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Decision No. 14369

BEFORE THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA

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HIGHWAY TRANSPORT COMPANY, et al., Complainants,	)	
-vs-	)	CASE NO. 1975
HENRY E. HOLMES, P. W. HOLMES, et al., Defendants.	)	

Walter H. Robinson and Gwynn H. Baker for Complainants.

Thelen & Marrin, for defendants.

F. W. Mielke, for Southern Pacific Company and American Railway Express Company, Intervenors on behalf of Complainants.

Devlin & Brookman, by Douglas Brookman, for South Shore Port Company, Intervenors.

SEAVEY, Commissioner:

O P I N I O N

This proceeding is a complaint brought on behalf of the Highway Transport Company, a corporation, and S. B. McLenegan and C. S. McLenegan, as co-partners doing business under the firm name of S. B. McLenegan & Son, complainants, against H. E. Holmes and P. W. Holmes, individually and as co-partners doing business under the name of Holmes Motor Transport Company and also under the name of H. E. & P. W. Holmes.

Public hearings were held at San Francisco on March 25,

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and April 11 and 12, 1924, at which time the matter was submitted subject to briefs, which later were filed. The matter is now ready for decision.

The complaint states in effect that complainants are transportation companies as defined under the Auto Stage & Truck Transportation Act (Chapter 213, Statutes 1917, as amended), both having been duly authorized, as provided in that act, to operate automotive truck service for the transportation of property for compensation between San Francisco, San Jose and intermediate points, and that they are at the present time so engaged; that defendants have for sometime been engaged in the business of operating trucks for the transportation of freight, express, provisions and other supplies for hire over the public highways between San Francisco and San Jose and intermediate points; that such operation falls within the provisions of the said Auto Stage and Truck Transportation Act, and that defendants are operating in violation of the provisions of said act in that they have never obtained from the Railroad Commission a certificate declaring that public convenience and necessity require the service rendered by them; that they have not filed their tariff of rates or time schedules with the Railroad Commission, nor were they operating prior to the effective date of the Act, section 5 of which provides that no certificate shall be required of any transportation company engaged in good faith in the operation of automotive vehicles for the transportation of persons or property for compensation on May 1, 1917, and continuously since that time.

In their answer, defendants deny that they are engaged in operating trucks for the transportation of property for compensation between any fixed termini or over any regular route within

the State of California; deny that they solicit business or take orders for business for the carriage of freight or express matter from the public in San Francisco, or persons in San Mateo and Santa Clara counties, and further deny that they are a transportation company or are operating in violation of law. Defendants allege themselves to be the owners of certain automotive trucks which are claimed to be leased to a limited number of selected shippers of freight. They declare that no transportation business is conducted by them except under and in accordance with the provisions of the so-called "lease," a copy of which is attached to the answer.

By stipulation, interested parties agreed that both complainants are operating lawfully in accordance with the provisions of the Auto Stage and Truck Transportation Act; that defendants have never secured a certificate of public convenience and necessity from the Railroad Commission, and that defendants were not engaged in good faith in the operation of automotive trucks for the transportation of property for compensation over the public highways on May 1, 1917. It is therefore necessary to review the testimony and exhibits introduced herein in order to discover the nature of the operation of defendants in the transportation of property, and to determine therefrom whether or not such operation falls within the provisions of the statute.

A public hearing was held in this matter and at said hearing a number of witnesses were called by complainant, all of whom were either shippers or receivers of freight in the territory of San Francisco and San Jose, inclusive. Several of these witnesses were retail merchants who received shipments of freight from San Francisco; others were traffic managers or officials of wholesale houses in the City of San Francisco who shipped freight to customers down the Peninsula, to San Jose

and adjacent territory.

