

Decision No. 27515

BEFORE THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA.

ASBURY TRUCK COMPANY, a corporation,
Complainant,

vs.

E. R. BALL, E. E. BALL, R. W. FUTHEY,
HOWARD C. WAGGENER, CHARLES KYNE,
K. E. BROWNE, EMMA C. LAUDERBACH,
CATHERINE FRISBEE, MRS. A. C. DOTTS,
and PETER BOY, doing business under
the fictitious name and style of Oil
Well Express and/or Oil Well Express
Corporation; OIL WELL EXPRESS, a co-
partnership; OIL WELL EXPRESS CORPORA-
TION, a corporation; FIRST DOE: SECOND
DOE: THIRD DOE: FOURTH DOE: FIFTH
DOE: FIRST DOE CORPORATION: SECOND DOE
CORPORATION and THIRD DOE CORPORATION,

Defendants.

Case No. 3799.

ASBURY TRUCK COMPANY, a corporation,
Complainant,

vs.

B. L. MIKESELL, an individual, and
PACIFIC SHIPPERS ASSOCIATION, a corpora-
tion,

Defendants.

Case No. 3881.

Rex Boston, for complainants.

Leland S. Bower, for E. R. Ball, E. E. Ball,
Howard C. Waggener, Emma C. Lauderbach,
K. E. Browne, Catherine Frisbee, Charles
Kyne, Peter Boy, R. W. Futhey, Oil Well
Express Corporation, B. L. Mikesell and
Pacific Shippers Association.

Reginald L. Vaughan and Scott Elder, for
Regulated Carriers, Inc., intervener in
behalf of complainants.

Robert Brennan, Wm. F. Brooks and H. K. Lockwood
for Atchison, Topeka & Santa Fe Ry., intervener
in behalf of complainants.

CARR, Commissioner:

O P I N I O N

Asbury Truck Company, by complaint filed on April 28, 1934 (Case No. 3799) charges E. R. Ball, E. E. Ball, R. W. Futhey, Howard C. Waggener, Charles Kyne, K. E. Browne, Emma C. Lauderbach, Catherine Frisbee, Mrs. A. C. Dotts,⁽¹⁾ and Peter Boy, doing business under the fictitious name and style of Oil Well Express and/or Oil Well Express Corporation, Oil Well Express, a co-partnership, and Oil Well Express Corporation with common carrier operations by auto truck between Los Angeles and adjacent territory on the one hand, and Bakersfield, Taft, Maricopa, Kettleman Hills, McKittrick, Coalinga, Avenal, Devil's Den, and other points within the lower San Joaquin Valley on the other hand; and between Los Angeles and adjacent territory on the one hand and oil fields located in Ventura and Santa Barbara Counties on the other hand, all without a certificate or operating right therefor. The same complainant, by complaint filed on August 1, 1934, charges B. L. Mikesell and Pacific Shippers Association with like operations.

The two cases were consolidated and heard together, hearings being had on September 25, 26, 27 and 28, 1934.

The trucking service here attacked in these two cases has been before this Commission before. On April 27, 1931 in Hodges vs. Ball, et al., 36 C.R.C. 197, the Commission found that E. R. Ball and F. E. Hayes, as co-partners under the name of Oil Well Express were operating a common carrier trucking service between Los Angeles and contiguous territory and certain San Joaquin Valley oil fields without a certificate therefor and they were ordered to cease and desist from such operations.

1. The complaint was dismissed on motion of complainant as to Mrs. A. C. Dotts.

On April 18, 1932 E. R. Ball, by Decision 24692, was adjudged guilty of contempt in disobeying the cease and desist order. On July 25, 1932 the Supreme Court denied a petition for a writ of review of such contempt adjudication (Ball vs. Railroad Commission, L.A. No. 13782) and on November 10, 1932 the District Court of Appeals discharged a writ of habeas corpus and remanded Ball to the custody of the sheriff. (Re E. R. Ball on Habeas Corpus, 127 Cal. App. 433.) On May 28, 1934, by Decision No. 27099 E. R. Ball was again adjudged guilty of contempt for disobedience to such cease and desist order. He applied to the Supreme Court for a writ of review of the order finding him guilty of the second contempt and the application was denied on October 8, 1934. (E. R. Ball vs. Railroad Commission, L. A. No. 14962.)

The trucking service involved in these two cases is both regular and substantial in volume. Daily, except Sundays, trucks leave the Los Angeles dock at 4450 So. Main Street for the oil fields in the lower San Joaquin Valley and for the coast fields in Santa Barbara and Ventura Counties. Back hauls are handled. Some 150 shippers patronize the service. This year the gross business has averaged not less than \$6000 per month. Shipments are handled on standard bills of lading, which in some instances at least are furnished to the shippers for their use. Shipments are received and transported by using the facilities of various individual truck owners or operators who are paid and receive for their services and the use of their trucks 75% of the over-all transportation charges. Regular schedules of charges or rates are assessed and collected. The service is carried on under the names of Oil Well Express Corporation and Pacific Shippers Association. The bulk of the business is conducted under the name of Oil Well Express Corporation. Only about twenty-five shippers are, as to their business, billed under the name of Pacific Shippers Association.

