GH

ORIGINAL

Decision No. 68295

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Investigation on the Commission's own motion into the operations, charges, rates and practices of WEBSTER H. TENNIS, DOUGLAS L. CRAIG, doing business as CRAIG TRUCK LINE, ROBERT L. LAMPMAN, BOB WILLEMS, M. LEE DANIELS, DONALD R. STANFIELD, ROBERT K. STUART, and DELBERT DEE DOERNER.	)	Case No. 7816

James A. Williams and Donald Murchison and Murchison & Stebbins, for Douglas L. Craig, Robert L. Lampman, M. Lee Daniels, Robert K. Stuart, Donald R. Stanfield, Bob Willems, and Webster H. Tennis, respondents.
Delmer Dee Doerner, in propria persona.
Joseph A. Armstrong and Chandler & Armstrong, for Brooks-Dodge Lumber Co., interested party.
William C. Bricca and Jerome Hannigan, 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, charges, rates and practices of Webster H. Tennis, Douglas L. Craig, doing business as Craig Truck Line, Robert L. Lampman, Bob Willems, M. Lee Daniels, Donald R. Stanfield, Robert K. Stuart, and Delbert Dee Doerner.

Public hearings were held before Examiner Gravelle on March 24, 1964 and June 23, 1964 at Los Angeles, briefs were filed and the matter submitted on September 15, 1964.

Respondents M. Lee Daniels (Daniels), Delmer Dee Doerner (Doerner), and Donald R. Stanfield (Stanfield) have never been issued any operating authority by this Commission to engage in for-hire truck transportation. Respondent Webster H. Tennis (Tennis) had his operating authority revoked by this Commission on April 3, 1961. Respondent Douglas L. Craig (Craig) caused his operating permit

to be suspended as of March 26, 1963 for a one-year period; it was reinstated on March 27, 1964 and again voluntarily suspended for a one-year period on May 14, 1964. Respondent Robert K. Stuart (Stuart) was issued a permit as a highway contract carrier on September 24, 1963. Respondent Bob Willems (Willems) was issued a radial highway common carrier permit on May 31, 1960. Respondent Robert L. Lampman (Lampman) was issued a radial highway common carrier permit on January 23, 1962; said permit has been alternately active or under suspension for various reasons from the date of its issuance and it is presently under voluntary suspension.

This case involves operations of the various respondents in their dealings with Brooks-Dodge Lumber Company (Dodge). Each of the respondents has at one time or another entered into a written lease with Dodge. All the leases provide generally for the exclusive use of respondents' equipment by lessee Dodge to haul lumber, Dodge to have the choice of dispatching, routing and use, and to provide public liability and property damage insurance for the benefit of lessor and lessee. Dodge is to pay the lessor $7.50 per thousand board feet for certain types of lumber or $125 per truck and trailer for other types plus a rental of $100 per week and $2.50 per hour for the services of respondents as drivers (their being so hired is a lease requirement).

Lessors are to provide for all other items of expense in the operation and maintenance of the trucks and trailers, including collision insurance and vehicle license fees. Lessor is also required to maintain the equipment in a clean and attractive manner and to display lessee's name prominently on the vehicle. A lease between each respondent and Dodge was included as part of Exhibit No. 1 which also included documents reflecting 23 movements of lumber involving Dodge and the various respondents. These latter documents consisted of Dodge delivery receipts, weight tags for

