

**ORIGINAL**

Decision No. 69608

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

Order to show cause why W. H.  
Kessler should not be judged  
guilty of contempt.

(Order to Show Cause filed  
June 16, 1964)

William H. Kessler and Gordon A. Olsson,  
for William H. Kessler, respondent.  
Franklin G. Campbell, for the Commission  
staff.

O P I N I O N

On June 16, 1964, the Commission issued its order that William H. Kessler (hereinafter called respondent) show cause why he should not be adjudged in contempt of the Commission and punished in the manner provided by law for each of the alleged contempts set forth in the Affidavit and Application for Order to Show Cause filed herein.

The affiant, then Acting Secretary of the Commission, alleged in said Affidavit and Application that respondent, an attorney at law, prior to and including March 20, 1963, represented Russell Thomas Phillips (hereinafter called Phillips) in the proceedings herein involving the Commission investigation into the operations, rates and practices of Phillips; that the Commission rendered its Decision No. 63441 herein and ordered Phillips to examine his records to ascertain the total amount of undercharges accruing with respect to certain transportation performed by him and to take such action, including legal action, as might be

necessary to collect the amount of undercharges so found; that Phillips made an examination of his records and determined that \$14,116.19 of undercharges existed; that respondent, as attorney for Phillips, by various letters requested the Commission to approve a compromise settlement of said undercharge claims for \$7,000 but the Commission refused to do so and advised that court action should be pursued to collect the full amount of the undercharges; that nevertheless respondent advised Phillips not to collect or attempt to collect said undercharge claims in full and prepared the complaint filed and the stipulation entered into by Phillips which resulted in a judgment rendered by the Superior Court for the County of Alameda in favor of Phillips in the sum of \$7,000; that respondent subsequently prepared, and procured and advised Phillips to execute, a satisfaction of judgment filed in said Superior Court; that respondent, by advising, aiding and abetting Phillips in procuring the aforementioned judgment and satisfaction of judgment with knowledge of Decision No. 63441 and the Commission's letters of September 26, 1962 and February 18, 1963, intended to and did thereby frustrate and nullify said orders and directions of the Commission and cause Phillips to violate Decision No. 63441; and that such conduct was in violation of law and in contempt of the Public Utilities Commission.

For a second alleged offense, affiant alleged that such acts of respondent were performed heedlessly and recklessly and without regard to the consequences thereof, and that such conduct by respondent was in violation of law and in contempt of the Public Utilities Commission.

Public hearing was held before Commissioner Grover and Examiner Cline in Fresno on August 27, 1964. During the hearing

respondent moved that the order to show cause in re contempt be dismissed on various grounds. Decision No. 67882, issued September 22, 1964, denied said motion to dismiss without prejudice to its renewal at the close of further hearings. At the close of a later hearing in San Francisco on October 5, 1964, respondent renewed the motion to dismiss on the ground that the Commission staff had failed to sustain the burden of proving beyond a reasonable doubt and to a moral certainty that respondent was in contempt of the Commission. Both the motion to dismiss and the question of submission of the contempt proceedings were referred to the Commission. On December 15, 1964, the matter was taken under submission by the Commission.

Preliminary Findings

Based upon the record the Commission finds that:

1. Respondent, as attorney of record for Phillips, received a copy of Decision No. 63441, issued herein on March 20, 1962. By said Decision No. 63441 Phillips was ordered in part as follows:

"3. [Phillips] 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, [Phillips] 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. [Phillips] 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, [Phillips] 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 respondent, attorney for Phillips, to the Commission, a request was made for 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 grounds that Phillips' failure to transport all component parts of multiple lot shipments within the time prescribed was due to Phillips' inability to furnish the necessary equipment, 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 that possibly a substantial portion of the undercharges might be barred by the statute of limitations.

3. The Commission in its letter to respondent dated September 26, 1962, signed by R. J. Pajalich, Secretary, acknowledged the above letter dated September 3, 1962, stated that by letter dated July 14, 1962, Phillips 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, Phillips filed his verified complaint, Action No. 327026, in the Superior Court of the State of California, in and for the County of Alameda, seeking judgment against the shipper, United Beverage Distributors et al., for undercharges in the amount of \$14,116.19.

