

Decision No. 24398.

BEFORE THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA

MOTOR FREIGHT TERMINAL COMPANY,
a corporation, and SAN JOAQUIN
VALLEY TRANSPORTATION COMPANY,
a corporation,

Complainants.

vs.

ED. H. BURKE, T.C. WALLACE,
JAMES K. DRINNON, HARRY A.
HOPPING, GEORGE C. LEBECK,
BUSINESS MEN'S MUTUAL EXCHANGE,
LTD., a corporation, JOHN DOE
ONE TO FIFTY, inclusive, JOHN
DOE CORPORATION ONE TO FIVE,
inclusive, JOHN DOE COMPANY,

Defendants.

ORIGINAL

Case No. 3100

O'Melvony, Tuller and Myers, by B.E. Ahlport
for Complainant.

Mark A. Hall for Defendants.

W.S. Johnson for Southern Pacific Company,
Intervener.

Edward Stern for Railway Express Agency, Inc.,
Intervener.

BY THE COMMISSION:

O P I N I O N

Complainant, Motor Freight Terminal Company, a corporation, operating automotive service under authority of this Commission between Bakersfield and Los Angeles, prays for an order requiring Business Men's Mutual Exchange Ltd., and H.L. Maxwell (substituted for Ed H. Burke) to cease and desist performance of common carrier service between Bakersfield and Los Angeles until said defendants have received a certificate of public convenience and necessity therefor, according to Chapter 213, Statutes of 1917, as amended.

Public hearings thereon were conducted by Examiner Kennedy at Bakersfield and Los Angeles, the matter has been duly submitted and is now ready for decision.

Defendant Business Men's Mutual Exchange Ltd. was organized under Title XXII of Part 4 of Division 1 of the Civil Code as a cooperative non-profit corporation serving mutually only its own members at cost. The objects of the corporation (Exhibit No.4) are collective buying, cooperative deliveries and hauling, to operate warehouses, to do cooperative advertising, to collect delinquent accounts or any other cooperative business. The record shows that only one activity has been actually established -- transportation by truck, although two efforts were made to collect delinquent bills. No limitation as to membership is provided by the articles of incorporation but in the by-laws (Exhibit No. 5, Section 2) membership is limited to "not to exceed 50 percent of the business men" in any city or any county. It is argued by defendant that this is a rejection of 50 percent of the "business men" described and, therefore, is not an offer to the public generally and not an offer subjecting the corporation to the status of a common carrier and hence becoming amenable to the Auto Stage and Truck Transportation Act. This limitation and the non-profit mutual operations defendants claim distinguish it from the "transportation company" definition of that act.

The corporation was organized in 1930 by one E.K. Errett. Its incorporators were James K. Drinnon, of Palmdale, Harry A. Hopping of Pasadena and T.C. Wallace of Pomona. The record discloses that none of these incorporators, who are also the directors, ever used any of the services of the corporation. Nothing appears to have been done by the corporation until May 1931 when memberships were solicited and sold for \$5. membership fee and \$5. a year dues additional. A membership entitled the shipper to demand the services of the corporation for his benefit. The only services performed were those of transportation and the record shows that solicitation was based on benefits of reduced

transportation charges. The only income of defendant was from transportation charges. Defendant corporation argues that it could not establish all its activities at once and selected transportation as a beginning. Admittedly the corporation had no funds to begin with (except the fees collected) and hence its business was placed in the hands of George C. Lebeck as manager-treasurer. Lebeck entered into verbal agreement with one E.H. Burke to transport freight of members between Bakersfield and Los Angeles at the rate of \$6. per ton. Later Burke retired and a written contract (Exhibit No. 2) was entered into between defendant corporation, under Lebeck's signature, with H.L. Maxwell for the same service, "the compensation of said contractor for said hauling shall be at an agreed rate per hundredweight" and "to be agreed upon from time to time". The contract calls for carriage between any points but under it no hauling was done by Maxwell except between Los Angeles and Bakersfield. Lebeck testified that Maxwell was paid \$5.00 a ton for this work; that the average load was three tons; that the back haul from Bakersfield was negligible in amount. The contract may be terminated instantly upon notice by either party.