After the operations of Ball and Hayes under the name of Oil Well Express were ordered discontinued, Oil Well Express Corporation was organized and operations continued from the same place and in the same manner, except that "contracts" with "Oil Well Express" were converted into "contracts" with "Oil Well Express Corporation." Some dummy incorporators were used. In a short time these were replaced as directors and officers, so that for some time R. W. Futhey and B. L. Mikesell have constituted the only officers. No stock was issued. It is claimed that Futhey put \$300 in the business and has gotten it back and that Mikesell put \$600 in which she has not gotten back, and that these two are entitled to share equally in any profits. Futhey has been and is on the payroll at the rate of 60 cents an hour. Mikesell is a bookkeeper. At first her wages were \$60 a month, later they were raised to \$80 and at present they are \$100. E. R. Ball received the highest compensation of any one on the payroll until July 1, 1934 when he is claimed to have left. Until that time Ball was the only one authorized to sign checks. Since then Mikesell has signed checks in the name of Oil Well Express Corporation.

Pacific Shippers Association⁽²⁾ was organized in the spring of 1933. As with the Oil Well Express Corporation, dummy incorporators were employed. Shortly after, however, Mikesell, Futhey and Norma Smith (Mrs. Mikesell's sister) appeared as the officers. E. R. Ball for some time signed checks for the corporation. Neither Futhey, Mikesell nor Ball receive compensation from Pacific Shippers. While Pacific Shippers Association collects from shippers the same rates as Oil Well Express Corporation and has a "contract" with Oil Well Express

2. In form this organization was similar to that of Imperial Valley Merchants Association, the operations of which were held to be unlawful in Regulated Carriers, Inc. v. Imperial Valley Merchants Association, Decision 26579 of date Nov. 25, 1933.

Corporation to do the hauling for 75% of the scheduled charges, it has had nothing left over for its members. Business under its name is handled in the same way as that under the name of Oil Well Express Corporation. Freight is handled at the same dock. The same truck owners perform the line haul and receive the same compensation. The accounts of the two businesses are confused. Allocations of cost between them are indefinite.

In respect to the business conducted in the name of Oil Well Express Corporation shippers were induced to sign "contracts" in the attempt to give the service a private cast.⁽³⁾ The number of these

3. These contracts generally were in the same form and were as follows, the blanks being filled in with the name of the shipper and the date of execution:

AGREEMENT

THIS AGREEMENT, entered into this day of
by and between OILWELL EXPRESS CORPORATION, of Los Angeles, California,
party of the first part, and

party of the second part:

W I T N E S S E T H

That in consideration of the mutual covenants herein contained, the parties hereto agree as follows:

Party of the first part will transport goods, wares, and merchandise for party of the second part from its terminal located at 4450 South Main Street, Los Angeles, for delivery at Bakersfield, Taft, and points north on the Coalinga Highway, to and including Kettleman and Coalinga, California.

Party of the first part will receive shipments of goods, wares, and merchandise at said terminal every day except Sundays and holidays, to be transported in accordance with this agreement.

Party of the second part agrees to deliver to party of the first part at said terminal not less than 100 pounds of goods, wares, and merchandise per calendar month during the period of this agreement for transportation between the points above mentioned.

Party of the second part agrees to pay to party of the first part for transportation service rendered under this agreement, at the schedule of charges attached to this contract, and designated, "SCHEDULE OF CHARGES", and party of the second part agrees to pay for said transportation service not later than the tenth day of each month for services rendered during the previous calendar month, after an itemized statement has been rendered therefore by the party of the first part.

Party of the first part agrees to make every reasonable effort to effect delivery of said merchandise the day after it is received, but in no event later than the afternoon of the following day. Party of the first part shall not be responsible for failure to make delivery

3. Cont'd.

of said merchandise on account of any cause over which party of the first part has no control.

Party of the first part shall be responsible for any loss, damage, or breakage to said merchandise while in the custody of party of the first part, his agents or employees, except when such loss, damage, or breakage is caused by acts of God or any other cause beyond his control, and party of the first part agrees to carry suitable accident, fire and theft insurance on all merchandise transported for party of the second part.

Party of the first part agrees to operate and maintain in the transportation service covered by this agreement, motor equipment suitable to the requirements of said transportation service.

