

Decision No. 25900.

ORIGINAL

BEFORE THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA

MOTOR FREIGHT TERMINAL COMPANY,
a corporation,

Complainant,

vs.

McCLAIN TRUCK COMPANY, a
copartnership, C.B. McCLAIN,
an individual, doing business under
the fictitious name and style of
McCLAIN TRUCK COMPANY, C.B. McCLAIN,
FIRST DOE, SECOND DOE and THIRD DOE,

Defendants.

Case No. 3178.

John M. Atkinson and Wallace K. Downey,
By Wallace K. Downey, for Complainant.

Richard T. Eddy, for Defendants C.B. McClain
and McClain Truck Company.

Richard T. Eddy, for Cudahy Packing Company,
Armour & Company, and Swift & Company,
interested parties.

R.E. Wedekind, for Southern Pacific Company and
Pacific Motor Transport Company, intervenors
on behalf of the Complainant.

Edward Stern, for Railway Express Agency, Inc.,
intervenor on behalf of the Complainant.

Robert Brennan and William F. Brooks, by
William F. Brooks, for The Atchison, Topeka
and Santa Fe Railway Company, Intervenor
on behalf of the Complainant.

HARRIS, COMMISSIONER:

OPINION ON PETITION FOR REHEARING

By complaint filed January 14, 1932, Defendant
C.B. McClain was charged with unlawful common carrier operations
by truck between Los Angeles and San Luis Obispo and intermediate
points. By amended complaint filed May 9, 1932, unlawful
operations between Los Angeles and Fresno and intermediate points
were alleged.

Decision No. 25652, dated February 20, 1933, found against Defendant as to the operations between Los Angeles and Fresno and intermediate points and ordered that he cease and desist such operation. On March 14, 1933, Defendant filed a Petition for Rehearing or Modification on the ground that he was a private carrier. Oral argument on such Petition was heard on April 7, 1933.

The record shows that Defendant had hauled between Los Angeles and Fresno and intermediate points for the following concerns as consignors: Rosenberg Brothers, Sunland Sales Cooperative Association, Bonner Packing Company, California Peach and Fig Growers, Cudahy Packing Company, Swift and Company, California Packing Corporation, and Chaddock and Company.

The consignees are considerably over 100 in number. In some cases the consignor paid the freight. In other cases the consignor paid it and charged it to the consignee. In other cases the consignee paid the freight directly to the Defendant.

Defendant contends that he was operating under contracts with all of these companies except Bonner Packing Company, California Peach and Fig Growers, Chaddock and Company, and California Packing Corporation, and that he had quit hauling for these latter named companies after the filing of the original complaint and before the filing of the amended complaint.

The contracts with Swift and Company and Cudahy Packing Company as shippers were entered into on May 1, 1932. The Swift Contract does not require Defendant to devote his service exclusively to shipper. It provides that McClain

"will not during the life of this contract enter into any contract or agreement with any person, firm, or corporation for the transportation of commodities under refrigeration between the points contemplated by this agreement if such transportation service will in any manner interfere with or prevent the handling by carrier of shipper's goods at the times and in the manner contemplated by this agreement."

It is clear that McClain may make other contracts or accept other freight so long as the handling of Swift's goods is not interfered with.

Neither is Swift bound to use McClain's service either exclusively or at all.

Paragraph 13 of the contract is as follows:

"Carrier agrees that he will at all times during the life of this contract, allot to the use of shipper sufficient equipment, fully to meet the demands and needs of shipper for its entire requirements for automotive transportation between the points specified, and in consideration of such agreement by carrier, shipper agrees that during the continuance of this contract it will utilize exclusively the services of carrier for such shipments as it may make by motor truck between the points herein referred to."

The Cudahy contract is of like import. By no contract or contracts is Defendant required to devote his services exclusively to one or a limited number of shippers.

This reference to these contracts is made because of Defendant's contention that these contracts are an important factor tending to establish his status as a private carrier.

It is clear that these contracts did not have this effect. As said in Forsyth vs. San Joaquin Light and Power Corporation, 208 Cal. 409: "It was the manner in which he carried on his business that determined his status as a common carrier and not the fact that he was transacting business with his customers under a written contract."

It is recommended that the finding of fact contained in the Order in Decision No. 25652 (38 C.R.C. 471) be reaffirmed and that the Petition for Rehearing or Modification be denied.

ORDER DENYING REHEARING

Oral argument having been had on the Petition for Rehearing or Modification in the above entitled matter,

The Finding of Fact contained in the Order in said Decision is reaffirmed, and

The Petition for Rehearing or Modification is denied.

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

Dated at San Francisco, California, this 10th day
of May 1933.

C. C. Leary
Leon Whitely
W. A. Carr
W. B. Harris
W. H. Brown
Commissioners.