

Decision No. 27318

BEFORE THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA

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ORIGINAL

MOTOR FREIGHT TERMINAL COMPANY, & COIN-  
PORATION, and SAN JOAQUIN VALLEY TRANS-  
PORTATION COMPANY, a corporation,

Complainants,

vs.

J. O. BRAY, doing business under the  
fictitious name and style of Bray Motor  
Drayage,

Defendant.

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) Case No. 2882  
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Wallace K. Downey for complainant Motor Freight  
Terminal Company  
Harry A. Encell and B. W. Gearhart for J. O. Bray  
Robert Brennan and William F. Brooks, by William  
F. Brooks, for Atchison, Topeka and Santa Fe  
Railway Company, Intervenor  
Edward Stern for Railway Express Agency, Incorporated,  
Intervenor  
Thomas A. J. Dockweiler for Dockweiler and Dockweiler  
for Los Angeles Soap Company

BY THE COMMISSION:

OPINION, FINDINGS AND JUDGMENT

Decision 23409 (February 16, 1931, 35 C.R.C. 842) found  
as a fact that J. O. Bray was operating a common carrier trucking  
service between Los Angeles and Fresno and intermediate points with-  
out having obtained a certificate of public convenience and neces-  
sity as required by the Auto Truck Transportation Act. He was  
ordered to cease and desist such common carrier operations until  
he should have obtained a certificate. (1)

(1) After denial of rehearing, writ of certiorari was denied by  
the Supreme Court. (Bray v. Railroad Commission, S.F. No. 14289,  
May 18, 1931.)

On February 23, 1932, after proceedings duly had, the Commission issued Decision 24507 (37 C.R.C. 224), being its Opinion, Findings, and Judgment (Exhibit 2), in which J. O. Bray was adjudged guilty of contempt in failing to comply with the desist order. <sup>(2)</sup>

Affidavit and application for order to show cause in the present proceeding was filed on April 29, 1932. It recites the filing of the original complaint, the holding of hearings thereon, and the issuance and service of the cease and desist order. <sup>(3)</sup> It alleges that notwithstanding the desist order, and subsequent to the effective date thereof, respondent Bray has continued common carrier operations between the points in question. Nineteen alleged separate and distinct offenses are set forth in the affidavit, the first of which was alleged to have occurred on October 22, 1931 and the last on February 25, 1932. In addition to general allegations of continued common carrier operation, specific movements are also alleged.

Respondent was ordered to appear before Commissioner whitsell on April 18, 1933 and show cause why he should not be punished for contempt. <sup>(4)</sup> Public hearing was had on April 18, 26, 27, May 24, August 1, 2 and 11, 1933 and the matter submitted on briefs. The facts developed at the hearing may be summarized as follows:

(2) On August 12, 1932 writ of habeas corpus was discharged in the District Court of Appeals and petitioner remanded to custody. (Re J. O. Bray on Habeas Corpus, 125 Cal. App. 363.) Rehearing was denied on August 24, 1932, and application to have the cause heard in the Supreme Court was denied by the latter court on September 8, 1932.

(3) The desist order was personally served upon J. O. Bray on September 15, 1931. (Exhibit 1.)

(4) As stated, the affidavit was filed April 29, 1932. An order to show cause issued May 13, 1932 was dismissed without prejudice because of inability to personally serve Mr. Bray within the time specified. Respondent was out of the State for approximately one year. Like orders to show cause issued on June 27, 1932 and September 6, 1932 were also dismissed without prejudice for the same reason. The present order to show cause was issued on March 14, 1933 and was personally served upon respondent on March 14, 1933. (Exhibit 3.)

Danish Creamery Association (Witness J. R. Murphy) at Fresno, shipped by and paid freight charges to respondent, and during the period October 1, 1931 to February 25, 1932 made 35 shipments of dried skim milk and dried buttermilk from Fresno to Challenge Cream and Butter Association at Los Angeles. Empty shock boxes were hauled "once in a while" by respondent from Los Angeles to Fresno. There was no refusal to haul, and the service was available when wanted. Respondent also hauled for the Danish Creamery between other points, such as Fresno and San Francisco, Oakland, Van Nuys, Hayward, and Monrovia.

Western States Grocery Company (Witness G. T. Parker), wholesale grocers at Fresno, was in most instances consignee, and in some consignor, of shipments moving by respondent's trucks during the period October 18, 1931 to February 25, 1932. It paid the freight charges. Service was never refused and was available at all times. Western States started in business at Fresno in October of 1931. The witness first met J. O. Bray when the latter called shortly thereafter, " \* \* \* to solicit freight business from us and try to get our hauling." (Tr., p. 983.) After several conversations, during which the witness outlined the nature of his transportation and the points between which it would then move, Mr. Bray quoted a rate, which was verbally agreed upon. Later, when new points of origin were added, a special rate was agreed upon as to such points. Either party to this arrangement was free to discontinue upon five days' notice.