5. By letter to the Commission dated January 25, 1963, respondent enclosed a copy of the complaint and answer on file in

said Action No. 327026 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 (signed by R. J. Pajalich, Secretary) to respondent, 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, Phillips, plaintiff, and his shipper, United Beverage Distributors et al., defendants, on March 4, 1963, in said Superior Court Action No. 327026 filed a stipulation that plaintiff 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 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 respondent, attorney for Phillips.

10. In signing and authorizing the signing of the documents giving rise to the stipulated judgment and satisfaction thereof, Phillips relied upon the advice of respondent, his attorney, and did not exercise any independent judgment.

11. Before the stipulation for judgment was filed, the attorney for defendants, United Beverage Distributors, advised respondent, the attorney for Phillips, that stipulated judgment for \$7,000 could properly be entered in said proceeding pending in

the Superior Court 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.

12. Respondent, the attorney for Phillips, was of the opinion that it was proper and lawful to enter into a stipulation and take a stipulated judgment in the amount of \$7,000 and he so advised Phillips.

13. The Judge of the Superior Court who presided over said Action No. 327026 was not informed by respondent that the Commission had twice refused to approve the compromise settlement.

14. Respondent, attorney for Phillips, 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 obtain much less, either gross or net, than the \$7,000 stipulated judgment.

15. Respondent, attorney for Phillips, 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 jurisdiction of the Court and from a practical standpoint the Commission's jurisdiction had been removed.

16. In the answer on file in Action No. 327026, the defendants alleged that the cause of action of plaintiff's complaint "is barred by the Statute of Limitations, Code of Civil Procedure, State of California, Section 337, sub-divisions 1 and 2; Section 337-A; Section 338, sub-division 1; Section 339, sub-division 1; and Sections 343 and 344."

17. As shown in a tabulation presented by respondent (Phillips' / petition for rehearing of Decision No. 67367):

- (a) The original billings for shipments to which \$3,843.63 (of the total of \$14,116.19 in undercharges) was applicable were dated

within two years of October 10, 1962, the date on which the complaint in said Action No. 327026 was filed in the Superior Court.

- (b) The original billings for shipments to which \$7,162.20 (of the total of \$14,116.19 in undercharges) was applicable were dated within three years of said October 10, 1962 filing date.
- (c) The original billings for shipments to which \$11,966.03 (of the total of \$14,116.19 in undercharges) was applicable were dated within four years of said October 10, 1962 filing date.

18. At the time the Commission issued its letter dated February 18, 1963, refusing to approve the proposed compromise settlement of \$7,000 and clarifying the nature of the legal action to be taken pursuant to Decision No. 63441, the Commission did not have before it sufficient factual information to determine whether all, or any portion, of the \$14,116.19 of undercharge claims was collectible or was barred by any statute of limitations.

19. After said satisfaction of judgment was filed in the Superior Court, the Commission, following due notice and public hearing, issued Decision No. 67367, dated June 10, 1964, in Case No. 7179, in which it was found that Phillips, in agreeing to said stipulation for judgment, had violated Decision No. 63441 and the instructions contained in the Commission's letters of September 26, 1962 and February 18, 1963. Said Decision No. 67367 imposed upon Phillips a fine of \$3,500 pursuant to Section 3774 of the Public Utilities Code. Rehearing of Decision No. 67367 was denied by Decision No. 68002, dated October 13, 1964, and said fine was paid on December 7, 1964.

#### Discussion

A preliminary issue concerns the nature of the Commission's letter of February 18, 1963. Respondent contends that any document

other than a formal order signed by a majority of the Commission is only a Commission staff document and that the Commission letter of February 18, 1963 (Exhibit C-7) was a staff opinion that he should proceed to file a suit. Exhibit C-7 was written in response to Exhibit C-6, which is a letter dated January 25, 1963, from respondent to the Commission, enclosing a copy of the complaint and answer in the action filed to collect undercharges in the Superior Court and requesting the Commission to reconsider and approve the compromise settlement in the amount of \$7,000. Exhibit C-7 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 pursuant to Decision No. 63441.