"SCHEDULE OF CHARGES"

Coalinga Oil Fields	\$12.00	per	ton,	60¢	minimum
Kettleman Hills Oil Field	12.00	"	"	60¢	"
Devils Den Oil Field	12.00	"	"	60¢	"
Lost Hills Oil Field	12.00	"	"	60¢	"
Belridge Oil Field	10.00	"	"	50¢	"
Temblor Oil Field	10.00	"	"	50¢	"
McKittrick Oil Field	10.00	"	"	50¢	"
Buttonwillow Oil Field	10.00	"	"	50¢	"
Elk Hills Oil Field	10.00	"	"	50¢	"
Midway Oil Field	9.00	"	"	45¢	"
Sunset Oil Field	9.00	"	"	45¢	"
Wheeler Ridge Oil Field	8.00	"	"	40¢	"
Union Avenue Oil Field	8.00	"	"	40¢	"
Fruitvale Oil Field	8.00	"	"	40¢	"
Kern River Oil Field	8.00	"	"	40¢	"
Round Mountain Oil Field	9.00	"	"	45¢	"
Mt. Poso Oil Field	9.00	"	"	45¢	"

"SCHEDULE OF CHARGES FOR BACK HAULS"

Coalinga Oil Field	\$9.20	per	ton,	46¢	minimum
Kettleman Hills Oil Field	9.20	"	"	46¢	"
Devils Den Oil Field	9.20	"	"	46¢	"
Lost Hills Oil Field	7.80	"	"	39¢	"
Belridge Oil Field	6.60	"	"	33¢	"
Temblor Oil Field	6.60	"	"	33¢	"
McKittrick Oil Field	6.60	"	"	33¢	"
Buttonwillow Oil Field	6.60	"	"	33¢	"
Elk Hills Oil Field	6.60	"	"	33¢	"
Midway Oil Field	5.80	"	"	29¢	"
Sunset Oil Field	5.80	"	"	29¢	"
Wheeler Ridge Oil Field	5.20	"	"	26¢	"
Union Avenue Oil Field	5.20	"	"	26¢	"
Fruitvale Oil Field	5.20	"	"	26¢	"
Kern River Oil Field	5.20	"	"	26¢	"
Round Mountain Oil Field	5.80	"	"	29¢	"
Mt. Poso Oil Field	5.80	"	"	29¢	"

"COAST DIVISION"

Ventura, Seacliff and Saticoy,	30¢	per	cwt.,	30¢	minimum
Santa Barbara and Elwood,	35¢	"	"	35¢	"
Orcutt and Lompoc,	50¢	"	"	50¢	"

Back-hauls five cents less per hundred pounds than the up-bound rates.

and the circumstances of their procurement are such that the conclusion is inescapable that they represent merely a crude attempt to misbrand operations which in fact are of a common carrier nature.

That the line haul, whether the business was handled under one name or the other, was performed by various individual truck owners does not take the operations out from the inhibitions of the statute. (See Motor Freight Terminal Co. v. Move Forwarding Co., 37 C.R.C. 857, certiorari denied Nov. 10, 1932 in Move Forwarding Co. v. Railroad Commission, S.F. No. 14801; M.F.T. Co. v. Dean, 37 C.R.C. 862; Regulated Carriers v. Universal Forwarders, Decision 26236, Case 3544, certiorari denied Oct. 23, 1933, Universal Forwarders v. Railroad Commission, L.A. 14467; Regulated Carriers vs. Move (Nov. 13, 1933), Decision 26553, Case 3466; Regulated Carriers v. May (April 16, 1934) Decision 26949, Case 3690.)

3. Cont'd.

"RATES ON TONNAGE TO KETTLEMAN"

1 pound to 4000 pounds, 60¢ per cwt.
4000 pounds to 8000 pounds, 55¢ per cwt.
8000 pounds to 12,000 pounds, 50¢ per cwt.
12,000 pounds to 14,000 pounds, 45¢ per cwt.
14,000 pounds or over, \$8.25 per ton.

This agreement shall remain in full force and effect for a period of three months from the date hereof, continuing thereafter until terminated by the written notice of either party hereto, providing that party of the second part may cancel this agreement upon three days written notice to the party of the first part in the event that party of the first part shall not render good and satisfactory transportation service, but that at least three days prior to such notice of cancellation, the party of the second part shall advise party of the first part the particulars in which said service is not considered good and satisfactory, in order that party of the first part may be given a reasonable opportunity to bring its service up to the standard required by party of the second part.

IN WITNESS WHEREOF, the parties hereto have caused their signatures to be affixed the day and year first above written.

OILWELL EXPRESS CORPORATION

by _____
President
party of the first part,

and

by _____
party of the second part.

