on November 6, 1980 on the grounds that he felt there were mitigating circumstances and he should have his day in court to explain them. In this connection, the representative testified that Greene had informed him that: (1) During the time written subhaul agreements were not prepared, the respondent carrier was going through a reorganization; (2) subhaulers were paid as soon as Greene received payment from the contractor for whom the transportation was performed; and (3) in those instances in which payment to subhaulers was late, the contractor was late in paying Greene.

Included in Exhibit 2 is a copy of an official notice served on Greene by the representative on May 15, 1979 for failure to pay subhaulers within the required time. The representative pointed out that Greene notified all subhaulers working for him by letter dated April 24, 1981, a copy of which is included in Exhibit 5, that: (1) He had not received payments for almost half of his March business; (2) although he does not have the money to pay for jobs for

which he has not been paid, payment would be made to subhaulers for the March work; and (3) in the future payment to subhaulers would not be made until he received payment for the job. The witness stated that 12 of Greene's subhaulers had mailed him a copy of this letter and that he had received numerous telephone complaints regarding it.

The representative testified that he has issued a number of citation forfeitures to other dump truck carriers for violations similar to those at issue. He asserted that as pointed out in Decision (D.) 91247 dated January 15, 1980 in Case 10278 (Phase II) and D.93146 dated June 2, 1981 in Application 59014: (1) Subhaulers are small businessmen who need their money as soon as possible; (2) the risk of nonpayment by a shipper should not be shifted from the prime carrier to the subhauler; and (3) to assure the economic stability of subhaulers, it is essential that they be paid within the time period prescribed by law.

In his closing remarks, staff counsel stated that while the staff does realize the difficulties Greene has experienced in collecting from contractors, nonetheless, the Commission has promulgated the rules in issue to protect subhaulers. He pointed out that Greene does not deny that violations did exist and that there is no evidence of any discrimination by the Commission or its staff in its investigation of Greene. He recommended that a \$1,000 punitive fine be imposed on Greene and that Greene be directed to cease and desist from any further violations of subhaul rules and regulations.

Respondent

Evidence on behalf of Greene was presented by the general manager, the bookkeeper, and the office manager of his company. Generally, it was their position that there were sufficient mitigating reasons for any errors that did occur and that steps have been taken to remedy them to the extent possible.

Following is a summary of the testimony of the three witnesses:

1. Greene has been in business since 1963. He operated primarily as a subhauler until the latter 1970s and as a prime carrier since then. In his present operation, 90% of this business is dump truck hauling, and he uses 30 to 40 subhaulers per day and sometimes as many as 70.
2. The general manager has been with Greene since June 1978 and the business has been expanding rapidly since then. In this connection, Greene's gross operating revenue was \$80,000 in 1978, \$460,000 in 1979, and \$1,300,000 in 1980, of which \$996,000 was paid to subhaulers. As shown in Exhibit 7, his gross operating revenue for the first six months of 1981 was \$956,769, and approximately 75% of this was paid to subhaulers.
3. The office manager and bookkeeper have each had considerable experience in the transportation field. They have been fulltime employees of Greene since October 1980. Prior to that time his business records were poorly maintained and inadequate. This chaotic situation was the reason some subhaul agreements were overlooked and not prepared in the past and was also part of the reason for the late payments to subhaulers listed in Exhibit 2. These two witnesses, with the assistance of another employee, set up new office procedures and efficient record keeping and billing systems. Since this reorganization, contractors are billed between the third and fifth of the month for all transportation services performed for them the prior month. Also, now when a subhauler is used, an instruction sheet and subhaul agreement are immediately mailed to the subhauler. There are followup procedures for shippers who do not pay promptly and for any subhauler who is dilatory in returning a signed copy of the subhaul agreement.

4. Greene has never taken advantage of subhaulers. He pays them as soon as he receives his money from shippers. With the new billing and followup procedures, collections are more prompt for the most part, and the majority of subhaulers are paid on time. However, some collections continue to be slow. Because of this and Greene's lack of a sufficient line of credit to obtain funds to pay subhaulers until he receives his money from shippers, the problem of late payment to subhaulers has not been entirely eliminated. In an attempt to minimize this as much as possible, Greene has from time to time borrowed money from a relative and delayed payments to his employees. In those instances where subhaulers are paid late, 99% understand the reason and are cooperative. The only complaints against Greene that his witnesses are aware of are the one in 1979 which resulted in the Official Notice warning and the one that resulted in this investigation.
5. Late payments to subhaulers are an industrywide problem. As shown by the documents in Exhibit 6, since the beginning of 1981 Greene was paid after the required time by 17 other carriers, including 11 dump truckers, for whom he subhauled.

