Decision No. 24651

BEFORE THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA

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| CALIFORNIA INTERURBAN MOTOR TRANSPORTATION ASSOCIATION,<br>Complainant<br>vs.<br>ALEX MEYERS doing business as WESTERN TRANSPORTATION COMPANY,<br>Defendant. | Case No. 3130 |

Phil Jacobson and Richard T. Eddy, for Complainant
Sanborn, Roehl & Brookman, by A. B. Roehl, for Defendant
H. M. Wade, for Wade Shipping Company, interested party
George L. Colburn, for Harbor Franchise Carriers Association, interested party
H. J. Bischoff, for Donovan Transportation Company, interested party.

BY THE COMMISSION:

OPINION

The complaint herein alleges that Alex Meyers, doing business as Western Transportation Company, is engaged in unauthorized common carrier operations by truck between Wilmington, San Pedro, East San Pedro, Harbor City, Terminal Island, and contiguous territory, on the one hand, and Los Angeles, Vernon, Huntington Park, Glendale, Pasadena, Santa Monica, and other points contiguous to the City of Los Angeles, on the other hand. The amended answer denies any operations within the provisions

of Statutes 1917, chapter 213, as amended, or sugject to the jurisdiction of the Commission. Defendant claims that "the only question presented in this proceeding is the question of the power of the Commission to grant to, or withhold from a transportation agency the right or privilege of engaging in interstate or foreign commerce over the highways of the state." (Brief for defendant, p. 67)

Alex Meyers, doing business under the fictitious name of Western Transportation Company, is engaged in the transportation business by auto truck between Los Angeles harbor points and Los Angeles and adjacent territory. He has been so engaged for some five or six years, prior to that time being employed as manager of California Truck Company, a certificated carrier. Twenty one trucks and three trailers are used in an almost daily operation between Los Angeles and the harbor. The record shows, and it was stipulated that defendant receives compensation from his services; that a hauling service is rendered from ship side to Los Angeles, or from ship side to towns contiguous to Los Angeles; and that defendant uses one of the main highways between the City of Los Angeles and the harbor.

Mr. Meyers, testifying on his own behalf, stated that the majority of his hauling from ships at Los Angeles harbor to Los Angeles and adjacent points is done for a limited number of customers, among which are S. H. Kress and Company,

F. W. Woolworth Company and J. J. Newberry Company[(1)]. Since November, 1926, defendant has been hauling for S. H. Kress and Company, and since 1927 for Woolworth and Company under an arrangement of practically the same nature as is set forth in the present written agreements. Defendant testified that 88 per cent of the tonnage hauled from docks, ex ships, harbor to Los Angeles and adjacent points is transported for these three companies, and that most of such tonnage originates in Atlantic seaboard points and interior Eastern cities, and the balance in foreign countries.

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(1) Exhibit No. 12 is an agreement dated November 10, 1930, between S. H. Kress and Company and A. Meyers. Exhibit No. 13 is an agreement dated November 28, 1930, with F. W. Woolworth Co., and Exhibit No. 14 is an agreement dated June 15, 1931 with J. J. Newberry Co. These agreements provide in substance that first party employs defendant to transport, distribute and deliver all merchandise and other property belonging to first party required to be transported, distributed or delivered to or from the harbor and the various stores of the first party located in southern California, and agrees to pay therefor in accordance with a schedule of rates attached to the agreement (these schedules were omitted from the exhibits); defendant to provide facilities and perform service promptly and efficiently; to render assistance in collection of claims against other carriers; and to remit collections thereon; to forward to office of first party (New York, San Francisco and Los Angeles, respectively) immediately after distribution, the originals or copies of all railroad freight bills covering pool cars; to cooperate with stores of first party as to hours, conditions of delivery, collection of freight bills and hauling charges, to note damage or shortage, assist in freight claim inspections; that freight bill charges covering carloads for distribution shall be pro-rated between stores of first party, separate freight bills to be issued by defendant on shipments to each store; dedendant to carry insurance; and that employment of defendant includes the transportation of all merchandise and property of first party received at the harbor and at rail terminals in Los Angeles, whether consigned to first party or its agents, or consolidated with other shipments and consigned to or in care of parties other than first party. These agreements are to continue in force for three years; for one year, and unless prior to expiration of such period one of the parties gives notice to the other of election to terminate, for an additional term of two years thereafter; and for one year, respectively.

