

EHM

Decision No. 19377

ORIGINAL

BEFORE THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA.

CORONADO TRANSFER,
PACIFIC TRANSFER, VAN & TRUCK COMPANY,
OPPENHEIMER TRUCK LINE, and
TIA JUANA EXPRESS,

Plaintiffs,

-vs-

UNITED PARCEL SERVICE OF SAN DIEGO,
a corporation,

Defendant.

Case No. 2407.

H. J. Bischoff, for Complainants,

Devlin & Brookman, by Douglas Brookman,
for Defendant.

Richard T. Eddy, for Inter City Parcel
Service of San Diego, Intervenor.

BY THE COMMISSION:

O P I N I O N

Complainants herein are engaged in the transportation of property by motor truck between San Diego and various adjoining towns, operating either under authority of certificates granted by this Commission or by virtue of prescriptive rights established prior to May 1, 1917. They complain that defendant United Parcel Service of San Diego is conducting, without authority from the Commission, a common carrier business for the transportation of parcels between San Diego, on the one hand, and Coronado, National City, Chula Vista, Nestor, Palm City, San Ysidro, La Mesa, Lemon Grove and other points on the other

hand, thus operating in competition with complainants. Complainants pray for an order restraining said defendant from continuing such operation unless and until it shall have obtained from the Railroad Commission a certificate of public convenience and necessity.

Defendant duly filed its answer to the complaint denying that it is now or at any time has been engaged in the transportation of freight as a common carrier between the points specified; admits that it has not obtained from the Railroad Commission a certificate of public convenience and necessity, and avers that its operations are such as would not bring it within the jurisdiction of the Commission.

Upon the issues thus joined a public hearing was conducted by Examiner Gannon at San Diego, the matter was duly submitted on briefs and is now ready for decision.

Complainants called two witnesses in support of their allegations, both employees of the defendant corporation. One of these, its manager, testified that defendant had commenced doing business in San Diego August 15, 1927, and had caused to be inserted in a San Diego daily newspaper an announcement of its entrance into that field. This advertisement set forth that defendant offered to furnish delivery service in San Diego similar to that rendered by United Parcel Service in various other metropolitan centers. It is admitted that in some instances such service is of the common carrier type, and in others of the private carrier type. Witness testified that defendant had entered into written agreements with approximately 30 shippers in San Diego for the delivery of their packages to the towns named, San Diego in each instance being the point of origin of such shipments. The witness further testified that he had been approached by other

shippers who desired the service but for various reasons he had declined their business and that no service was in any case rendered except under contract.

The other witness called was employed by defendant to interview shippers for the purpose of soliciting their business. His testimony was that he had been instructed by his superiors to exercise great care in the selection of persons to whom the service was offered and in no case to render such service except as a result of a contract duly signed. He had called on various merchants to familiarize himself with the nature of their business, the probable volume thereof, and other minor considerations in which he might be interested. The contracts vary as to rates, terms, etc., and the matter of signing a contract might be, and frequently was, the subject of prolonged negotiations. Witness estimated the number of contracts actually entered into at three per cent of the total number of shippers in San Diego. He called on about 100 firms and wrote 15 contracts, the other 85 prospects being rejected by him for one reason or another. The witness testified he made no offer of service generally to the public. All the contracts were in written form and there was no uniformity as to their provisions. Approximately 300 packages per day were picked up in San Diego, of which 250 were delivered within the limits of that city, about 15 per cent going to other points.

Complainants undertook to show that defendant was delivering, over its regular route, parcels collected in Los Angeles by the United Parcel Service of Los Angeles and forwarded to San Diego by an authorized carrier, but this testimony was excluded as not being within the issues of the case. The complaint specifically limits the alleged illegal operation to shipments originating in San Diego and destined to other designated points.

There is no dispute as to the facts herein and we are called upon to determine only whether the operations of defendant

company are those of a common or a private carrier.

The evidence shows that United Parcel Service of San Diego was incorporated "to conduct and carry on the business of a private carrier * * * * but only for and under contract with parties whom it may voluntarily select; providing that ***** this corporation shall not have the power and shall not engage in the business of a common carrier." From the inception of the business defendant has reserved and exercised the right of selection in respect to the shippers served but, generally speaking, it appears willing to enter into a contract with any individual or firm handling a class of business which may appear desirable.

To impress upon one the character of common carrier it must be shown that he "holds himself out as such to the world; that he undertakes generally and for all persons indifferently to carry goods and deliver them for hire; and that his public profession of his employment be such that if he refuses, without some just ground, to carry goods for any one, in the course of his employment and for a reasonable and customary price, he will be liable to an action."

In *Associated Pipe Line Co. v. Railroad Commission* (176 Cal, 518) the court quotes the above definition and by way of further clarification adds:

"It is one who offers to carry goods for any person between certain termini, and who is bound to carry for all who tender their goods and the price of carriage. Hence, in order to bring petitioners within the purview of the provisions under consideration, it must have been made to appear that they had voluntarily devoted their transportation facilities to the indiscriminate use of the public for hire, thus constituting them common carriers."

In the case of *Munn v. Illinois* decided by the U. S. Supreme Court and reported in 94 U.S. at page 113, it was said:

"When, therefore, one devotes his property to a use in which the public have an interest, he in effect

grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created."

It was suggested in *Frost & Frost v. Railroad Commission of California* (271, U.S. 583) that any carrier might, "by the simple device of making private contracts to an unlimited number, secure all the privileges afforded common carriers without assuming any of their duties or obligations."

There is no evidence here that defendant made, or attempted to make, contracts to an unlimited number. Nor is there any evidence that its operations were not carried on in good faith. It was not even "posing" as a private carrier. Out of a total of approximately 1000 potential shippers it selected 100 as offering the greatest possibilities and of this number 85 were finally rejected for one reason or another. To the 15 contracts thus signed 15 more were subsequently added in the same manner making a total of 30 contracts now in force and effect.

We have given careful consideration to the evidence in this proceeding and conclude the testimony does not sustain a finding that defendant was operating as a common carrier. Its service is confined to shippers with whom it has contracts, and to them only, and in no sense does it hold itself out to serve the public generally. So far as the record indicates its operations are those of a private carrier. In view of the determination of this question which has been made by the U. S. Supreme Court in the *Frost & Frost* case, supra, holding that the jurisdiction of the Railroad Commission over auto truck carriers is limited to those who operate between fixed termini or over regular routes, as common carriers, we must find that the operations of defendant are those of a private carrier over which this Commission has no jurisdiction.

The complaint will, therefore, be dismissed for lack of jurisdiction.

O R D E R

A public hearing having been held in the above entitled complaint, the matter having been duly submitted, the Commission being fully advised, and basing its order on the findings of fact appearing in the foregoing opinion,

IT IS HEREBY ORDERED that the complaint in this proceeding be and the same is hereby dismissed for lack of jurisdiction.

Dated at San Francisco, California, this 17th day of February, 1928.

Leon Whitell
C. J. Sweeney
Ernest L. ...
Thos. J. ...
M. J. ...
Commissioners.