During the period October 18, 1931 to February 25, 1932 respondent carried some 59 shipments from Los Angeles to Fresno upon which Western States Grocery Company paid the transportation charges. (5)

(5) Among the Los Angeles consignors of such shipments were General Food Products Company, Los Angeles Soap Company, Swift & Company, Southern Rice Sales Company, Jell-Well Dessert Company, Halfhill Company, California Figco Company, Dina-Mite Food Company, California Walnut Grower's Association, Goodwin Company, MacMarr Stores, General Food Sales Company, Purex Corporation, Ltd., Flavo-Jell Company,

TWO OF SUCH shipments involved distribution to Safeway Stores at various points in the San Joaquin Valley. <sup>(6)</sup> During the same period Western States made some 18 shipments by respondent from Fresno to points south thereof. <sup>(7)</sup> One shipment moved from Bakersfield to Fresno. Respondent also hauled for Western States between various origin and destination points in California other than those named.

The local plant of Adohr Creamery (Witness C. O. Wiseman) at Tulare shipped cream and milk from Tulare to certain consignees in Los Angeles by respondent, during the period October 5, 1931 to February 26, 1932. <sup>(8)</sup> There was no refusal to serve, and shipments were made daily during that period. The witness, who has been manager of the Tulare plant since 1930, testified that the arrangement for transportation by Mr. Bray was made in Los Angeles, and has not seen any contract for transportation. Bray also hauled skim milk from Tulare to Encinal Terminal in Alameda.

Dairymen's Cooperative Creamery (Witness W. J. Higdon) at Tulare, between October, 1931 and February 26, 1932, used the service of respondent between Tulare and Los Angeles, and paid the Boyle Manufacturing Company, Walker Manufacturing Company, Talbot Manufacturing Company, Cudahy Packing Company, and Western Terminal Warehouse.

Among the commodities so carried were peanut butter, candy, soap, shortening, rice, mackerel, oysters, "Figco," cereal, salad oil, platforms, walnuts, ammonia, flat boards, coffee, canned fish, "Jello," "Purex," garbage cans, sugar, gingerale, fly spray, and popcorn.

(6) Among such points were Fresno, Tulare, Dinuba, Reedley, Hanford, Exeter, Porterville, Visalia, Sanger, Selma, Kingsburg, Fowler, and Corcoran.

(7) To Bakersfield 6, Visalia 3, Tulare 6, Exeter 2, Los Angeles 1.

(8) The witness enumerated some 361 shipments made via respondent from Tulare to Los Angeles during the above period. Adohr Creamery at Tulare was the consignor in each instance and paid the freight charges. The consignees at Los Angeles were Adohr Creamery, Beverly Dairies, and Knutsen Creamery. The commodities which moved were various kinds of cream, condensed skim milk, pastuerized skim milk, cottage cheese curd.

transportation charges. The service was used daily southbound and the shipments consisted of butter, cream, condensed milk, and skim milk, consigned to the Challenge Creamery, Adohr Creamery, and Western Dairies at Los Angeles. At least one truck called at the Tulare plant daily. Challenge Creamery<sup>(9)</sup> at Los Angeles is a marketing organization for various creameries throughout the state. Bray also hauls paper cartons northbound. There has been no refusal to serve. The transportation understanding was verbal, and at an agreed rate. "We would change the agreements once in a while, as we felt that the rates were different, or something of that kind: \* \* \*." (Tr., p. 1050.) Bray has also hauled salt and sugar from the San Francisco Bay district to Tulare, and milk from Modesto to Tulare.

Kings County Creamery Association (Witness W. N. Hubbard) at Lemoore, during the period October 22, 1931 and February 25, 1932, generally shipped butter daily except Saturdays and holidays from Lemoore to Challenge at Los Angeles via respondent, and paid the freight thereon. It also received shipments of salt from Newark, chemicals from Stege, transite board and chemicals from San Francisco, acid from Nickols, canned goods and cheese from Challenge at Los Angeles, acid from Dairymen's Cooperative Creamery at Tulare, butter boxes from Kreckhefer Container Company at Los Angeles, and cans from the Creamery Package Company at Los Angeles. It shipped approximately 4 tons of butter per day to Los Angeles. Hauling was first performed under a verbal understanding and later a written agreement was signed.<sup>(10)</sup>

The vegetable oil branch of Globe Grain and Milling Company (Witness G. A. Whitney) at Los Angeles, during the period

(9) Challenge Cream and Butter Association.

(10) It was stipulated that this agreement, read into the record of a former proceeding, be deemed a part of the witness' testimony in this proceeding. (Tr., p. 1058.) It reads as follows:

"This agreement made this 25th day of June, 1931, by and between

October 16, 1931 and February 28, 1932, shipped via respondent usually on Mondays and Thursdays of each week, paying transportation

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J. O. Bray, of Tulare, California, doing business under the firm name of Bray Motor Drayage, party of the first part, and Kings County Creamery Association, a California non-profit corporation, of Lemoore, California, party of the second part,

"Witnesseth:

"For and in consideration of the mutual promises and agreements of the parties hereto hereinafter contained, it is hereby mutually understood and agreed by and between them, as follows:

"The first party, for the period of two years, commencing on the first day of July, 1931, and ending on the first day of July, 1933, inclusive, shall, with Motor Trucks properly equipped therefor, call at such times as shall be designated by the second party at the plant of the second party at Lemoore, California, properly load and pack and promptly and carefully transport from said plant to such plant of the Challenge Cream and Butter Association at Los Angeles as may be from time to time designated by the second party, all of the butter and/or cream produced and packed for shipment by the second party at its plant in Lemoore, California.