specific movements, and freight settlement statements issued by Dodge to the various respondents. The weight tags were secured by the respondents at the request of the staff investigator; respondents did not normally utilize such information in the conduct of their business with Dodge. Each of the freight settlement statements indicates a date of movement, an order number, a ticket number (the Dodge delivery receipt), the footage of the lumber moved, a rate, a total (the sum paid for the movement), a charge for the fuel purchased by the respondents from Dodge, and the amount due which is the total less the fuel charge. From the amount due as shown on the statement are deducted such items as salary of respondents or other drivers, advances to respondents, trailer payments, repair bills and other items of expense incurred by respondents and charged to Dodge as well as an item shown as "Less Comp.Etc.". At the bottom of each statement is a dollar sum derived by taking the amount due and deducting the various items listed above. This dollar sum was the amount presumably paid to the various respondents by Dodge. Under the heading of rate on the statement appeared either "Flat" or a figure ranging between "7.00" (sic) and "15.00" (sic). It is obvious from the documents and was admitted by counsel for respondents and Dodge that the actual payment by Dodge to the respondents was not made pursuant to the terms of the various leases. The argument is made that such variation in payment constituted an executed oral modification of one of the provisions of the written leases but did not detract from the validity of said leases.

The Commission staff contends that the leases and operations conducted pursuant thereto are in violation of Section 3548 of the Public Utilities Code and were in violation of the case law, which said section is claimed to have codified, prior to its enactment.

It is the staff contention that the operations conducted by respondents and Dodge did not constitute proprietary carriage but were in reality for-hire transportation at rates less than the minimum established by the Commission. A rate expert presented Exhibit No. 2 which established undercharges on each of the 23 movements reflected by the shipping documents in Exhibit No. 1 if said movements were in fact for-hire transportation. The theory relied upon by the Commission staff is that which is expressed by the Supreme Court of the United States in United States v. Drumm, 368 U.S. 370, 7 L.ed. 2d 360 (1962) wherein the court set out what it called the "characteristic burdens of transportation" as a test as to whether or not a trucking operation was proprietary or for-hire. The basis employed by the court in applying the test was threefold. The first was whether the so-called proprietor had made a large capital investment in equipment and assumed the risk of premature depreciation and loss; the second was whether the so-called proprietor had assumed the risk of a rise in operating costs, fuel, repairs and maintenance; the third and last was whether the so-called proprietor had assumed the risk of nonuse of high-priced equipment. Applying the criteria of Drumm to the instant proceeding we see that the purported lessee, Dodge, has not complied with any of the three requirements. As to the first, it may be said that the very purpose of a lease is to avoid a large capital investment in equipment while entering into a proprietary trucking operation. If such is the case, then at the least the remaining two requirements would have to be assumed by the lessee, but here it is the lessors alone who bear these burdens.

Respondents offered no evidence at the hearing. One witness was called by the purported lessee, Dodge. In the main the testimony of the witness served to confirm the method of operation

indicated by the various leases and the fact that payment was not made to the lessors upon the basis set forth therein but rather on some different standard which involved the length of the haul and the size of the equipment.

Respondents moved for dismissal at the hearing and were joined by the interested party. The motion was also urged in the brief filed by respondents. The basis of the motion is that since certain of the respondents hold no permits issued by the Commission the Commission is without jurisdiction over said respondents, that if any action is to be taken against them it must be pursued under Section 3807 of the Public Utilities Code in the Superior Court, and that said respondents were not given notice in the Order Instituting Investigation that they might be operating in violation of Section 3571 of the Public Utilities Code. The only respondent excepted from the motion as made is Willems. Counsel for respondents overlook the fact that respondents Craig, Stuart and Lampman also hold permits from this Commission. The fact that such permits may be in suspension for one reason or another does not negate their existence. Counsel also overlook the fact that the Order Instituting Investigation specifically put respondents Tennis, Daniels, Stanfield, Stuart and Doerner on notice that they might be operating in violation of Section 3571.

Section 3515 of the Public Utilities Code defines "Highway permit carrier" as "...every highway carrier other than a cement carrier, a highway common carrier or a petroleum irregular route carrier." Section 3511 defines "Highway carrier" as "...every corporation or person, their lessees, trustees, receivers or trustees appointed by any court whatsoever, engaged in transportation of property for compensation or hire as a business over any public highway in this State by means of a motor vehicle,..."; the section then goes on to except certain operations from the above definition; one of those

exceptions is: "(c) Persons or corporations hauling their own property." Section 3541 states in effect that no "highway carrier" shall engage in the business of transportation of property on the highways of this State except in accordance with the provision of the chapter regulating "Highway Carriers". It is clear that the Legislature intended all "highway carriers" to obtain authority to operate as such from this Commission. It is equally clear that this Commission is the body empowered by the Legislature to determine whether or not a person is a "highway carrier". Section 3807 does not prevent the Commission from determining that a person is a "highway carrier" and from ordering him to comply with the laws regulating such activity or imposing appropriate sanctions.

