

Decision 11262

BEFORE THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA.

W. W. ALLEN and JOE OLINSKY,  
doing business as a co-partner-  
ship under the name of COAST  
LINE FREIGHT AND STAGE COMPANY;

Complainants;

vs.

MILTON MOYLES, J. W. MATHEWS,  
GUS DAUBENICK, PETE LUZZI; and  
ED BARFF;

Defendants.

ORIGINAL

Case No. 1740.

Devlin & Brookman, by Douglas Brookman, for  
Complainants;  
J. W. Kingren for Milton Moyles, Defendant,  
Pete Luzzi, in propria persona, Defendant,  
Ed. Barff, in propria persona, Defendant,  
Piersol & Stone, by Leonard Stone, for Gus  
Daubenick and J.W. Mathews, Defendants.

BY THE COMMISSION:

O-P-I-N-I-O-N

In this proceeding, Allen and Olinsky, a copartner-  
ship operating under the fictitious name of Coast Line Freight  
and Stage Company, complain of defendants and allege that said  
defendants, and each of them, are without legal authority or  
certificate of public convenience from the Railroad Commission  
operating regularly over the highways of the state in the  
business of a common carrier, either of passenger or freight  
or of passenger and freight; that such alleged illegal opera-  
tion is conducted over routes over which complainants are duly  
authorized to operate passenger and freight operation under

the provisions of Chapter 213, Statutes of 1917 and amendments thereto; that the alleged illegal operation is unlawfully infringing upon the rights of complainants and is depriving said complainants of business to which it is entitled and which if the alleged unlawful operation were not being conducted complainants would obtain; that the alleged unlawful operation complained of is in violation of the provisions of Chapter 213, Statutes of 1917 and amendments thereto, and is in contempt of the jurisdiction and authority of the Railroad Commission. Complainants pray for an order of the Railroad Commission finding that defendants, and each of them, have no right to operate as a transportation company, as defined by the provisions of Chapter 213, Statutes of 1917 and amendments thereto, over the public highways and on the routes referred to in the allegations of the complaint; that the defendants, and each of them, are operating in violation of the hereinabove mentioned statutory enactments and of the authority and jurisdiction of the Railroad Commission; and directing the defendants to immediately cease and hereafter discontinue the alleged unlawful operation.

Defendants, Milton Moyles, Gus Daubenick, Pete Luzzi and Ed Barff, filed their answers herein, such answers being general denials of the material allegations of the complaint.

A public hearing on this matter was conducted by Examiner Handford at Fort Bragg, the matter was duly submitted and is now ready for decision.

Complainants' alleged unlawful operation has been conducted by defendant, Milton Moyles, in the operation of auto stages as a common carrier of freight and passengers between Point Arena and Fort Bragg and intermediate points; by defendant, J. W. Mathews, in the operation of auto stages for the carriage of freight between Fort Bragg and Elk and intermediate points;

by defendant, Gus Daubenick, in the operation of auto stages as a common carrier of passengers between Casper, Fort Bragg and intermediate points; by defendant, Pete Luzzi, in the operation of auto stages as a carrier of passengers between Albion and Fort Bragg and intermediate points; and by defendant, Ed. Barff, in the operation of auto stages as a carrier of passengers between Little River and Fort Bragg and intermediate points.

Defendant, Pete Luzzi, a witness for complainants, testified that he had carried passengers for compensation between Fort Bragg and Albion, that he has neither owned nor operated a machine in such service during the eight months previous to the hearing, and that he did not propose to re-enter the business of a passenger carrier.