It seems clear that defendants have operated under written agreements with shippers, which they term "leases", which documents will be more fully discussed hereinafter. Twenty-three such agreements were shown to be in effect at the time of the hearing. The majority of commodities handled by defendants are shipped f.o.b. point of destination, freight being paid by the shipping house. A percentage, however, is shipped f.o.b. point of origin, the freight being collected by defendants from the consignee. These collections, it is claimed, are collected by the truck owner on behalf of the San Francisco consignor and are credited to consignor's account. The testimony showed that such collections were made upon a basis of 32½¢ per hundred pounds with a minimum of 65¢, a fact the importance of which will hereinafter appear. As regards shipments f.o.b. San Francisco, it appears that the wholesale houses holding the so-called "leases" and shipping goods by defendants' trucks are billed either weekly or semi-monthly, the bills covering total shipments for the preceding period.

The evidence tended to show that the merchandise is picked up at the various wholesale houses holding these so-called "leases," principally wholesale dealers in drugs, drug supplies and drug sundries and wholesale grocery houses, during the afternoon of each business day; that such merchandise is assembled at defendants' place of business on Folsom Street and there loaded upon trucks during the afternoon, the driver taking the truck out at approximately 3:00 or 4:30 the following morning, and driving to the most southerly point of delivery of any particular shipment, and distributing his cargo on the northbound return trip, arriving in San Francisco at approximately 3:00 p.m., whereupon

the truck is used for pick-up service. Defendants at the present time operate some three trucks of 1½ and 1½ ton capacity, and a trailer is also operated on occasions. They admit that no "lease" of any nature whatsoever exists covering merchandise hauled on the trailer.

Defendants contend that no merchandise is transported on defendants' trucks between San Francisco and points in San Mateo and Santa Clara counties other than under the established form of "lease." This contention the evidence does not contradict, although as mentioned above it was shown to be a regular practice of defendants to accept merchandise for transportation moving f.o.b. point of origin, the consignee of the merchandise paying the transportation charge to the truck operator. Defendants contend that such transportation charges are collected by them on behalf of the consignor, and state that while the actual amount of the collection is not turned over to consignor, it is credited to consignor's account and deducted from the total amount of the periodical bills when they are submitted.

Defendants contend that they are not common carriers and are therefore not subject to the regulation of the Railroad Commission. This contention is based upon the fact that none of their trucks are used in transportation for the general public nor for transportation for any shipper or shippers not holding written "leases" and that the co-partnership has not held itself out as being engaged in the transportation of merchandise for the general public, nor for the transportation of all classes of merchandise. Defendants state that they pick and choose the classes of shippers with whom they enter into written "leases" and such "leases" are only entered into with shippers of the particular classes of commodities which they desire to transport.

The evidence shows that defendants have at times refused to accept shipments from shippers of certain classes of commodities which they did not desire to handle. The brief of defendants sets forth the names of certain firms in San Francisco whose business was refused by defendants, and a member of the copartnership testified in effect that he called upon business firms and that shipments were refused in some instances because they refused to sign one of the "leases", and in other instances

> "* * * because we handle only a certain class of freight and take Weinstein's for instance, they have a bunch of small packages that we would not care to handle on the size of truck we have * * * and we did not feel that we could handle that merchandise with a profit* *".

The testimony shows, however, that defendants have in fact solicited business. This appears from the evidence to the effect that they had called upon the Traffic Manager of Haas Bros., explaining the nature of their operations and requesting that this wholesale grocery firm sign one of their written forms of "lease" and turn over its transportation business down the Peninsula to them, but that such firm refused. Further, that at times they had received telephone calls to pick up shipments from firms not holding written "leases" and that such firms were called upon, the nature of the business in which defendants were engaged explained, and that they were requested to enter into a written agreement in the form of the so-called "lease" and thereafter use the service of defendants in the transportation of their commodities.

The mere fact that defendants do not haul all classes of commodities cannot, of course, affect the question of this Commission's jurisdiction. There are innumerable classes of commodities transported by various forms of carriers in this state,

and it is a well known fact that certain of these classes of commodities are far more desirable from a transportation point of view than others. Many authorized carriers limit their business to one or a selected few of such classes.

