

ORIGINALDecision No. 67367

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Investigation on the Commission's)
 own motion into the operations,)
 rates and practices of RUSSELL)
 THOMAS PHILLIPS.)

Case No. 7179

William H. Kessler and Bruce R. Geernaert,
for Russell Thomas Phillips, respondent.
Franklin G. Campbell, for the Commission staff.

O P I N I O N

On June 4, 1963, the Commission issued its order to show cause stating it appeared that (1) by Commission Decision No. 63441, issued March 20, 1962, in Case No. 7179, Russell Thomas Phillips, a permitted highway carrier and the respondent herein, was ordered to ascertain the total amount of undercharges for transportation performed by him and to take such action, including legal action, as may be necessary to collect the same; (2) notwithstanding the terms of said Decision No. 63441 and Commission letters dated September 26, 1962 and February 18, 1963, in which the Commission refused to give approval of a proposed compromise settlement of all undercharges for \$7,000, respondent on March 4, 1963, entered into a written stipulation compromising the amount of his claim for said sum of \$7,000; (3) pursuant to said stipulation, a court judgment in the sum of \$7,000 was duly entered on March 4, 1963; and (4) respondent through his attorney, on March 13, 1963, executed a Satisfaction of Judgment which was duly filed with the court on March 20, 1963. The order required said respondent to show cause why his operating permit should not be cancelled, revoked or

suspended, or, as an alternative to the cancellation, revocation or suspension of such operating permit, why the Commission should not impose a fine upon said respondent not to exceed the sum of \$5,000.

Public hearings in this matter were held before Examiner Cline on August 22 and 26, 1963. The matter was taken under submission upon the filing of the Commission staff's Answer to Respondent's Memorandum of Points and Authorities on September 23, 1963.

Based upon the record the Commission finds that:

1. By Decision No. 63441 issued herein on March 20, 1962, respondent Russell Thomas Phillips was ordered in part as follows:

"3. Respondent shall examine his records for the period from April 1, 1958 to the present time, for the purpose of ascertaining all undercharges that have occurred.

"4. Within ninety days after the effective date of this decision, 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 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 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."

2. By letter dated September 3, 1962, from William H. Kessler, attorney for respondent, to the Commission, respondent sought Commission approval of a compromise settlement for all undercharges on United Beverage Distributors shipments for the sum of \$7,000.

The compromise was based on the circumstance that respondent's failure to transport all component parts of multiple lot shipments within the time prescribed was due to respondent's inability to furnish the necessary equipment and that the shipper was not to blame for the departures from the provisions of the multiple lot rule in Minimum Rate Tariff No. 2, and upon the circumstance that possibly a substantial portion of the undercharges might be barred by the Statute of Limitations.

3. The Commission in its letter dated September 26, 1962, signed by R. J. Pajalich, Secretary, to said William H. Kessler, acknowledged the above letter dated September 3, 1962, stated that by letter dated July 14, 1962, respondent had advised counsel for the shipper that his examination had disclosed undercharges in the amount of \$14,116.19, referred to ordering paragraph 5 of Decision No. 63441, and stated that the Commission expected compliance with the provisions of Decision No. 63441.

4. On October 10, 1962, respondent filed its verified complaint, Action No. 327026 in Superior Court of the State of California in and for the County of Alameda, seeking judgment against its shipper United Beverage Distributors, et al., for undercharges in the amount of \$14,116.19.

5. By letter dated January 25, 1963, to the Commission, respondent's attorney, William H. Kessler, enclosed a copy of the complaint and answer on file in said Action No. 327026 in the Superior Court of the State of California in and for the County of Alameda and again requested Commission approval of the compromise settlement in the amount of \$7,000.

6. By letter dated February 18, 1963, from the Commission and signed by R. J. Pajalich, Secretary, to said William H. Kessler, the Commission stated it had considered the request for approval of the \$7,000 compromise settlement, but that it was of the opinion

that court action should be pursued to collect the full amount of undercharges, pursuant to Decision No. 63441 in Case No. 7179.

7. Nevertheless, the plaintiff Russell Thomas Phillips, respondent herein, and its shipper United Beverage Distributors, et al., defendants, on March 4, 1963, in said Superior Court Action No. 327026 filed a stipulation that plaintiff may have judgment against defendants in the sum of \$7,000.

8. On March 5, 1963, pursuant to said stipulation judgment was entered in said Superior Court Action No. 327026 in favor of Russell Thomas Phillips and against Joe Roveda, Bruno J. Roveda, and Roy A. Rosenberger, individually and as copartners, doing business under the fictitious name and style of United Beverage Distributors, in the sum of \$7,000.

9. A satisfaction of the judgment in said Superior Court Action No. 327026 was filed March 20, 1963, by William H. Kessler, attorney for Russell Thomas Phillips, respondent herein.

10. Respondent Russell Thomas Phillips had knowledge of the facts set forth in findings numbered 1 through 9 above.

11. Respondent Russell Thomas Phillips had been told by his attorney, William H. Kessler, that any compromise of the claim for undercharges would have to have the approval of this Commission.

12. Respondent Russell Thomas Phillips was of the opinion that the sum of \$7,000 was a reasonable amount to collect from United Beverage Distributors for undercharges.

13. Respondent Russell Thomas Phillips was not advised by his attorney that it would be improper to settle the undercharge claim for \$7,000 without the approval of this Commission.