"During the said period of two years the second party shall deliver said butter and/or cream to the first party at its plant at Lemoore for the purposes aforesaid.

"The second party shall pay the first party on the 15th of each calendar month for said transportation an amount equivalent to \_\_\_\_\_ cents a hundred for all of the butter and/or cream so transported during the preceding month.

"The first party shall, at its expense, properly ice said products for and during such transportation when weather conditions shall make the same necessary in order to deliver said products to Los Angeles in a good merchantable and marketable condition.

"The first party shall carry adequate workmen's compensation insurance covering all of his employes necessary in connection with such transportation, also adequate property damage and public liability insurance of not less than \$50,000, also cargo insurance up to \$10,000 covering the cargo during such transportation, and any consequential damage to such cargo en route. It is the intention of the parties hereto by the foregoing agreement to provide for the carrying of all insurance by the first party as may be necessary entirely and completely to protect the second party from any liability resulting from said transportation.

"The rates which the second party has during the past two years; been paying the first party for the transportation of freight other than butter and/or cream shall be paid during the existence of this agreement to the first party by the second party for transportation of freight other than butter and/or cream.

"In witness whereof, said parties have executed this agreement in duplicate the day and year first above written.

"(Signed), J. O. Bray," under which is written "Doing Business under the firm name of Bray Motor Drayage, first party." Typed in "Kings County Creamery Association, by W. N. Hubbard, its Manager, second party."

charges, from Los Angeles to practically all of the intermediate points between and including Fresno and Bakersfield. These shipments consisted largely of Bestola, a lard substitute, and moved pursuant to a verbal understanding at a specified rate per 100 lbs. This arrangement was to continue in force "until either one of us got disgusted" (Tr., p. 1106), and became dissatisfied with the other's service. The arrangement was first entered into in 1929. There was no refusal to serve.

Challenge Cream and Butter Association (Witness H. C. Ake) at Los Angeles, a marketing and selling agency for a number of creameries (including Danish Creamery at Fresno, Cooperative Creamery at Tulare, and Kings County Creamery at Lemoore), during the period October 22, 1931 to February 25, 1932, received shipments via respondent and occasionally sent empty boxes north.

B. F. Goodrich Rubber Company (Witness L. C. Wolfe) made shipments via respondent from Los Angeles to Diamond Rubber Company, a subsidiary at Visalia, on December 7, 1931 and on February 25, 1932. (11)

Germain Seed Company (Witness F. H. Miller) at Los Angeles, between October and February, 1932, made shipments via respondent from Los Angeles to Fresno and to points between Fresno

(11) "Q How did you happen to get this service from Mr. Bray? A Well, Mr. Bray \* \* \* called on us soliciting our business for Valley points, \* \* \*. Q What points did Mr. Bray ask for your business to? A I do not recall that he mentioned any particular destination, only that he was operating between Fresno or Tulare and Los Angeles, southbound, and returning to the same points. I believe Tulare was his headquarters. Q He said that he also served Fresno? A Well, he said he would take loads to any point north of Bakersfield -- Bakersfield and north, probably. We objected to Bakersfield at the time, because he would arrive there in the middle of the night, no one to receive. Q He offered to haul, though, to Bakersfield for you? A I recall he did, he would take any points, Bakersfield and north, any of the points over the Ridge, in truck loads; he wanted full loads. Q Yes. Did he ever refuse to haul anything for you? A No, I don't believe he did." (Tr., pp. 1120, 1121.)

"Q Did he call you up, you say, from time to time? A Yes, he called us up from time to time, wanted to know -- said he had trucks going back, wanted to know if we had a load." (Tr., p. 1123.)

(12)  
and Los Angeles. Respondent also made hauls during the same period for this company to Manteca, Turlock, Kingsburg, Lodi, San Jose, Merced, and Oakland. Exhibit 5 is a uniform straight bill of lading covering a shipment of 3300 pounds of fertilizer on October 27, 1931 from Germain Company at Los Angeles to Hobbs-Parsons Company at Fresno via "Bray Truck" and is signed "Bray Truck - D. Haskell." The same form of bill of lading was used on other shipments, which ranged in size from 100 pounds to a truckload.

Dina-Mite Food Company of California (Witness P. Powell) at Los Angeles, during the period October, 1931 and February, 1932, had the Bray Motor Drayage pick up shipments of cereal for delivery to Fresno and Bakersfield for the consignees, among which were Haas Brothers, Western States Grocery Company, United Grocers, Ltd., Better-Buy Cash Grocery, all of Fresno; and Western States Grocery Company at Bakersfield. Its products were sold f. o. b. Los Angeles, less freight, and consignees paid freight and deducted the amount thereof in remitting.

