

Decision No. 27688

BEFORE THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA

CERTIFICATED HIGHWAY CARRIERS, INC.,  
a corporation,

Complainant,

vs.

Case No. 3867

PAUL R. KEMP, JACK KEMP and  
FRANCES KEMP, doing business under the  
fictitious name and style of California  
Delivery Service, California Delivery  
Service, a co-partnership, First Doe,  
Second Doe, Third Doe, First Doe Corpor-  
ation, Second Doe Corporation.

Defendants.

David G. Shearer and Douglas Brookman,  
for Complainant.

Mc Intyre Faries, for Defendants, Paul R. Kemp,  
Jack Kemp, Frances Kemp and California  
Delivery Service.

BY THE COMMISSION -

O P I N I O N

Certificated Highway Carriers, Inc. herein complains that Paul R. Kemp, Jack Kemp and Frances Kemp, doing business under the fictitious name and style of California Delivery Service, are operating as a transportation company over the highways of this state and that said defendants have no certificates of public convenience and necessity so to do, nor any prescriptive or other rights for such operation, which is being conducted in violation of Chapter 213, Statutes of 1917.

A public hearing on this complaint was held before Examiner Gorman at Los Angeles on November 20, 1934, at which time the matter was duly submitted.

The facts, as developed at the hearing, may be summarized briefly as follows:

Paul R. Kemp and Jack E. Kemp, co-partners, operating under the fictitious name and style of California Delivery Service, are operating motorcycles for the transportation of merchandise from Los Angeles to San Pedro, Long Beach, Huntington Park, Whittier, Pasadena, Monrovia, Glendale, Van Nuys, North Hollywood, Santa Monica, Beverly Hills, Inglewood, Alhambra, Burbank, San Fernando and Compton, said service having been established in January, 1933.

The record shows that Frances Kemp is the wife of Paul R. Kemp and is not engaged in the business in any way, so that the complaint, in so far as it relates to her, should be dismissed.

The formal answer filed by defendants in this matter alleged that Clarence C. Pope was associated with Paul R. Kemp and Jack Kemp in the operation of the California Delivery Service; however, at the hearing in this matter Paul R. Kemp testified that Clarence Pope was not connected with the business.

Defendants operate nine motorcycles with side cars, the side cars consisting of boxes attached to chassis, the dimensions of which are 1 to 2 feet deep, 4 to 5 feet long and approximately 3 feet wide. Seven pieces of said equipment are owned by defendants and two are owned by drivers in defendants' employ.

The business consists of delivering merchandise. <sup>(1)</sup> from various concerns in Los Angeles to other concerns in Los Angeles

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(1)

At the present time, automotive parts and supplies constitute the bulk of the shipments; however, the service is not limited to this particular business.

and neighboring cities. To practically all points outside of the City of Los Angeles service is rendered daily, except Sunday, with three schedules per day, leaving Los Angeles at 9:30 a.m., 1:30 p.m. and 4:30 p.m. In addition to the regular service, defendants render an "on call" special delivery service.

Regular pickup service by motorcycle and side car is rendered in the City of Los Angeles by defendants; said pickup service collects the merchandise at consignor's place of business and delivers same to defendants' terminal at 1116 South Main Street, Los Angeles. The merchandise is then dispatched from the terminal to its final destination in territory outside the City of Los Angeles by line haul motorcycle equipment. Defendants do not transport merchandise from points outside of the City of Los Angeles to points within the City of Los Angeles, except merchandise being returned to original consignors.

Defendants serve forty to fifty concerns outside of the City of Los Angeles under a so-called contract (Exhibit No.6) and serve approximately a like number in the outside cities without contract. The contract relates principally to rates and ordinary tariff provisions. The general rate for transportation of merchandise from Los Angeles to the outside cities is 20 cents per package, while under the so-called contract the general basis is 17 cents per package; this amount, however, fluctuates with the amount of business offered. The contract is terminable on 30 days' notice by either party.

Defendants alleged that even though it were found that they were transporting merchandise for compensation over the public highways in this state between fixed termini and over a regular route, their operations would not fall within the purview of the Auto Truck Transportation Act (Chapter 213, Statutes 1917), since their operations are conducted exclusively by motorcycle with side car, while the Act specifically relates

to auto trucks.

Section 2 of the Auto Truck Transportation Act (Chapter 213, Statutes 1917), reads as follows:

"No corporation or person, their lessees, trustees, receivers or trustees appointed by any court whatsoever, shall operate any auto truck, for the transportation of persons or property for compensation on any public highway in this state except in accordance with the provisions of this act."

Defendants averred that the words "auto truck" were a contraction of automobile truck; that a truck is a vehicle for hauling heavy loads; that a motorcycle is not included within the meaning of the words "auto truck" ; that, according to statutory law, the act is limited by its heading; that motorcycles are not included within the meaning of the words "auto truck" in the Auto Truck Transportation Act, inasmuch as the California Legislature, at its 1933 session, did not pass bills, the specific purpose of which was to include the transportation of merchandise by motorcycles under the supervision of this Commission; that in the California Vehicle Act, motorcycle is included in the generic term "motor vehicles" and that, under the general rule of statutory interpretation (59 Corpus Juris 1041), where a statute is uncertain and on its face susceptible to more than one construction, the court may look to prior and contemporaneous statutes to determine its meaning.

