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Decision No. 22792

BEFORE THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA

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PETALUMA & SANTA ROSA RAILROAD COMPANY,

Complainant,

vs.

SAN RAFAEL FREIGHT & TRANSFER COMPANY,  
EDGAR POMEROY,

Defendants.

ORIGINAL

Case No. 2644.

In the Matter of the Investigation  
upon the Commission's own motion into  
the practices, rates, rules, regula-  
tions and operations of SAN RAFAEL  
FREIGHT & TRANSFER COMPANY.

Case No. 2652.

In the Matter of the Investigation on  
the Commission's own motion into the  
practices, rules, rates, regulations  
and operations of EDGAR POMEROY.

Case No. 2653.

In the Matter of the Application of  
SAN RAFAEL FREIGHT & TRANSFER COMPANY  
for an amendment of its certificate  
of public convenience and for the  
operation of an automobile truck for the  
transportation of freight between  
Sausalito and Santa Rosa.

Application No. 15227.

Gwyn H. Baker and R. M. Barrett for Applicant  
in Application No. 15227, and for both  
Defendants in Case 2644 and for both  
respondents in Cases 2652 and 2653.  
Donald Geary and H. S. Graham for Petaluma &  
Santa Rosa Railroad Company, Complainant in  
Case 2644, Protestant in Application 15227  
and Interested Party in Cases 2652 and 2653.  
A. S. Weston and Edward Stern for Railway Express  
Agency, Inc., Protestant in Application 15227.  
Christopher M. Jenks and J. J. Geary for North-  
western Pacific Railroad Company, Protestant  
in Application 15227, Intervenor in behalf of  
Complainant in Case 2644, and Interested  
Party in Cases 2652 and 2653.

W. S. Johnson and Morton G. Smith for  
Southern Pacific Company, Protestant in  
Application 15227 and Intervenor in behalf  
of Complainant in Case 2644 and Interested  
Party in Case 2652 and 2653.  
Lewis H. Cromwell for City of Petaluma and  
Petaluma Chamber of Commerce, Protestants  
in Application 15227.

BY THE COMMISSION:

O P I N I O N

These four proceedings relate primarily to the operations of the San Rafael Freight & Transfer Company, either as an individual carrier or in conjunction with Edgar Pomeroy, between San Francisco and points north of San Rafael to and including Petaluma and Santa Rosa.

In Case 2644 the Petaluma & Santa Rosa Railroad Company alleges (1) that the San Rafael Freight & Transfer Company is violating the terms of its certificate of public convenience and necessity obtained from this Commission by transporting package merchandise weighing in excess of 60 pounds per package between San Francisco and points on the public highway north of San Rafael; (2) that Edgar Pomeroy is operating as a common carrier of property by auto truck over the public highways between San Rafael, Santa Rosa and intermediate points without first having obtained a certificate of public convenience and necessity from this Commission; and (3) that the San Rafael Freight & Transfer Company and Edgar Pomeroy have conspired together to operate as common carriers of property between San Francisco and points on the public highway north of San Rafael to and including Petaluma and Santa Rosa.

Following the filing of the complaint in Case 2644 the Commission, on its own motion, instituted Cases 2652 and 2653

for the purpose of inquiring into the practices, rates, rules, regulations and operations of the San Rafael Freight & Transfer Company and Edgar Pomeroy, between San Francisco, Santa Rosa and intermediate points.

Application 15227 was filed by the San Rafael Freight & Transfer Company seeking the enlargement of its existing operative rights between San Rafael, Santa Rosa and intermediate points to permit the transportation of all freight, regardless of weight.

Public hearings were held before Examiner Cannon at Petaluma, Santa Rosa and San Francisco and the matters involved submitted on briefs. By stipulation the four proceedings were heard on one record and will be disposed of in one decision.

The San Rafael Freight & Transfer Company, hereinafter referred to as the Transfer Company, is a common carrier of property by vessel between San Francisco and San Rafael and by auto truck between Sausalito, San Rafael, Santa Rosa and intermediate points. The operations by vessel are unrestricted, but by truck this company is prohibited from transporting between Sausalito, San Rafael, Santa Rosa and intermediate points single pieces of package merchandise weighing in excess of 60 pounds. It may, however, transport shipments of newspapers, ice cream and dairy products regardless of weight. (Petaluma & Santa Rosa Railroad Co., et al. vs. Lawson Transfer Co., et al., 21 C.R.C. 785)

On or about July 14, 1927, the Transfer Company attempted to work out a method by which it could, either directly or indirectly, haul freight weighing in excess of 60 pounds per package. It first entered into an agreement with Samuelson Bros. Inc. whereby the latter obtained contracts from various shippers in San Francisco to haul their merchandise, regardless of weight, from San Francisco to points on the highway north of San Rafael.

The Transfer Company received its regular tariff rates for the haul by vessel from San Francisco to San Rafael and the balance was divided equally between the two parties. This method of operation was subsequently abandoned. The Transfer Company thereafter directly solicited shipments from various wholesale firms in San Francisco, offering to haul shipments of any weight from San Francisco to points north of San Rafael and Sausalito. The offer was in the form of a letter with a preamble reading: "We hereby contract to make store-door deliveries of all your shipments from Pier 9, San Francisco, to all points on the highway between Sausalito and Santa Rosa". The service from San Francisco to San Rafael was performed by the Transfer Company and beyond San Rafael by Edgar Pomeroy with trucks, at a flat rate of 15 cents per 100 pounds. (Petaluma & Santa Rosa Railroad Co. vs. San Rafael Freight & Transfer Co., 32 C.R.C.272.)