Joe Lowe Corporation (Witness F. M. Kahn), in the baker's supplies business at Los Angeles, during the period October, 1931 and February, 1932, shipped powdered sugar, prepared flour, confectioner's paste, etc. via respondent to Channel Pie Company at Fresno, pursuant to the latter's instructions. It did not pay the freight charges.

J. Baumgarten & Company (Witness E. A. Vincent), tamale manufacturers, Los Angeles, during the period October, 1931 and

(12) Such as Fresno, Tulare, Hanford, Porterville, Bakersfield, Weed Patch, Visalia. Among the consignees at the above points were Central Dressed Beef Co., Tulare; Germain Seed Co., Fresno; Coe Warehouse Co., Hanford; Farmers Feed and Poultry Exchange, Porterville; San Joaquin Grain Company, Bakersfield; Belluomini Brothers, Bakersfield; F. M. Parrish & Co., Weed Patch; Bakersfield Hardware, Bakersfield; Linder Hardware, Tulare; L. O. Doyle Grain Co., Bakersfield; Farmers Hardware and Implement Co., Hanford; Visalia Milling Co., Visalia; Zellerbach Paper Co., Fresno; J. B. Hill, Fresno; and Hobbs, Parsons Company, Fresno.

February, 1932, shipped practically every day except Fridays via respondent to Sondberg's Lactic Products Corporation at Tulare, at the latter's request. The shipments varied between 500 and 1000 pounds, and were taken to the Bray terminal at 55th and Alameda Streets, Los Angeles. Witness did not pay the transportation charges.

Maxwell House Products Co. (Witness J. J. Brennan) during the period in question made two collect shipments of coffee<sup>(13)</sup> from Los Angeles to Western States Grocery Company at Fresno at the latter's request.

Los Angeles Soap Company (Witness George Rahe), Los Angeles, during the period October, 1931 and February, 1932, shipped via respondent to Fresno two or three times a week, and paid transportation charges pursuant to a verbal understanding had with Mr. Bray. The witness did not know when this oral understanding under which such shipments moved was entered into, but testified that every six or eight months such understanding was renewed. At such renewal the only thing that would be changed was the price or rate.

Fibreboard Products, Inc. (Witness B. J. Flynn) at Los Angeles, made shipments of butter cartons via Bray Motor Drayage during the period in question to Danish Creamery Association, Fresno; Dairymen's Cooperative Creamery, Tulare; and Kings County Creamery, Lemoore. It paid transportation charges thereon, and there was no refusal to serve.

Affiant D. Haskell testified that he was employed by respondent for about a year and a half, having been discharged in February of 1932. He began working for Motor Freight Terminal Company in March of 1932. The witness picked up and delivered freight for Mr. Bray in Los Angeles. The latter's terminal in that city was at 55th and Alameda Streets in October of 1931, on the premises of

(13) October 28, 1931, 120 cases, weight 2799 pounds.  
January 18, 1932, 27 cases, weight 509 pounds.

one M. D. Moore. One Paul Odom also worked at such terminal, and answered the telephone for Mr. Bray. Shipments coming into Los Angeles were taken from the "line trucks" by witness and another employee, placed on "delivery trucks," and distributed in Los Angeles. At the terminal respondent had one telephone and Mr. Moore two telephones. Witness answered the telephone in the absence of Paul Odom and had taken pick-up orders over the telephone. (14) Moore Transportation Company (M. D. Moore) also shipped over respondent's line.

Paul Odom, between October, 1931 and February 1932 was employed by Moore Transportation Company at the terminal at 55th and Alameda Streets, Los Angeles. Mr. Bray's trucks operated out of that terminal every day. The Moore Company had an agreement with respondent whereby "we was to furnish him a terminal and I was to oversee their trucks in Los Angeles for a monthly amount of money by the month." (Tr., p. 1138.) Haskell was a pick-up and delivery man for Bray, and the latter had a telephone at the terminal. As a part of his duties the witness answered and took orders for hauling over that telephone. He had instructions from Mr. Bray "to refuse any new business without first consulting he or his manager in Tulare." (Tr., p. 1140.) The Moore Transportation Company was engaged in the hauling business as a "forwarder," or "freight broker," and during the period involved made shipments over respondent's line on which it paid the transportation charges.

(14) "Was everything loaded back to Fresno, that is, loaded in Los Angeles, destined for Fresno in straight truckload lots from one consignor to one consignee? A No, it was not. Q How was it loaded? A Well, we would have as high as six and eight and ten orders on one piece of equipment going up. Q Was there any particular way in which you were instructed to pack that? A Well, when Pacific Freight Lines was after him pretty hot, while I was working for him, why, we was instructed to put small orders underneath the empty milk cans. Q Did you do that? A Yes sir. Did what I was told. Q Did you do that during the period that is mentioned in this affidavit? A Yes sir." (Tr., p. 1259.)

