

Decision No. 19869.

BEFORE THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA

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L. A. THORNEWILL,
 Complainant,
 vs.
 C.W. GREGORY and R.C. GREGORY,
 Defendants.

ORIGINAL

Case No. 2484.

Devlin & Brookman, by Douglas Brookman, for complainant.
 Rittenhouse & Snyder, by Bert B. Snyder, for defendants.
 W. S. Johnson, for Southern Pacific Company, an
 interested party.

BY THE COMMISSION:

O P I N I O N

It is alleged that the defendants are engaged in the business of operating motor trucks for compensation, as common carriers, over the public highways between Santa Cruz and San Francisco, without having obtained a certificate from this Commission. The complainant operates as a certificated carrier over the same route. The answer of defendants alleges that they operate exclusively under a group of private contracts, approximately fourteen in number, and that they do not solicit business from the public generally. The only question for decision is whether their business is that of a common carrier.

The defendants, father and son, apparently as partners, conduct the "Gregory Truck Service". Though R. C. Gregory, the son, is the legal owner, C. W. Gregory is the general manager and real head of the business. C. W. Gregory at one time applied for a certificate covering his operations, (Application 12758), and it was found by the Commission (Decision No. 17928 issued January 26, 1927), that public convenience and necessity did not

require his proposed operations. He declares that his operations now do not differ from what they were then, and, in view of the conclusion of the Commission in that decision to the effect that he was not then seeking business from the public generally, he contends that the Commission is precluded in this proceeding from making a contrary finding. We do not believe that we are so bound by that decision. The question raised as to the public nature of his business was not directly in issue in that proceeding, and our conclusion thereon is in no way determinative of our judgment in this case.

The operations of defendants may be described very briefly. They admit they are in the "trucking business". They carry an average of ten or more tons daily each way. Their trucks bear the sign "Gregory Trucking Service." Nearly all their business comes from twelve firms with whom they claim to have contracts, though it was clearly shown that such contracts in each case consist in nothing more than a verbal agreement as to the probable volume of goods to be hauled and the rate to be charged. Rates are uniform to all shippers. There is no question either that they do solicit business from prospective customers when there is a prospect of receiving a profitable volume. The testimony of C. W. Gregory, in answer to questions as to his accepting new customers, abounds in such statements as these: "We refuse to carry if it is beyond our capacity or capability." "We do not want small hauling jobs". "We prefer large lots". "Would take feed or canned goods running into tonnage, that is, I would consider it". "I would serve regular customers first". "If there is a heavy haul in sight, I sometimes solicit".

A number of witnesses produced by the complainant testified that Gregory had solicited their business, and none of those for whom he now hauls stated that there was any contract between them other than an understanding as to the rate to be charged. Gregory admits his readiness to make good all losses or damages to goods hauled, and his customers expect that this will be done.

It can hardly be seriously contended that the operations of these defendants are not of a common carrier nature. It would be an evasion of the clear intent and purpose of the Auto Stage and Truck Transportation Act, (Stats.1917, p.330, as amended) to permit a carrier, by the simple device of entering into a number of verbal agreements, terming them "contracts", to secure all the advantages of a public motor carrier without assuming the attendant obligations and duties. The defendants have all the advantages of public carriers. They accept only the most desirable business, and will not accept new business unless it gives promise of considerable volume. By merely pretending to investigate each inquiry and discriminate in the selection of customers, a carrier, otherwise public, does not so change his status that he may be regarded a private carrier. *Sanger vs. Lukens*, 24 Fed. (2d) 226; *Smitherman & McDonald vs. Mansfield Lumber Co.* (D.C.) 6 Fed. (2d) 29. *Restivo vs. West* (Md.) 129 Atl. 884; *State vs. Washington Tug Co.*, (Utah) 250 Pac. 49; *Barbour vs. Walker*, 126 Oka.227, 259 Pac. 552. *Craig vs. P. U. Commission of Ohio*, 115 Ohio St. 512, 154 N. E. 795; *Producers Transportation Co. vs. Railroad Commission*, 251 U.S. 228, 40 S.Ct. 131, 64 L.Ed. 239; *re Champlin Refining Co.*, (Oka.) 264 Pac. 160; *re H. J. Martsfeld*, P.U.R. 1926 E.463; *re Will Thome*, P.U.R. 1927A, 860;

Lehigh Valley Transit Co., P.U.R. 19284, 606.

As said in Restivo vs. West (supra):

"It is difficult to determine with exactness just when the owner of a motor vehicle is operating as a common carrier, as that term is ordinarily understood in the law, but the courts have not been inclined to excuse the increasing numbers of those who earn their livelihood by transporting persons or goods for hire in motor vehicles from the responsibilities of common carriers simply on technical grounds, and they have been particularly slow to excuse them when their plan of operation bore evidence of being a studied attempt to reap the rewards of common carriers without incurring the corresponding liabilities."

Defendants cite the case of Frost vs. Railroad Commission, 271 U.S. 583, 46 S. Ct. 605, 70 L. Ed. 1101, and claim that it is controlling. That case, as well as others involving questions of statutory construction and the regulation of carriers admittedly private, is not in point.

We find that the defendants C. W. Gregory and R. C. Gregory are operating motor trucks used in the business of transportation of property, as common carriers, for compensation, over the public highways of this State between fixed termini and over a regular route, without first having obtained from this Commission a certificate declaring that public convenience and necessity requires such operation, in violation of the Auto Stage and Truck Transportation Act. An order directing said defendants to cease and desist from said operation will be issued.

ORDER

Complaint as above entitled having been filed, a public hearing having been held, the matter submitted, and now being ready for decision, and basing its order upon the con-

clusions and findings in the opinion above,

THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA hereby orders said C. W. Gregory and R. C. Gregory jointly and severally immediately to cease and desist from the operations above described.

IT IS HEREBY FURTHER ORDERED that the Secretary of the Railroad Commission be and he is directed to mail a certified copy of the order herein to the District Attorneys of Santa Cruz and San Mateo Counties and the City and County Of San Francisco.

Dated at San Francisco, California, this 6th day of June, 1928.

Leon Whitely

C. Seaver

Thos D. Lewis

W. J. Can
Commissioners.