In his closing statement, Greene did not deny the alleged violations but did take exception to the staff recommendations. He argued that the facts and circumstances do not warrant the imposition of any penalty on him. He asserted that he is paying subhaulers correct rates and is doing everything possible to pay them on time. Greene explained that as soon as he has a sufficient line of credit, he will obtain more equipment of his own and pay all subhaulers within the prescribed time. It is his position that had he paid the \$500 fine specified in the forfeiture citation knowing that he could not immediately correct the late payment problem, the staff would be

continually after his company. He requested that his efforts to remedy the problems in issue be taken into account. He asserted that he will appeal any adverse decision against him.

Discussion

The evidence clearly establishes the violations alleged by the staff. The only question requiring discussion is the penalty, if any, that should be imposed on Greene.

We will accept the explanation by Greene's witnesses that the instances in which subhaul agreements were not issued were inadvertent errors. As they explained, Greene's office was understaffed at the time with inexperienced help, and with the addition of experienced employees, this problem no longer exists.

As to the late payment to subhaulers, the subhauler's contract of carriage is with the prime carrier and not the shipper. The subhauler provides the service and assumes all of the expenses of performing the transportation. The prime carrier assumes the obligation of paying the subhauler within the required time period. When or if the shipper pays the prime carrier does not alter this obligation. As pointed out by the staff, the purpose of the credit period is to assure subhaulers, most of whom are small businessmen with limited resources, that they will have the money available to pay their expenses for the services they perform within a reasonable time.

The argument by Greene and his witnesses that there were sufficient mitigating circumstances to excuse the late payments is not persuasive. In support of their position, they cite slow payments by some shippers and an insufficient line of credit to pay subhaulers prior to collecting transportation charges from shippers as the cause. While we do not question their assertion that a good faith effort is being made to comply with the time requirement for subhaul payments, the fact remains that Greene is not complying with the applicable rules. A somewhat similar argument of mitigating circumstances was considered and rejected in our decision in Investigation of Kelly Trucking Co. (1969) 70 CPUC 25. In Finding 9 of the decision, we stated in part as follows:

"Respondent did not at times pay other carriers engaged by it as...subhaulers... within the applicable credit [period] set forth in MRT No. 7. Said delays in payment were occasioned by delays experienced by respondent...in obtaining payment from other companies for whom the work was performed. MRT No. 7 makes no provision for such delays."

The credit period within which a subhauler must be paid provided in MRT 7 was identical to that in the applicable rules in MRTs 7-A and 20 and GO 102-F during the time covered by the staff investigation and current reissues.

Greene's contention that this investigation is unfair to him is likewise without merit. In this connection, he asserted that the difficulty in collecting from some shippers and the resulting inability to pay all subhaulers on time is an industrywide problem and not unique to him. This investigation is not a matter of selective enforcement against Greene. As the staff witness testified, any similar infractions brought to the Commission's attention are investigated and are dealt with if found to exist. The representative explained that he has issued a number of citation forfeitures to other carriers for similar violations. Furthermore, Greene was placed on official notice on May 15, 1979 for his failure to timely pay all of his subhaulers. No fine was imposed on him at that time. At the conclusion of this investigation, he admitted that late payments to some of his subhaulers continues, and he was then given the opportunity to accept Citation Forfeiture F-1912 and pay a \$500 fine for the violations, which he declined. His letter of April 24, 1981 to his subhaulers shows his intent to continue this practice should shippers pay him late. Greene was certainly given ample opportunity to correct this problem prior to any remedial action. As we have consistently held, the fact that a tariff rule may be difficult to comply with is not an excuse for ignoring it.

We are of the opinion that a fine of \$500 should be imposed on Greene and that he should be directed to cease and desist from violating applicable rules and regulations governing payments to subhaulers. The fine is based solely on the subhauler credit rule violations. Also, in arriving at the amount of the fine we have taken into account the fact that Greene has not paid his dump truck subhaulers less than the amounts required by applicable tariff rules.