Webster's International Dictionary gives the following definition for truck: "Any of numerous vehicles for transporting heavy articles." The definition of a motorcycle is as follows: "A bicycle having a motor attached so as to be self-propelled."

The California Vehicle Act (Title I, Sec.2) defines a vehicle as follows: "Every device in, upon or by which any person or property is or may be transported or drawn upon a public highway, excepting devices moved by human power or used

exclusively upon stationary rails or tracks; provided, that for the purpose of this act, a bicycle shall be deemed a vehicle." Section (3) of said Act defines a motor vehicle as follows: "Every vehicle, as herein defined, which is self-propelled." Section (5) of said Act defines a motorcycle as follows: "Every motor vehicle designed to travel on not more than three wheels in contact with the ground and of not exceeding ten horsepower and not exceeding the weight of five hundred pounds unladen."

Considering the lexicon definition of auto truck, it is not inconceivable that a motorcycle with side car would be included, as it is possible for such a vehicle to transport heavy articles. The definition of motor cycle, as contained in the California Vehicle Act, still places such equipment in the category of a motor vehicle, which is defined as a self-propelled device in, upon or by which any person or property is or may be transported or drawn upon a public highway. The words "motor vehicle," as defined, would also include auto truck.

It would appear reasonable to assume that the intent of the Legislature at the time the Auto Truck Transportation Act was passed was to include under this Commission's jurisdiction the supervision and regulation of the transportation of property for compensation over any public highway by motorized equipment. To disregard such intent entirely and attempt to base the purpose of the act solely upon the lexicological significance of the term "auto truck," would appear to be a contradiction of the real purpose of the Act.

The prospectus of the manufacturers of equipment similar to that used by defendants (Exhibits Nos. 3 and 5), designates such equipment as commercial trucks and package trucks. This would indicate that the word "truck" has become a more or less

accepted term for this particular type of equipment.

Many transportation companies operating under certificates of public convenience and necessity from this Commission transport property by means of a trailer drawn by a tractor. To accept defendants' contention that the term "auto truck" should not be construed in its broader sense, apparently would relieve such carriers from the necessity of certification for such operation. It may be readily seen that such an interpretation could lead to a complete ineffectiveness of the regulation and supervision of the movement of property over the highways, which condition we feel certain the Legislature was attempting to avoid. Defendants' argument - that the rejection by the Legislature, at its 1933 session, of bills purporting to cover the operation of all common carriers, including those operating motorcycles, was indicative of the tenor of the Legislature on this subject is, in our opinion, without merit. The mere rejection of bills by the Legislature may be for many reasons and it would be just as logical to assume that such rejection was the result of a belief that the subject was already covered.

Defendants alleged that at the time of commencement of operations, there was pending before this Commission the case of Regulated Carriers, Inc. v. H. E. Brown, et al (Case No. 3343), wherein the same issues were involved as in the instant case. Defendants further alleged that they had at all times acted in good faith and were willing to and, if the above case or the instant case were determined contrary to their interpretation of the law, will file an application for a certificate of public convenience and necessity.

After carefully considering all of the evidence in this record, we are of the opinion and hereby conclude that defendants are operating as a transportation company as defined in Section 1,

Subdivision (c) of the Auto Truck Transportation Act (Chapter 213, Statutes 1917, as amended), and that 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 \$500.00 or he may be imprisoned for five (5) days, or both. C.C.P. Sec. 1218; Motor Freight Terminal Company 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 Co. 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 this 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.

In view of the circumstances, there appears to be justification for modification of the usual cease and desist order. The record indicates that defendants' legal counsel interpreted the Auto Truck Transportation Act to the effect that operation by motorcycle was not included therein and that there was no bad faith or attempt to evade the law in the minds of defendants.

It would appear reasonable to modify the usual form of cease and desist order, so as to permit defendants to file, within a reasonable time, an application covering the service found to be illegal, and to stay the effective date of the order pending disposition of said application by the Commission. (Bekins Van Lines. v. Griggs, 36 C.R.C. 183; re U. C. Express and Storage Co., Decision No.26993, dated April 30, 1934; re Carpenter, Decision No.26922, dated April 2, 1934; re Garcia, Decision No.26505, dated November 6, 1933; re Sandercock Transfer Co., Decision No.27514, dated November 5, 1934).

#### O R D E R

IT IS HEREBY FOUND that Paul R. Kemp and Jack B. Kemp, co-partners, operating under the fictitious name and style of California Delivery Service, are 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 from Los Angeles to San Pedro, Long Beach, Huntington Park, Whittier, Pasadena, Monrovia, Glendale, Van Nuys, North Hollywood, Santa Monica, Beverly Hills, Inglewood, Alhambra, Burbank, San Fernando and Compton 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 California Delivery Service shall cease and desist, directly or indirectly or by any subterfuge or device, from continuing such operations; provided, that should defendants herein file, within thirty (30) days from the date hereof, their proper application for a certificate of public convenience and necessity covering such service, the foregoing



Order, in all respects, shall stand suspended until the Commission shall have finally disposed of said application.

IT IS HEREBY FURTHER ORDERED that this complaint, in so far as it relates to Frances Kemp, be and it is hereby dismissed.

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

Dated at San Francisco, California, this 21st day of January, 1935.

Leon Whitely

W. A. L.

M. B. Harris

Walter J. ...

Frank R. ...  
COMMISSIONERS.