Even assuming that the business of these defendants has been carried on with and for selected shippers only, it is our opinion that we must assume jurisdiction thereover. When originally enacted in 1917, the Automobile Stage and Truck Transportation Act defined the term "transportation company" to include

> "****every corporation or person, their lessees, trustees, receivers, or trustees appointed by any court whatsoever, owning, controlling, operating or managing any automobile, jitney bus, auto truck, stage or auto stage used in the transportation of persons or property as a common carrier for compensation over any public highway in this state between fixed termini or over a regular route and not operating exclusively within the limits of an incorporated city or town or of a city and county" (with certain provisos and exceptions not pertinent here)
> (Italics ours.)

In 1919, however, this passage was amended by the insertion of the word "or" before the words "as a common carrier." This Commission has, therefore, by legislative mandate, been given jurisdiction over automotive carriage for compensation, as above defined, even where not handled by a "common carrier", if it moves over the public highways "between fixed termini or over a regular route," and does not consist exclusively in operations within an incorporated city or town or city and county. This was recognized in our decisions in the cases of Bolton et al v. Olson & Rouch et al. (Decision No. 12700) and (Lingo Bros. case (Decision No. 12907). Under the mandate of the Legislature we have seen no alternative but to assume jurisdiction over such carriage, and must do so in the present instance.

As above briefly mentioned, however, defendants contend that they are not engaged in the business of transportation of property for compensation, but that they are solely engaged in the leasing of their trucks, or space thereon, to a limited number of selected lessees who have merchandise for transportation. This contention requires an analysis of the nature of the so-called "leases" mentioned above as having been entered into betwen defendants and shippers or receivers of freight served by them.

There are three classes of these so-called "leases," the most common form providing, in part, that the "lessee" (shipper or receiver of freight) agrees, for a term of one month, and thereafter from month to month until the "lease" is cancelled upon ten days' written notice, to "lease" a truck of three-ton capacity from lessor (defendant herein), for the transportation of merchandise and for no other purpose, between San Francisco and points in San Mateo and Santa Clara counties, the "lessor" to employ and furnish a driver for such trucks and to pay the expenses and wages of such driver, and further, to maintain such trucks in good running order, condition and repair and pay all expenses in connection with their upkeep and operation, and to indemnify and hold harmless the "lessee" from any and all liability of any kind and character whatsoever arising from the operation of said trucks and for any loss or damage to merchandise of the "lessee", in consideration whereof the "lessee" is to pay the "lessor" as rental for said trucks the sum of $19.50 per truck for each and every day in which said trucks are in good running order and are used for the transportation of merchandise of the "lessee."

This section of the so-called "lease," however, provides that if on any day only a portion of the capacity of any truck

is used for such transportation the rental shall be such proportion of said rental of $19.50 as is represented by the ratio which the capacity of the truck actually utilized in the transportation of the lessee's merchandise bears to the total capacity of the truck, and the agreement provides further that the minimum rental in connection with any transportation of the merchandise of the "lessee" shall be based on 1/30 of the capacity of any such truck, the parties agreeing that said trucks are all of 3-ton capacity. It is further provided that the "lessee" shall not be liable for any damage done to said trucks while under "lease."

As mentioned above, defendants testified in effect that they had outstanding some 23 "leases", the majority of which were of the nature described above. One such "lease provided for a rental of $20.00, one other for a rental of $15.00, and several others had been modified to provide for a minimum of 1/60 of the capacity of the truck instead of 1/30. In general, they are all of a similar tenor, and all the "leases" with the exception of two provide for a payment of $19.50 per truck per day for a 3-ton capacity truck with a minimum of 1/30 capacity. This in effect provides a rate of 32½¢ per hundred with a minimum charge of 65¢ for 200 pounds or less, and the evidence clearly shows that such was the basis upon which shipments were handled.