The witness described certain shipments, including one on January 2, 1932, consisting of 2 pieces of steel plate, weight 490 pounds, from Ducommon Corporation in Los Angeles to Kettleman Hills Gasoline Company in Hanford.

" Q. Now, what part did the Moore Transportation Company play in this? Were they freight brokers?  
A. Yes, sir. Q. What do you mean by that? A. Well, the biggest part of this is from our regular business. We did the heavy hauling for them and this method we took care of their light shipments. Q. Who picked these shipments up? A. Why, Bray Motor Drayage truck picked them up except those items that were delivered by the consignee to our yard." (Tr., p. 1142.)

Mr. Bray never refused to haul "we had an agreement that he would take care of them for us," (Tr., p. 1143.) and Bray handled small as well as large shipments. Different shipments were hauled on the same truck, "whatever there happened to be to go. \* \* \* I would take the order and give it to the driver and he would go and get it, because I did not make any bills whatever on the stuff, I would just make a notation and give it to the pick-up man; he would take care of it." (Tr., p. 1144.) The best recollection of the witness is that Mr. Bray then had about 40 customers. Mr. Bray ran at least one truck daily, including Sunday, and there were as many as nine or ten of his trucks in the yard in one day during the period in question. During said period Haskell worked for Bray Motor Drayage and never worked for Moore Transportation Company. (15)

"Q \* \* \* Did Mr. Bray refuse to haul, or indicate that he would refuse to haul, during the period that I have mentioned, shipments tendered him by the Moore Transportation Company that were picked up from any consignor in Los Angeles? A. No, sir. Q. He would handle all of that business that you could give him; is that right? A. Yes, sir. Q. Did he state that he would? A. Yes, sir." (Tr., pp. 1155-1156.)

(15) Bray "made an agreement with me that if I would pay the wages he would, in turn, reimburse me if I would pay him weekly. He was in the habit of not sending the checks down on time, and he asked me if I could take care of it, and he would, in turn, pay me the money back.

MR. ENCELL: Q. In other words, you paid Mr. Haskell and were reimbursed by Mr. Bray, his employer? A. Yes, sir." (Tr., p. 1151.)

RESPONDENT'S EVIDENCE

Haas Brothers, wholesale grocers (Witness T. Sargent, Fresno sales manager), maintain a distributing point at Fresno, and warehouses in Oakland, San Francisco, and Fresno. It distributes from Fresno to practically every point in the San Joaquin Valley from Turlock to the Tehachapi Mountains. During the period October 22, 1931 and February 25, 1932, J. O. Bray transported (16) merchandise by truck for Haas Brothers under verbal arrangements. The principal points of origin were Oakland and San Francisco. Some shipments were to the Fresno warehouse, from whence the goods were thereafter distributed, and others moved direct to customers in the San Joaquin Valley. When asked if there was any refusal to serve "outside of your agreement" (Tr., p. 1452), witness cited an instance of a shipment of sardines from Monterey, where "Mr. Bray's rate did not suit us, and he refused to handle the shipments at the rates which we wanted to have the merchandise hauled \* \* \*." (Tr., p. 1453.) The hauling during the period in question was not done under any one arrangement, there was no arrangement for any particular rate for any given period of time, and if respondent "couldn't give us a rate that was satisfactory, we would endeavor to make other arrangements." (Tr., p. 1455.) Bray would not handle unless it was a full truckload.

(16) "Q. Will you state what the arrangements were that covered and controlled during the period I have referred to? A. Well, the arrangements were for most of the hauling that Mr. Bray did for us, that he would handle these shipments, provided we could get together on the rates. That was the essence, I would say, of every agreement we had, was our ability to get together on the rates. Sometimes we could and sometimes we could not. That is why we saw fit to do business with other carriers." (Tr., p. 1442.)

"A \* \* \* Now, we didn't have any definite point of shipment always on that merchandise, because we made distribution all through the Valley, and the merchandise naturally would be delivered wherever we had orders for that merchandise, regardless of where it was in our territory. We had an understanding with Mr. Bray that over that fixed territory, whenever he saw fit and wanted to handle merchandise, that certain rates would apply." (Tr., pp. 1442-1443.)

W. J. Higdon, manager of Dairymen's Cooperative Creamery at Tulare (who was also called as a witness for complainants) testified that respondent also hauls from and to San Francisco, Oakland, Palo Alto, Hayward, Modesto, Tracy, Stege, and south to Los Angeles, and also performs a tank haul of milk daily between Tulare and Hanford. As stated in the prior testimony of this witness, hauling was performed daily during the period in question from Tulare to Los Angeles. (17)

M. L. Seymour was sales manager in 1931 for Larson and Krog at Fresno, and in January and February of 1932 was branch manager at Fresno for Utility Trailer Company. In December of 1931 he asked respondent to haul certain wheels from Los Angeles to Fresno, but was refused service. "He told me unless I had a truckload -- he would not handle less than truckloads." (Tr., p. 1540.)