In the proceeding just cited the Commission held that by the foregoing method of operation the Transfer Company had attempted to transmute itself from a common carrier into a private contract carrier for the obvious purpose of defeating the restriction placed upon it by its certificate of public convenience and necessity prohibiting the transportation of package merchandise weighing in excess of 60 pounds per package. An order requiring the Transfer Company to cease and desist from the unlawful practices was entered October 10, 1928.

Thereafter the Transfer Company notified by letter all shippers with whom it purported to have a contract that "it will be necessary for us to change the present method of handling contract shipments". The change in the existing method was effected by Edgar Pomeroy entering into alleged contracts with

a portion of these shippers and others whereby he undertook to perform as a private contract carrier a through service from Pier 9, San Francisco, to points on the highway north of San Rafael. Both the Transfer Company and Edgar Pomeroy deny there was any agreement between them to perform this service. However, the testimony of the Transfer Company's president leads us to conclude that the new plan originated with the Transfer Company, and although there may have been no definite agreement between the two, there was at least an implied understanding that Pomeroy was to obtain the so-called contracts, and both would jointly participate in the transportation. Clearly the present method of operation was devised for the purpose of continuing a service which the Transfer Company was ordered by the Commission to cease and desist from performing.

Pomeroy now has approximately twenty so-called contracts. He is willing to accept more until the capacity of the two tracks now being used is reached, provided the shipments are not of a heavy and bulky nature. Moreover, if without a great deal of effort he can expand his business he is willing to acquire additional equipment. The record shows that Pomeroy, in so far as his operations in connection with the Transfer Company are concerned, is not a private contract carrier as defined by the United States Supreme Court in Frost vs. Railroad Commission, 271 U.S. 583, but is a common carrier operating over the public highways between fixed termini and over a regular route without first having obtained from this Commission a certificate of public convenience and necessity. Pomeroy also performs other hauling by truck, principally for the Poultry Producers of Central California, but these operations are not here in issue.

There is also evidence in this record to show that the Transfer Company hauls shipments of a weekly periodical and eggs in crates weighing in excess of 60 pounds per package. This is

done without the aid of Pomeroy. Under the terms of its certificate of public convenience and necessity the only articles which may be transported when the weight is in excess of 60 pounds per package are newspapers, ice cream and dairy products. The Transfer Company contends that weekly periodicals are newspapers and eggs are dairy products. While there may be some analogy between newspapers and periodicals and between dairy products and eggs, the certificate of public convenience and necessity is definite in its terms and will not include analogous articles.

Application No. 15227 requests authority to legalize an operation which in the past has been illegally rendered by the Transfer Company itself, or jointly with others. Aside from the fact that the past conduct of the Transfer Company raises a serious doubt as to its fitness to perform the service, the evidence and testimony do not support an affirmative finding of public convenience and necessity.

After consideration of all the facts of record we are of the opinion, and so find,

1. That the San Rafael Freight and Transfer Company and Edgar Pomeroy have conspired to jointly haul package merchandise weighing in excess of 60 pounds per package for the purpose of defeating the restriction of the certificate of public convenience and necessity granted to the San Rafael Freight and Transfer Company by the Commission, prohibiting the transportation of such articles from or to points north of San Rafael to and including Petaluma

and Santa Rosa.

2. That in connection with shipments between Pier 9, San Francisco, and points north of San Rafael to and including Petaluma and Santa Rosa, Edgar Pomeroy is operating as a common carrier over the public highway between fixed termini and over a regular route in violation of Section 5 of the Auto Stage and Truck Transportation Act, without having first obtained a certificate of public convenience and necessity from this Commission.
3. That the San Rafael Freight and Transfer Company is violating the terms of its certificate of public convenience and necessity by transporting shipments of weekly periodicals and eggs weighing in excess of 60 pounds per package.
4. That Application No. 15227 should be denied.

An order to cease and desist from the foregoing unlawful practices will be entered. This is the second order which the Commission has made against the San Rafael Freight and Transfer Company as a result of its irregular practices. It would seem almost unnecessary to warn both San Rafael Freight and Transfer Company and Edgar Pomeroy, defendants in the above entitled complaints, that any future attempt on their parts, directly or indirectly, to evade the restrictions placed upon the certificate of public convenience and necessity heretofore granted to San Rafael Freight and Transfer Company will be met by a prompt imposition of the penalties provided by law.

O R D E R

These proceedings having been duly heard and submitted, full investigation of the matters and things involved having been had, and basing this order upon the findings of fact and the conclusions contained in the opinion which precedes this order,

IT IS HEREBY ORDERED that the San Rafael Freight and Transfer Company be and they are hereby ordered to cease and desist and thereafter to abstain from transporting package merchandise weighing in excess of 60 pounds per package between San Francisco and points on the public highway north of San Rafael to and including Petaluma and Santa Rosa, and

IT IS HEREBY FURTHER ORDERED that Edgar Pomeroy be and he is hereby ordered to cease and desist from transporting property as a common carrier between San Francisco and points on the public highway north of San Rafael to and including Petaluma and Santa Rosa, and

IT IS HEREBY FURTHER ORDERED that the San Rafael Freight and Transfer Company be and it is hereby ordered to cease and desist and thereafter to abstain from transporting weekly periodicals and eggs, in crates, weighing more than 60 pounds per package, and

IT IS HEREBY FURTHER ORDERED that Application 15227 be and it is hereby denied, and



IT IS HEREBY FURTHER ORDERED that in all other respects the above entitled proceedings be and they are hereby dismissed.

Dated at San Francisco, California, this 13<sup>th</sup> day of August, 1930.

C. C. Sewey

Leon Whiteley

Wm. S. Smith

Commissioners.