

Decision No. 25891

BEFORE THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA

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ORIGINAL

MOTOR FREIGHT TERMINAL COMPANY, a corporation,

Complainant,

vs.

MOYE FORWARDING COMPANY, a corporation, O. P. MOYE, FIRST DOE, SECOND DOE and THIRD DOE,

Defendants

)
)
) Case No. 3149

CALIFORNIA MOTOR EXPRESS, LTD., a corporation,

Complainant,

vs.

MOYE FORWARDING COMPANY, a corporation, O. P. MOYE, FIRST DOE, SECOND DOE and THIRD DOE,

Defendants

)
)
) Case No. 3217

Reginald L. Vaughan and Scott Elder, for Regulated Carriers, Inc.

M. F. Sylva, for Moyer Forwarding Company, a corporation; Edward Melde; A. R. Fouratt; and Lee Case.

Robert Brennan and William F. Brooks, for A. T. & S. F. Rwy. Co.

Edward Stern, for Railway Express Agency, Inc.

Reginald L. Vaughan, for Motor Freight Terminal Company.

Douglas Brookman, for California Motor Express, Ltd.

WARE, Commissioner:

OPINION, FINDINGS AND JUDGMENT

Decision No. 25139, dated August 29, 1932 (Exhibit 1 in contempt proceeding), found as a fact that Moye Forwarding Company and O. P. Moye were engaged in the operation of a common carrier trucking service between San Francisco and Los Angeles without first having obtained a certificate of public convenience and necessity. It was ordered that such defendants cease and desist said operations until a certificate should have been obtained.⁽¹⁾

Petition for rehearing of said decision was filed on September 7, 1932, and rehearing denied on September 20, 1932 (Decision No. 25202). Petition for a writ of certiorari was filed in the Supreme Court of California on October 18, 1932. Writ of review was denied on November 10, 1932. (Moye Forwarding Company v. Railroad Commission, S. F. No. 14201.)

The application for order to show cause and affidavit of service of Fred N. Bigelow was filed on November 10, 1932. Attached to and a part of that application are the supporting affidavits of Willard S. Johnson and F. M. Jones. The application recites the filing of the complaints, the holding of hearings thereon, the issuance of Decision No. 25139 and the service thereof upon Moye Forwarding Company by personal service upon A. R. Fouratt, secretary-treasurer. It alleges that Edward Malde, as director and president of the corporation; A. R. Fouratt,

(1) Decision 25139 was personally served upon A. R. Fouratt, secretary-treasurer and director of Moye Forwarding Company on September 3, 1932 (Exhibit 3), and by its terms became effective twenty days after such service (September 23, 1932.)

as a director and secretary-treasurer; and Lee Case, as a director and manager in Los Angeles, had personal knowledge of the order and its contents. It is alleged in substance that the corporation and each of the three individuals named, as directors and officers, with full knowledge of and subsequent to the effective date of the desist order, have and that each of them has continued to operate a common carrier trucking service between San Francisco and Los Angeles.

Specific violations setting forth license numbers of trucks, names and addresses of consignees, commodities delivered, etc., are alleged to have occurred on October 11, 12, 13, September 21, 23, and October 3, 1932.

On November 23, 1932, the Commission issued its order to show cause directing Moye Forwarding Company, a corporation, Edward Malde, A. R. Fouratt, and Lee Case to appear on January 24, 1933, and show cause why they, or any of them,

(2) Among the consignees alleged to have received shipments on the specific dates mentioned are the following:

Calirox Company	Los Angeles
Buddy Squirrel	Hollywood
Henry's Cafe	"
Newcomer Trailer Mfg. Co.	Los Angeles
Pacific Mill & Mine Supply Co.	"
The Emporium	San Francisco
Baer Notion & Toy Company	"
Westinghouse Electric & Mfg. Co.	"
Lawrence Warehouse Company	"
Sherwin-Williams Paint Company	"
Butler Bros.	"
California Notion & Toy Company, Ltd.	"
Maurice Rosenthal, Inc.	"
San Francisco Notion & Toy Company	"
Leed's Shoe Store	"
S. H. Kress & Company	"
Merry Co., Ltd.	"
West Coast Laundry Machine Company	"
Hostess Cake Kitchen	"
J. M. Feldman & Co.	"
Premier Canning Company	"
Tay-Holbrook, Inc.	"
Cochrane and St. John, Ltd.	"
Pacific Gear & Tool Works	"

should not be punished for contempt. (3) Counter-Affidavits to the order to show cause were filed by Lee Case and by A. R. Fouratt on December 21, 1932. No answer was filed on behalf of any of the respondents.

At the hearing counsel for respondents stipulated that certain of the allegations of the application were true and correct as stated therein. (4)

Representatives of several business houses in San Francisco testified regarding their use of the service of Moye Forwarding Company between San Francisco and Los Angeles. The Emporium (Witness Lee Chalk) has received occasional shipments consisting mostly of robes and dresses from Los Angeles. (Exhibit 8 covers collect shipment on October 13, 1932.) Baer Notion and Toy Company (Witness William Vinol) has received collect shipments from Associated Manufacturers at Los Angeles. Westinghouse Electric and Manufacturing Company (Witness R. F. Ramey) has used the service both to and from Los Angeles (Exhibit 9 covers shipment of October 12, 1932.)

Haslett Warehouse Company (Witness J. L. Brash) now operating Lawrence Warehouse Company, has received shipments as agents for Erlen Chemical and Soap Co. (Exhibit 10 covers shipment of October 12, 1932.) Sherwin-Williams Corporation (Witness R. C. Ziegler) and two of its affiliated companies used the service approximately once a week both prior to and

(3) The "Application for Order to Show Cause and Affidavit of Service", together with the Order to Show Cause, was personally served upon Moye Forwarding Company, a corporation, through A. R. Fouratt, secretary; and upon Edward Malde and A. R. Fouratt, on November 28, 1932 (Exhibit 4); and upon Lee Case on December 5, 1932.

(4) As to the affidavit of Fred N. Bigelow it was stipulated and admitted that the allegations contained in the following paragraphs were true and correct; Paragraphs I, II, III, V, VI, VII, VIII, IX, XIII, XIV and XV. All of the allegations contained in the affidavit of W. S. Johnson were admitted except Paragraph IV thereof. All of the allegations contained in the affidavit of F. M. Jones were admitted.

(5)
after September 23, 1932. There was no difference in the frequency or nature of the service rendered after September 23, 1932 than was rendered prior to that date. The service of the Moye Company was used last on October 19, 1932 (Exhibit 11 covers shipment of October 12, 1932.) California Notion and Toy Company has used the service and Witness Julius Jacobs testified respecting a specific shipment on October 13, 1932.

Maurice Rosenthal, Inc. has a warehouse which stocks drugs for one of its stores, at which warehouse goods have been received from Jurgens-Woodbury Sales Co. at Los Angeles. Witness Joseph S. Rosa testified as to three specific shipments after September 23, 1932 (October 12, 13 and November 5, 1932.) Witness O. M. Grimm of West Coast Laundry Machinery Company testified regarding specific shipments on October 12 and 18, 1932.

Butler Bros., general wholesalers (Witness Charles Forrest) used the service approximately once each week during the year 1932. No change in the frequency or manner of service occurred after September 23, 1932. The witness believed that he received a notice from Moye Forwarding Company to the effect that they would cease operation on November 19, 1932. Since November 19, 1932 and during 1933 shipments have been delivered in the same manner and accompanied by the same form of billhead, except that the printed words "Moye Forwarding Company, Inc." have been crossed out and the following words inserted, "Atlas Shipping Agency Los Angeles". (Exhibit 13, shipment of January 7, 1933.) The conclusion of this witness was that Moye Forwarding Company and Atlas Shipping Agency were the same, although he did not ob-

(5) Decision No. 25139 became effective on September 23, 1932.

serve that trucks bore any distinguishing marks nor did he recognize the drivers. Checks are sent to the Los Angeles address on the bill.