Exhibit No. 15, a group of shipping documents covering what is stated to be a representative movement for the above three parties consists in part of a bill of lading issued by Baltimore & Ohio Railroad Company covering a shipment of glassware from Clarksburg, West Virginia, shipper Hazel-Atlas Glass Co., consigned to Luckenbach Steamship Line, Philadelphia, Pa., and bearing a notation "For S. H. Krees & Co. Santa Monica, Calif." The next document in this exhibit is a photostatic copy of an original bill of lading of the Luckenbach Line, showing shipment received from "Hazel Atlas Glass Co Clarksburg W Va", consigned to "S. H. Kress & Co Santa Monica Calif", port of discharge being "Port of Los Angeles Calif", and "Routing Beyond Port of Discharge c/o Western Trans Co".

In addition to tonnage for the above three companies, defendant testified that he handles traffic in pool lots, or consolidations, for Western Traffic Conference, Retail Furniture Association, Intercoastal Consolidators, and the "West Transco" consolidation (Western Transportation Company). Defendant testified that the business handled under these four consolidations amounts to 5½ per cent of the total tonnage handled by him from the harbor to Los Angeles and adjacent points. The Western Traffic Conference is an association of Pacific Coast department stores, and the traffic of this consolidation arrives by ships of the Williams Line and Gulf Pacific Line from the Atlantic seaboard or eastern interior cities. These goods consist largely of cotton piece goods and toys. Exhibit No. 17 (shipping documents) covers a consolidated shipment from various eastern shippers to Bullock's, Broadway Department Store, and Sears Roebuck Co. at Los Angeles. The

shipper (via Gulf Pacific Redwood Line, from New Orleans ) was "Columbia Terminals Co., St. Louis, Missouri", and the consignee "Western Traffic Conference, Care Western Transportation Co., 317 N. Meyers Street, Los Angeles, California", the port of discharge being "Los Angeles Harbor".

According to defendant the percentage distribution of traffic handled from the harbor ex ship to Los Angeles and adjacent points is 88 per cent to Kress, Woolworth and Newberry, 5½ per cent under the four consolidations, and 6½ per cent miscellaneous, none of which originates at points within the State of California. There are some 15 or 20 miscellaneous accounts.

As to the return movement of trucks from Los Angeles to harbor points, defendant testified that about 90 per cent of such movement is empty. The balance of 10 per cent consists of shipments for Cudahy Packing Company destined for eastern points and Honolulu, and of furniture for the Furniture Manufacturer's Association destined to San Francisco and adjacent territory, and handled under a consolidation consigned to Overland Freight Transfer Company at San Francisco, distributor for the association at that point. In addition there are a few return shipments from other customers destined to eastern points.

Transportation for Cudahy Packing Company is handled in accordance with a letter, which was not offered in evidence. Exhibit No. 18 is an agreement dated June 12, 1931, with Furniture Manufacturer's Association and is somewhat similar to

the agreements referred to previously.[2] Defendant estimated that between 4 and 5 per cent of his total volume of traffic handled moves under the arrangement with the Furniture Manufacturer's Association and is the only traffic handled which has its origin and destination in California. Furniture is hauled for stores other than members of the association.

During the month of September, 1931, approximately 1500 tons were handled between Los Angeles and the harbor, and approximately the same amount during October, 1931. In addition, during the above months, approximately 80 tons were hauled for Cudahy Packing Company and 65 or 70 tons for furniture companies.

It appears from the testimony of the terminal superintendent of American-Hawaiian Steamship Company that shipments arriving at the harbor by boat are discharged from ship's hook and placed on four-wheel trucks, which trucks are hauled to a central place on the dock called the "battlefield", where the freight is segregated. The larger truck companies operating into the harbor each have a designated "spot" in the transit shed. After segregation, the packages are distributed to the various "spots". This work is performed by stevedores employed by the steamship company. The shipments are checked out to the truck companies, the latter giving a receipt for the particular

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(2) The first paragraph of Exhibit 18 provides that first party employs defendant "to consolidate, transport, distribute and deliver merchandise and other property forwarded by, or consigned to, or in the care of First Party and required to be consolidated and/or distributed at Los Angeles or Los Angeles harbor and transported or delivered between Los Angeles, Los Angeles harbor and other points in Southern California. Such employment shall apply to consolidated or pool car shipments of merchandise forwarded by, or consigned to, or in the care of First Party and the consolidation, distribution and/or transportation of which First Party has control".