Defendant, J. W. Mathews, called as a witness for complainants, testified that he hauled beef and cream by auto truck between Fort Bragg and Greenwood and intermediate points. This defendant testified that he had been doing similar hauling for a period of four years and that he held himself out to do hauling of any commodity offered at a rate of three-quarters of a cent per pound, also that he hauled to points not over one mile distant from the main route between Fort Bragg and Greenwood at a rate of \$1.00 per cwt. The name of this defendant is shown as a commercial hauler in the February, 1922, issue of Motor Transport Shipping Guide, as serving the territory between Fort Bragg and Greenwood at a rate of \$1.00 per cwt. on First-class commodities, and in explanation of such listing witness testified that the information was solicited by the publisher of the shipping guide and that a response was made to such request, although no amount had been paid for such representation in the publication. The witness testified that he had been advised to apply to the Railroad Commission for a certificate of public convenience

and necessity but had made no application or other inquiry to the Railroad Commission as to his status as an operator or as to whether his operation came within the provisions of the statutory law. This applicant succeeded to the business of one Ordway, a wholesale butcher, and began hauling meat under contract for Ordway during the year 1918. He hauls beef from Fort Bragg to Mendocino and Greenwood and as a back haul in connection with his meat contract has hauled cream since 1918 from Greenwood to Fort Bragg. Witnesses testified as to the carriage by defendant, Mathews, of laundry between Fort Bragg and Elk-Greenwood; cream between Greenwood and Fort Bragg; and butter from Greenwood to Fort Bragg.

L. E. Milliken, a wholesale butcher, testified that he was the successor to the business of Ordway and operated at a point known as Ranch on the Noyo River (a short distance from Fort Bragg). He supplied his trade at Greenwood and Elk by making shipments from Ranch over the railroad line of the California Western Railway & Navigation Company to Fort Bragg, thence by the use of the stages of defendant, Mathews, to their destination. A verbal contract was made for the transportation of the meat and for such transportation between Fort Bragg and Greenwood-Elk, Mathews was paid at the rate of seventy-five cents per cwt. On return trips dressed veal and live hogs were sometimes carried. The verbal contract had no definite date of termination but was to exist so long as proper service was given, the reason of the witness for patronizing Mathews being the care and proper handling given to the shipments, deliveries being made in a satisfactory manner and the product being kept free from contact with other freight shipments. Some business has been given to the stage line operated by the complainants, at times when the truck of defendant, Mathews, was broken down and no complaint was made that such shipments were not satisfactorily handled and delivered.

From a review of the evidence as regards the complaint herein, insofar as it refers to the alleged illegal operations of defendant, J. W. Mathews, it is apparent that such evidence fully sustains the allegations of the complainants and we hereby find as a fact that the operation of auto trucks by defendant, J. W. Mathews, as a carrier of freight between Fort Bragg, Greenwood, Elk and intermediate points is in violation of the provisions of Chapter 213, Statutes of 1917, and amendments thereto, for the reason that such operation was not being conducted in good faith over the regular route and between the fixed termini of Fort Bragg, Greenwood and Elk, on May 1, 1917, nor has a certificate of public convenience and necessity authorizing such operation ever been applied for or granted by the Railroad Commission.

As regards the portion of the complaint herein against Milton Moyles as defendant: By stipulation of counsel, complaint was amended by substituting the firm of J. Moyles and Sons as defendants in lieu of Milton Moyles.

The firm of J. Moyles and Sons have a contract with the Western Refrigerating Company under which the transportation of dairy products require the operation of auto truck service by such defendant. A certified copy of the contract was introduced as evidence in this proceeding. The contract provides for the receipt of cream by defendant, J. Moyles and Sons, from dairymen on the Mendocino Coast at such place or places as may be agreed upon; for the weighing, sampling, testing, hauling and delivery of such cream to either the express office of the American Railway Express Company or to the depot of the Northwestern Pacific Railroad Company at Fort Bragg; to account for and treat as private property all cans; to take care of and watch over the general welfare of the business; collections and deliveries to be made at least twice each week; proper statements of weights

and tests to be made which statements are to be the basis upon which payment is to be made for all cream by the Western Refrigerating Company to the dairymen and members of the Point Arena Grange. Defendant, J. Moyles and Sons, receives as compensation for the service performed under the contract the sum of two and three-quarters cents per lb. on the butter fat content of the cream tested, handled, hauled and shipped, such amount covering all work performed which includes the return of empty containers. The contract was made under date December 1, 1921 for a term of one year. Witnesses testified that formerly the cream was handled by the line of complainants and that the service was unsatisfactory. It does not appear from the evidence that this defendant hauls other freight than the cream as an incidental part of its contract with the Western Refrigerating Company.

