EHM

Decision No. 18876

ORIGINAL

BEFORE THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA.

In the Matter of the Investigation upon the Commission's own motion into the practices and operations of JACK HIRONS.	Case No. 2524.

Everts, Ewing, Wild & Everts, by C. M. Ozias, for Defendant.

G. L. Aynesworth, for Haynes & Haynes, interested parties.

BY THE COMMISSION:

O P I N I O N

Upon complaint filed and hearing thereon duly held, this Commission by Decision No. 18801 found Jack Hirons, the respondent herein, to be operating a motor truck in violation of the Auto Stage and Truck Transportation Act, and ordered him to cease and desist his illegal operations. This proceeding, begun upon the Commission's own motion, is to determine whether said Jack Hirons has violated the Commission's order.

The respondent contends that he is operating under a single private contract and that he does not hold himself out to serve anyone except those within a certain group, and, therefore, that he can not be regarded as a common carrier. The transportation business in which respondent is engaged is limited to the hauling by motor truck of goods sold by the United Grocers, Inc., a wholesale grocery firm located in Fresno, to the various customers of such firm in the towns

of Hanford and Lemoore.

The United Grocers, Inc. is a corporation organized under the laws of this state. It sells groceries and produce to those retail stores only which are "members" of its corporation. The requirement is that each member own one share of stock in the corporation, and, in addition, enter into an agreement by which he is obligated to pay a monthly fee to the corporation in consideration of the sale to him at cost of such goods as he may order. Upon an order for goods being received by the United Grocers, Inc. from a member grocer a bill of sale is executed, a copy of which is forwarded by mail to the buyer, who is required to remit payment therefor each week or ten days. Apparently all prices are quoted and sales made F.O.B. Fresno. The seller is under no obligation to deliver goods to the buyers. It is admitted that the respondent is hauling goods from the warehouse of the United Grocers, Inc. in Fresno to six member grocers in Hanford and Lemoore, making four or five trips weekly. The carrying charge determined on a weight basis is paid to the respondent by the customer upon receipt of the goods. The alleged contract which the respondent possesses with the United Grocers, Inc. is merely a verbal agreement to the effect that as long as he renders satisfactory transportation service to its customers it will endorse the service and encourage its customers to use the respondent's service exclusively. Bearing a letter of introduction from the United Grocers, Inc. the respondent has solicited grocers in the towns above mentioned who are members of and purchase goods from the United Grocers, Inc. and he is now hauling for all such grocers, with the exception of one or two who have preferred to make different transportation arrangements. Upon these facts the respondent's status as a carrier must be determined.

Carriers have always been classified in law as public and private, their duties and liabilities being distinct. No hard and fast rule has been devised for determining whether one transporting persons or property falls within one class or the other. Attempts have been made to determine a carrier's status by determining his liability for refusal to carry for all members of the public alike, but that is only to attack the problem from another angle. "A common carrier is such by virtue of his occupation, not by virtue of the responsibilities under which he rests." (State of Washington v. Kuykendall, 72L. Ed. 50, 48 Sup. Ct. 41.) His status can be determined only by what he actually elects to do, not by his declarations, and the question depends, in the last analysis, upon the facts concerning his occupation and the way it is conducted. Wyman, in his treatise on public service corporations, (page 204), states that private carriers fall into four groups; those whose services are (1) Casual, (2) Intermittent, (3) Of limited undertaking, and (4) Incidental. Casual and Intermittent undertakings to carry goods or persons are private, for, as the terms indicate, the service is not intended or expected to be continued regularly or frequently. A limited undertaking is one in which the transportation service is limited to those who may be connected with or engaged in business with the one furnishing the transportation service. Thus an employer may maintain private conveyances for his employees, or one may furnish transportation to his visitors or customers, without undertaking to serve the public generally. The service is more an accommodation than a business for profit. (State vs. Nelson, 65 Utah 457, 238 Pacific 237.)

An Incidental service, according to Wyman, is one auxiliary or supplemental to another service or business relation. This

classification of private carriers deserves some attention, for within this class fall many of the cases which are on the border line between private and public service. Such an undertaking is not a mere accommodation. It is for profit, but it is carried on primarily to promote another and the main business in which the carrier is engaged. A contractor engaged in erecting a building may transport the materials to be used in its construction. The delivery by a seller of goods is a service incidental to the main contract. But when the incidental transportation service is conducted, not by the owner of the primary business but by his agent, who is compensated on some basis related to the carriage operation, it is frequently difficult to determine whether such service is in fact merely incidental to another business relation, or is in reality a private enterprise of the carrier whose undertaking is limited by the number of persons who may be patrons of the principal business.

A public or common carrier has been defined as one who undertakes for hire to transport from place to place the property of others who may choose to employ him. Some courts have said that a common carrier is one who holds himself out to carry goods of all persons indifferently. But the holding out which was so important a factor in earlier definitions seems to imply no more than the existence of a transportation business which may serve such persons as choose to employ it. It is obviously not a prerequisite that, to be classed as a common carrier, one must undertake to serve all persons without limitation of any kind as to the place where his services are given or the class of goods which he professes to haul. Neither does a limitation imposed regarding the number of shippers served, or the requirement of an express contract in each case prior to the rendition of the service, necessarily fix a carrier's operations as purely private. In other words,

if the particular service rendered by a carrier is offered to all those members of the public who can use that particular service, the public is in fact served, and the business is affected with a public interest, though the actual number of persons served is limited. As was said in the matter of Lehigh Valley Transit Company (Pa.) P.U.R. 1928A, 606),

> If a carrier for profit is by circumstances available to a portion of the consignors and consignees in a given territory who are willing to make more or less the same arrangements as prevail with existing patrons, it cannot be said that this carrier has so circumscribed his field of operations that he must be regarded as a private carrier.

