Decision No. 27299

BEFORE THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA

REGULATED CARRIERS, INC., a corporation,

Complainant,

vs.

ARTHUR WAY, FIRST DOE, SECOND DOE, THIRD DOE, FOURTH DOE, FIFTH DOE, FIRST DOE CORPORATION, SECOND DOE CORPORATION, THIRD DOE CORPORATION, FOURTH DOE CORPORATION, FIFTH DOE CORPORATION,

Defendants.

Case No. 3729

ORIGINAL

Reginald L. Vaughan & Scott Elder, by Scott Elder, for complainant.

Sanborn & Roehl, by Harvey Sanborn and Clair MacLeod, for defendant.

BY THE COMMISSION:

O P I N I O N

Complaint charges Arthur Way, also referred to as A. W. Way, and numerous unidentified Does with the unauthorized and illegal operation of freight trucks in the transportation of property as a common carrier for compensation over the public highways between Arcata and Eureka on the one hand and San Francisco and Bay points on the other. It is alleged that these operations are in violation of Section 5 of Chapter 213 of the Statutes of 1917 inasmuch as the services are rendered without the defendant having secured a certificate of public convenience and necessity required by the statute.

Defendant A. W. Way, in answer to the complaint, admits of the operations of a common carrier freight service between Eureka and Ferndale by virtue of a lawful certificate, admits he does not possess a certificate authorizing the transportation of

freight as a common carrier between Eureka and San Francisco, admits he is now transporting freight between these points pursuant to a number of special contracts entered into with shippers, denies that the operations are those of a common carrier and prays that the complaint be dismissed as not subject to the jurisdiction of this Commission. As a counter claim, defendant alleges that because he has been transporting property for hire for compensation since prior to May 1, 1917, he should be granted a prescriptive right in the event the Commission concludes that the present operations are those of a common carrier. This latter contention was not urged or definitely referred to at the hearings and is therefore deemed to have been abandoned.

Public hearings were conducted by Examiner Geary at San Francisco and Eureka March 22 and May 1 and 22, 1934, and the case submitted after the filing of brief on July 31, 1934.

Defendant has been engaged in the trucking business with headquarters in Eureka since 1902 and on February 14, 1917, responsive to the requirements of Chapter 213, filed a freight tariff of rates applicable between Eureka, and Loleta, Ferndale and Fortuna. No tariffs have ever been filed for the services now being performed between the communities involved in this proceeding, namely between Eureka and the San Francisco Bay points.

Testimony was given by some 33 witnesses. Eighteen exhibits were filed, 13 of these being copies of the hauling contracts.

The operations of this defendant and his predecessors may be described very briefly. They commenced more than thirty years ago with minor trucking operations in the City of Eureka and apparently had assumed substantial proportion at the time the Auto Truck Transportation Act (Chapter 213) became effective in 1917, for defendant claimed prescriptive rights under the Statute and filed tariffs to legalize the regular operations between Eureka and Fortuna. The

hauling services have been conducted under different trade names, viz., A. W. Way, auto trucking and general freight contracting; Ferndale, Loleta, Eureka Freight Line; Ferndale, Petrolia, Upper Mattole Freight Line; Ferndale Truck Line, and Way's Contract Truck and Reefer Service.

The truck operations under attack commenced in May, 1933, and refrigerator trucks are leaving Eureka three times per week, on Sundays, Wednesdays and Fridays, reaching San Francisco the following morning, and leaving San Francisco Mondays, Thursdays and Saturdays. The regularity of the trips southbound is positive in order to meet the necessities of the tonnage of fresh butter and dairy products although the particular day of the week may sometimes change.

The equipment in use consists of two trucks and two trailers having a combined capacity of 39 tons and all four vehicles are complete dry ice refrigerators. They were purchased at the commencement of operations in 1933 and with the accessorial ice plant, etc., represent a claimed investment of approximately $22,000.

There were entered into the record copies of thirteen contracts claimed by defendant to cover all tonnage transported by the refrigerator trucks. The first agreement is dated May 1, 1933, the last January 31, 1934, and they embrace two dairy companies, four meat packing companies, one poultry organization, two chain stores and four merchandising firms. The rates charged are of different volume, viz: 25, 30, 35, 40 and 50 cents per hundred pounds, apparently based upon the commodity total tonnage, distance and competitive conditions. Two of the agreements made with large meat packers base the compensation upon rates as agreed upon at or before the time of shipment. One shipper of fresh butter and dairy products guarantees 60 tons per month, the other not to exceed 18 tons per day with a minimum of 400,000 pounds of

butter during the year the agreement remains in effect, and both stipulate that in the event of a failure to furnish the required tonnage the defendant shall receive revenue based on the difference between the tonnage actually shipped and the minimum agreed to be shipped. These penalty contracts have not yet been effective for a full 12 month period and defendant testified that if shippers failed to meet the tonnage specifications the under-payments would be collected. Some of the contracts specify definite quantity tonnage and others do not.

The regularity of the protested operations actually commenced when the largest shipper of fresh butter and dairy products made a contract with defendant for a heavy tri-weekly movement to San Francisco. The testimony of a witness for this shipper showed dissatisfaction with the refrigeration services given by the railroad because their rules did not permit the use of individual light fiberboard containers; that the butter required rates for any quantity lots; it must have a quick and flexible refrigerator service; and that the combined results of trucks vs. railroad made a net saving in transportation and other costs of approximately $12,000. per year.

A second and smaller shipper of dairy products in like manner complained of the rail transportation and, although presenting no detailed figures of reduced costs, testified that the average saving was $2.04 per ton. These two contractors have practically no northbound business.

