

Decision No. S1041 NOV 20 1979

ORIGINAL

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Investigation on the Commission's own motion into the operations, rates and practices of Mark Gibson and Nancy Gibson, his wife, doing business as Transport-Sea and Sea Enterprises; and General Tire & Rubber Co., an Ohio corporation.

OII No. 51
(Filed May 22, 1979)

Mark Gibson and Nancy Gibson, dba Transport-Sea and Sea Enterprises, for themselves; and Theodore E. Ravas, Jr., for General Tire and Rubber Company; respondents.
Randolph L. Wu, Attorney at Law, for the Commission staff.

O P I N I O N

This is an investigation on the Commission's own motion into the highway carrier operations, rates, and practices of respondents Mark Gibson and his wife, Nancy Gibson, doing business respectively as Transport-Sea and Sea Enterprises, to determine whether respondents Gibson violated Sections 3548, 3664, 3667, and 3737 of the Public Utilities Code and the Commission's General Order No. 130 in transporting property for General Tire and Rubber Company (General) at less than the applicable minimum rates. Hearing was held on the matter on June 19, 1979, at San Francisco before Administrative Law Judge Pilling and the case was submitted August 9, 1979, upon the filing of the Commission staff's answer to General's motion to dismiss.

This is an undercharge case stemming from two different types of alleged violations. The first type pertains to the alleged failure of General to properly document 15 multiple lot-split delivery shipments which Transport-Sea, under its radial highway common carrier permit, hauled for General between February and April 1978. Item No. 172 of Minimum Rate Tariff 2 requires the shipper--in this case, General--at or prior to pickup to furnish the carrier with a single master document consolidating the component parts of a split delivery shipment and also to furnish the carrier with a single document covering each component part. The failure of General to follow this documentation process would require that each component part of the shipments be rated as a separate shipment, resulting in General being liable for \$3,344.76 in undercharges. The staff's evidence showed that Transport-Sea was not furnished with the master documents until after each of the shipments had moved when the master document, in the form of a copy of a master bill of lading, was mailed to Transport-Sea. In addition, the staff showed that the master bill of lading had not been signed by Transport-Sea. General showed, however, that the appropriate master bill of lading was made up by General before each of the moves and that it was made available to or shown to each of the drivers as they picked up their component part of the shipment but that none of the drivers, who were subhaulers, wanted to sign the master bill of lading, i.e., receipt for the entire shipment, since each driver was taking possession of only a component part of the shipment. Each driver did, however, on pickup, receipt for the component part of the shipment he picked up by signing the single document, in the form of an underlying bill of lading covering the part he picked up. General further showed that Transport-Sea had requested General not to entrust copies of the master bill of lading to any

of Transport-Sea's drivers but to mail the carrier's copy to Transport-Sea after the entire shipment had been picked up. Mark Gibson testified that his drivers were paid for their labors upon the presentation to Transport-Sea of copies of their underlying bills of lading and since the drivers had no pecuniary interest in a copy of a master bill of lading he was afraid they would be prone to lose or misplace it. For this reason Mark Gibson had General mail the copies to his office. The evidence further showed that each master bill of lading and its underlying bills of lading were properly cross-indexed and that each component part of a shipment was picked up within the time allowed. Subsequent to the hearing, General filed a written motion to terminate the investigation pertaining to the 15 shipments with a finding that its documentation in respect to those shipments met the tariff requirements. The staff supported the motion.

The second type of alleged violation involves the oral lease of two tractor-trailer units to General by Transport-Sea and the furnishing of drivers to drive those units by Sea Enterprises, a trade name of Nancy Gibson, wife of Mark Gibson who owns Transport-Sea. The staff contends that the lease and driver arrangement was a device to evade the payment and collection of the minimum rates applicable to the 84 hauls performed by the two tractor-trailer units in March and April 1978 and which resulted in undercharges totaling \$8,163.84. The staff requests that Mark Gibson be fined in the amount of the undercharges and that he be ordered to collect the amount of the undercharges from General. The staff also recommends that a punitive fine of \$2,500 be levied against Mark Gibson for this violation. The staff showed that during March and April of 1978 Transport-Sea orally leased two tractor-trailer units to General for a flat daily monetary amount plus mileage charges for the transportation of General's products from its facilities at Burlingame to points within 250 air miles of Burlingame and that Sea Enterprises furnished and paid the