Should Greene feel that the payment to subhauler credit rules should be revised, he may file an appropriate petition requesting this. Also, should he so desire, he could file an application for authority to deviate from the payment to subhaulers rules in issue. However, he is cautioned that should he pursue either of these alternatives, he should be prepared to present appropriate justification for his request.

Findings of Fact

1. Greene operates under a dump truck carrier permit. He also holds a highway common carrier certificate and highway contract and agricultural carrier permits.
2. During the period covered by the staff investigation, Greene had copies of all applicable minimum rate tariffs.
3. Greene was placed on official notice by the staff on May 15, 1979 for failure to pay subhaulers within the required time period.
4. In the instances set forth in Exhibit 2, Greene did not pay many of the dump truck subhaulers he engaged during the May through July 1980 staff review period within 20 days following the last day of the month in which the transportation was performed as required by the applicable rules in MRTs 7-A and 20 and GO 102-F.
5. As shown in Exhibit 2, Greene did at times date a check for subhaul service the 20th of the month following the month in which a subhauler provided the transportation but did not issue the check to the subhauler until some later date.

6. The fact that the cause of the late payments by Greene to dump truck subhaulers after the time period stated in Finding 4 was delays experienced by him in obtaining payment from contractors for whom the work was performed and an insufficient line of credit to pay them until the transportation charges were collected does not provide exemption from MRTs 7-A and 20 and GO 102-F.

7. Reissues of the subhaul credit rules have not changed the time within which a prime carrier must pay a dump truck subhauler, as stated in Finding 4. ✓

8. As indicated in the letter from Greene to his subhaulers dated April 24, 1981, it is Greene's policy not to pay his dump truck subhaulers until he has collected transportation charges from the contractors for whom work is performed even if this would result in late payment to subhaulers beyond the required time period.

9. Greene failed to prepare required subhaul agreements during the staff review period in the seven instances set forth in Exhibit 2. Greene's office was being reorganized at that time and this problem no longer exists.

10. Greene has not paid his subhaulers less than the amounts required by applicable tariff rules.

Conclusions of Law

1. Greene violated Public Utilities (PU) Code § 3737 and the Commission's GO 102-F.

2. Greene should pay a fine under PU Code § 3774 in the amount of \$500.

3. Greene should be directed to cease and desist from violating applicable rules and regulations governing subhaul agreements with and payments to dump truck subhaulers he hires.

Greene should promptly take all necessary actions to assure that all dump truck subhaulers engaged by him are paid within the required time period. The Commission staff will investigate Greene's

compliance. If it believes that Greene has not acted in good faith, the Commission will reopen this proceeding to determine whether to impose sanctions.

O R D E R

IT IS ORDERED that Peter K. Greene shall:

1. Pay a fine of \$500 to this Commission under PU Code § 3774 on or before the 40th day after the effective date of this order.
2. Pay 7% annual interest on the fine, beginning when the payment is delinquent.
3. Cease and desist from violating applicable rules governing subhaul agreements with and payments to dump truck subhaulers he engages.

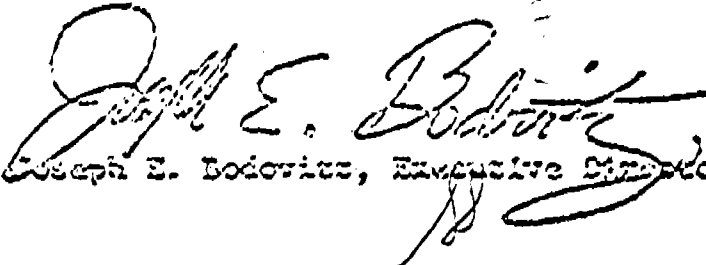
The Executive Director shall have this order personally served upon respondent Peter K. Greene.

The order shall become effective for Peter K. Greene 30 days after this order is served.

Dated JAN 19 1982, at San Francisco, California.

JOHN E. BRYSON
President
RICHARD D. GRAVELLE
LEONARD M. GRIMES, JR.
VICTOR CALVO
PRISCILLA C. GREW
Commissioners

I CERTIFY THAT THIS DECISION
WAS APPROVED BY THE ABOVE
COMMISSIONERS TODAY.


Joseph E. Bodovitz, Executive Director