San Francisco Notion and Toy Company (Witness Ricci) during the period August-December, 1932, used the service approximately once or twice each month. Exhibit 14 covers shipments of December 8 and 15, 1932. On these forms the printed words "Moye Forwarding Company, Inc." have been blocked out by printed red lines, as well as the addresses of the San Francisco and Oakland offices, and the words "Atlas Shipping Agency" printed in. The Los Angeles office address has not been blocked out but remains on these forms. Charges have been paid to the driver delivering the shipments.

J. M. Feldman and Company (Witness Louis T. Warriner) has used Moye Forwarding Company almost exclusively between San Francisco and Los Angeles for at least three years, shipping almost daily both prior to September 23, 1932, and after that date. The witness produced documents covering shipments on October 8, 11, 12, 13, 14 and 17, 1932. In November the witness received a letter from his Los Angeles office to the effect that Moye Forwarding Company would cease hauling on November 18, 1932. On November 15, 1932, he received a second letter stating that hauling arrangements had been made with Atlas Shipping Agency.

Edward Malde, President of Moye Forwarding Company, testifying in his own behalf, stated that after the Supreme Court had denied the petition for a writ of review steps were taken to cease and desist and that a notice was sent to all customers (Exhibit 12.) He testified that this company ceased operating on November 19, 1932; that it is now engaged only in the collection

of back bills; that neither he nor the company are interested in any other concern; that prior to November 19, 1932 the officers of the company were Malde, President and Director, Fouratt, Secretary-Treasurer and Director, and Case, Director and Manager of the Los Angeles Office; and that Case resigned on November 16, 1932.

As to the continued use of Moye Forwarding Company forms Mr. Malde testified that during October, 1932, he ordered 5,000 of such printed forms and received them on November 16, 1932. He stated that he then instructed his dispatcher "to get rid of them", but that he afterwards learned that the dispatcher had given half of the forms to Lee Case and half to "Aetna Shipping Agency". The witness stated that Aetna Shipping Agency now hauls southbound to Los Angeles and that Atlas Shipping Agency hauls northbound to San Francisco. He believes that Lee Case is manager of Atlas Shipping Agency, and that Messrs. Welker and Thorkelson, former employees of Moye Forwarding Company, are "connected with" Aetna Shipping Agency, which is located at 1182 Folsom Street, San Francisco. He stated that Moye Forwarding Company did not cease operations on the effective date of Decision No. 25139 (September 23, 1932) under the advice of counsel that it was legal to continue operating until the Supreme Court had acted on the petition.

It was stipulated by counsel for respondents that, on each of the specific shipments prior to November 19, 1932 testified to by the various witnesses, Moye Forwarding Company moved the goods in question between Los Angeles and San Francisco, for compensation. Said counsel stipulated further that during the

period September 23, 1932 to November 9, 1932, the operations of that company were the same as to frequency, regularity, and holding out as prior to September 23, 1932; but that after November 9, 1932, less business was handled. Said counsel stipulated further that respondents Malde, Fouratt and Case each had personal knowledge and notice of Decision No. 25139. Said counsel stipulated further that during the period September 23, 1932 to and including November 9, 1932, Edward Malde, as President and Director, A. R. Fouratt, as Secretary-Treasurer and Director, and Lee Case, as Los Angeles Manager and Director, and each of them, had knowledge of and consented to the operations of Moye Forwarding Company, and that said operations were conducted in the same manner as prior to September 23, 1932, under their direction as officers of the company and in the manner set forth in the application for order to show cause.

The evidence clearly shows that common carrier operation was continued after September 23, 1932 (the effective date of the desist order) in identically the same manner as prior to that date. Such operation continued until November 19, 1932, although less business was handled after November 9, 1932.