14. In signing and authorizing the signing of the documents giving rise to the stipulated judgment and satisfaction thereof, respondent Russell Thomas Phillips relied upon the advice of his attorney Mr. Kessler and did not exercise any independent judgment, but said respondent was not justified in believing that the compromising of said undercharges would not be in violation of said Decision No. 63441. ✓
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15. Mr. Healy, the attorney for defendants, United Beverage Distributors, advised Mr. Kessler, the attorney for respondent, that stipulated judgment for \$7,000 could properly be entered in the complaint proceeding pending in the Superior Court in and for the County of Alameda even though the Commission had not approved a compromise settlement for \$7,000 and that a stipulated judgment had actually been entered in a similar case in the Los Angeles area.

16. Mr. Kessler, attorney for the respondent Russell Thomas Phillips, was of the opinion that it was perfectly proper and perfectly lawful to enter into a stipulation and take a stipulated judgment in the amount of \$7,000 and he so advised respondent Russell Thomas Phillips, but he was not justified in holding such opinion or in believing that such action would not be in violation of said Decision No. 63441. ✓
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17. The Judge of the Superior Court in and for the County of Alameda was not informed by said Mr. Kessler that the Commission had twice refused to approve the compromise settlement.

18. Mr. Kessler, attorney for the respondent, was of the opinion that \$7,000 was a fair settlement of the action for undercharges, and that if the case went to trial his client would get much less gross and net than the \$7,000 stipulated judgment.

19. Mr. Kessler, attorney for the respondent, was of the opinion that after the action for undercharges had been filed and the case was at issue the amount of the judgment was within the discretion of the court and from a practical standpoint the Commission's jurisdiction had been removed, but he was not justified in holding such opinion. ✓
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20. Said attorney Kessler stated that in his opinion any document but a formal order signed by a majority of the Commission is only a Commission staff document, and Exhibit No. 3 was a staff opinion that he should proceed to file a suit. Exhibit No. 3 was

written in response to Exhibit No. 7 which is a letter dated January 25, 1963, from said William H. Kessler to the Public Utilities Commission enclosing a copy of the complaint and answer in the action filed to collect undercharges in the Superior Court in and for the County of Alameda and requesting the Commission to reconsider and approve the compromise settlement in the amount of \$7,000. Exhibit No. 8 which is a letter to William H. Kessler from the Commission signed by its Secretary and dated February 18, 1963, reads as follows:

"The Commission has considered your letter of January 25, 1963, requesting approval of a compromise settlement in the above matter [Phillips v. United Beverage Distributors, Superior Court, Alameda County, No. 327026] in the amount of \$7,000, and is of the opinion that court action should be pursued to collect the full amount of undercharges pursuant to Decision No. 63441 in Case No. 7179."

This letter on its face clearly is not a Commission staff letter. The Commission takes official notice of the fact that it is a letter sent by the Secretary of the Commission pursuant to the direction of the Commission itself at its conference held on February 13, 1963. Said letter is a refusal to approve the proposed compromise settlement of \$7,000 and a statement from the Commission clarifying the nature of the legal action to be taken by respondent pursuant to Decision No. 63441 in Case No. 7179.

The following issue based upon the foregoing facts has been presented to the Commission for determination: Did the order of the Commission require respondent to proceed to trial on the merits of respondent's action for undercharges where respondent had sought approval of a compromise after the action had been filed and the Commission by letter from its Secretary had advised counsel for respondent that it was of the opinion that court action should be pursued to collect the full amount of undercharges pursuant to its order, even though the attorney for respondent was of the opinion

that \$7,000 which was the amount of the compromise settlement equaled or exceeded the amount of undercharges legally collectable despite the fact that said attorney signed and respondent verified a complaint alleging undercharges in the amount of \$14,116.19 were due and unpaid? Respondent made no contention that reliance upon the advice of his attorney excused his failure, if any, to comply with the order of the Commission.

Based upon the foregoing findings of fact, we conclude that ordering paragraph 5 in Decision No. 63441 herein as clarified by the letter dated February 18, 1963, from the Commission to the attorney for respondent, Exhibit No. 2 herein, required respondent to proceed to trial on the merits of respondent's action for undercharges and that the entry of the stipulated judgment and the filing of the satisfaction thereof by respondent constituted a willful refusal and failure by respondent to comply with ordering paragraph 5 of said decision. We further conclude that by reason of said violation of ordering paragraph 5 of said Decision No. 63441 herein, respondent should be fined the sum of \$3,500 pursuant to Section 3774 of the Public Utilities Code.

This Commission cannot condone a stipulated judgment for undercharges without Commission approval, as such condonement would be an open invitation to "friendly settlement" to circumvent minimum rate enforcement.

The Commission will consider instituting a contempt proceeding against William H. Kessler, attorney for respondent, by reason of the evidence concerning his conduct which appears in the record of this proceeding.

ORDER

IT IS ORDERED that respondent Russell Thomas Phillips shall pay a fine of \$3,500 to this Commission on or before the twentieth day after the effective date of this order.

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 date of such service.

Dated at San Francisco, California, this 11th day of JUNE, 1964.

William K. Bernard
President
Robert W. [unclear]
Thomas H. [unclear]
Fredrick B. Hillhoff
Commissioners