It further appears that Lebeck began solicitation of memberships in Bakersfield and Los Angeles. In all 28 members were obtained of which 23 were in Bakersfield. The transportation rate charged was 60 cents per 100 pounds, (or less according to commodity or quantity) which is less than that of complainant herein. There was frank admission by defendant that all transportation services had been performed for compensation, that the operation was between fixed termini. Counsel for defendant in his brief concedes that, if defendant were a common carrier, it is a legal entity subject to the jurisdiction of the Commission "in spite of its non-profit, cooperative character."

Complainant claims that the corporation is a mere sham and subterfuge and that anyone willing to pay dues can receive the service offered; that the limitation to 50 percent of the "business men" is practically no limitation. In this connection it is to be noted that this limitation is fixed only through a by-law which may be amended at any time by a vote of members, each member having one vote. The phrase "50 percent of the business men" itself is indefinite, as the number of "business men", as such, is indeterminable. It is also note-worthy that the management of the corporation, while theoretically in the control of the membership, is really vested in the manager-treasurer under the contract executed by the directors with him whereby the profits are to be divided between the members and the manager-treasurer — 10 percent to the members and 90 percent to the manager-treasurer. The transportation business has been profitable but no division has been made, although Lebeck testified he had received all net earnings.

The organization was not formed by shippers. The incorporators never used its service. What they did was to employ Lebeck, who himself and by the use of R. Irwin as solicitor sold memberships.

How they were sold is related by H.I. Kimsey, proprietor of Class "A" Motor Company of Bakersfield. Kimsey testified that he was solicited by Irwin in May 1931; Irwin told him he could ship more economically and presented a rate of 60 cents per 100 pounds. Kimsey paid his dues May 16 and received service almost immediately. Before that the bulk of his shipments had moved to Bakersfield from Los Angeles via complainant, Motor Freight Terminal Company, at a rate of 75 cents per 100 pounds; he also had used Railway Express Agency, Inc. It was stipulated by defendant that other Bakersfield shippers who were members and were under subpoena would testify in substance the same.

No claim is made that the corporation is not such an entity as may be within the jurisdiction of the Commission if it is in fact rendering a common carrier service. No question as to the disregarding of corporate entity is involved. The sole issue is whether the operations are those of a common carrier or a private carrier. "Members" only are entitled to service. Any bona fide, reputable business man who can use the service offered is eligible to membership, provided that the number of members is limited to 50 percent of such business men in any community. Active solicitation of prospective members was carried on until the filing of the complaint. The record does not show that membership was refused to anyone. As was said in Re 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 can not be said that this carrier has so circumscribed his field of operations that he must be regarded as a private carrier."

See, also, Re Jack Hiron, 32 C.R.C. 48, and cases there cited; Thornwill v. Gregory, 31 C.R.C. 843; California Transit Co. v. Auto Tours Continental Club, 31 C.R.C. 158; Petaluma etc. R. Co. v. Leal, 33 C.R.C. 65; Sierra Ry. Co. v. Berg, 35 C.R.C. 508;

O R D E R

It is hereby found as a fact that Business Men's Mutual Exchange, Ltd., a corporation, and H.L. Maxwell, are engaged in the operation of a common carrier trucking service between Los Angeles and Bakersfield, within the meaning of Statutes 1917, Chapter 213, as amended, without first having obtained a certificate of public convenience and necessity therefor; and

IT IS HEREBY ORDERED

That said Business Men's Mutual Exchange, Ltd., a corporation, and H.L. Maxwell, and each of them, cease and desist such common carrier operations unless and until they shall have obtained a certificate of public convenience and necessity from this Commission; and

That the secretary of the Commission cause personal service of a certified copy of this opinion and order to be made upon said Business Men's Mutual Exchange, Ltd., and upon said H.L. Maxwell; that a certified copy of this opinion and order be mailed to the district attorneys of Los Angeles and Kern Counties; to the Board of Public Utilities and Transportation of the City of Los Angeles; and to the Department of Public Works, Division of Motor Vehicles: and

That this order shall become effective twenty (20) days after the date of service above mentioned.

The foregoing opinion and order are hereby approved and adopted as the opinion and order of the Railroad Commission of the State of California.

Dated at San Francisco, California, this 18th day of

January 1932.

Cal Seamy
Leon ...
M. J. ...
W. B. ...
Fred G. ...
COMMISSIONERS