

Decision No. 27808

BEFORE THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA

CALIFORNIA INLAND WATER CARRIERS
CONFERENCE,

Complainant,

vs.

J. C. FREESE COMPANY, a corporation,

Defendant.

ORIGINAL

Case No. 3770.

Gwyn H. Baker, for the Complainant.

Pillsbury, Madison & Sutro, by Hugh Fullerton,
for the Defendant.

James E. Lyons and A. L. Whittle, for Southern
Pacific Company, Northwestern Pacific Railroad
Company, and Petaluma & Santa Rosa Railroad
Company, Interveners.

HARRIS, Commissioner:

OPINION

Complainant alleges in substance that defendant is operating vessels on the inland waters of the State of California between points wholly within said state, in the transportation of property as a common carrier for hire without a certificate authorizing it so to do and without tariffs on file either now or prior to August 15, 1923, or July, 1927, or August 15, 1933, and that said vessels are of the type not exempt from the jurisdiction of this Commission under the terms of the Public Utilities Act, and that in so conducting the said operations defendant has violated and is violating the provisions of the Public Utilities Act, and particularly Section 50(d) thereof, and asks that defendant be required to cease and desist from such operations.

Defendant filed its offer to satisfy, offering "to carry

on its business entirely as a private carrier and not as a common carrier."

It also answered denying the material allegations of the complaint, including of course a denial that it is operating as a common carrier, and filed a motion to dismiss the amended complaint on the grounds:

1. That complainant has no legal capacity to complain.
2. That the complaint does not state facts upon which a complaint can be brought before the Commission.
3. That the complaint is indefinite and gives defendant no warning of any act complained of.
4. That the complaint does not show that defendant is under jurisdiction of the Commission in that it contains no affirmative allegation that defendant's vessels are of the type within the Act.
5. That the only substantial question presented by the complaint is whether the defendant conducted business as a public utility and that the Commission has not jurisdiction to adjudicate the character and status of defendant.
6. That an offer to satisfy has been filed which meets the prayer of the amended complaint.
7. That the amended complaint is not verified by a proper person.
8. That no evidence has been presented that defendant has been operating as a common carrier.

Preliminary to passing upon this motion to dismiss, attention is directed to certain provisions of the Public Utilities Act of California which are applicable here.

Section 31 of that Act vests this Commission with power and jurisdiction to supervise and regulate every public utility in the state and to do all things whether specifically designated in the Act or in addition thereto which are necessary or convenient

in the exercise of such power and jurisdiction.

Section 72 makes it the duty of the Commission to see that the provisions of the Constitution and Statutes of California affecting public utilities, the enforcement of which is not specifically vested elsewhere, are enforced and obeyed.

Section 53 provides that all hearings, investigations and proceedings shall be governed by the Act and by rules of practice and procedure to be adopted by the Commission and in the conduct thereof the technical rules of evidence need not be applied and that no informality in any hearing or proceeding or in the manner of taking testimony shall invalidate any order or decision made by the Commission.

Section 60 provides that complaint may be made by the Commission on its own motion or by any corporation or person, chamber of commerce, board of trade, labor organization or any civic, commercial, mercantile, traffic, agricultural or manufacturing association or organization or any body politic or municipal corporation by complaint in writing setting forth any act or thing done or omitted to be done by any public utility in violation, or claimed to be in violation of any provision of law and that the Commission shall not be required to dismiss any complaint because of the absence of direct damage to the complainant.

Section 50(d) provides that no corporation or person shall hereafter begin to operate any vessel in the transportation of persons or property for compensation between points in this state without first having obtained from the Commission a certificate for such operation.

Section 2(y) provides that the term "vessel" when used in the Act includes every species of water craft, by whatsoever power operated which is owned, controlled, operated or managed for public use in the transportation of persons or property, except certain types of boats not involved here.

Rule 11 of Rules of Procedure of this Commission provides that if the complainant is a corporation or association, any officer or director thereof may verify the complaint.

To be considered in connection with the above is the following undisputed evidence:

Section 2, Article 1 of California Inland Water Carriers Conference Agreement (Exhibit 1 herein) states that, among other things, the purposes of the Conference are: (a) to protect, promote, improve and stabilize transportation upon the inland waters of the State of California tributary to San Francisco Bay; (c) to insure observance of lawfully established rates, rules and regulations, and compliance with the Public Utilities Act of the State of California and other provisions of law:

The Conference Agreement also provides that the officers of the Conference shall be, among others, the Secretary and the General Manager;

The amended complaint was verified by Gwyn H. Baker as General Manager of the Conference;

It was undisputed that at the date of such verification Mr. Baker was such General Manager and also Secretary;

While Mr. Baker was such Secretary and General Manager and prior to the filing of the amended complaint, the Board of Managers of the Conference adopted the following resolution:

"The Secretary reported that the application of J. C. Freeze for permit to operate vessels for hire had been withdrawn, but that in hearing on this application the applicant demonstrated that the operations now being conducted by it, and those proposed to be conducted in the future were those of a common carrier. The Secretary was, therefore, directed to prepare and file a formal complaint asking the Commission to make such finding and to direct the company to cease and desist from further operations."