wages of the drivers to drive those vehicles. The leased trailers were registered in the name of Nancy Gibson. In paying the salaries of the two drivers, Sea Enterprises deducted the usual payroll deductions--FICA, Workers' Compensation, and federal and state income taxes--from their weekly paycheck. The drivers were not on General's payroll. However, General paid Sea Enterprises for furnishing the drivers. Transport-Sea's name and file "T" number were displayed on the vehicles while the vehicles were in use under the lease to General. Subsequent to the staff's investigation of the lease operation, the lease arrangement was terminated and the two drivers driving the leased vehicles went to work as driver employees for Transport-Sea. Mark Gibson caused his wife to set up Sea Enterprises for the sole purpose of furnishing drivers to drive the trucks leased to General and the receiving of monies from General for furnishing the drivers. Nancy Gibson has not taken an active part in Sea Enterprises, as her only function is to sign checks which are prepared by the bookkeeper for Sea Enterprises. The bookkeeper is on the payroll of Sea Enterprises but does most of her work for Transport-Sea. The Western Region Traffic Manager for General, under whose authority the leases were entered into and the drivers were contracted for, testified that he was unaware of the connection between Transport-Sea and Sea Enterprises. Mark Gibson testified that he was under the impression that it was not a violation of the Public Utilities Code or Commission regulations to lease vehicles to a shipper as long as the drivers of the leased vehicles were furnished by a company different than the company which furnished the vehicles. The staff showed that under the rental and driver arrangement General paid respondents Gibson \$8,164.84 less than General would have paid if the applicable

minimum rate had been charged. Section 3548 of the Public Utilities Code provides as follows:

"3548. The leasing of motor vehicles for the transportation of property to any person or corporation other than to a highway carrier, is prohibited as a device or arrangement which constitutes an evasion of this chapter, unless the parties to such lease conduct their operation according to the terms of the lease arrangement, which shall be in writing, and shall provide that the vehicle shall be operated by the lessee or an employee thereof... The lessor or any employee of the lessor shall not qualify as an employee of the lessee for the purposes of this section..."

Section 3547 of the Public Utilities Code provides that "The commission shall regulate the leasing of motor vehicles by highway carriers to other highway carriers or to any other persons or corporations." Part II of the Commission's General Order No. 130, adopted April 14, 1970, requires, in part, as follows:

"A. No carrier shall enter into or make any lease of any motor vehicle to any noncarrier except in accordance with the general provisions of this general order and the provisions of this part."

* * *

"C. Every lease from a carrier to a non-carrier shall conform to the following requirements:

"1. Shall be in writing, contain all of the terms and conditions of the agreement, and be executed and signed by the parties thereto... prior to the beginning of the lease term; ..."

* * *

"6. Shall provide that the motor vehicle shall be operated by the lessee or an employee thereof.

"D. The lessor or any employee of the lessor shall not qualify as an employee of the lessee for the purposes of this part."

Discussion

The Commission's General Order No. 130, supra, prohibits a highway carrier from leasing a motor vehicle to a noncarrier unless the lease is in writing, signed by the parties thereto, and provides that the motor vehicle shall be operated by the lessee or an employee of the lessee. And Section 3548 of the Public Utilities Code, supra, provides that, among other things, if such lease is not in writing and does not provide that the vehicle shall be operated by the lessee or an employee of the lessee then the lease is to be considered as a device or arrangement constituting an evasion of The Highway Carriers' Act. The lease between General and Transport-Sea was an oral arrangement and did not call for General's employees to drive the vehicles. The drivers were, in fact, employees of Sea Enterprises while they were driving the leased vehicles. By operation of Section 3548 of the Public Utilities Code, the lease and driver arrangement constituted an arrangement to evade the provisions of The Highway Carriers' Act. General's lack of knowledge of the connection between Transport-Sea and the company furnishing the drivers is irrelevant in this case. Vehicles leased by a highway carrier to a noncarrier must be driven by employees of the noncarrier and General failed to abide by this requirement, as well as the requirement that the lease be in writing and be executed by the parties. The lease-driver arrangement was a prohibited device.

We agree with the parties that General's evidence at the hearing showed that General properly documented the 15 multiple lot-split delivery shipments and that the investigation should be terminated as to these hauls.