Mrs. Doris Leeper, during October, November, and December, 1931, and January and February, 1932, was employed by Mr. Bray in the Tulare office as bookkeeper, answered the telephone, made out freight bills, and was in general charge of the office. She testified that subsequent to the desist order certain requests for (18)

(17) "Q. What are the full terms of this verbal contract that you mentioned? A. Well, different commodities carry different rates. Picked up at the plant and delivered to Los Angeles. \* \* \* Q. Are there any obligations on his part, or on your part, aside from the question of the mere haul and the rates, and the places where it shall be hauled? A. None whatever, other than we are to have one truck or two trucks, or a truck for part of a load -- whatever we have must go out those days, because it is a perishable product. Q. Is he given the exclusive right to haul all of your products between certain points? A. No. I suppose we could give it to any one else we wanted to. Q. According to your interpretation of the contract, you have a right to call any one to haul that you desire? A. Well, yes, there would be no penalties or anything of that kind. We have an agreement that he does our hauling. MR. ENCELL: Q. Mr. Bray, by the same token, could refuse to haul if he chose? A. Absolutely. MR. BROOKS: Has he ever refused, Mr. Higdon? A. Never has." (Tr., p. 1473.)

(18) The cease and desist order was issued on February 16, 1931.

(19)

transportation were refused over the telephone. Exhibit 7 is a document entitled "Transcript of Deliveries Oct. 1, 1931 to Feb. 29, 1932. J. O. Bray, " which the witness compiled from delivery receipts. It does not contain the shipments carried during this period between Los Angeles and Fresno and intermediate points, but covers shipments between other points. As to the latter, it contains tables of origin and destination points, showing thereunder the date, shipper, consignee, commodity, and weight. To illustrate, the first ten pages show as follows:

1. Alameda to Fresno, 19 shipments
2. Alvarado to Armona, 1 shipment
3. Alvarado to Atwater, 5 shipments
4. Alvarado to Banta, 1 shipment
5. Alvarado to Bakersfield, 1 shipment
6. Alvarado to Caruthers, 5 shipments
7. Alvarado to Chowchilla, 9 shipments
8. Alvarado to Clovis, 5 shipments
9. Alvarado to Coalinga, 3 shipments
10. Alvarado to Corcoran, 1 shipment

(19) "Q. And did you accept them or refuse them? A. We refused them. Q. And were those refusals made of ten? A. Yes, I would say almost daily. Q. And were those refusals confined to any particular class? A. If you mean the type of shipments -- Q. Yes, well, we will take that first. A. Well, not the type of shipments. To the weight of the shipments. Q. What was the basis of refusal there? A. If they were less than carload lots. Q. By 'carload' what do you mean? A. Truck and trailer. Q. Not l.c.l., but l. t. l? A. Yes, either truck or trailer. If there was a truckload, why -- that -- Q. In addition to your l.t.l., or l.c.l. shipments, which you received, did you refuse anybody else? A. Well -- Q. Did you have any instructions from Mr. Bray on that? A. Well, we never accepted any shipments of a new customer. The only shipments that we were to accept in the office was our regular customers, or people who we already had on the books and knew Mr. Bray had agreed to haul for. A. So that subsequent to the cease and desist order, you refused anybody who was not on the books? A. We did." (Tr., pp. 1489-1490.)

"Q. Mrs. Leeper, when you use the term 'truck load', what do you mean? A. Well, a truck load is either what we term "bobtail," that is, just the truck, or a truck load is truck and trailer. Q. Are you familiar with the size of Mr. Bray's equipment and the carrying capacity of his equipment? A. Yes. \* \* \* Q. And what was the size of his trucks, of his smallest truck? A. Well, his smallest truck, I believe -- I won't say to his smallest truck, but I think it was two ton. Q. Would you term it a truckload if you had two tons, is that what you mean by a truckload? A. Ordinarily, no, but we did have several small trucks." (Tr., p. 1492.)

There are 533 pages of like tables, showing some 73 origin points and numerous destination points.

E. W. Gearhart, one of respondent's counsel testified that he was employed as attorney for J. O. Bray shortly after service upon the latter of the original complaint in 1930. After the issuance of the cease and desist order on February 16, 1931, and after denial of rehearing and denial of petition for writ of review by the Supreme Court, the witness advised respondent to stop distributing calendars, upon which were fastened thermometers, and which contained the words "Bray Motor Drayage, Trucking," or words to that effect. He also advised respondent to stop advertising in the "Buyer's Guide" section of telephone directories; to stop any advertising or identification marks being carried upon his trucks; and that he should not advertise in any newspaper or magazine, or over the radio. "Mr. Bray was accepting, under my advice, business only as a consequence of personal solicitation. No circular letters were sent out. No new customers were taken on, except as a consequence of a personal interview with Mr. Bray, and personal arrangement made with him for the transportation." (Tr., p. 1508.)

After respondent had been adjudged guilty of contempt in the first contempt proceeding, the witness stated that in his opinion respondent was adjudged guilty because of the use of "Public Service" license plates on the equipment, and the affidavits made in connection with the obtaining of such license plates. "I told him then, 'get rid of those plates as fast as you can.'" (Tr., p. 1513.)