Exhibit No. 16 is a similar agreement dated June 17, 1931, with Retail Furniture Association of California.

commodity. If no standing order is on file with the steamship company, a shipment is placed on a spot on the dock called the "miscellaneous spot". Notice of arrival is sent, and if no instructions are received, the shipment is automatically moved by a truck company designated by the auditor's office of the steamship company.

Trucks are loaded by employees of the trucking companies, and delivery is made to the trucking companies (there are approximately twenty carriers operating between the harbor and Los Angeles under certificates of public convenience and necessity issued by this Commission or by virtue of operation in good faith prior to regulation) only upon presentation of a delivery order, which order is not issued by the auditor's office of the steamship company until freight charges have been paid.

Defendant hauls for numerous concerns located in Los Angeles and adjacent cities, such as Glendale, Vernon, Huntington Park, Santa Monica, Pasadena, Hollywood, etc.(3). Some of the business houses served are members of one or more of the various consolidations mentioned above. Following the filing of a new tariff on October 12, 1931 by a certificated carrier, rates charged to members of the Retail Furniture Association consolidation for hauling from the harbor were revised downward at the request of stores for whom defendant was hauling.

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(3) Some of the Los Angeles concerns for whom goods are moved are S. H. Kress and Company, Barker Bros., F. W. Woolworth Company, Broadway Department Store, Sears, Roebuck Company, Wilhelm Paint Company, the May stores, Bullock's, Schulte United Company, William Voelker Company, J. J. Newberry Company, J. W. Robinson, Walker's Department Store, Coulter's Department Store, Jacoby Brothers, Dyas Company, Eastern Outfitting Company, Lipman Brothers, Greater Broadway Furniture, Chandlers, McPherson, National Silver Company, National Dollar Stores, J. M. Overall, Ruskin Company, Good and Jenkins, Birch Smith Furniture Company.

Certain concerns for whom property is transported, such as National Silver Company, do not move property over any consolidation. Transportation charges of defendant to and from the harbor are paid by the shipper or receiver of freight. In the case of S. H. Kress & Company, which operates a number of 5, 10 and 25 cent stores, each store pays its own transportation charges, ordinarily by cash. The movement is controlled by the New York office of Kress & Company, although local drayage arrangements for transportation from the harbor was made through the Los Angeles office of said company. Steamship and other advance charges are paid by defendant, who is reimbursed at the time of delivery. Bills rendered by defendant, as explained by the traffic manager of Broadway Department Store, show the inland freight charges, wharfage handling, insurance, ocean freight, and the trucking charge.

The record herein clearly shows that defendant is operating a common carrier trucking service and that the major portion of the goods hauled by him originate at or are destined to points outside of the State of California. It is the position of defendant that he is not engaged in local or intrastate commerce, but in interstate and foreign commerce, and that the said statute (Auto Stage and Truck Transportation Act, Stats. 1917, ch. 213, as amended) providing that a certificate of public convenience and necessity shall be obtained from this Commission prior to conducting common carrier truck operations for compensation between points in California, does not apply to his operations.

Section 9 of Statutes 1917, chapter 213, as amended, reads as follows:

"Neither this act nor any provision thereof shall apply or be construed to apply to commerce with foreign nations or commerce among the several states of this union, except in so far as the same may be permitted under the provisions of the constitution of the United States and the acts of congress; provided, however, that with reference to transportation companies operating solely in interstate commerce between any point or points within this state and any point or points in any other state or in any foreign nation, the railroad commission shall have the power to prescribe such reasonable, uniform and non-discriminatory rules and regulations in the interest and aid of public health, security, safety, convenience and general welfare as shall in its opinion be required by public convenience and necessity."