Both Futhey and Mikesell were interrogated at length as to the costs and expenses of the service rendered under these various names and were unable to specify items of expense which would consume the 25% of the gross revenue retained for getting and managing the business, maintaining a dock, billing, collecting, etc. Indeed, it is clear from the record that the service netted substantial profits. Futhey and Mikesell, who claimed to be entitled to such profits as to business conducted under the name of Oil Well Express Corporation testified they had received none. Members of Pacific Shippers Association, as previously pointed out, received no refunds.

That a cease and desist order must issue is clear. Because of the transmutations the service has undergone, and the varying disguises set up to conceal its real nature and the persons responsible for it the order should be as comprehensive as may be under the record as developed. As to the defendant, E. R. Ball, there is a subsisting order directing him to cease operations and a second order is unnecessary. Futhey and Mikesell, so far as this record is concerned, are responsible for the operations, although the evidence leaves a strong suspicion that they are acting for some one else who enjoys the substantial profits of the service. While the two corporations, Oil Well Express Corporation and Pacific Shippers Association are manifestly shams, the order should be directed against them, as well as against Futhey and Mikesell.⁽⁴⁾ The remaining named defendants are truck owners. These trucks are regularly in use in the conduct of the service. They have no direct contractual relations with the shippers, their dealings being with those who arrange for and control the business. However, they do perform a very definite function in the service here found to

4. That said defendants "control" and "manage" the trucks of others in the rendition of common carrier service is clearly borne out by the evidence.

be conducted in contravention of law, and the order should be directed against them.

None of the defendants have obtained a certificate of public convenience and necessity from the Commission, nor have they any prior operative right to conduct such common carrier operation.

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 \$500.00, 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 \$1000.00, 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.

I recommend the following form of order:

O R D E R

Public hearings having been had in these cases and the cases having been submitted for decision, the Railroad Commission of the State of California, after giving full consideration to the record

before it, concludes and finds as follows, to-wit:

The defendants, R. W. Futhy, B. L. Mikesell, Oil Well Express Corporation and Pacific Shippers Association, at the times mentioned in the complaint were and now are operating as a Transportation Company with common carrier status as defined in sub-division (c) of Section 1 of the Auto Truck Transportation Act (Chapter 213, Statutes of 1917 as amended) between Los Angeles and adjacent territory, on the one hand, and Bakersfield, Taft, Maricopa, Kettleman Hills, McKittrick, Coalinga, Avenal, Devil's Den and other oil fields within the lower San Joaquin Valley, on the other hand, and also between Los Angeles and adjacent territory, on the one hand, and oil fields located in Ventura and Santa Barbara Counties, on the other hand, the operations sometimes being conducted under the name of Oil Well Express Corporation and sometimes in the name of Pacific Shippers Association, and all without a certificate of public convenience and necessity or operative right for such service; and the defendants, E. E. Ball, Howard C. Waggener, Charles Kyme, K. E. Browne, Emma C. Lauderbach, Catherine Frisbee and Peter Boy each, during the times herein mentioned, was and now is assisting, aiding and abetting such unauthorized and unlawful operations.

Based on the finding herein and on the opinion,

IT IS HEREBY ORDERED that

1. The defendants, R. W. Futhy, B. L. Mikesell, Oil Well Express Corporation and Pacific Shippers Association, each cease and desist, either individually or in conjunction one with another, in the name of Oil Well Express Corporation or Pacific Shippers Association, or otherwise, or at all, directly or indirectly, or by any subterfuge, scheme or device from operating as a Transportation Company between the termini specified in the foregoing findings unless and until a certificate of public convenience and necessity authorizing the same is secured.

2. The defendants, E. E. Ball, Howard C. Waggener, Charles Kyne, K. E. Browne, Emma C. Lauderbach, Catherine Frisbee, and Peter Boy, each cease and desist from assisting, aiding or abetting, through the use of their trucks or services, or otherwise, the said defendants, R. W. Futhy, B. L. Mikesell, Oil Well Express Corporation and Pacific Shippers Association, or any one or more of them, or any other person, firm or corporation, from operating as a common carrier transportation company between the termini specified in the findings, unless and until a certificate of public convenience and necessity is secured authorizing such service and operations.

3. That the Secretary of this Commission cause a certified copy of this decision to be personally served upon each of the defendants named in paragraph 2 of the order herein; and that this order, as to each such defendant, shall become effective twenty (20) days after such personal service upon said defendant.

4. That the Secretary of this Commission cause certified copies of this decision to be mailed to the District Attorneys of Los Angeles, Ventura, Santa Barbara, Kern and Fresno Counties, to the Board of Public Utilities and Transportation of the City of Los Angeles 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.

Dated at San Francisco, California, this 5th day of November, 1934.

Lena O. Whitwell
W. J. Cline
M. S. Wagner
W. B. G. G. G.
W. B. G. G. G.
Commissioners.