The period involved in this proceeding is from October,

1931 to February, 1932, both inclusive.

J. O. Bray testified in his own behalf, after being advised by the Commissioner presiding that he could not be compelled to testify and need not unless he so desired. He testified that during the above period he instructed his employees "to receive no freight without my O.K. of any new accounts, outside of what we had contracts with."

" Q. And the instructions that you gave to your employes were to take on no new customers? A I did. Q. And that they were not to haul for anybody except those who appeared on the books? A That's right." (Tr., p. 1556.)

Respondent also testified regarding various refusals to haul. One man was refused because he "didn't pay his bills very good." (Tr., p. 1552.) Another, for whom respondent had hauled was

(20) Contract Carrier Corporation was organized in Nevada on May 24, 1932. Mr. Gearhart testified that he advised Mr. Bray that the latter should do something drastic and emphatic to separate the business "from the personality of Mr. J. O. Bray." "So, under my advice, Mr. Bray decided to organize a corporation known as the Contract Carrier Corporation. We selected that name - under my advice - because that name itself would be notice to the world or to any person who used that Contract Carrier Corporation, that the concern was engaged in a private business, based upon contract, and not in a public business based upon utility obligations. I said to him also 'The Auto Stage and Transportation Act of 1917 provides that no certificate of convenience or necessity shall be issued to a foreign corporation to act as a common carrier over our highways in California. Therefore, to make certain that you want the world to know that you are not acting as a common carrier, but as a private carrier, we will organize our corporation in a state under the charter of which we will be prohibited from becoming a common carrier in California.'

So we went to Nevada and organized the corporation, and Mr. Bray sold his entire business theretofore conducted under the name of the Bray Motor Drayage Company, including the good will, accounts, everything pertaining to that business, to the Contract Carrier Corporation, and received in payment therefor 209,000 shares." (Tr., pp. 1513-1514.)

The Board of Directors, at the meeting of which the witness acted as secretary, employed a Mr. Jorgensen as general manager. Mr. Bray then left the State of California for approximately one year, (Tr., p. 1519), and upon his return was "re-employed" as general manager, and Mr. Jorgensen resigned. (Tr., p. 1535.)

The affidavit in this proceeding was filed April 29, 1932, but was not served upon Mr. Bray until March 14, 1933 (Exhibit 3), after Mr. Bray returned to California.

refused on certain shipments because "I didn't like the place they went, maybe, or I didn't have time, or may be I just didn't want to." (Tr., p. 1554.) He has refused to haul furniture "because I ain't equipped to haul furniture. It is a line by itself." (Tr., p. 1573.) Hay is "too hard work. I wouldn't haul it myself, and I wouldn't ask a man to do anything I wouldn't do myself." (Tr., p. 1574.) Respondent quit hauling for one company because of an unpaid bill of \$1200.00. (Tr., p. 1574.) He refused to haul for a man in San Francisco who "farms out" transportation and takes a percentage, because "you wouldn't get nothing if you hauled." (Tr., p. 1576.) He stopped hauling tires for one company from Los Angeles up as far as Modesto because "if he had a straight load that amounted to anything he would give it to somebody else and give me his little shipments." (Tr., p. 1576.) He refused another because "I didn't like the rate, for one thing, what they wanted to pay. We could never get together on a rate \* \* \*." (Tr., p. 1577.) The hauling of empty cans is not "good freight" and "I wasn't interested." (Tr., p. 1578.)

One shipper was refused because "I just didn't like the looks of him." (Tr., p. 1578.); and another because "I took a bumping from him for \$903." (Tr., p. 1578.) A lumber man was refused because the commodities were "too hard to handle. If you hauled his grain you would have to haul his lumber and his window weights and everything else he had." (Tr., p. 1578.) He refused to haul grain out of Buena Vista Lake because the "rate wasn't right, and it was right in the winter time, and it was over that ridge, and there was snow and ice, and it was too far to go around to Santa Maria." (Tr., p. 1579.) He refused to haul beet pulp, mill feed, and chicken feed for a certain dairy association because "A. The sacks are too big; takes up too much room. Q. It is light and bulky? Balloon freight, in other words? A. Yes. Q. There is

no remuneration in handling matters of that kind? A No."

(Tr., p. 1579.)

Counsel for respondent have urged in their brief several questions involving the jurisdiction of the Commission to entertain this proceeding, or to enter an order finding the respondent guilty of contempt. Among other things, it has been urged that no cease and desist order can be issued in a proceeding founded upon a complaint brought under the Auto Truck Transportation Act; that the Commission is without power to punish for contempt a violation of any order issued under that act; and that the affidavit, although upon its face alleging the facts positively was, nevertheless, shown by the record in this case to have been based in part upon the information and belief of affiant, and that, therefore, it was insufficient in substance to form the basis for this proceeding. All of these questions, which have been argued at length in the briefs filed by the respective parties, have been carefully considered and, after mature deliberation, we find them to be without merit.

