

Decision No. 3023.

BEFORE THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA

SOUTHERN PACIFIC COMPANY,
a corporation,
RAILWAY EXPRESS AGENCY, INC.,
a corporation, and
PACIFIC MOTOR TRANSPORT COMPANY,
a corporation,

Complainants,

vs.

L.E. SMITH,
DOE ONE,
DOE TWO, and
DOE COMPANY, a corporation,

Defendants.

ORIGINAL

Case No. 3023

H.W. Hobbs and W.S. Johnson, for Complainants
Southern Pacific Company and Pacific Motor
Transport Company.

H.W. Hobbs and Edward Stern, for Railway Express
Agency, Inc., Complainant.

Bacigalupi, Elkus & Salinger and Frank B. Austin,
for Defendant L.E. Smith.

W.H. Metson, for California Transportation Company.

J.H. Anderson, for Sacramento Navigation Company.

W.G. Stone, for Sacramento Wholesalers and Manufacturers
Association.

R.W. Rogers, for Sacramento Motor Transport Company.

HARRIS, Commissioner:

OPINION

Southern Pacific Company, Railway Express Agency, Inc.
and Pacific Motor Transport Company complain of Louis E. Smith,
conducting a freight trucking business under the name Smith Trucking
Service, and allege that his business is that of a common carrier
between fixed termini and over a regular route and that such business

is established and operated without the prerequisite certificate of public convenience and necessity in conformity with the Auto Stage and Truck Transportation Act (Chapter 213, Acts of 1917, as amended).

Defendant Smith denies that he is engaged in the transportation business as a common carrier and alleges that any property transported by him has been transported solely as a private carrier, that he does not carry property for the public generally, and has not dedicated his property or services to the general public.

Public hearings were conducted at San Francisco, Sacramento and Redding, the matter was submitted on briefs which have been filed and the matter is now ready for decision.

Defendant Smith began his operations for the transportation of freight between Sacramento and points intermediate to Chico and Redding including Redding in July 1929. The movement consisted of freight delivered in Sacramento by The River Lines from San Francisco and consignments picked up by defendant in Sacramento. The back haul was negligible. Later defendant inaugurated truck service between Sacramento and San Francisco and East Bay cities, particularly Oakland, and ceased shipments by water carriers. In February 1931 Smith testified, he formed an equal partnership with Marko and Calvert and that this partnership since has conducted the business. Smith formerly operated a stage line between Susanville and Doyle in 1918 and between Sacramento and Placerville and between Placerville and Caldor in 1924-1926 selling the latter operations to Pierce Arrow Stage Company. By solicitation before and after the partnership, Smith built up a business between San Francisco and East Bay cities and Sacramento which transported, about the time of the hearing, 12 to 15 tons daily

eastbound and 5 to 6 tons westbound. The business between Sacramento and Northern California points to Redding averaged 7 to 8 tons per trip (tri-weekly) with a negligible return movement. Defendant is now using 5 trucks and 3 trailers. A considerable portion of the volume brought by them from either direction into Sacramento has been delivered to other carriers, some certificated and some without certificates, for delivery to destinations not served by defendant.

Physically the service conducted is and has been similar in all respects to service maintained by common carriers. A terminal is maintained at 1115 R. Street, Sacramento and another at 1400 Seventh Street, San Francisco. Daily schedules are maintained between San Francisco and Sacramento Valley points by way of the San Mateo Bay Bridge and Stockton or, infrequently via steamer to Vallejo. Between Sacramento and Redding three schedules each week are maintained. Pickup and delivery services are maintained in Sacramento and San Francisco.

During the hearings complainants produced 18 witnesses in support of their allegations. The only witness for the defense was Smith. In all 41 exhibits were received in which were included 134 contracts with shippers or consignees. Of these contracts 64 are treated by defendant as obsolete or inactive in that no transportation has been rendered under them for many months. Smith testified he would not consider them "in force". The earliest contract produced (July 10, 1929) with United States Rubber Co. and Smith (Exhibit No.37) provided:

"That the party of the first part agrees to deliver to the party of the second part, all freight which said party of the first part may have for transportation to and from Sacramento to Red Bluff, Cottonwood, Anderson and Redding, California.

"That the party of the second part, in consideration of the delivery to him for transportation of said freight, agrees to transport same to and from Sacramento to the towns listed above at the following rates, and to carry cargo insurance on all merchandise carried."

This form was used until November 1929 when, in an agreement with Wellman, Peck & Co. the words "all freight" were changed to "such freight" and this sentence added to the form:

"It is further understood that if the rate or transportation service rendered under this agreement is not satisfactory to either party, it may be terminated upon five (5) days' notice."

Also the words "All shipments are to be store(side-walk) delivery."

In other forms a blank was left before the word "freight" and in a number of contracts left unfilled.

Defendant does not dispute the testimony of the witnesses as to defendants' operations but contends that the contracts submitted show defendants to be a private carrier not subject to regulation under the Auto Stage and Truck Transportation Act (Chapter 213, Acts, of 1917, as amended). The record discloses that the contracts were not observed by the shippers in that but few tendered all their shipments to defendants. Moreover, a majority of the shipments were accompanied by standard bills of lading accepted by defendants which in their terms were common carrier obligations.