In their brief respondents take the position that the Commission was without jurisdiction over the operations during the pendency of the petition for a writ of review before the Supreme Court, and that they cannot be adjudged guilty of contempt for any acts committed during the period in which the validity of the desist order was under attack.

The desist order by its terms became effective on September 23, 1932. Rehearing was denied on September 20, 1932. Petition for writ was filed in the Supreme Court on October 18,

1932. Section 62(a) of the Public Utilities Act reads as follows:

"(a) The pendency of a writ of review shall not of itself stay or suspend the operation of the order or decision of the commission, but during the pendency of such writ, the supreme court in its discretion may stay or suspend, in whole or in part, the operation of the commission's order or decision."

In the present case a writ of review was not granted, but the petition therefor was denied on November 10, 1932. No request was made to the Commission for an extension of the effective date of the desist order so as to permit continued operation until a petition had been filed with the Supreme Court and until the Court had acted on such petition. (6)

The fact that the corporation and its officers acted under the advice of counsel that it was legal to continue operating until the Supreme Court had acted upon the petition for a writ does not justify the willful disregard of the desist order. It is, however, a mitigating circumstance entitled to careful consideration. As stated in United Parcel Service v. 20th Century Delivery Service, Inc. (Decision No. 25613, dated February 6, 1933, in Case No. 3299):

"The power vested in this Commission by the Constitution and by the Public Utilities Act to punish for contempt is one which should be used sparingly and only when and to the extent necessary to insure a respect for and an observance of its lawful orders."

(6) Section 66 of the Public Utilities Act provides in part as follows:

"* * * An application for rehearing shall not excuse any corporation or person from complying with and obeying any order or decision, or any requirement of any order or decision of the commission theretofore made, or operate in any manner to stay or postpone the enforcement thereof, except in such cases and upon such terms as the commission may by order direct.
* * *"

As to respondent Lee Case, formerly the Los Angeles Manager and a director of the corporation, the record suggests the possibility that he may have continued operating a common carrier service after the denial of the petition by the Supreme Court. The present record, however, does not support a finding to that effect.

Upon a careful review of the record in this proceeding the Commission makes the following findings of fact:

1. On August 29, 1932, the Railroad Commission, in its Decision No. 25139, found as a fact that Moye Forwarding Company and O. P. Moye were operating as common carriers within the meaning of Statutes 1917, chapter 213, as amended, between San Francisco and Los Angeles, without having a certificate of public convenience and necessity, and ordered said defendants to cease and desist such common carrier operations. Said order has never been revoked or stayed and is still in full force and effect.

2. A certified copy of said Decision No. 25139 was served upon Moye Forwarding Company, a corporation, by personal service on September 3, 1932, upon A. R. Fouratt, Secretary-Treasurer and a director of said corporation. Edward Malde, President and a director of said corporation, A. R. Fouratt, Secretary-Treasurer and a director of said corporation, and Lee Case, Los Angeles Manager and a director of said corporation, each had personal knowledge and notice of said Decision No. 25139 and the contents thereof on and prior to September 23, 1932, the effective date of said decision.

3. On November 10, 1932 there was filed with the Railroad Commission the affidavit of Fred N. Bigelow, together with the supporting affidavits of W. S. Johnson and F. M. Jones, in which it was alleged in substance that Moye Forwarding Company and Edward Malde, A. R. Fouratt and Lee Case, and each of them,

as officers and directors of said corporation, notwithstanding the order of the Railroad Commission in its Decision No. 25139, and with full knowledge of the contents and provisions thereof, had failed and refused to comply with said order in that they were continuing to conduct and operate an automobile truck line as a common carrier of property, for compensation, over public highways in this state, and specifically between San Francisco and Los Angeles.