It is clear from the evidence, which has been reviewed at length, that respondent J. O. Bray, during the period in question, operated a common carrier trucking service within the meaning of the statute between Los Angeles and Fresno and intermediate points. In addition, he carried freight to and from numerous other points not involved in this proceeding. The Commission is not concerned with such additional trucking activities herein, nor do such activities have any bearing in the determination of the status of the operations between the points to which the desist order was directed.

The Commission recognizes that its power to punish for contempt "should be used sparingly and only when and to the extent necessary to insure a respect for and an observance of its lawful

orders." (United Parcel Service v. 20th Century Delivery Service, 38 C.R.C. 455.) In 1931 respondent was found to be operating as a common carrier in violation of law and was ordered to desist. The validity of such order was sustained by the Supreme Court. (Bray v. Railroad Commission, S.F. No. 14289.) In 1932 a contempt proceeding was instituted and respondent was adjudged guilty of contempt in continuing that operation. The validity of the contempt judgment was also sustained by the courts. (Re J. O. Bray on Habeas Corpus, 125 Cal. App. 363.)

Notwithstanding this adjudication and the prior punishment for contempt, the record in this second contempt proceeding shows that respondent continued his unauthorized common carrier operations and so operated during the period involved herein. Under the circumstances the imposition of the maximum fine and imprisonment authorized by law in contempt proceedings appears to be the only manner in which the Commission may insure an obedience of its desist order.

#### FINDINGS

1. On February 16, 1931 the Railroad Commission, in its Decision 23409, found as a fact that J. O. Bray was operating as a common carrier within the meaning of Statutes 1917, Chapter 213, as amended, between Los Angeles and Fresno and intermediate points, without having a certificate of public convenience and necessity; and ordered a cessation of such common carrier operation. Said order has never been revoked, annulled, or stayed, and is now in full force and effect.

2. A certified copy of said Decision 23409 was personally served upon J. O. Bray on September 15, 1931, and said J. O. Bray had personal knowledge and notice of said decision and the contents thereof on and prior to the effective date thereof, and was able at all times thereafter to comply with said order.

3. On April 29, 1932 the affidavit and application for order to show cause of D. Haskell was filed, in which it was alleged in substance that said J. O. Bray, notwithstanding the order contained in Decision 23409, with full knowledge of its contents, and subsequent to its effective date, and more specifically during the period October 22, 1931 to February 25, 1932, failed and refused to comply with said order in that he continued to operate, conduct, and manage an automobile truck line as a common carrier of property for compensation between Los Angeles and Fresno and intermediate points.

4. On March 14, 1933 the present order to show cause was issued by the Railroad Commission, directing J. O. Bray to appear on April 18, 1933 and show cause why he should not be punished for contempt. Said order to show cause, together with said affidavit, was personally served upon J. O. Bray on March 14, 1933. Upon the return date J. O. Bray appeared and was represented by counsel, hearings were had and the matter submitted.

5. Notwithstanding the order of the Railroad Commission contained in its Decision 23409, the said J. O. Bray failed and refused to comply with the terms thereof, and continued to and did operate, control, and manage the business of operating automobile trucks for the transportation of property as a common carrier, for compensation, over the public highways in this state, within the meaning of Statutes 1917, Chapter 213, as amended, between Los Angeles and Fresno and intermediate points, and more specifically during the period October 22, 1931 and February 25, 1932.

6. Said failure of J. O. Bray to comply with said order of the Railroad Commission, as set forth in Finding No. 5 above, 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

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IT IS HEREBY ORDERED AND ADJUDGED that J. O. Bray has been and is guilty of a contempt of the Railroad Commission in disobeying its order of February 16, 1931, contained in its Decision 23409, during the period October 22, 1931 and February 25, 1932, all as more specifically found above.

IT IS HEREBY FURTHER ORDERED, ADJUDGED AND DECREED that for his said contempt of the Railroad Commission and its order, said J. O. Bray be punished by a fine of Five Hundred Dollars (\$500.00) and by five (5) days imprisonment in the county jail of the County of Fresno; said fine to be paid to the Secretary of the Railroad Commission within five (5) days after the effective date of this opinion, findings, and judgment; and that in default of payment of said fine, said J. O. Bray be committed to the county jail of the County of Fresno until such fine be paid or satisfied in the proportion of one day's imprisonment for each Five Dollars (\$5.00) thereof that shall so remain unpaid.

IT IS HEREBY FURTHER ORDERED that the Secretary of the Railroad Commission, upon this order becoming effective, prepare, sign, and issue in the name of the Railroad Commission of the State of California, appropriate order or orders of arrest and commitment, to which shall be attached and made a part thereof a certified copy of this opinion, findings, and judgment, and providing for the incarceration of said J. O. Bray for a period of five (5) days.

IT IS HEREBY FURTHER ORDERED that the Secretary of the Railroad Commission, if the above fine is not paid within the time specified above, prepare, sign, and issue 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 twenty (20) days after personal service of a certified copy thereof upon J. O. Bray.

Dated at San Francisco, California, this 27<sup>th</sup> day of August 1934.

Leon C. White  
M. A. Lewis  
W. B. Lewis  
W. H. Lewis  
Commissioners