Respondents claim that the evidence shows that they were not "highway carriers" and were excepted from such definition under paragraph (c) of Section 3511. We do not agree with respondents on either point. The evidence demonstrates that respondents are engaged in the business of transportation of property over the highways of this State by motor vehicle for compensation and are therefore "highway carriers". The evidence also discloses that the property so transported is not that of respondents. No evidence was offered to show that the lumber transported by the respondents in equipment owned by them was their property. Perhaps it is the theory of respondents that the property was hauled by, and owned by, Dodge. If such were the case, then the exception provided by paragraph (c) of Section 3511 would apply to Dodge. We find that the operations disclosed by this investigation were performed by respondents on a for-hire basis regardless of whether they were performed under the

leases as indicated in Exhibit No. 1, as they were claimed to have been modified subsequently, or were performed without any such leases. In either case the operations as conducted by respondents and Dodge under the purported leases would be in violation of Section 3548 of the Public Utilities Code. The operations as conducted by respondents and Dodge prior to the effective date of Section 3548 constituted a device to evade the minimum rates established by this Commission.

The motion to dismiss is denied.

After consideration the Commission finds that:

1. Each of the respondents herein is engaged in the business of transporting property over the public highways of this State for compensation by means of a motor vehicle and are therefore highway carriers as defined in Section 3511 of the Public Utilities Code.

2. Respondents Craig, Stuart, Willems and Lampman are highway permit carriers as defined in Section 3515 of the Public Utilities Code.

3. Each of the respondents herein has entered into an arrangement with Dodge which constituted a device to evade the minimum rates established by this Commission.

4. Each of the respondents herein has charged less than the lawfully prescribed minimum rate in the instances as set forth in Exhibit No. 2.

Based upon the foregoing findings of fact, the Commission concludes that:

1. Respondents have violated Sections 3664 and 3668 of the Public Utilities Code.

2. Respondents Craig and Lampman have violated Sections 3771 and 3775 of the Public Utilities Code, and respondent Tennis has violated Section 3775 of the Public Utilities Code.

3. Respondents Daniels, Doerner, Stanfield, Stuart, and Tennis have violated Section 3571 of the Public Utilities Code.

The order which follows will direct respondents to review their records to ascertain all undercharges that have occurred since March 1, 1963 in addition to those set forth herein. The Commission expects that when undercharges have been ascertained, respondents 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 respondents and the results thereof. If there is reason to believe that respondents, or their attorneys, have not been diligent, or have not taken all reasonable measures to collect all undercharges, or have 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 sanctions should be imposed.

O R D E R

IT IS ORDERED that:

1. Respondents shall cease and desist from providing shippers transportation of property at rates less than the minimum established by this Commission.

2. Respondents shall examine their records for the period from March 1, 1963 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, respondents shall complete the examination of their records as 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. Respondents 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, respondents shall institute legal proceedings to effect collection and 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.

6. Respondents Daniels, Doerner, Stanfield and Tennis shall cease and desist from engaging in the business of transporting property for compensation by motor vehicle on the public highways of this State until they have obtained permits authorizing such operation as required by Section 3571 of the Public Utilities Code.

The Secretary of the Commission is directed to cause personal service of this order to be made upon each respondent. The effective date of this order as to each respondent, shall be twenty days after the completion of such service upon each respondent.

Dated at San Francisco, California, this 30th day of NOVEMBER, 1964.

Frederick B. Holoboff
President

Everett C. Haggerty

George G. Grover

William M. Bennett
Commissioners