In essence, respondent's principal defense is that the Commission's order to Phillips to collect undercharges was an order to collect collectible undercharges; that the Commission never intended to order, nor could the Commission lawfully order, that Phillips attempt to collect more than the amount actually due from the shipper; that the full amount of the undercharges disclosed by Phillips' rate audit was included in his complaint



in the Superior Court for bargaining purposes and also because the defense of the statute of limitations is waivable; that when the shipper asserted this defense in the answer filed in the Superior Court, there was no longer any basis upon which undercharge claims barred by the statute of limitations could be collected; that further prosecution of claims thus barred would have been an idle - indeed, a frivolous - act; that such further prosecution would have constituted an unwarranted burden and gross imposition upon the Superior Court; and that the amount included in the compromise settlement, although less than the amount originally sought in the Superior Court action, was more than Phillips was entitled to collect, was more than he could possibly have collected by further prosecution of the action, and was therefore all the Commission's order contemplated he should collect.

With the theory of this defense, we do not disagree. Thus, if the claims in question actually were barred by the statute of limitations, then Phillips did all that was required of him when he filed suit to collect them.<sup>1/</sup> Once the statute of limitations was asserted as a defense in the shipper's answer, there could be no legitimate purpose in pursuing such claims. The Commission's decision did not contemplate that outlawed items be further prosecuted; whatever we might think of the inconvenience to the parties, we certainly would not act to impose such a pointless burden upon the Superior Court. The Commission's letter of February 18, 1963 was not inconsistent with this interpretation of Decision No. 63441; the refusal in that letter to approve the proposed compromise was

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<sup>1/</sup> He clearly had to do that much. As is pointed out in Kentner Truck Line v. Maier Brewing Co. (1960), 183 Cal.App.2d 89, 92: "The statute of limitations is a defense which must be properly raised else it is waived. If a plaintiff trims his demand ... he prematurely concedes the conclusiveness of a defense which a defendant might neglect to plead or be unable to prove."

not for the purpose of adding a new requirement that claims barred by the statute of limitations should be pursued to final judgment, but rather was the result of respondent's failure (in his letter of January 25, 1963) to establish that any of the claims were in fact so barred.

Even so, the letter of February 18, 1963 constituted a forceful warning that something more than the explanation theretofore offered would be necessary to justify the proposed settlement. After receiving that letter, respondent certainly should have been aware that in advising Phillips to compromise any of the undercharge claims, he would be acting at his peril. Moreover, it seems obvious that, in any event, only those claims which were uncollectible as a matter of law might be compromised; we expressly refuse in these supplemental proceedings to consider any fact questions which might have been presented to the Superior Court, for a carrier may not be permitted to avoid the appropriate tribunal for undercharge litigation in an attempt to transfer to this Commission the resolution of the issues involved.<sup>2/</sup>

We are thus brought to the critical question in this contempt proceeding: Were the claims in question, as a matter of law, uncollectible? As Finding No. 17 (above) indicates, if the two-year statute of limitations was applicable, respondent did not act improperly in counseling Phillips to settle for \$7,000; even if the three-year statute was applicable, the maximum amount collectible would have been only \$7,162.20, substantially equivalent to the \$7,000 settlement. But if the four-year statute

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<sup>2/</sup> Of course we are referring here only to issues still not decided. Determinations already made in Decision No. 63441 might be binding upon the Superior Court. (See Pratt v. Coast Trucking, Inc. (1964), 228 Cal.App.2d 139, 149.)

was applicable, then undercharges amounting to almost \$12,000 might have been collected, and the compromise settlement was a violation of the Commission's order.