A number of manifests were submitted in evidence, and from these it appears that the same shipper frequently sent out shipments to more than one party upon the same trucks. If the "lease" was actually in effect as shown upon its face, the "lessee" or shipper should pay for the total of his shipments in the aggregate as he is the "lessee" of the unit of equipment upon which such shipments move. It has, however, been defendants' practice to

charge a rate of 65¢ for every shipment weighing under 200 pounds, while if over 200 pounds the charge has been at the rate of 32½¢ per hundred pounds. These particular manifests further show a shipment of 8,594 pounds, being considerably over the 3-ton truck limit of defendants, which defendants admitted was moved upon a truck and trailer and was billed for at $27.93, or at the rate of 32½¢ per hundred pounds. In fact, defendants admitted that that was the simplest way of computing charges for the transportation service which they rendered.

Although these so-called "leases" provide that the "lessee" shall have the possession and control of the trucks, and determine the use to be made thereof, the testimony clearly demonstrates that the "lessor" nevertheless actually retains possession of them, exercises sole control and supervision over them, furnishes and pays the drivers thereof, maintains them in proper order and repair, pays all the expenses of upkeep and operation, and assumes all liability for loss or damage to the goods transported. Although the "lessee" purports to lease the trucks or "such space therein as may be necessary to transport its merchandise" at a fixed price per truck or space, he is, notwithstanding, in practice, charged by the "lessor" on the basis of the weight of the respective shipments and according to the number of shipments. Finally, although the instruments are in writing and purport to represent the agreement of the parties, yet the testimony shows that, in practice, they have been subject to verbal modification at the will of the parties.

If we add to this the fact that defendants solicited various wholesale houses in San Francisco to enter into these "leases" for the shipment of their goods down the Peninsula, and the further fact that in a number of instances consignees of Peninsula

freight were solicited by defendants to place stickers on their orders directing shipment to be made via defendants' trucks, it appears clear that the defendants are not in good faith leasing their trucking equipment, but are in fact merely contracting for, and performing a type of trucking service falling within the provisions of the Auto Stage and Truck Transportation Act.

Inasmuch as defendants have also contended that their operations are not "between fixed termini" or "over a regular route" we must now review briefly the testimony regarding the character of their operations. It will be remembered that Subsection (e) of Section 1 of Chapter 213, Statutes of 1917, as amended, defines these terms as follows:

> "***the termini or route between or over which any transportation company usually or ordinarily operates any ***auto truck****even though there may be departures from said termini or route whether such departures be periodic or irregular."

This subsection further provides that whether or not an auto truck operated by a transportation company between fixed termini or over a regular route within the meaning of the act shall be a question of fact to be ascertained by this Commission from the evidence adduced before it. Defendants contend that they are not operating between fixed termini nor over any regular route, because they have had no depot at any point in San Mateo or Santa Clara counties; nor have they a telephone at such points; that deliveries are made either to store or sidewalk; that there is no point in any city or town in San Mateo or Santa Clara counties which constitutes a terminus, since the destination of trucks is determined entirely by the load which the "lessees" of the particular truck happen to offer for transportation on that particular trip; and that there are no cities or towns in San Mateo

or Santa Clara county to which any trucks regularly go on all trips.

It is true that each and every truck operated down the Peninsula by defendants does not stop for pick-up or delivery of merchandise at each and every point along the highway, San Francisco to San Jose, inclusive; and that on occasion the trucks have gone off the highway for several miles to make deliveries to points such as the County Poor Farm back of Belmont, Camp No. 4 on the Skyline Boulevard, Chadwick and Sykes Camp three miles east of Redwood City, etc. The evidence, however, does show that there is only one main highway known as the Peninsula Highway over which the trucks of the defendants usually or ordinarily operate; that defendants' drivers are instructed during fair weather to use what is known as the Bay Shore Highway out of San Francisco to its connection with the main Peninsula Highway at San Bruno and in rainy weather to use the Mission Road through Colma to San Bruno. From San Bruno there is but a single route through Burlingame, San Mateo, Belmont, Redwood City, Menlo Park, Palo Alto and other intermediate points, to San Jose. This main State Highway is usually and ordinarily used with the exception of the infrequent occasions upon which, as mentioned above, a truck carries merchandise destined to points somewhat off the highway.