As regards the complaint against this defendant, it appears from the evidence that the transportation of cream from Point Arena to Fort Bragg and returning of empty containers that such transportation is but a portion of the service rendered by defendant in connection with its contract with the Western Refrigerating Company, that such contract fixes a definite compensation for all the service to be rendered by defendant and that no segregation is made as to the amount to be paid for transportation as distinguished from the other services to be rendered. There is no evidence before the Railroad Commission indicating that any shipments have been hauled by this defendant other than the cream and returning empty containers required by the contract or that the defendant is now holding, or at any time in the past, has held itself out as a carrier of freight between Fort Bragg and Point Arena and intermediate points. We are therefore of the opinion and hereby find as a fact that the carriage

of cream between Point Arena and Fort Bragg and returning empty containers from Fort Bragg to point of origin, such carriage being but a portion of an obligation to which defendant, J. Moyles and Sons, is required to conform under the provisions of a contract with the Western Refrigerating Company, said contract covering all services mutually agreed upon to be performed for a fixed compensation in which the item of transportation is not specifically set forth or allocated, is not a violation of the provisions of Chapter 213, Statutes of 1917, and amendments thereto, or that a certificate of public convenience and necessity is required from the Railroad Commission authorizing this defendant to continue such operation as may be necessary to comply with the provisions of the contract herein referred to.

As to the complaint against defendant, Gus Daubenick: This defendant is the proprietor of a barber shop and cigar store at Caspar. He also owns two automobiles and uses same in rent service at Caspar, making trips to all points desired by his patrons, including Fort Bragg. Frequent trips are made to Fort Bragg, on some days two or three trips. Fares are charged according to the expense of operation or as to whether other business of defendant requires his attention. The fare for one person alone is from \$2.00 to \$2.50 according to whether any wait is to be made at Fort Bragg, if four or five passengers are secured a charge of from \$1.00 to \$1.25 per round trip is assessed. For one way trips, charges of from 50¢, 65¢ or 75¢ are made, depending upon the number of passengers secured and the defendant's judgment of the amount that should be paid. It is the practice of this defendant in bringing one-way loads from Caspar to Fort Bragg to obtain, if possible, return passengers for Caspar. The demand for transportation between Caspar and Fort Bragg is

relied upon as the necessity for defendant's operation, prospective patrons desiring immediate service and at other than scheduled stage time. This demand has been met by defendant in the operation of his automobiles as an alleged rent service at any rate procurable, either for one passenger or as many as his cars would transport.

If a demand exists for a local service between Caspar and Fort Bragg, and such demand is not met by the existing authorized stage line, the remedy is either a complaint as to inadequate service or an application to the Railroad Commission for a certificate of public convenience and necessity in which application a supporting reason for the establishment of the proposed service, among any others, would be the alleged fact that the public required additional service at other times than the hours of scheduled trips of the authorized stage line. Operation, at irregular hours and under the guise of "rent car" service, particularly as has been conducted by this defendant is an attempted evasion of the statutory law in that it is the operation of an automobile "for compensation, between fixed termini and over a regular route", which operation is specifically prohibited by the statute unless duly authorized by a certificate of public convenience and necessity after proper application and subsequent order of the Railroad Commission. The statute does not provide exemption from its provisions because the operation is irregular, either as to time at which given or as to fares which may be charged at the whim of the operator.

We are of the opinion and hereby find as a fact that the operation of automobiles as heretofore conducted by defendant, Gus Danbenick, between Fort Bragg and Caspar as a carrier of passengers has been operation over a regular route and between fixed termini and without compliance with the provisions of Chapter 213, Statutes of 1917, and amendments hereto in that no certificate of public



convenience and necessity has ever been applied for or granted by the Railroad Commission as required by such statutory enactment.