It is true that in this contempt proceeding respondent testified that the transportation arrangements in question were essentially oral and that the shipping documents were not sufficient to make the contracts of carriage written contracts governed by the four-year statute of limitations. It is also true that staff counsel did not offer (and, so far as we know, did not attempt to obtain) the shipping documents involved in the transportation which took place more than three years prior to the Superior Court suit. Nevertheless, the record contains evidence which persuades us that the critical transactions (that is, the transactions which took place more than three years, but less than four years, prior to the filing of the Superior Court suit) were subject to written contracts and therefore governed by the four-year statute. In the supplemental phase of these proceedings which led to the \$3,500 fine against Phillips, respondent himself testified, at pages 77 and 78 of the transcript (Volume B, Exhibit C-10 herein), as follows:

"I was negotiating with opposing counsel. Let me say that the shipper, Joseph Schlitz Brewing Company tendered the shipments to the carrier, Russell Phillips Trucking on a standard uniform bill of lading, with a master bill, a multiple lot, and several multiple lot memos. And for purposes of trading and negotiating a settlement, I laid out the inference, at least, that there might be a four-year statute of limitations, because the shipments were actually tendered on a standard uniform bill of lading, which was a contract in writing. But, in my own thinking and evaluation of the case, I realized that the contract was an oral contract between Phillips and the consignee. And, in my opinion, those so-called bills of lading were nothing but receipts for merchandise. They had nothing to do with the charges to be paid. And in any case the deduction of the loading and unloading charges, which

was \$8200, and by far the substantial greater part of the amount claimed, had nothing to do with the written bills of lading. So, there could be no possibility of a contention that those loading and unloading charges were governed by a four-year statute." (Emphasis added.)

It thus appears, and we find, that the shipping contracts for the transportation between October 10, 1958 and October 10, 1959 were executed in the form of a standard uniform bill of lading. This inference is reenforced by the fact that the form used for later transportation arrangements between the parties was a standard uniform bill of lading. (Exhibit 3.) Neither can we ignore the fact that, in this contempt proceeding, although respondent could easily have produced the shipping documents for the period October 10, 1958 to October 10, 1959, he nevertheless failed to do so. (Cf. Code Civ. Proc. §2061, subd. 6 and 7.)

It has been held that a transportation contract made on a bill of lading containing the language which appears on the standard uniform bill of lading is not only a receipt but is also a contract based upon an instrument in writing and is subject to the four-year statute of limitations. (Kentner Truck Line v. Maier Brewing Co. (1960), 183 Cal.App.2d 89, 92-93.)

The unlawful deduction of loading and unloading charges in the amount of \$8,200 does not make the four-year statute of limitations inapplicable to the claims for undercharges based on the standard uniform bills of lading.

Accordingly, although we agree with respondent's theory that the Commission's directives did not contemplate idle prosecution of undercharges barred by the statute of limitations, nevertheless it has not been demonstrated that these claims were so barred. The compromise was a violation of Decision No. 63441 and the Commission's letter of February 18, 1963.

We desire to comment upon an additional aspect of respondent's defense. He has stressed the uncertainties of litigation and the financial advantages of the compromise to his client, Phillips. We are not unmindful of either the risk or the cost of litigation, and we can appreciate the possible attraction of the compromise in terms of Phillips' ultimate net dollar recovery. But in emphasizing such a standard for judging the compromise, respondent has evidenced a serious misapprehension concerning the nature of the Commission's orders for collection of tariff undercharges. The Commission does not direct the collection of undercharges in order to reward guilty carriers. Quite the contrary. In 1963 the Commission supported, and the Legislature enacted, a bill which has now authorized the Commission to levy against such carriers, in addition to all other penalties, a fine equal to the amount of the undercharges. The purpose of this legislation was to prevent the inequitable windfall which would otherwise result from the Commission's concern for the integrity of the minimum rates. A carrier who undercuts the minimum rates may thereby attract business which would otherwise go to his competitors; in such a case, it might be unjust to allow him later to obtain the full minimum charges after all. On the other hand, a shipper who pays less than the minimum rates may gain an unfair advantage over competing shippers, and it is therefore important that he be required to pay the undercharges. The 1963 legislation, although not enacted in time to be applicable to the transportation involved here, points up the true objective of our undercharge policy. Respondent's duty in the premises was not simply to achieve the best net recovery for his client; rather his duty was to assist his client in obeying the order of the Commission - an order designed in large part to make sure that the affected shipper eventually paid the minimum charges due.

