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Decision No. 20200.

BEFORE THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA

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MARY J. TUCKER, Executrix of the  
Last Will and Testament of  
B. N. TUCKER, deceased,

Complainant,

vs.

HARRY S. PAYNE,

Defendant.

Case No. 2333.

In the Matter of the Investigation  
on the Commission's own motion into  
the rates, practices, rules, regula-  
tions and operations of HARRY S. PAYNE  
operating an auto trucking service  
under the fictitious name and style of  
PACIFIC MOTOR EXPRESS.

Case No. 2446.

Walter S. Clayson, for Complainant.

H. J. Bischoff, for Respondent and  
Defendant.

Frank B. Austin for Pickwick Stages  
System, Intervenor.

BY THE COMMISSION:

O P I N I O N

The complaint of Mary J. Tucker, executrix of the last will and testament of B. N. Tucker, deceased, against Harry S. Payne, operating under the name of Pacific Motor Express, alleges unlawful operation and asks that an order be issued restraining the defendant from transporting freight of any character between Corona and Wilmington and San Pedro, and for such other and proper relief as will protect complainant's operative rights.

Defendant by his answer admits the transportation of citrus fruits between Corona and Wilmington and San Pedro,

denies that his operations are of a common carrier nature, and alleges that he is conducting a private trucking business not within the jurisdiction of the Railroad Commission.

A public hearing was held before Examiner Williams at Corona on May 5, 1927. Case 2446 is an investigation upon the Commission's own motion into the operations of Harry S. Payne. A further hearing was held on December 1, 1927, at which time the matters were consolidated for hearing and decision.

Complainant, under the name of Pioneer Transfer Company, carries various commodities, including citrus fruits and products, between the points mentioned in the complaint and other points, and is the only carrier in Corona authorized by this Commission to perform such truck service to the harbor points. Defendant possesses operative rights for the transportation of all commodities between Corona and Los Angeles, but not including Los Angeles Harbor points. Complainant uses the highway through Santa Ana and Garden Grove while defendant operates through Chino and Pomona and the Valley Boulevard to Los Angeles. The rates of complainant for the transportation of citrus fruits and other commodities are \$3.65 per ton between Corona and Wilmington, and \$4. per ton to San Pedro, while the rate at which defendant has transported certain commodities to Wilmington for the Queen Colony Fruit Exchange is \$3.50 per ton.

The Queen Colony Fruit Exchange at Corona acts as a sales agency for its five members; - A. F. Call Estate, Corona Citrus Association, Corona Foothill Lemon Company, W.H. Jameson and Orange Heights Fruit Association. Citrus fruits are

shipped from Corona to Los Angeles Harbor points. Between January and April, 1927, seven carloads were handled by defendant for this exchange at the rate of \$3.50 per ton. This business was solicited by defendant and there is no contract or agreement other than a verbal understanding as to the rate covering such transportation.

Defendant carries lumber from Los Angeles Harbor points to Corona for Corona Lumber Company, eight trips having been made during the two and one-half months prior to the hearing. A verbal understanding exists as to the rate. The lumber company is not obligated in any manner to use defendant's service. Lumber has likewise been carried from the Harbor to Corona for the Hayward Lumber and Investment Company.

The Exchange Lemon Products Company, a cooperative organization consisting of fifty-seven members, ships citric acid and lemon oil from Corona to the Harbor and utilizes the services of both complainant and defendant. Defendant has manifested a willingness to render a lower rate on back hauls. In addition defendant has carried muriatic acid in glass carboys from Vernon to Corona for this Company.

It appears from the testimony of defendant that service has been performed for Queen Colony Fruit Exchange, Corona Lumber Company, Hayward Lumber and Investment Company, Exchange Lemon Products Company, American Fruit Growers, Corona Fruit Growers and Corona Foothill Lemon Company, between the Harbor and Corona; North Corona Land Company between Pasadena and Corona; and Exchange Lemon Products Company between Vernon and Corona. Defendant states that he is ready, able and willing to serve the above shippers, ~~that he is ready, able and willing to serve the above shippers,~~

that he is soliciting other "contract" customers; that he would carry for additional shippers if equipment were available; that he would take care of present customers first; that he "would be a poor business man", if he did not carry for additional shippers, provided the load was large enough and equipment was available; that if the amount of business offered would justify the purchase of additional equipment he would do so - "That is what I have a sign on the building for, to solicit just such customers."

Defendant contends that his operations are those of a private carrier. The record shows that the only "contract" that exists is a verbal understanding as to the rate, agreed upon by the parties at the time of solicitation. In some instances the rate originally agreed upon has been decreased. Shippers are not obligated in any manner to patronize defendant's service. It would be an evasion of the clear intent and purpose of the Auto Stage and Truck Transportation Act (Stats. 1917 Ch. 213 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. 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 as a private carrier. (See Thornewill vs. Gregory, Dec. 19860, Case 2484, and cases therein cited).

We find that the defendant and respondent, Harry S. Payne, operating under the fictitious name and style of Pacific Motor Express, is usually and ordinarily operating motor trucks 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 first having obtained from this Commission a certificate declaring that public convenience and necessity require such operation, in violation of the Auto Stage and Truck Transportation Act. An order directing said Harry S. Payne to cease and desist from said operation will be issued.

O R D E R

Complaint as above entitled having been filed, and an investigation on the Commission's own motion having been instituted, public hearings having been held, the matters having been submitted after consolidation for purpose of hearing and decision, and now being ready for decision, and basing our order upon the conclusions and findings in the opinion above;

IT IS HEREBY ORDERED that said Harry S. Payne immediately cease and desist from his said operations between Corona and Wilmington or San Pedro, or vice versa, as above described, unless or until he shall have received a certificate to the effect that public convenience and necessity require the same; and

IT IS HEREBY FURTHER ORDERED that the Secretary of the Railroad Commission mail a certified copy of the opinion and order herein to the District Attorneys of Riverside, Orange, and Los Angeles Counties.

Dated at San Francisco, California, this 6<sup>th</sup> day of September, 1928.

C. L. Sweeney  
Wm. J. Cost

W. J. Cost  
Commissioners.