Defendant in support of his argument that this Commission is without certificating jurisdiction over his operations relies particularly upon Buck v. Kuykendall (1925), 267 U. S. 307, and Bush & Sons Company v. Maloy (1925), 267 U. S. 317. In each of these cases the Supreme Court of the United States held that a state statute requiring a certificate of public convenience and necessity from a state regulatory commission as a condition precedent to the conduct of interstate motor carrier operations was an interference with interstate commerce and unconstitutional.

Buck v. Kuykendall, supra, involved a Washington statute prohibiting common carriers for hire from using the highways between fixed termini or over regular routes, without having first obtained a certificate of public convenience and necessity. The highest state court had construed the section as applying to common carriers engaged exclusively in interstate commerce. The facts were that Buck, wishing to operate a stage line between Seattle, Washington, and Portland, Oregon, as a common carrier exclusively for through interstate passengers and express, applied in Washington for the prescribed certificate. This was refused on the ground that under state laws a certificate could not be granted for territory already being ade-

quately served by a certificate holder, and that there were adequate transportation facilities between Seattle and Portland. A bill to enjoin enforcement of the statute was dismissed by the Federal Court for western Washington, and reversed on appeal. It was held that the primary purpose of the statute was not regulation with a view to safety or to conservation of the highways, but the prohibition of competition. In this regard the Court stated:

> "The vice of the legislation is dramatically exposed by the fact that the state of Oregon had issued its certificate, which may be deemed equivalent to a legislative declaration that, despite existing facilities, public convenience and necessity required the establishment by Buck of the auto stage line between Seattle and Portland. Thus, the provision of the Washington statute is a regulation, not of the use of its own highways, but of interstate commerce. Its effect upon such commerce is not merely to burden but to obstruct it. Such state action is forbidden by the commerce clause." (69 L. ed. — 627)

In Bush & Sons Company v. Maloy, supra, a permit to do an interstate business (between Delaware and Maryland) as a common carrier of freight over specified routes was denied by the Public Service Commission of Maryland. Action of the state court dismissing a bill to restrain state officials from interfering with the operations was reversed.

We are of the opinion that the said two decisions of the Supreme Court of the United States are not applicable to the facts in the instant case. In the two cited decisions there was, in each case, a physical movement of transportation facilities between two states, which movement was interfered with by the respective state statutes. In the instant case the transportation facilities of defendant are not operated interstate. The opera-

tions are local, principally between Los Angeles and Los Angeles harbor, approximately twenty-two miles in distance. The fact that a substantial amount of commerce which is moved by defendant from the harbor to Los Angeles is interstate in character (the continuity of the movement not being broken at the harbor) is of no significance. The requirements of the California statute cast no undue burden on such commerce.

In Re Railway Express Agency, Inc. (Ohio Pub. Ut. Comm., 1930) P. U. R. 1931 A, 177, 193, the Ohio Commission stated:

> "While it is true that this Commission cannot deny a certificate between a point without the state and a point within the state for interstate transportation upon payment of tax, filing of insurance and complying with reasonable police regulations, and such operation is an interstate operation, the operation of the truck proposed in the present case is purely intrastate, regardless of the fact that it may handle shipments that are in interstate commerce. The various decisions such as the Daniel Ball Case and others cited by applicant apply simply to the questions as to whether or not a certain shipment is an interstate movement and does not in any way affect the fact that the proposed operation herein is an intrastate operation of a truck governed by the Ohio Motor Transportation Law and the rules of this Commission."

N. Y. Central R. Co. v. Public Utilities Commission (1931), 175 N. E. 596, P. U. R. 1931 D, 101, was a proceeding in error from the Ohio Commission before the Ohio Supreme Court. An order denying a certificate[4] was claimed to be unlawful in

> "That the Commission failed to recognize that the denial of the right to transport intrastate commerce on the highways constitutes a denial of the right to transport interstate commerce, in the light of the evidence that interstate commerce constitutes a very large percentage of the traffic handled and was not reasonably susceptible of separation from the intrastate commerce."

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(4) The application for a certificate was denied upon three grounds: (1) that no proper tariffs had been filed as required by law and the rules of the Commission; (2) that the evidence did not show public necessity for the additional service proposed; and (3) that the evidence did not show that the existing motor transportation companies were not rendering adequate and convenient service.

