

ORIGINALDecision No. 72009

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Investigation on the Commission's
own motion into the operations,
rates and practices of BEN SMITS.

Case No. 7843

Ben Smits, in propria persona, for
respondent.

John C. Gilman and J. B. Hannigan,
for the Commission staff.

O P I N I O N

On January 19, 1965, the Commission issued Decision No. 68504, wherein it was found that respondent's "buy and sell" transactions on hay were not bona fide, but a device employed by the respondent to provide his shippers transportation of property lower to the extent of \$482.46 than the rates and charges established by the Commission. The Commission concluded that respondent had violated Section 3668 of the Public Utilities Code and provided in ordering paragraph 1 of the decision that respondent should pay a fine of \$1,500 on or before February 16, 1965; in ordering paragraph 2 that respondent should cease and desist from using fictitious "buy and sell" transactions as a device for evading the minimum rate orders of the Commission; in ordering paragraph 3 that respondent should examine his records from January 1, 1963 to January 19, 1965 to ascertain all undercharges that have occurred; in ordering paragraph 4 that respondent complete the examination of records required by paragraph 3 and file a report with the Commission prior to May 17, 1965, setting forth the undercharges found pursuant to

that examination; in ordering paragraph 5 that the respondent take such action, including legal action, if necessary, to collect the undercharges and to notify the Commission in writing when collection has been completed; and in ordering paragraph 6 to report all undercharges not collected by June 16, 1965 and to institute legal proceedings to effect collection - also to provide further reports of the undercharges remaining to be collected, on the first Monday of each month thereafter, along with a description of any action taken to collect the said undercharges until they have been collected in full or until further order of the Commission. The period within which to pay the \$1,500 fine was extended to September 1, 1965, by a Commission order dated February 24, 1965. This extension of time was authorized after the Commission denied the request made by respondent on February 3, 1965, wherein he suggested that his radial highway common carrier permit be revoked in lieu of the \$1,500 fine. Respondent's permit (Radial Highway Common Carrier Permit No. 19-55501) was suspended effective June 29, 1965, by Commission Resolution No. 14527.

On March 21, 1966, Rolla J. Weiser, Assistant Secretary of this Commission, filed his affidavit and application for an order to show cause wherein it was alleged, among other things, that a copy of Decision No. 68504 was served on respondent on January 27, 1965, and that respondent has since omitted, failed and refused to comply with the terms of ordering paragraphs 1, 3, 4, 5 and 6 of said Decision No. 68504 in violation of said decision and ordering paragraphs; further, that such failure to comply with and violation of said decision and ordering paragraphs was committed in violation of law and in contempt of the Public Utilities Commission of the State of California. Affiant

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requested that the Commission issue an order requiring Ben Smits to appear and show cause why he should not be punished for contempt.

On March 22, 1966, the Commission issued its order to show cause as requested in the affidavit. The order to show cause and the affidavit in support thereof were duly served on respondent on March 25, 1966; an amendment to the order to show cause was duly served on April 8, 1966. The amended order changed the hearing date from April 14, 1966 to April 28, 1966.

The matter was heard on April 28, 1966, in Los Angeles before Examiner Fraser. Respondent was not present and no one appeared for him. The matter was submitted after the staff presented evidence and exhibits.

On September 20, 1966, the Commission set aside the submission and issued a warrant of body attachment directing the Sheriff of Los Angeles County to apprehend Ben Smits and bring him before the designated Commissioner at 10:00 A.M., on October 6, 1966, in the Commission Courtroom, in the Los Angeles State Building.

Respondent was taken into custody on September 23, 1966, and released after posting the required \$500 bail and being served with a certified copy of the warrant of body attachment. A hearing was held on October 6, 1966, in Los Angeles before Commissioner Holoboff and Examiner Fraser. Respondent appeared in person, participated in the hearing and testified in his own behalf. He stated that he preferred to proceed without an attorney, although he was aware of his right to have an attorney present and had retained legal counsel on other matters in the past.

The assistant secretary in the Los Angeles office of the Commission testified that he has no record of any payment of the fine being received and that none of the reports have been received that respondent was ordered to file by Decision No. 68504. He further testified that accepting checks and reports is one of his duties and if any had been filed the documents would first have been brought to him and recorded. The witness testified that the lack of any documents in the official records of the Commission showing compliance or the reason for noncompliance make it evident that respondent has not paid the fine or filed the reports required by Decision No. 68504.

A Commission transportation representative testified that he visited Smits several times from December 6 through 10, 1965, and reviewed respondent's business records for that year. He testified that his inspection revealed respondent had received a total of \$54,000 on sales of hay during the months of September, October and November and that respondent owned 300 tons of hay stored on a nearby farm. The witness stated that he was informed this hay was valued at over \$9,000, since hay was selling for about \$33 a ton. The representative further testified that he showed the respondent a copy of Decision No. 68504, that the latter admitted receiving a copy, that he understood the decision and what it required him to do, that he had made no effort to comply with its requirements and did not intend to comply in the future. The staff witness then testified that respondent told him he (respondent) had discussed Decision No. 68504 with his attorney, but he still did not intend to comply with the decision because he disagreed with the findings made by the Commission. The witness further testified that he then advised the respondent

that the Commission could impose additional penalties for non-compliance with its order, including additional fines and possible imprisonment.

Respondent testified that his records show he was simply buying and selling hay - not hauling for hire. He testified that he does not agree with Decision No. 68504 and cannot see why he should pay a fine when he is not guilty. He further testified that he had an attorney during the original proceeding which resulted in Decision No. 68504, but did not appeal the decision because of the expense involved. He testified he does not have the money to pay the \$1,500 fine; a bankrupt owes him \$14,000 which will probably not be paid and a hay dealer owes him \$10,000 for hay already received; he has borrowed all he can to meet current expenses and is still \$20,000 in debt. He testified if he is ordered to pay a fine it will have to be in monthly installments. He further testified that he doesn't know how to collect undercharges from people who were merely purchasing hay, not negotiating for transportation.