Findings of Fact

1. Transport-Sea operates as a radial highway common carrier under a permit duly issued by this Commission.
2. General is a noncarrier.
3. During March and April 1978 Transport-Sea orally leased two tractor-trailer units to General for transporting freight.
4. The oral lease did not provide that employees of General were to drive the leased vehicles.
5. The leased vehicles were in fact driven by employees of Sea Enterprises, a company owned by the wife of the owner of Transport-Sea.
6. The leased vehicles, driven by the aforementioned drivers, performed 84 hauls during March and April 1978.
7. Under the lease-driver arrangement, General paid respondents Gibson \$8,163.84 less than General would have paid had General made payments in accordance with the minimum rates applicable to the hauls.
8. The undercharges of \$8,163.84 are from General to Transport-Sea.
9. Transport-Sea should be ordered to collect the undercharges of \$8,163.84 from General.
10. General properly documented the subject 15 multiple lot-split delivery shipments which Transport-Sea hauled for General between February and April 1978 and General paid no less than the applicable minimum rates for such transportation.

Conclusions of Law

1. The lease-driver arrangement between General and respondents Gibson violated Section 3548 of the Public Utilities Code and the Commission General Order No. 130, Part II.
2. The lease-driver arrangements between General and respondents Gibson was an arrangement which constituted an evasion of The Highway Carriers' Act.

3. Mark Gibson violated Sections 3664, 3667, and 3737 of the Public Utilities Code by undercharging General in the amount of \$8,163.84.

4. Mark Gibson should be ordered to collect the amount specified in Conclusion No. 3.

5. Mark Gibson should be ordered pursuant to Section 3800 of the Public Utilities Code to pay a fine of \$8,163.84.

6. Mark Gibson should pay a fine of \$2,500 levied pursuant to Section 3774 of the Public Utilities Code.

7. Mark Gibson did not violate any section of the Public Utilities Code, tariff section, or Commission regulation in transporting the subject multiple lot-split delivery shipments and received no less than the applicable minimum rate for such transportation.

The Commission expects that Mark Gibson will proceed promptly, diligently, and in good faith to pursue all reasonable measures to collect the undercharges including, if necessary, the timely filing of complaints pursuant to Section 3671 of the Public Utilities Code. The staff of the Commission will make a subsequent field investigation into such measures. If there is reason to believe that Mark Gibson 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 determining whether further sanctions should be imposed.

O R D E R

IT IS ORDERED that:

1. Mark Gibson shall pay a fine of \$8,163.84 to this Commission pursuant to Public Utilities Code Section 3800 on or before the fortieth day after the effective date of this order.

2. Mark Gibson shall pay a fine to this Commission pursuant to Public Utilities Code Section 3774 of \$2,500 on or before the fortieth day after the effective date of this order. Mark Gibson shall pay interest at the rate of 7 percent per annum on the fine; such interest is to commence upon the day the payment of the fine is delinquent.

3. Mark Gibson shall take such action, including legal action instituted within the time prescribed by Section 3671 of the Public Utilities Code, as may be necessary to collect the undercharges set forth in Finding No. 8 and shall notify the Commission in writing upon collection.

4. Mark Gibson shall proceed promptly, diligently, and in good faith to pursue all reasonable measures to collect the undercharges. In the event the undercharges ordered to be collected by paragraph 3 of this order, or any part of such undercharges, remain uncollected sixty days after the effective date of this order, respondent shall file with the Commission, on the first Monday of each month after the end of the sixty days, a report of the undercharges remaining to be collected, 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. Failure to file any such monthly report within fifteen days after the due date shall result in the automatic suspension of Mark Gibson's operating authority until the report is filed.

5. Mark Gibson shall cease and desist from charging and collecting compensation for the transportation of property or for any service in connection therewith in a lesser amount than the minimum rates and charges prescribed by this Commission.

The Executive Director of the Commission shall cause personal service of this order to be made upon respondent Mark Gibson and cause service by mail of this order to be made upon all other respondents. The effective date of this order as to each respondent shall be thirty days after completion of service on that respondent.

Dated NOV 20 1979, at San Francisco, California.

John E. Bayson
President

Clair J. DeSilva
Commissioners

Commissioner Richard D. Gravello, being necessarily absent, did not participate in the disposition of this proceeding.