

Decision No. 28221

BEFORE THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA

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SACRAMENTO NORTHERN RAILWAY, a  
corporation; SOUTHERN PACIFIC COMPANY,  
a corporation; PACIFIC MOTOR TRANSPORT  
COMPANY, a corporation; THE ATCHISON,  
TOPEKA, AND SANTA FE RAILWAY COMPANY,  
a corporation; RAILWAY EXPRESS AGENCY,  
INC., a corporation; THE RIVER LINES  
(The California Transportation Company,  
Sacramento Navigation Company, and  
Fay Transportation Company),

Complainants. )

vs. )

CaseNo. 3384

FRANK McMANN, JR., an individual doing  
business under the firm name and style  
of ACME TRANSFER COMPANY,

Defendant. )

John O. Moran, Roy G. Hillebrand, Robert Brennan,  
Wm. F. Brooks, Edward Stern and L. N. Bradshaw,  
for complainants.

T. C. McGettigan, for the Defendant.

Reginald L. Vaughan and Willard S. Johnson, by  
Willard S. Johnson, for Regulated Carriers, Inc.,  
intervener on behalf of complainants.

McCutchen, Olney, Mannon & Greene by Carl I. Wheat,  
for The River Lines.

HARRIS, COMMISSIONER:

OPINION ON REHEARING

On October 13th, 1932, complaint was filed in the  
above entitled proceeding charging defendant with operating auto  
trucks as a common carrier between Oakland, California, on the  
one hand and Walnut Creek, Concord, Clayton, Pittsburg, California,  
and intermediate points on the other hand, in violation of Chapter  
213, Statutes 1917, as amended.

ORIGINAL

The answer admits operation of auto trucks for a period of about eighteen months in the business of transportation of property for compensation over the public highways for the public generally and between the points in question without a certificate, but avers that prior to the filing of the complaint, upon advice that such operation was unlawful, defendant "ceased to perform said service and has not since performed the said service or any part thereof, and is not now performing said service or operations between said points or between any other points in this state." (Answer, p. 3.)

Decision 25863 (April 24, 1933) dismissed the complaint. Rehearing was granted and oral argument had.

On September 3, 1932 defendant applied for a certificate. (App. No. 18395.) The first date of hearing thereon was October 14, 1932. The present complaint was filed on October 18, 1932. <sup>(1)</sup> Defendant contends that he has not operated as a common carrier since October 15, 1932.

Prior to May, 1931, defendant was engaged in the transfer business in San Francisco. Having trucks but being without work for them to do he solicited Armour & Company, Haas Brothers, Sussman-Wormser & Company, Calvin M. Orr, Inc., Dodge Sweeney & Company, M. J. B. Coffee Company, Equitable Cash Grocery Co. (a subsidiary of Sussman-Wormser & Company), and West Coast Soap Company for hauling to Contra Costa County points. Writings

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(1) It was stipulated that the record in Application 18395 be considered in Case 3384. (Transcript in Case 3384, p. 2, p. 62; Transcript in App. 18395, p. 153.)

were entered into with certain of these companies <sup>(2)</sup>, but not with all.

Defendant began hauling for these companies between the points named in the complaint and gradually accepted business from others, rendering a daily service. He also called regularly at Interurban Express Corporation, <sup>(3)</sup> which referred to him all requests for service to Walnut Creek, Concord, etc. He would haul

(2) Case 3384

Exhibit 1 - Agreement with Equitable Cash Grocery Co., providing that for period of one year, ending June 1, 1932, defendant "shall haul, transport, and/or deliver, groceries, supplies and merchandise . . . from their place of business, warehouse and/or other storage places to the County of Contra Costa and/or adjoining counties"; specifying a rate per 100 lbs. and a minimum charge; charges and collections "to be made as per instruction"; agreement to be revocable and terminable by mutual consent or by written notice served by either party by registered mail or personally.

Exhibit 2 - Agreement with West Coast Soap Co. (same form as Exhibit 1) for one year period ending June 1, 1932.

Exhibit 3 - Agreement with Sussman, Wormser & Co. (same form as Exhibit 1) for one year period ending June 1, 1932.

Exhibit 4 - Agreement with Dodge, Sweeney & Company (same form as Exhibit 1) for one year period ending May 20, 1932.

Exhibit 5 - Agreement on letterhead of M. J. B. Co., dated July 15, 1931, "to confirm our understanding" that defendant will haul from Oakland for "1 year from date" (ending July 15, 1932), charges "to be paid by you or by your instructions" to defendant, agreement terminable upon five days' notice if service unsatisfactory.

App. 18395

Exhibit 1 - Agreement with Armour & Company, effective "from . . . July 1, 1931 . . . until cancelled by either party upon fifteen days prior written notice"; providing that defendant shall haul from Oakland to Contra Costa County and adjoining counties, including Walnut Creek, Danville, Concord and Crockett at a specified rate and minimum charge; and providing for the making of collections for all C. O. D. shipments, etc.

