IN

Decision No. 22412

BEFORE THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of G. M. ADAMS, doing business under the fictitious name and style of K. B. PURCHASING AND DELIVERY SERVICE, for (1) an order of this Commission determining whether or not the said Commission has jurisdiction over the business and operations of applicant; and if so (2) for a certificate declaring that public convenience and necessity require the operation by applicant of such service between San Francisco and San Jose and intermediate points, and vice versa.

ORIGINAL

Application No. 16317

Harry A. Encell, for Applicant.
H. W. Hobbs, for Southern Pacific Company, Protestant.
W. E. Robinson, for Pioneer Express Co., Protestant.

CARR, Commissioner -

O P I N I O N

The application here presented is a peculiar one. After alleging the character of operations of the applicant the Commission is requested "to determine whether or not said Commission has jurisdiction over the business and operations of applicant conducted as herein set forth; and if so, "to certificate such operations." There is no offer to dedicate property to the public service. On the contrary, it is alleged "that it is not the intention of applicant to operate as a common carrier nor perform any act or acts from which actual or implied dedication to public use could be held to be a fact."

At the public hearing held on April 2, 1930, the applicant, through Thomas Keller, its General Manager, who has full charge of the business as now conducted, related in considerable detail the operations as now being conducted and stated that it

was the desire to continue such operations in their present form. Counsel for the applicant then requested that some determination be made as to whether or not the Commission considered that it had jurisdiction and that if the determination was in the affirmative, the applicant be afforded opportunity to present public witnesses as to the convenience and necessity of a continuation of the present service.

I think the matter may be disposed of without the necessity of further hearings.

The situation presented is a peculiar one. This applicant in Pioneer Express Co. vs. Keller, 32 C.R.C. 314, (Decision No.20349, Case No.2508, decided October 18, 1928), was found to be engaged in common carrier operations and was ordered to cease and desist. Thereafter, upon affidavit being filed that the applicant had not complied with the order of the Commission, Mr. Keller, the Manager, was cited for contempt. After a hearing on this citation it was found that he had not changed the character of his operations and was guilty of contempt of this Commission and a fine was imposed. Application was made to the Supreme Court for a review of this order, but the Supreme Court refused to issue a writ. (Keller vs. Railroad Commission, S. F. 13758).

Thereafter, in February of the present year, Keller paid the fine imposed. Following this the present application was filed.

Mr. Keller, the applicant's manager, testified here that there had been no change in the operations of the Company since on or about the time the fine for contempt was paid, except that the service accorded had been reduced from twice to once a day and that the number of customers of the applicant had been somewhat reduced.

According to Mr. Keller's testimony, the character of the present operations of the applicant, which it is desired to continue, is as follows:

Applicant has about forty customers consisting of garage and automobile parts concerns and radio dealers in the Peninsular cities. For these he performs what is claimed to be primarily a personal service, with transportation on the highway a mere incident. This consists of stopping each day at the place of business of the customer and picking up any orders to be filled or samples of old parts to be duplicated. Then a shopping service is performed in San Francisco to fill the orders and duplicate the spare parts desired. These are assembled, transported in a truck which the applicant has, to the places of business of the various customers and delivered. For this service applicant receives a flat compensation per month, which apparently is the result of bargaining between applicant and the respective customers, this amount depending upon the extent and volume of the service required. Sometimes C. O. D. packages are transported to the customers, for which a charge of 15 cents per package is made, this being in addition to the flat monthly charge.

In addition to this the applicant also does certain general hauling for several concerns which have located in San Francisco and the Peninsula with agencies in the Peninsula and San Francisco. As to this class of his business, testimony does not indicate the presence of any particular element of personal service. It is claimed these are private contract operations.

The line separating operations over which the Commission has certification jurisdiction from those as to which it has not, is not always easy to define. The leading decision of this Commission on what may be termed a "personal service operation" is Hare vs. Gilboy, 31 C.R.C. 566, (Decision No.19613,

Case No.2443, decided April 13, 1928). Evidence in this proceeding developed that one Thomas Gilboy was transporting films, etc., for moving picture houses and, in connection with the transportation service, was giving a personal service that made the act of transportation a minor feature of the service. The complaint against him was dismissed. Also many decisions have been handed down dealing with situations where a party claimed he was doing a private contract as distinguished from a common carrier business. In nearly all of the cases of these characters where the location of the line as compared with the party's operations was involved, the contention was advanced that an attempt was being made to evade the law. It is easy to over estimate this element for, as said by Mr. Justice Holmes in delivering the opinion of the Court in Superior Oil Company v. Mississippi, 74 L. ed. (Adv. Op.) 320, decided February 24, 1930:

> "The fact that it desired to evade the law, as it is called, is immaterial, because the very meaning of a line in the law is that you intentionally may go as close to it as you can, if you do not pass it."

It may be that the applicant here as to some of his oper - ations has not passed the line and, as to others, he has. There is outstanding against this applicant an order forbidding him to pass this line. The law likewise inhibits this. As to any operations as to which the applicant has not passed the line, there is no occasion here, in view of the peculiar form of the application, for certification. As to any operations which have passed the line, under the uniform holding of the Commission, (Re J. W. Ritzman, 31 C.R.C. 772, Southern Pacific Company v. Thornewill, 33 C.R.C. 450-452, and Thornewill vs. Gregory, 33 C.R.C. 455-460, certification would be refused.

It may be, of course, that a full disclosure of applicant's operations would indicate that the ones first referred to above, and which he claims fall in the category of "personal service operations," have a wider scope than indicated by his testimony and are of such a nature as to be in violation of the "cease and desist" order of the Commission and the law.

Taking applicant's testimony thus far given at its face value, the so called personal service operations would not seem to be of a character calling for certification. Even if they did cross the line and if the remainder of his operations fall within the category of those which require certification, the applicant finds itself within the rule above referred to, that the Commission will not certify operations conducted in defiance of its orders and the law.

It may not be amiss at this time to warn applicant that nothing in this opinion or order will in the least relieve him of the burden of full observance of the law and the Commission's order.

It seems, therefore, that whatever view is taken of this application no useful purpose would be subserved in going on any further with the hearings, as certification, which is the only order which the Commission could make here, could not be granted. If the applicant desires to become a certificated carrier, it should make plain its desire to dedicate its property and business to the public service. To the extent its present operations are such that in fact it is a common carrier, it should comply with the law and the subsisting order of the Commission before coming here.

O R D E R

IT IS HEREBY ORDERED that Application No.16317 be and the same is hereby dismissed.

The above Opinion and Order are hereby declared to be the Opinion and Order of the Railroad Commission of the State of California.

Dated at San Francisco, California, this 16th day of May, 1930.

C. L. Seavey

Leon O. Whitsell

COMMISSIONERS.