Contracts were executed October 24, 25 and 27, 1933, and January 31, 1934, with the Cudahy Packing Company, Swift and Company, Armour and Company, and Kingan Company. Two contracts named no fixed compensation and two base charges on 50 cents per hundred pounds. These four packing houses demanded refrigeration for their fresh meats and other perishable commodities. As heretofore stated, contracts were also made with one poultry producer's

association and six chain stores and merchandise firms. These seven contractors are shipping merchandise of every description from San Francisco into the Eureka territory, some of it perishable, but apparently much of the tonnage, in lots of from 5 to 5,000 pounds, requires no refrigeration although it is moved in defendant's refrigerator trucks.

Tonnage is also hauled for a large department store at Eureka with fair regularity in lots weighing from 100 to 2,000 pounds, without any agreement or contract, upon the presumption that all of this freight originated at points beyond the State of California and was delivered direct to defendant by railway and steamship companies upon telegraphic requests. However, neither the telegrams nor other controlling proof was presented to support the contention that all of the freight was actually interstate.

Defendant maintains that he hauled only under the 13 contracts, although it is admitted that almost any shipper can use the services from the San Francisco Bay district to Eureka and the local territory by merely arranging with one of the contractors and the prepaying of the freight charges. In other words, the facilities are open to the shipping public through the pretext of the shipper having the property forwarded through a contractor instead of going direct to defendant or to one of his representatives and making the separate shipments. Defendant apparently makes no organized effort to secure any small tonnage from individuals but he does transport their commodities by virtue of one of the agreements entered into with this defendant by another party.

Defendant claims not to have employed solicitors nor to advertise offers of the services to the general public. Testimony was given in an effort to prove that all of the freight being transported was the result of the parties approaching Mr. Way and offering to contract the business or of the interested shippers notifying this defendant to call and discuss hauling contracts.

All of the methods employed to secure tonnage lead to the conclusion that they are but efforts to dodge the provisions of the statute and build up a transportation system under contractual relations although in fact rendering a regular common carrier service to a large and selected group of shippers, many of whom are in the business of selling the merchandise transported to the consignees while others are using the services without themselves entering into a contract.

This record clearly shows that defendant is engaged in the transportation of property by trucks over the state highways, for compensation, between fixed termini and over a regular route. It further conclusively proves that although 13 contracts are in existence, defendant has and will serve those members of the public who may be in a position to arrange with a contract holder for the transportation of the freight. The consignees are without limit and the same may be said of the consignor provided they be in the good graces of a contract holder. Merchants requiring an expedited refrigeration service for perishable commodities cannot in fact use the service of this defendant unless the goods be either purchased from one of the large contracting concerns engaged in the particular line of business or by securing the consent of one of the parties holding a contract and who will authorize the movement under the contract. It is, of course, to the seller's advantage to arrange, as a part of its sales obligation, for a quick and satisfactory delivery of the goods. These operations could, without much difficulty, expand into a virtual monopoly to the benefit of a few producers or purchasers of meats, butter and other perishables consumed in the destination communities and to the detriment of non-contractors, thus permitting a wrong which the statute was chiefly designed to prevent.

In Case No. 2896 (Nov. 28, 1930) Sierra Railway Company

of California vs. Thomas Berg, et al, 35 C.R.C. 512, we said:

> "Since the decision in Frost vs. Railroad Commission, supra, the Commission has been confronted with many instances of so-called 'contract hauling' claimed to be that of a private carrier. The mere fact that a truck operator enters into verbal or written contracts or agreements with his customers will not change a common carrier status to that of a private carrier (Thornewill vs. Gregory, 33 C.R.C. 455, 459). Nor is it a prerequisite that one must undertake to serve all persona without limitation in order to be classed as a common carrier. If a particular service is offered to all those members of the public who can use it, the public is in fact served, and the business is affected with a public interest, although the actual number of persons served may be limited. (Re Jack Hirons, 32 C.R.C. 48, 51.) The Commission has heretofore held that where, as in the instant proceeding, the only limitation upon the right to receive service (otherwise common carrier in nature), is that the business of an individual shipper shall 'prove profitable,' such operation is unlawful in the absence of a certificate. (P. & S.R.R. Co. vs. Deysher, 32 C.R.C. 141, 145.)"

See also Re Jack Hirons 32 C.R.C. 48 and cases there cited.

That this defendant's operations are a matter of convenience because of the refrigerator trucks, the rapid transit, the store door pick-up and delivery and the reductions in transportation charges is not a question of doubt. The facts of record however are conclusive that defendant's operations as complained of are conducted as a common carrier for compensation between the San Francisco territory and the Eureka territory without a certificate of public convenience and necessity and are in violation of Chapter 213, Statutes of 1917. It follows that under the law he must be ordered to cease and desist.

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

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 Transportation Act (Statutes 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 $1,000.00 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.

O R D E R

Public hearings having been had in the above entitled case,

IT IS HEREBY FOUND THAT Arthur Way, also referred to as A. W. Way, is operating as a transportation company as defined in Section 1, Subdivision (c) of the Auto Truck Transportation Act (Chapter 213, Statutes 1917, as amended), with common carrier status between Arcata and Eureka on the one hand and San Francisco and Bay points on the other and without a certificate of public convenience and necessity or prior right authorizing such operations.

Based upon the finding herein and the opinion,

IT IS HEREBY ORDERED THAT Arthur Way, also referred to as A. W. Way, shall 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 shall cause a certified copy of this decision to be

personally served upon Arthur Way, that he cause certified copies thereof to be mailed to the District Attorneys of San Francisco, Alameda, Marin, Sonoma, Mendocino and Humboldt Counties, and to the Department of Public Works, Division of Highways, at Sacramento.

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

Dated at San Francisco, California, this 27th day of August, 1934.

Leon O. Whitsell

M. J. Carr

M. B. Harris

Matthew Sweeney

Commissioners.