Throughout these supplemental proceedings, respondent has taken full responsibility for Phillips' acceptance of the settlement. It is clear that respondent was thoroughly familiar with the Commission's directives, that he advised Phillips to compromise the undercharges, and that Phillips agreed to the settlement solely on the basis of respondent's recommendation. Under these circumstances, it is of no significance that Decision No. 63441 was nominally directed to Phillips or that respondent acted merely as plaintiff's attorney. With full knowledge of the order, he counseled and assisted in its violation. (See McFarland v. Superior Court (1924), 194 Cal. 407, 423.)

In Decision No. 67367, which imposed a \$3,500 fine upon Phillips, we expressly found that respondent, when he advised Phillips to settle the Superior Court suit for \$7,000, believed that Phillips could lawfully do so. We have repeated that finding herein. However, we also found in Decision No. 67367 that respondent's belief that Phillips could lawfully compromise the undercharges was not justified; for the reasons hereinabove given, we hereby find again that that belief was unjustified. In view of the Commission's express refusal to approve the proposed compromise, in view of respondent's own testimony that a standard uniform bill of lading had been used and his suggestion that contracts in writing may therefore have been involved, in view of the prior holding in the Kentner case that transportation governed by such a bill of lading is within the four-year statute of limitations, and in view of respondent's many years of familiarity in the field of transportation law - in view of all of these prominent indications that great care was called for in evaluating the legality of the settlement - we simply cannot find that respondent's conduct was excusable. In his

preoccupation with his client's financial interest, respondent appears to have neglected the more important objectives of the minimum rates. Even where there is no direct intentional disobedience as such, conduct may nevertheless constitute contempt if it is contrary to a lawful order and is unjustified. (See Hughes v. Moncur (1915), 28 Cal.App. 462, 470.) This is such a case.

The Commission takes official notice of that portion of the file in Case No. 7179 which indicates that the fine of \$3,500 imposed by Decision No. 67367 was paid, not by Phillips, but by respondent here. (Letter of December 5, 1964.) Although respondent was not obligated to pay Phillips' fine, we are impressed by his willingness to do so and also by his forthrightness in accepting full responsibility herein for Phillips' action. Respondent has been cooperative throughout the proceedings. In the light of the whole record, we believe the interests of justice would not be served by imposing any further monetary penalty. A public reprimand will be sufficient.

Based upon the foregoing findings of fact and discussion, we conclude that ordering paragraph 5 in Decision No. 63441 herein, as clarified by the letter dated February 18, 1963, from the Commission to respondent, Exhibit C-7 herein, required Phillips to proceed to trial on the merits of Phillips' action for undercharges. We further conclude that respondent's motion to dismiss should be denied, and that by reason of respondent's advising his client, Phillips, to enter into the stipulated judgment in said Superior Court Action No. 327026 and by reason of respondent's filing the satisfaction of judgment entered in said Superior Court Action No. 327026, in reckless disregard of the orders of this

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Commission, respondent is in contempt of this Commission, and should be publicly reprimanded by this Commission for such contempt.

O R D E R

IT IS ORDERED that respondent's motion to dismiss is denied.

IT IS FURTHER ORDERED that respondent William H. Kessler is adjudged in contempt of this Commission and is hereby publicly reprimanded by this Commission for such contempt.

The Secretary of the Commission is directed to cause personal service of this order to be made upon respondent William H. Kessler. The effective date of this order shall be twenty days after the date of such service.

Dated at San Francisco, California, this 24<sup>th</sup> day of August, 1965.

Fredrick B. Holbrook  
President

Paul E. Mitchell

George T. Crowe

Augustin

Commissioners

After so long a delay  
in rendering a decision  
I would have dismissed  
William H. Kessler