4. Upon said affidavits being received and filed the Railroad Commission regularly, on November 23, 1932, issued its order directing Moye Forwarding Company, a corporation, Edward Malde, A. R. Fouratt, and Lee Case to appear on January 24, 1933 and show cause, if any they had, why they or any of them should not be punished for contempt for their refusal, failure, and/or omission to comply with the terms of the order of the Railroad Commission. Said order to show cause, together with the affidavits upon which based, was personally served upon Moye Forwarding Company, a corporation, by service upon A. R. Fouratt, Secretary, on November 28, 1932, upon Edward Malde on November 28, 1932, upon A. R. Fouratt, personally, on November 28, 1932, and upon Lee Case on December 5, 1932. Hearing was had on January 24, 1933 and the matter submitted on briefs.

5. Notwithstanding the order of the Railroad Commission contained in said Decision No. 25139, the said Moye Forwarding Company, a corporation, failed and refused to comply with the terms thereof, and continued to operate as a common carrier, for compensation, over the public highways in this state, within the meaning of Statutes 1917, chapter 213, as amended, and specifically between Los Angeles and San Francisco on October

11, 12, 13, September 21, 26, and October 3, 1932, and during the period September 23, 1932 and including November 19, 1932. During all of the period September 23, 1932 to and including November 9, 1932, Edward Malde, as President and Director, A. R. Fouratt as Secretary-Treasurer and Director, and Lee Case as Los Angeles Manager and Director, and each of them, had knowledge of and consented to said operations of the corporation and said operations were conducted under their direction.

5. The said failure of Moye Forwarding Company, a corporation, to comply with the said order of the Railroad Commission, and its continuance to operate as a common carrier, and the failure of Edward Malde, A. R. Fouratt, and Lee Case to comply with the said order, and their acts as officers and directors of said corporation in consenting to and directing continued common carrier operation by said corporation was and is in contempt of the Railroad Commission of the State of California and its order, and in violation of Statutes 1917, chapter 213, as amended.

JUDGMENT

IT IS HEREBY ORDERED AND ADJUDGED that the said Moye Forwarding Company, a corporation, and Edward Malde, A. R. Fouratt, and Lee Case, as officers and directors of said corporation, have and each of them has been guilty of contempt of the Railroad Commission in disobeying its order made on August 20, 1932, in its Decision No. 25139, by having failed and refused to desist from operation as a common carrier between San Francisco and Los Angeles; and

IT IS HEREBY FURTHER ORDERED, ADJUDGED AND DECREED that for said contempts of the Railroad Commission and its order,

the said Moye Forwarding Company, a corporation, Edward Malde, A. R. Fouratt, and Lee Case shall each be punished by a fine of One Hundred dollars (\$100.00), said fines to be paid to the Secretary of the Railroad Commission of the State of California within five days after the effective date of this opinion, findings and judgment.

IT IS HEREBY FURTHER ORDERED, ADJUDGED, AND DECREED that in default of the payment of their respective fines, Edward Malde and A. R. Fouratt be committed to the county jail of the City and County of San Francisco, until such fine be paid or satisfied in the proportion of one days' imprisonment for each five dollars thereof that shall so remain unpaid; and that in default of the payment of his fine said Lee Case be committed to the county jail of the County of Los Angeles, until such fine be paid or satisfied in the proportion of one day's imprisonment for each five dollars thereof that shall so remain unpaid.

IT IS HEREBY FURTHER ORDERED that the Secretary of the Railroad Commission, if said fines are not paid within the time specified above, prepare appropriate order or orders of arrest and commitment in the name of the Railroad Commission of the State of California, to which shall be attached and made a part thereof a certified copy of this opinion, findings and judgment.

IT IS HEREBY FURTHER ORDERED that this opinion, findings and judgment shall become effective as to each of the respondents herein twenty days after personal service of a

certified copy thereof upon said respondent.

The foregoing Opinion, Findings and Judgment are hereby approved and ordered filed as the Opinion, Findings and Judgment of the Railroad Commission of the State of California.

Dated at San Francisco, California, this 27th day of February 1933.

W. J. Cunniff
Leonard D. Kelly

W. J. Cunniff
W. B. Kamm
W. B. Kamm

COMMISSIONERS.