(3) From Interurban Express Corporation he has hauled door, window, lumber, moulding, building material from Oakland to Concord for C. H. Lamb (Case Tr., p. 45); hardware and jars to Freitas at Walnut Creek (Case Tr., p. 46).

for any person in business in the territory from any of the concerns mentioned above for whom he was hauling. Early in 1932 Haas Brothers bought Dodge Sweeney & Company and defendant continued to haul for Haas Brothers without entering into any writing. The first day of the hearing in the application (October 14, 1932) eleven witnesses for applicant (defendant herein) testified that they regularly used the service. Testifying in his own behalf in the complaint, defendant stated that since October 15, 1932 he has been hauling "just what I get from the contracts that I have" (Tr., p. 40); that Haas Brothers have prepaid their freight for 60 days (defendant testified on December 29, 1932); and that he is hauling only for Haas Brothers, Calvin M. Orr, Inc., Armour & Company, Sussman Wormser & Co., Equitable Cash Grocery Co., and West Coast Soap Company, and receives shipments at Interurban Express Company for M. J. B. Company only.

On December 16, 1932 the shipping clerk of Haas Brothers testified that they have used defendant's service for several years.

"Q. Are you still using it? A. Yes, sir.  
Q. Who pays the freight? A. We pay the freight and charge it to the customer." (App. Tr., p. 148.)

There has been no change in the service since October 14, 1932. (App. Tr., p. 151.) Testifying for applicant (defendant here) on December 16, 1932, witness Contiente, grocer at Pittsburg, testified that he receives goods from Haas Brothers and M. J. B. Company via defendant's service.

"Q. Do you pay anything in addition to the San Francisco purchase price when you receive shipments from Haas Brothers or M. J. B. over Mr. McMann's line? A. You mean the house I buy from pay the freight part?

Q. They add it to your price of the goods? A. Yes, sir." (App. Tr., p. 221.)

On December 16, 1932 witness Grabstein, merchant and grocer at Pittsburg, testified that he receives shipments over defendant's line. (4) On the same day witness Hornback, a grocer at Antioch, testified in part as follows:

"Q. Who pays the transportation charges on the shipments which you receive from Haas Brothers at the present time? A. Why, I do, indirectly. I pay them all. I pay on all these.

Q. And in saying 'indirectly', tell us what you mean? A. Well, on Haas Brothers . . . we don't on Haas Brothers pay freight to the driver, if that is what you mean. It is billed as . . . it is billed on the bill.

. . . Q. Now, how long has it been the practice for Haas Brothers to pay the charges to the transportation company and bill the amount of charges to you on your bill? A. Well, that is a question I would not be prepared to answer definitely without looking for my tags. Roughly I would say approximately a month, but I couldn't swear to that. That is just the approximate time.

Q. What was the practice before that? A. Well, we paid the Acme driver." (App. Tr., pp. 241-242.)

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(4) "Q. Do you pay the transportation charges on these shipments? A. I have been paying, until recently.

Q. Until recently? A. Yes.

Q. And at the present time do your shippers add something to the San Francisco prices to cover transportation? A. No, they bill us a regular bill of goods, and then they add so many pounds of freight, so much, and they total it against the bill.

Q. I see. Can you tell us about when the practice changed from that of paying the transportation at this end to the driver of the truck, and when they started to collect the charges at the other end? A. I believe right after the transportation companies of Pittsburg brought suit against the Acme Transfer." (App. Tr., p. 227.)

The record shows that before and after October 15, 1932, defendant was and is now operating as a common carrier within the meaning of the regulatory statute. A cease and desist order should issue.

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 vest 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 or he may be imprisoned for five days or both. C.C.P., Sec. 1218; Motor Freight Terminal Co. vs. Bray, 37 C.R.C. 224; re Ball and Hayes, 37 C.R.C. 407; Wermuth vs. Stamper, 36 C.R.C. 458; Pioneer Express Company vs. Keller, 33 C.R.C. 571.

It should also be noted that under Section 8 of the Auto Stage and Truck Transportation Act (Statutes of 1917, Chapter 213, as amended), a person who violates an order of the Commission is guilty of a misdemeanor and is punishable by a fine not exceeding \$1,000.000 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.

ORDER ON REHEARING

Decision No. 25863 is vacated, and it is hereby found that defendant, Frank McMann, Jr., doing business under the firm name and style of Acme Transfer Company, is operating as a transportation company as defined in Section 1(c) of the Auto Truck Transportation Act, (Statutes 1917, Chapter 213, as amended), with common carrier status between Oakland, California, on the one hand and Walnut Creek, Concord, Clayton and Pittsburg, California, and intermediate points on the other hand without a certificate of public convenience and necessity or prior right authorizing such operation.

IT IS HEREBY ORDERED that Frank McMann, Jr. cease and desist directly or indirectly or by any subterfuge or device from continuing such operations.

IT IS HEREBY FURTHER ORDERED that the Secretary of this Commission cause a certified copy of this decision to be personally served upon Frank McMann, Jr., and that he cause certified copies thereof to be mailed to the District Attorneys of Alameda and Contra Costa Counties and to the Department of Public Works, Division of Highways at Sacramento.

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.

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

Dated at San Francisco, California, this 7<sup>th</sup> day of August, 1933.

[Signature]  
[Signature]  
[Signature]  
Commissioners