Ed Barff, defendant herein, testified that he was the owner of a ranch at Little River and was engaged in business in Fort Bragg; that he had carried passengers for hire but on the basis of hiring out the entire car, no individual passengers being accepted nor individual fares; that for a year last past no operation has been conducted for the reason that defendant has now moved to and has his residence in Fort Bragg.

As to this defendant, the evidence shows that the operation complained of has been suspended for a period of a year, and that such operation when conducted was not in violation of the statutory law.

At the hearing on this proceeding a motion was made by attorneys for defendants that the complaint in this proceeding be dismissed as to all defendants for the reason complainants on April 8, 1922 were not authorized to operate a stage and truck line under the jurisdiction of the Railroad Commission and in conformity with the provisions of the statutory enactment. The motion was taken under advisement by the examiner for the consideration and decision of the Commission. The complaint herein was filed with the Railroad Commission on April 10, 1922; service was made upon defendants by mailing an order to satisfy or answer on April 19, 1922; and answers of defendants were thereafter filed with the Railroad Commission. On April 5, 1922 an application was filed with the Railroad Commission requesting authority to transfer from W. W. Allen to W. W. Allen and Joe Olinsky, as co-partners, the equipment and operative rights of the stage line operated under the fictitious name of Coast Line Freight and Stage Company, and such application was assigned No. 7723 on the docket of the Railroad Commission and thereafter granted by this Com-

mission on April 12, 1922 by its Decision No. 10308, the application containing as an exhibit the articles of co-partnership which were dated April 12, 1920. The basis of the application as stated in the order granting the transfer was as follows:

"Applicants state in their petition that they have been co-partners in the conduct of this stage business for several years, but that through ignorance of the provisions of Chapter 213, Statutes of 1917, as amended, they were unaware that an order of the Commission was necessary to legally transfer a one-half interest in the operative right. The present application is made to legalize the operation of this stage line as a co-partnership."

Rule II, Section 1 of the Rules of Procedure of the Railroad Commission refers to the matter of formal complaints and provides in part as follows:

"Complaint may be made \*\*\*\*\* by any corporation or person \*\*\*\*\* by complaint in writing, setting forth any act or thing done \*\*\*\*\* or claimed to be in violation, of any provision of law or of any order or rule of the Commission. Any public utility shall have the right to complain on any of the grounds upon which complaint may be made by other parties."

In the opinion of the Commission the fact that the complainants were not legally of record as the operators of the stage line on the date of the verification of the complaint is not a sufficient reason for the granting of the motion to dismiss the complaint, and the status of complainants is fully of record with the Commission and the matters complained of are alleged violations of law and a proper subject of complaint by any interested citizen. The motion to dismiss will therefore be denied.

O-R-D-E-R

A public hearing having been held in the above entitled proceeding, the matter having been duly submitted and the Commission being now fully advised and basing its order on the findings of fact as appearing in the opinion which precedes this order,

IT IS HEREBY ORDERED,

I. That the motion for dismissal of this complaint as

to all defendants be and, for the reasons heretofore set forth in the preceding opinion, it hereby is denied.

II. That J. W. Mathews, defendant herein, immediately cease operation as a carrier of freight by auto truck between Fort Bragg, Greenwood, Elk and intermediate points.

III. That Gus Daubenick, defendant herein, immediately cease the operation of automobile stages as a common carrier of passengers between Fort Bragg and Caspar and intermediate points.

IV. That this complaint insofar as it refers to alleged illegal operation by defendants, J. Moyles and Sons, (substituted for defendant, Milton Moyles), Ed Barff and Pete Luzzi has not been substantiated by the evidence herein and is therefore dismissed as to such defendants.

Dated at San Francisco, California, this 23<sup>d</sup>  
day of November, 1922.

W. H. Brundige  
Waring Macton  
Charles H. Lawrence

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Commissioners.