The foregoing recitals of law and fact require the denial of the motion to dismiss as to all points except the ones numbered (5) (6) (8).

As to point (5) a recent decision directly in point is in *Betts v. R. R. C.* Feb. Sup. Vol. 6 - No. 8 at page 529, as follows:

"He correctly contends that the jurisdiction of the Commission is confined to public carriers and that it has no jurisdiction over private carriers. It does, however, have jurisdiction to determine whether or not a carrier is public or private. Such determination is essential to the exercise of its jurisdiction."

On appeal to the U. S. Supreme Court this decree was affirmed. (U.S.S. Ct. Law Ed. Adv. Op. Vol. 78, No. 11, page 761.)

As to point numbered (6) defendant maintains that its operations now and in the past are and have been private. Its offer to satisfy is therefore merely an offer to continue the operations which complainant contends are public. This issue must be determined and the offer to satisfy is of no avail.

Point numbered (8) is the heart of the controversy. Is defendant operating as a common carrier?

The evidence shows that it has four specially constructed molasses barges. The special equipment on these barges consists of tanks in the hold, cargo pumps and boiler. These barges are moved by tugs rented by defendant. Defendant transports molasses for a number of shippers from all points in San Francisco Bay district including ships in the stream. Defendant transports all the molasses movement in bulk that there is in the Bay district. Defendant has refused to handle molasses in small amounts. It has always handled molasses under contracts. There is no molasses in San Francisco Bay being hauled by anyone else. Defendant has the only equipment for that purpose.

Defendant has one gasoline barge equipped with metal tanks mounted on the decks, pumping equipment and gasoline engine. It handles on this barge nothing but gasoline from "most any point" and for practically all the major oil refineries in San Francisco

Bay to all points on the Bay and tributaries. It has refused to make contracts with different parties because they did not have proper loading or discharging facilities. It refused one contract because it would have had to put on additional equipment. It hauls gasoline under contract for Texas Company, Richfield Oil Company, Signal Oil and Gas Company, Standard Oil Company, Union Oil Company and General Petroleum Company. There are no regular schedules for either the molasses or gasoline barges. It is clear that defendant has held itself out and now holds itself out as willing to transport molasses in bulk for the public indiscriminately so far as its equipment will permit.

It is also clear that defendant has held itself out and now holds itself out to transport gasoline for the public indiscriminately so far as its equipment and loading and discharging facilities of the shippers will permit.

Defendant has no certificate from this Commission authorizing its operations and has had no tariffs or schedules therefor on file with the Commission.

The complaint alleges that defendant is a corporation. The evidence shows that it is a partnership consisting of Constance Mogan, a minor, by R. F. Mogan, her guardian, and Ruth Freese Conway, doing business under the name of J. C. Freese Company. It is ordered that the complaint be amended in accordance with this fact.

An order of this Commission finding an operation to be unlawful and directing that it be discontinued is in its effect not unlike an injunction issued by a court. A violation of such order constitutes a contempt of the Commission. The California Constitution and the Public Utilities Act vest the Commission with power and authority to punish for contempt in the same manner and to the same extent as courts of record. In the event a party is adjudged guilty of contempt, a fine may be imposed in the

amount of \$500, or he may be imprisoned for five days, or both. C.C.P. Sec. 1218; Motor Freight Terminal Co. vs. Bray, 37 C.R.C. 224; Re Ball and Hayes, 37 C.R.C. 407; Wermuth vs. Stamper, 36 C.R.C. 458; Pioneer Express Company vs. Keller, 33 C.R.C. 571.

The following form of order is recommended:

ORDER

A public hearing having been had and the above matter having been submitted on briefs,

IT IS HEREBY FOUND AS A FACT that defendant J. C. Freese Company, a copartnership consisting of Constance Mogan, a minor, by R. F. Mogan, her guardian, and Ruth Freese Conway, is engaged in the transportation of property by vessel for compensation and as a common carrier between points on the inland waters of the State of California, to wit, San Francisco Bay and its tributaries, without first having obtained a certificate of public convenience and necessity for such operations as required by law, therefore,

IT IS HEREBY ORDERED that defendant J. C. Freese Company, a copartnership consisting of Constance Mogan, a minor, by R. F. Mogan, her guardian, and Ruth Freese Conway, shall immediately cease and desist such common carrier operations as described herein, unless and until it shall obtain a certificate of public convenience and necessity therefor; and

IT IS HEREBY FURTHER ORDERED that the Secretary of this Commission shall cause a certified copy of this decision to be personally served upon said defendant and upon each of such partners:

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

Dated at San Francisco, California, this 11th day of March, 1935.

Leon C. White

M. P. Lee

M. B. Davis

W. H. ...

Frank R. ...

Commissioners.