Regarding this contention the court states:

> "The proposed route is entirely within the state and we regard the fact that some of the freight proposed to be hauled involves interstate shipments entirely immaterial".

Prior to the above case the New York Central Railroad Company had been ordered by the Ohio Commission to cease trucking operations, and such order was before the Supreme Court of Ohio in New York Central Railroad Company v. Public Utilities Commission (1930), 170 N. E. 574, P. U. R. 1930 B, 423. In 1925 the railroad had made a contract with A. B. Peek Company, under which the latter agreed to transport by truck from station to station between Cleveland and Toledo all such freight (including interstate commerce) as the railroad might deliver to such company, at a specified rate.

> "The evidence showed that all freight hauled, 74.4 per cent of the number of shipments was interstate and about 70 per cent of pounds weight was also interstate. * * * *
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> "The respondent" (railroad) "accepts such freight and transports it under its bills of lading and way bills, being the uniform bills of lading and way bills in general use by the respondent and other railroad companies.* * * * * *
> "In short, the respondent has made this truck operation a part of its common carrier business. * * * * *
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> "* * *Complete supervision of the operation is in the New York Central Railroad Company. The trucks are used exclusively for the railroad, and at every minute of the time of carriage the property transported is under the railroad's control, being handled through the use of bills of lading and way-bills, exactly as all other classes of freight. * * * * * *
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> "* * *Hence the New York Central Railroad Company under this record is not only a common carrier for hire, but with reference to this particular freight it is a common carrier for hire, and the contract of carriage never ceases to be a contract of common carriage."

The Court held that the Commission order directing respondent to cease and desist did not cast a burden on interstate commerce and the order was affirmed.

In Stephenson v. Binford (United States District Court, S. D. Texas, Oct. 26, 1931) P. U. R. 1932 A, 1, 53 Fed. (2d) 509 certain "private contract carriers" sought to enjoin enforcement of a statute requiring a permit.

> "* * *Finnegan alone claims to be a hauler in interstate commerce. His allegation in that respect is that, though he hauls between points entirely within the state of Texas, the goods which he hauls have moved into Texas interstate, and that he hauls them as part of their uncompleted movement.
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> "We do not any more agree with the intervener Finnegan that he is an interstate carrier. His contract is made in Texas; his carriage is in Texas. Whether the goods which he is carrying have really come to rest before he picks them up, or are in the course of continuous transit, the record does not show. But, if it did show the facts to be as he contends, we think it would be a straining of the point to say, because the goods he handles intrastate have come from outside of it, that the requirement that the carrier who contracts wholly in Texas, and who carries wholly there, procure a permit to do so, and submit himself to the regulations which the state requires, constitutes a burden on interstate commerce."

## O R D E R

A public hearing having been had and the above matter submitted upon briefs,

It is hereby found as a fact that Alex Meyers, doing business under the fictitious name and style of Western Transportation Company, is engaged in the transportation of property by auto truck, for compensation, and as a common carrier, between fixed termini and over regular routes, on the public

highways of this state, between Wilmington, San Pedro, East San Pedro, Harbor City, Terminal Island, and contiguous territory within the State of California, on the one hand, and Los Angeles, Glendale, Vernon, Huntington Park, Santa Monica, Pasadena, Hollywood, and points adjacent to the City of Los Angeles, all within the State of California, on the other hand, without first having obtained a certificate of public convenience and necessity for such operations, as required by Statutes 1917, chapter 213, as amended, and

IT IS HEREBY ORDERED that said Alex Meyers immediately cease and desist such common carrier operations unless and until he shall have obtained a certificate of public convenience and necessity therefor; and

IT IS HEREBY FURTHER ORDERED that the Secretary of this Commission cause a certified copy of this opinion and order to be personally served upon said Alex Meyers, and that certified copies of this opinion and order be mailed to the Board of Public Utilities and Transportation of the City of Los Angeles, and to the Division of Motor Vehicles of the State of California.

This opinion and order shall become effective twenty (20) days after the date of service above mentioned.

Dated at San Francisco, California, this 4th day of April, 1932.

C. L. Seavey
Leon O. Whitsell
M. B. Harris
Fred G. Stevenot

Commissioners