Defendant asserts that all movements were by private contract either written or oral. The oral contracts are few and the defendant stresses the fact that in every movement they tried to get a written contract even though only one movement was performed for the shipper. That neither shipper nor operator sought to enforce the provisions of the contracts submitted is clearly established by the testimony. Smith testified that he did not inquire of the shippers whether he received all their shipments under the contracts presented or not; that he did not question when delivery to him ceased or attempt any enforcement of the provisions of the contract.

It is clear from the record that though defendant entered into a contract with the shipper, the shipper was left at liberty to furnish consignments or not as he pleased.

It appears that defendant during two and a half years of operation had obtained contracts solely for the purpose of circumventing the requirements of Chapter 213, Stats. 1917, as amended. Contracts similar in form and language to those used by defendant have heretofore been determined by the Commission to be insufficient to take the operations out of the purview of the Auto Stage and Truck Transportation Act. At best they are mere rate quotations. There is some evidence in the record that even the price feature in the contract was not observed. (Re Jack Hirons, 32 C.R.C. 48; Petaluma & Santa Rosa RR. vs. Leal, 33 C.R.C. 63; Re R.W. Rasmussen Co., 34 C.R.C. 497; Petaluma & Santa Rosa RR. vs. Baglinson, 35 C.R.C. 793; Motor Freight Terminal Co. vs. Taber, 35 C.R.C. 757).

The Commission should find as a fact that defendant L.E. Smith is now transporting property as a common carrier for compensation between San Francisco, Oakland and East Bay cities and Sacramento and between Sacramento and all points between Chico and Redding excluding Chico and that such business has been established and maintained and operated by L.E. Smith without procuring from this Commission the certificate of public convenience and necessity as required by the Auto Stage and Truck Transportation Act (Chapter 213, Stats. 1917, as amended). An order should be issued requiring defendant to cease and desist all such operations unless and until a certificate therefor has been obtained.

An order of this Commission finding an operation to be unlawful and directing that it be discontinued is in its effect not unlike an injunction issued by a court. A violation of such order constitutes a contempt of the Commission. The California Constitution and the Public Utilities Act vests the Commission with power and authority to punish for contempt in the same manner and to the same extent as courts of record. In the event a party is adjudged guilty of contempt, a fine may be imposed in the amount of \$500.00, or he may be imprisoned for five (5) days,

or both. C.C.P. Sec. 1218; Motor Freight Terminal Co. v. Bray,
37 C.R.C. 224; re Ball and Hayes, 37 C.R.C. 407; Wermuth v.
Stamper, 36 C.R.C. 458; Pioneer Express Company v. Keller,
33 C.R.C. 571.

It should also be noted that under Section 8 of the Auto Truck Act (Statutes 1917, Chapter 213), a person who violates an order of the Commission is guilty of a misdemeanor and is punishable by a fine not exceeding \$1000.00, or by imprisonment in the county jail not exceeding one year, or by both such fine and imprisonment. Likewise a shipper or other person who aids or abets in the violation of an order of the Commission is guilty of a misdemeanor and is punishable in the same manner.

The Secretary of the Commission should be directed to mail certified copies of this opinion and order to shippers who appeared as witnesses in the course of the proceeding and to other shippers who are known to be using the service and facilities of defendants, upon the said opinion and order becoming final.

The following form of order is recommended.

ORDER

A public hearing having been had and the above matter having been submitted on briefs:

IT IS HEREBY FOUND AS A FACT that defendant Louis E. Smith, doing business under the name and style of Smith Trucking Service 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, viz: between San Francisco, Oakland, Alameda and Berkeley, Sacramento, Los Molinos, Cottonwood, Anderson, Red Bluff and Redding without first having obtained a certificate of public convenience and necessity for such operations, as required by the Auto Stage and Truck Transportation Act (Chapter 213, Statutes of 1917, as amended). Therefore,

IT IS HEREBY ORDERED that defendant Louis E. Smith, shall immediately cease and desist such common carrier operations, as described in the preceding paragraph, unless and until he shall obtain a certificate of public convenience and necessity therefor; and

IT IS HEREBY FURTHER ORDERED that the Secretary of this Commission shall cause a certified copy of this decision to be personally served upon defendant Louis E. Smith; that he cause certified copies thereof to be mailed to the District Attorneys of San Francisco, Alameda, Sacramento, Shasta and Tehama Counties and, upon this decision becoming final, he shall cause certified copies thereof to be mailed to shippers who appeared as witnesses in the course of this proceeding and to other shippers who are known to be using the service and facilities of defendant.

The effective date of this order shall be twenty (20) days after the date of service upon defendant Louis E. Smith.

Dated at San Francisco, California, this 14th day of

August 1932.

C. C. Seavey
Leon Whittier
W. A. C.
W. B. Harris
James G. Stewart
Commissioners.