

Decision No. 67275**ORIGINAL**

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Investigation by the Commission's  
own motion into the operations,  
rates, charges and the practices  
of GARY R. JOHNSON, an individual.

Case No. 7819

Gary Reed Johnson, respondent.John C. Gilman, for the Commission staff.O P I N I O N

By its order dated January 14, 1964, the Commission instituted an investigation into the operations, rates, charges and practices of Gary R. Johnson, an individual.

A public hearing was held before Examiner Gravelle on March 27, 1964, at Los Angeles.

Respondent is not presently conducting any for-hire transportation but does hold Highway Contract Carrier Permit No. 30-3510 issued March 7, 1961. Said permit was suspended for a one-year period commencing February 10, 1964 pursuant to a request made by respondent on January 21, 1964 for the stated reason that he was "out of business". When he was conducting operations under the above-mentioned permit he owned three trucks and one trailer and employed two drivers. His wife maintained his books and records at their home. Respondent's total gross revenue for the calendar year 1963 was \$36,501. Copies of the appropriate tariff and distance table were served upon respondent.

On October 1, 1963 and again on October 16 and 17, 1963, a representative of the Commission's Field Section visited respondent's home and checked his records for the period February 1962

through February 1963, inclusive, but with particular emphasis on the month of February 1963. The underlying documents relating to the transportation performed in that month were taken from respondent's files, photocopied and the copies, along with any necessary additional information supplied by respondent, were submitted to the License and Compliance Branch of the Commission's Transportation Division. Based upon said data a rate study was prepared by a transportation rate expert and introduced in evidence as Exhibit 5. Said exhibit reflects undercharges in the amount of \$153.55.

Staff counsel in his opening statement alleged that respondent would be shown to have violated Sections 3664 and 3737 of the Public Utilities Code in that he had charged and collected rates less than those provided in Minimum Rate Tariff No. 7 for the transportation of sand and gravel for a shipper, one Earl W. Lumley; he alleged further that respondent would be shown to have violated Section 3668 of the Public Utilities Code in that he rebated to the said Lumley 5 percent of the total transportation charges assessed in the form of a fee for "brokerage" or "bookkeeping".

The representative of the Field Section, called as a staff witness, testified his investigation disclosed that respondent had purchased two "spots", i.e., rights to act as a carrier for Lumley, from a third party, that Lumley dictated the rates which respondent would be paid for the transportation performed, and that Lumley insisted a 5 percent deduction be made from the gross transportation charges as a "brokerage" or "bookkeeping" fee. His investigation also disclosed that Lumley did not actually perform any bookkeeping

service for respondent. He cannot obtain discounts in freight rates by declaring himself to be broker.

Exhibit 1 introduced through the staff witness contains the delivery receipts which reflect the individual shipments transported by respondent for Lumley during the month of February 1963. Exhibit 2 is a recapitulation of those delivery receipts showing the delivery receipt number, the tonnage hauled, the delivery zones involved, the rate, and the total charge. Exhibit 3 is a statement reflecting the "Total February Haul" and indicates a gross charge of \$1955.89 from which has been deducted \$750.00 as "Draws", \$509.57 as "Gas Purchases", \$8.00 as "Shop to the 22nd", and \$97.79 as "5% of Haul". The "Draws" deduction was explained as salary of respondent's drivers which was paid directly to them by Lumley, "Gas Purchases" covered the purchases of fuel by respondent from Lumley, and "Shop to the 22nd" was for parking respondent's operating equipment on property owned by Lumley.

Exhibit 4 is a copy of an undercharge letter from the Commission to respondent dated May 9, 1963 directing respondent to collect a \$6 undercharge on a shipment of "Plaster Sand" for Earl W. Lumley; attached thereto is a photocopy of a letter from respondent to Earl W. Lumley dated June 22, 1963 in which demand is made upon Lumley for payment of undercharges totaling \$4,843.85 including the 5 percent "brokerage" for February 1962 through February 1963 and \$2,800.00 for the sale of respondent's two "spots" made by Lumley to another party without the consent or knowledge of respondent. There has been no response by Lumley to the demand made by respondent. The testimony of the staff witness also disclosed that respondent is presently out of the business of for-hire transportation, he owns no equipment and is

employed as a truck driver. It was stated that he cooperated completely with the staff witness in the conduct of his investigation.

Respondent testified in his own behalf and corroborated the testimony of the staff witnesses; he stated that although he had protested repeatedly to Lumley about the 5 percent deduction his protestations were of no avail and Lumley continued to make the deduction. Respondent bought his two "spots" from one Fred Sheppard who had purchased them directly from Lumley. He paid, respectively, \$1,000 and \$1,200 for them. When respondent refused in March of 1963 to continue providing transportation under Lumley's terms he secured a buyer for both "spots" but was subsequently informed that those "spots" had been sold to another party by Lumley for \$750 each. When respondent tried to secure business from other sand producers he learned that Lumley had contacted them and told them not to give respondent any business. Respondent filed a petition as a bankrupt on January 28, 1964. He made clear the fact that his wife performed all of his bookkeeping and that although he accepted a "draw" from Lumley for his drivers' wages they were his employees for whom he kept payment records and paid taxes.

Staff counsel recommended that in view of the facts in this case no fine or suspension be imposed by the Commission, but that respondent be directed to cease and desist from any further unlawful practices and be ordered to review his records and collect any undercharges thereby disclosed.

After consideration the Commission finds that:

1. Respondent operated pursuant to Highway Contract Carrier Permit No. 30-3510.

2. Respondent was served with the appropriate tariff and distance table.

3. Respondent charged less than the lawfully prescribed minimum rates in the instances set forth in Exhibit 5, resulting in undercharges in the amount of \$153.55.

4. Respondent has unlawfully paid a rebate of 5 percent to Earl W. Lumley for all the transportation performed by respondent for Lumley during February 1963.

Based upon the foregoing findings of fact, the Commission concludes that respondent violated Sections 3664, 3668 and 3737 of the Public Utilities Code.

The order which follows will direct respondent to review his records to ascertain all undercharges that have occurred since February 1, 1962 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 cease and desist from any further violations of the Public Utilities Code or the orders of this Commission.

2. Respondent shall examine his records for the period from February 1, 1962 to the present time, for the purpose of ascertaining all undercharges that have occurred.

3. Within ninety days after the effective date of this order, respondent shall complete the examination of his records required by paragraph 2 of this order and shall file with the Commission a report setting forth all undercharges found pursuant to that examination.

4. 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 2 of this order, and shall notify the Commission in writing upon the consummation of such collections.

5. In the event undercharges ordered to be collected by paragraph 4 of this order, or any part of such undercharges, remain uncollected one hundred twenty days after the effective date of this order, respondent shall proceed promptly, diligently and in good faith to pursue all reasonable measures to collect them; respondent shall file 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.

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 26<sup>th</sup> day of MAY, 1964.

William B. Bennett  
President

George H. Hoover

Frederic B. Holcomb  
Commissioners