This principle was applied in the following cases: Sanger vs. Lukens, 24 Fed. (2d) 226; Smitherman & McDonald vs. Mansfield Lumber Co. (D.C.) Ark. 6 Fed. (2d) 29. Restivo vs. West, 129 Atl. 884; State vs. Washington Tug Co., 250 Pac. 49; Barbour vs. Walker, 126 Oklahoma 227, 259 Pac. 552; Craig vs. P.U. Com. 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., 264 Pac. 160, re E. J. Martsfield, P.U.R. 1926E, 463; re Will Thome, P.U.R. 1927A, 860; Lehigh Valley Transit Co., P.U.R., 1928A, 606.

In each of the cases above cited the carrier held himself out directly to a portion of the public that he was ready to serve such persons to the extent of his profession, and it was held that regardless of the limited number of persons served and the existence of a special contract with each customer, the carrier's service was nevertheless public. Such, however, is not exactly the circumstance in the instant case. The service of the respondent is claimed to be to, and his reputed contract to be made with, one shipper only, instead of several. He claims to be operating under a contract with the United Grocers, Inc. and transports only such commodities as may be sold by it to its customers in other towns.

Though the various grocers who purchase goods from the United Grocers, Inc. each own one share of stock in the latter corporation, from all that appears, such corporate relationship has no bearing on the daily purchase and sale transactions between them. All goods are sold on short time credit, a sales order being made out in each case just as in any merchandise sale transaction. Title to the goods presumably passes upon their delivery to the carrier. There is no evidence that the seller is under any obligation to deliver goods to the purchaser, or is undertaking, by its arrangement with respondent, to itself deliver the goods sold to purchaser. It is to the seller's advantage, of course, to render as a part of its service to customers any assistance possible in respect to the transportation of its goods. With that alone in mind, the United Grocers, Inc., made arrangements with the respondent whereby the latter was to be accorded the privilege of soliciting business among its customers, and, with the promise that as long as he continued to render a satisfactory service, the United Grocers, Inc.,would exercise its influence to the end that the respondent carrier's privilege would be exclusive.

It is not disputed that respondent solicited business from the customers of the United Grocers, Inc., directly. He claims, however, that such solicitation was done by virtue of his one contract with the United Grocers, Inc. But the fact that there is only one contracting party with a carrier does not of itself classify such a carrier's operations as private, if, in fact, a substantial portion of the public is being served. The contractor, as we may term the party entering into the agreement with the carrier, may be an association of persons which directly represents or serves its members or the public, and the carrier in such case serves the public just as much as though his arrangement had been with the individual members themselves. If the contractor is not himself the real owner of the goods and does not obligate himself to pay the transportation charges without

recourse to others, his part in the transaction is merely that of agent for the real shippers. Textile Alliance Co. vs. Keahon, 125 Misc. Rep. 400, 211 N.Y.S. 205; Davis vs. People, 79 Colo. 642, 247 Pacific 801; West vs. Western Maryland Dairy, 151 Md.- , 135 Atlantic 136; Terminal Taxicab Company vs. Kutz, 241 U. S. 252, 60 L. Ed. 984; U. S. vs. Brooklyn Terminal, 249 U.S. 296, 39 Sup. Ct., 283; Chicago and E. I. Railway Co. vs. Chicago Heights Terminal, 317 Ill. 65, 147 Northeastern 666; Harlocker v. Adams Transit Company, P.U.R. 1928 A, 12.

We must conclude then, that the respondent in this case is performing the functions of a common carrier. He is engaged in such operations as a business of his own. The United Grocers, Inc. is not itself rendering a transportation service incidental to its other business, nor is the respondent rendering such service as its agent. The agreement between the United Grocers, Inc. and the respondent amounts to no more than the granting to him of the special privilege of soliciting business among the various customers of the United Grocers, Inc. Most of these customers availed themselves of respondent's service but some did not. The fact that there are a limited number of such persons does not, as we have seen, make the service private, and, even if we should view the operations of respondent as being performed wholly under a valid contract with a single employer, the United Grocers, Inc., since this employer has entered into such agreement merely for the account of others with whom it happens to sell its commodities, the transportation service of the respondent is indirectly for the benefit of those other persons, and must be regarded as public in its nature. However, we find that respondent has solicited, served and stands ready and willing to serve all those members of the public who may be in a position to use the particular service offered.

The Railroad Commission finds as a fact that the respondent,

Jack Hirons, is operating a motor truck used in the business of transportation of property, as a common carrier, for compensation, over the public highways of this State between fixed termini and over a regular route, without having first obtained a certificate declaring that public convenience and necessity require such operation, in violation of the Auto Stage and Truck Transportation Act and the previous order of this Commission, contained in Decision No. 18801, to said respondent to discontinue said operations. Since, however, the respondent did apparently in good faith discontinue solicitation of business from all persons other than those who were recipients of merchandise from the United Grocers, Inc. and expected thereby to meet the requirements of the order of the Commission, we do not find that the respondent is guilty of willful contempt of our previous order.

O R D E R

The above entitled proceeding having been instituted by the Commission upon its own motion, a public hearing having been held, the matter being duly submitted and now being ready for decision, and basing its order on the conclusions and findings in the opinion above,

THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA hereby orders said respondent, Jack Hirons, immediately to discontinue the illegal operations above described, and

IT IS HEREBY FURTHER ORDERED that the Secretary of the Railroad Commission mail to the district attorneys

of the counties of Kings and Fresno a certified copy of the order herein.

Dated at San Francisco, California, this 24 day of July, 1928.

Commissioners.