

**ORIGINAL**

Decision No. 72361

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Investigation on the Commission's own motion into the rates, operations, and practices of ARVIL E. SMITH, an individual.

Case No. 8587  
(Filed January 24, 1967)

John M. Nairn, for respondent and Concrete Sales, Inc., interested party.  
J. C. Gilman and E. E. Cahoon, for the Commission staff.

O P I N I O N

By its order dated January 24, 1967, the Commission instituted an investigation into the rates, operations, and practices of Arvil E. Smith, hereinafter referred to as respondent, for the purpose of determining whether respondent violated Sections 3667, 3668 and 3737 of the Public Utilities Code by paying trailer rentals to Concrete Sales, Inc. in excess of the amount allowed by Item 165(1) of Minimum Rate Tariff No. 10.

Public hearing was held before Examiner O'Leary on March 7, 1967 at Bakersfield at which time the matter was submitted.

Respondent has been issued permits to operate as a radial highway common carrier, city carrier and cement contract carrier. During the period involved in this proceeding respondent owned one tractor which he drove himself. His gross operating revenue for the calendar year 1966 was \$28,636. Respondent was served with Minimum Rate Tariff No. 10 and Distance Table No. 5 and all corrections and supplements thereto.

A transportation representative of the Commission's Field Section testified that on September 19, 1966 he communicated with respondent at his residence and examined all of respondent's

transportation records for the period January to June 1966. The records were photocopied and were received in evidence as Exhibit No. 1.

The transportation representative further testified that respondent informed him that Concrete Sales, Inc., hereinafter referred to as Concrete, rented its trailers to respondent for the purpose of transporting cement to its place of business. The cement was transported from three suppliers; namely, Kaiser Cement Company, Calaveras Cement Company and Riverside Cement Company. The suppliers paid respondent the applicable minimum rates. It was agreed between respondent and Concrete that the round-trip mileages between Concrete and Kaiser Cement Company, Calaveras Cement Company and Riverside Cement Company were 322,572 and 280 miles, respectively. Rental was paid to Concrete as follows: Of the revenue received from the suppliers respondent retained 25 cents per mile plus the  $1\frac{1}{2}$  percent tax due the Board of Equalization and the  $\frac{1}{3}$  of 1 percent due the Public Utilities Commission. The excess was remitted to Concrete as trailer rental. Exhibit No. 1 discloses that respondent retained 25 cents per mile in January and February 1966 and 26 cents per mile in March, April, May and June 1966. During the period involved in this proceeding respondent received \$21,318.99 from the cement suppliers. Respondent retained \$13,572.00 and paid \$7,746.99 to Concrete for the use of the trailers.

A rate expert from the Commission staff testified that she had taken the set of documents contained in Exhibit No. 1 together with the supplemental information testified to by the transportation representative and prepared Exhibit No. 2. Exhibit No. 2 discloses that the minimum charge for the transportation is \$21,241.02. Of this respondent should have retained \$19,329.33 since the maximum trailer rental allowed to be paid pursuant to Item 165, Minimum Rate

Tariff No. 10 is \$1,911.69 (9 percent of \$21,241.02). The exhibit shows a total amount due carrier of \$5,757.33 which is the difference between the \$13,572.00 respondent retained and the \$19,329.33 respondent should have retained.

Respondent's counsel made a motion to dismiss the proceeding on the basis that respondent was being denied due process of law guaranteed by the United States and State of California Constitutions in that the Commission was both prosecutor and judge in the instant proceeding. The motion was taken under submission.

Respondent testified that he did not advise the transportation representative he was renting trailers from Concrete, but rather advised him that he had entered into an oral agreement with Concrete to haul bulk cement to Concrete's place of business for 25 cents per mile. Respondent was to furnish the power equipment and driver. Concrete Sales was to furnish the trailers.