The Commission finds that:

1. The Commission, on January 19, 1965, rendered its Decision No. 68504, in Case No. 7843. Said decision has never been revoked and, insofar as it contains mandatory orders, said decision is in full force and effect. A copy of said decision was duly served upon Ben Smits, on January 27, 1965.

2. On March 21, 1966, the affidavit and application for the order to show cause herein were filed with the Commission, in which it was alleged, in substance, that Ben Smits had failed and refused to comply with ordering paragraphs 1, 3, 4, 5 and 6 of said Decision No. 68504.

3. On March 22, 1966, the Commission issued its order to show cause directing respondent to appear on April 14, 1966, and to show cause why he should not be punished for the alleged contempt set forth in said affidavit and application for order to show cause. The order to show cause and affidavit in support thereof were duly served upon the respondent on March 25, 1966. An amended order to show cause was issued on April 5, 1966, and served upon respondent on April 8, 1966. It changed the hearing date from April 14, 1966 to April 28, 1966.

4. Respondent did not attend the April 28, 1966 hearing as directed in the order to show cause and further failed to notify the Commission of any reason for his absence.

5. On September 20, 1966, the Commission issued its order directing the issuance of a warrant of attachment to bring said Ben Smits before a designated Commissioner on October 6, 1966, to answer the charges contained in the affidavit of Rolla J. Weiser, filed on March 21, 1966; that such warrant of attachment was issued on September 20, 1966, and was executed on September 23, 1966; that respondent posted bail after his arrest and appeared at 10:00 A.M., on October 6, 1966, before Commissioner Holoboff, as ordered in the warrant, at which time and place evidence was received relative to the charges contained in said affidavit.

6. Ben Smits has omitted, failed, and refused to comply with paragraphs 1, 3, 4, 5 and 6 of the order in Decision No. 68504. Respondent did not refute the evidence presented by the staff. His refusal to comply was apparently due to his expressed belief that he was not guilty. Respondent presented no defense and apparently intends to continue his "do nothing" policy. Respondent has the right of appeal and other judicial

remedies, but he cannot nullify a Commission decision by doing nothing and claiming performance is too difficult or too inconvenient to his customers.

7. Respondent was notified of the rendition of Decision No. 68504 and of its requirements on January 27, 1965; he has been able to comply with ordering paragraphs 1, 3, 4, 5 and 6 thereof at all times since but has refused and neglected to do so.

From the findings herein set forth, we conclude that:

1. Ben Smits has failed and refused to comply with ordering paragraphs 1, 3, 4, 5 and 6 of Decision No. 68504 and such failure and refusal were and are in contempt of the Public Utilities Commission of the State of California and its said order, and that for such contempt Ben Smits should be fined the sum of \$750.

2. Respondent has made no effort to comply with Commission directives or to answer Commission process. We shall therefore impose twenty days imprisonment and suspend its execution. If respondent pays the fine of \$750 promptly, and endeavors to satisfy the other requirements of Decision No. 68504 within the period provided in the order herein, the suspended sentence will be vacated after one year. On the other hand, if respondent continues his present policy of noncompliance, a further order will issue to direct that the sentence of imprisonment be executed.

O R D E R

Ben Smits having appeared in person and having been given full opportunity to answer the order to show cause and to exonerate himself from the alleged contempts set forth in the affidavit and application for order to show cause herein, now therefore,

IT IS HEREBY ORDERED that Ben Smits shall comply with the requirements of ordering paragraphs 1, 3, 4, 5 and 6 of Decision No. 68504 within sixty days after the effective date of this order.

IT IS HEREBY FURTHER ORDERED that Ben Smits is adjudged in contempt of the Public Utilities Commission of the State of California for failing and refusing to comply with ordering paragraphs 1, 3, 4, 5 and 6 of Decision No. 68504, and that for such contempt said Ben Smits shall be punished by a fine of \$750, which fine shall be paid to the Secretary of the Public Utilities Commission of the State of California within ten days after the effective date of this order.

IT IS HEREBY FURTHER ORDERED that on failure to comply with the ordering paragraphs of Decision No. 68504 within the time specified herein, or in default of the payment of the additional \$750 fine herein assessed against Ben Smits, he shall be committed to the County Jail of Los Angeles County, State of California, for a period of twenty days as provided in the next paragraph and in addition thereto until such fines be paid or satisfied in the proportion of one day's imprisonment for each \$50 of such fines that shall so remain unpaid; and if such fines or any part thereof shall not be paid within the time specified above, the Secretary of the Commission is hereby ordered and directed to prepare an appropriate order of arrest and commitment in the name of the Public Utilities Commission of the State of California, directed to the Sheriff of Los Angeles County, to which shall be attached and made a part thereof a certified copy of this judgment.

IT IS HEREBY FURTHER ORDERED that Ben Smits be committed to the County Jail of Los Angeles County for twenty (20) days; provided that the execution thereof is hereby deferred pending further order of this Commission. If no further order of this Commission is issued affecting said commitment within one year from the date of issuance of this decision, the commitment shall be automatically vacated.

The Secretary of the Commission is directed to cause personal service of this order to be made upon respondent Ben Smits. The effective date of this order shall be twenty days after personal service of a certified copy thereof upon said respondent.

Dated at San Francisco, California, this
15th day of FEBRUARY 1967.

Edith E. Mitchell
President

William A. Bennett

Augusta

William Figueroa

Paul P. Morrison
Commissioners