

MEM

Decision No. 17613

BEFORE THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA.

CHARLES A. HARE,
NICK GOMBOS and
WILLIAM H. NEILL,

Complainants,

-vs-

THOMAS GILBOY,
(APEX TRANSFER),

Defendants.

Case No. 2443.

Richard T. Eddy, for Complainants.

Gwyn H. Baker, for Defendants.

Earl A. Bagby and L. G. Markel, for
California Transit Co., Interveners.

BY THE COMMISSION:

O P I N I O N

This is a complaint against Thomas Gilboy formerly operating under the fictitious name of Apex Transfer and now operating as the Gilboy Company, alleging that said defendant is engaged as a common carrier in the operation of an automobile truck line for the handling of motion picture films, etc. without first having obtained a certificate of public convenience and necessity from the Railroad Commission.

Defendant duly filed his answer in which he denies that his operations are those of a common carrier and avers

that he is engaged in transportation as a private carrier and is, therefore, not subject to the jurisdiction of the Railroad Commission.

Upon the issues thus joined, a public hearing was held before Examiner Gannon at which time the matter was submitted and is now ready for decision.

Defendant's operations, as developed by his own testimony, consist in transporting films, advertising matter, lobby displays, etc. from the film exchanges in San Francisco to some 75 or 80 theatres located chiefly in the Sacramento and San Joaquin valleys, and in picking up and returning to the exchanges such films as have been displayed by the theatres. In addition, he renders to his customers what may properly be designated an "ancillary" service consisting in the main of checking the films to see that they are the ones ordered, personally making substitutions when necessary, and generally acting as the agent of the theatres served by him.

The defendant testified that he undertook the business of rendering this ancillary service about 13 years ago and has been carrying on the business continuously ever since. Originally, all shipments had been made by express, but about 18 months ago his clients urged him to install a motor truck service which he did. He has verbal contracts with all the theatres served and declines to enter into any contract unless provision is made both for the hauling and ancillary service. No service of any character is rendered except to theatres and the rate is based on the personal service as well as on the weight of package and distance to be transported.

As illustrative of the personal and confidential relationship existing between defendant on the one hand and supply houses and theatres on the other, Gilboy testified that he carried keys to all the theatres and film supply houses served by him and had

access to such places at any hour of the day or night. Notice of substitutions may come to him late at night and being familiar with the booking system of the exchanges he is thus enabled to make selections of films which will be satisfactory to the theatres.

Defendant testified that he operates four or five trucks over the public highways on his various routes, renders a daily service, and the actual delivery of films to the theatres is ordinarily made after 11:00 p.m. and from then on until the early morning hours.

The evidence herein conclusively shows that defendant is not operating as a common carrier. He does not hold himself out to serve the public generally. Being a private individual, he is invested with the right to make his own contracts and in so doing he necessarily selects certain customers and rejects others. In addition to the general attributes of a private carrier, as disclosed by defendant's operations, there is another characteristic of his services which clearly takes him out of the category of common carriers and that is the so-called ancillary service rendered by him to the theatres. It is apparent from the testimony that the services performed by defendant, both in the transportation of films and the ancillary service attendant thereupon, are so closely interrelated that they cannot be separated. Indeed, having over a long period of time confined himself exclusively to the personal service, it may be said that such service constitutes the primary consideration of the contract and that the transportation service is only incidental thereto. The transporting of these goods between San Francisco and the various points of delivery does not of itself require any unusual training or experience of a technical character. On the other hand the matter of the selection of films for a diversified clientele

does presuppose a technique in this regard which is acquired only through experience and which must necessarily be performed by the same person who furnishes the transportation. It is a personal and individual service which the ordinary transportation agency would decline to undertake.

Counsel for defendant cites the recent case of Film Transport Company vs. Michigan Public Utilities Commission, 17 Fed. Rep. (2nd series) 857, in support of his contention that defendant's operations are those of a private carrier. In that case the plaintiff company had entered into a written contract with 150 theatre owners for the transportation of films and performed no other hauling service whatsoever. The court held that the transportation company was a private carrier and hence not subject to regulation by the Public Utilities Commission. It does not appear from the language of the decision that the Michigan company rendered what we have here referred to as an ancillary service, though it may be entirely possible that such service was performed, in which event the Michigan case would undoubtedly be on all fours with the instant case.

After a careful consideration of the evidence in this proceeding, we conclude there is nothing in the record to sustain the allegation that defendant Gilboy is operating as a common carrier. His operations are strictly those of a private carrier over which this Commission's regulation does not extend. 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 and 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 13th day of April, 1928.

Leon White
Chairman

W. H. [unclear]
Commissioners.