Respondent also testified that prior to entering into the agreement in June 1963, he discussed the proposed agreement with a representative of the Commission in Bakersfield who advised him that the arrangement appeared to be "OK" and that he would contact him if anything was wrong. During cross-examination respondent was unable to supply any details of the discussion. Respondent also testified that no one from the Commission contacted him prior to being served with the Order Instituting Investigation. Counsel for respondent urges that because of the advice received from the Commission representative prior to entering into the agreement the Commission is estopped from prosecuting the instant case. It is a well established principle that statements of policy, administrative opinions or interpretations of laws and regulations rendered by employees of an administrative agency cannot be used to preclude the agency from taking whatever action it is lawfully empowered to take.

The person who was General Manager of Concrete at the time the agreement was entered into testified that Concrete entered into an oral contract with respondent which provided for the lease of respondent's tractor for 25 cents per mile. The agreement was still in effect when the witness left Concrete in September 1964. The present General Manager of Concrete testified that respondent continued to haul pursuant to the agreement from September 1964 to June 1966 at which time Concrete purchased respondent's tractor. This witness further testified that Exhibit No. 5 is a copy of that portion of Concrete's ledger which contains the entries for Account 414 entitled "Other Income - Truck". Payments from respondent are recorded in this account. In some instances the amounts shown in Exhibit No. 5 are \$30.00 more than the amounts in Exhibit No. 1 entitled "Paid Concrete Sales, Inc. for use of trailers". It was stipulated that the \$30.00 difference is attributable to the monthly insurance premiums which respondent pays to Concrete. Said payments are reflected in Exhibit No. 1.

The issue to be resolved is whether the respondent rented trailers from Concrete or leased his tractor to Concrete. The evidence discloses the following undisputed facts. Respondent received no compensation from Concrete but rather received his compensation from the suppliers of cement. Respondent retained only a portion of the compensation pursuant to the agreement between respondent and Concrete. The remainder was remitted to Concrete. The records contained in Exhibit No. 1 disclose respondent labeled the payments to Concrete as payments for use of trailers. Exhibit No. 5 discloses that Concrete labeled the payments from respondent as "Other Income - Truck" in its ledger.

After consideration the Commission finds that:

1. Respondent operates pursuant to radial highway common carrier, city carrier and cement contract carrier permits.
2. Respondent was served the appropriate tariff and distance table.
3. Respondent rented trailer equipment from Concrete Sales, Inc.
4. Respondent paid rentals in excess of the amount authorized by Item 165, Minimum Rate Tariff No. 10 in the instances set forth in Exhibit No. 2, in the amount of \$5,757.33.

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

1. Respondent has not been denied due process of law.
2. The motion to dismiss should be denied.
3. Respondent violated Sections 3667 and 3737 of the Public Utilities Code.
4. Respondent did not violate Section 3668 of the Public Utilities Code.
5. Respondent should pay a fine pursuant to Section 3800 of the Public Utilities Code in the amount of \$5,757.33.

The Commission expects that respondent will proceed promptly, diligently and in good faith to pursue all reasonable measures to collect the excess rental payments. 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 the excess rental payments, or has not acted in good faith, the Commission will reopen this proceeding for the purpose of determining whether further sanctions should be imposed.

O R D E R

IT IS ORDERED that:

1. Respondent's motion to dismiss is denied.
2. Respondent shall pay a fine of \$5,757.33 to this Commission on or before the twentieth day after the effective date of this order.
3. Respondent shall take such action, including legal action, as may be necessary to collect the amount of excess trailer rental payments set forth herein; and shall notify the Commission in writing upon the consummation of such collections.
4. Respondent shall proceed promptly, diligently and in good faith to pursue all reasonable measures to collect the excess trailer rental payments and in the event excess trailer rental payments ordered to be collected by paragraph 3 of this order, or any part of such payments remain uncollected sixty days after the effective date of this order, respondent shall file with the Commission on the first Monday of each month after the end of said sixty days, a report of the amount remaining to be collected, specifying the action taken to collect such payments and the result of such action, until such payments have been collected in full or until further order of the Commission.

5. Respondent shall cease and desist from paying trailer rental in excess of the amounts authorized by Minimum Rate Tariff No. 10.

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 2nd day of MAY, 1967.

[Signature]  
President  
[Signature]  
[Signature]  
Commissioners

Commissioner A. W. Gatov, being necessarily absent, did not participate in the disposition of this proceeding.