In connection with defendants' Exhibit No. 12, entitled "Some Routes used by E.E. and P.W. Holmes," P. W. Holmes testified that no two of such routes were alike. Route No. 3 names Redwood City only; No. 5 Burlingame-Redwood City; No. 12 Redwood City-Burlingame. These three routes, however, when taken in connection with San Francisco as a northern terminus, are identical in every respect. Transposing the names

of communities does not differentiate as to route over which the trucks travel, but merely shows a difference in the routing of particular deliveries. In fact, this entire exhibit in the main substantiates the contention of complainants' that defendants' trucks do usually and ordinarily operate over a regular route or between fixed termini as represented by manifests therein named.

Defendants further contend that they have no fixed termini due to the fact that the manifests submitted in the evidence covering the month of January, 1924, show a different southerly terminus on different trips. Analysis of this evidence shows that during the thirty day period above mentioned, San Jose or a point immediately adjacent to the city limits of San Jose, such as Alum Rock, Meridian Road, etc., appears as the most southerly terminus upon twenty occasions, the most southerly destination on other occasions being some point along what is known as the main Peninsula Highway, San Francisco to San Jose, such as Redwood City, which appears same seven times, or Palo Alto, which appears some five times.

Certainly if a truck carries no merchandise for delivery upon a specified trip which would necessitate it going the entire length of its route and has no call for a pick-up on the northbound trip, it would in any case turn back after making its most southerly delivery, and if this Commission should hold that the law contemplated this class of operation as not being over a regular route no truck operator in the state could be held to fall within the provisions of the state regulation, due to the fact that one or more of his trucks on infrequent occasions might not cover the entire route usually or ordinarily served by him.

After full consideration of the evidence and exhibits

introduced and briefs filed by counsel, the Railroad Commission hereby finds as a fact that defendants herein are operating a transportation company as that term is defined in Section 1 (c) of Chapter 213, Statutes of 1917, and amendments thereto; that they are engaged in the operation of auto trucks over the public highways for compensation, over a regular route and between fixed termini, namely, San Francisco to San Jose and intermediate points, and that said defendants have not obtained from the Commission a certificate declaring that public convenience and necessity require such operation.

O R D E R

Public hearings having been held in the above-entitled proceeding, evidence and exhibits having been introduced, briefs having been filed, the matter now being submitted and ready for decision, and the Commission basing its order upon the findings of fact contained in the opinion preceding this order;

IT IS HEREBY ORDERED that defendants, H. E. Holmes and P. W. Holmes, as co-partners and as individuals, be, and they are hereby directed to cease and hereafter to desist from any and all such transportation unless and until they have secured from this Commission a certificate declaring that public convenience and necessity require the resumption or continuance thereof; and

IT IS HEREBY FURTHER ORDERED that the Secretary of this Commission be, and he hereby is directed to serve or cause to be

personally served upon said defendants, H. E. Holmes and P. W. Holmes a certified copy of this order, and that he send a copy of this order by registered mail to the District Attorneys of the City and County of San Francisco and of the counties of San Mateo and Santa Clara, respectively.

For all other purposes, the effective date of this order shall be twenty (20) days from and after the date thereof.

The foregoing opinion and order are hereby approved and ordered filed as the opinion and order of the Railroad Commission of the State of California.

Dated at San Francisco, California, this 17th day of December, 1924.

C. L. Lawson
H. W. Brundige
Duncan Matheson
J. T. Whittell
Commissioners