Decision No. 28803

BEFORE THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA

Certificated Highway Carriers, Inc., a corporation

Complainant,

vs.

E.H.Robinson, doing business under the fictitious name and style of Arrow Transfer,

Defendant.

Case No. 3948

ORIGINAL

Wallace K. Downey, for complainant.

Stearns, Luce, Forward & Swing, by Fred Kunzel, for E.H.Robinson doing business as Arrow Transfer, defendant.

Reginald L. Vaughan, for Regulated Carriers, Inc., intervener on behalf of complainant.

Robert Brennan and Wm.F.Brooks, by Wm. F.Brooks, for The Atchison, Topeka & Santa Fe Railway Company, intervener on behalf of the complainant.

H.J.Bischoff, for Southern California Freight Lines, intervener on behalf of the complainant.

C.J.Gamble, for San Diego Forwarding Company, as intervener as their interests may appear.

BY THE COMMISSION

O P I N I O N

In this case complainant charges defendant, E.H.Robinson, an individual, doing business under the fictitious name and style of Arrow Transfer, with operating as a transportation company or a highway common carrier without the authority of a certificate of public convenience and necessity or prior operating right held pursuant to Chapter 213, Statutes 1917, as amended, which is succeeded by Sections 2 3/4 and 50 3/4 of the Public Utilities Act,

between Los Angeles and the metropolitan area adjacent thereto on the one hand and San Diego and points intermediate between said cities on the other hand. By answer, defendant admits that he has no certificate of public convenience and necessity or prior operating right pursuant to the above cited statutes, but denies specifically and generally having engaged in any of the illegal operations charged by the complaint.

Hearings were held in San Diego on May 17, 1935, before Examiner W.R.Williams and on June 21st 1935, before Examiner Geary. The matter was submitted on the latter date and is now ready for decision.

The nature of the Defendant's operations as brought out at the hearings is briefly as follows:

Defendant has engaged in a general transfer business in San Diego for many years. He has gradually come to serve some of his local customers for the freight that they have to be transported between Los Angeles and contiguous territory on the one hand and San Diego on the other hand. For the purpose of accommodating his customers as to this inter-city movement, defendant has one truck which is kept in Los Angeles by a driver who lives in that city and which is devoted entirely to this service. Other trucks are used when necessary. Defendant also maintains, in Los Angeles, a light pick-up truck for the purpose of assembling loads to be transported to San Diego. On his freight bills, defendant gives his Los Angeles Driver's residence telephone number as being the defendant's telephone number in Los Angeles. Defendant pays for this telephone. Defendant rents a small garage next to his driver's Los Angeles residence for use in assembling loads to be transported to San Diego.

Defendant's operations between the points involved may be divided into two classifications:

(1) Operations which are clearly those of a common carrier; and,(2) operations which are performed under written agreements and which defendant claims are the operations of a highway contract carrier.

(1) Those operations which are clearly the operations of a common carrier: Defendant testified that he would haul truck load lots for anyone who tendered him such a load and who would prepay the freight or with whose credit he was satisfied; that he had never in the past turned down such a load; that the rates which he charged for such services are determined by a fixed tariff; that he carries cargo insurance and considers himself liable for any loss or damage to cargo irrespective of whether such loss or damage is caused by his negligence. However, between January 1, 1935, and June 21, 1935, defendant's truck made only seven trips between the points involved in this proceeding for persons with whom the defendant did not have contracts.

(2) The operations which are performed solely for persons or firms with whom defendant has written agreements: Defendant claims that these operations, which constitute the vast majority of his operations between Los Angeles and San Diego, are the legitimate operations of a highway contract carrier rather than the operations of a highway common carrier.

It is to be noted in this respect, that the defendant has, since the submission of this case, filed application for and been granted a permit to operate as a highway contract carrier pursuant to the requirements of the Highway Carrier's Act, Chapter 223, Statutes of 1935.

Defendant has written agreements with twelve different shippers.* These agreements set forth the rates to be charged by the defendant to the individual shipper. The shipper is not bound to use defendant's service exclusively between the points involved nor is the shipper bound to ship any specific amount or any amount of property whatever by the defendant. These agreements are subject to cancellation by either party thereto on fifteen days' written notice. The agreements provide for the handling of C.O.D. shipments by the defendant although it was testified that such shipments had never been made. Defendant also considers himself liable, irrespective of negligence, for loss or damage of cargoes handled in these operations, and carries cargo insurance to protect himself against such liability.

As to the defendant's operations under the above described agreements, he makes several trips a week between Los Angeles and San Diego. Defendant will not run his trucks over this route for his contract shippers without a full pay load. Rather, he assembles a number of less than truck load lots in order to make up a load. Commodities for shipment are picked up and delivered by the defendant at such places as the shipper requests. The freight is always paid to the defendant by the persons with whom he has written contracts. However, in many cases the alleged contract shipper

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* As shown by Exhibit No. 3 these twelve shippers and the dates of their agreements are as follows:
Armour & Company -December 15, 1934
Piggly Wiggly Company-October 1, 1934
H.E.Morse & Company-October 1, 1934
Klanker Waigenheim Company-July 31, 1934
Gilmore Oil Company-September 18, 1934
Golden West Products Company-September 13, 1934
S.J.Wines Coffee Company-January 15, 1935
Southwestern Grocery Company-August 13, 1934
Wellman Peck & Company-October 10,1934
Southern California Baking Company-August 1, 1934
S.R.Frazee Company-October 30,1934
Vernon Nussbaum Company-December 31, 1934

receives a freight allowance from the person or persons to whom he is selling the commodities to be transported or from whom he is buying them. In this regard, the persons with whom defendant has contracts make a practice of requesting the third persons with whom they are dealing to ship by the defendant and to adjust the freight charges by means of the allowances above referred to. It does not appear from the record that the defendant had any knowledge of these freight allowances which his customers obtained from the third persons. Defendant testified that he would enter into such contracts with anyone with whose credit he was satisfied and whom he thought would give him a sufficiently large amount of freight to transport.

Insofar as the transportation services provided by the defendant between the points involved for persons with whom he has no written agreements are concerned, the defendant is clearly a common carrier. However, these services have not been sufficiently frequent by themselves to justify a finding that the defendant is operating as a Highway Common Carrier between fixed termini or over a regular route. Such operations could well be a part of the operations of a Radial Highway Common Carrier as defined by Chapter 223, Statutes of 1935; Rampone v.Leonardini, 39 C.R.C. 588. It is to be noted however, that the defendant has never filed application for nor obtained a permit to operate as a Radial Highway Common Carrier under Chapter 223, Statutes of 1935.

Insofar as the operations performed by the defendant under written agreements are concerned, it will be assumed, for the purpose of discussion, that these agreements are binding contracts, sufficient in all respects to constitute the transportation of the property of the persons with whom the contracts are made, the

operations of a contract carrier. In many instances the compensation for the services performed was paid to the defendant by the contract shippers who received an allowance for the exact amount of said compensation from the third party consignors or consignees from whom the commodities transported were being bought or to whom such commodities were being sold.

Section 1739 of the California Civil Code provides:

> "Unless a different intention appears, the following are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer....."
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> "Rule 4. (1) Where there is a contract to sell unascertained or future goods by description, and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer, or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer. Such assent may be expressed or implied and may be given either before or after the appropriation is made.
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> (2) Where, in pursuance of a contract to sell, the seller delivers the goods to the buyer, or to a carrier or other bailee (whether named by buyer or not) for the purpose of transmission to or holding for the buyer, he is presumed to have unconditionally appropriated the goods to the contract, except in the cases provided for in the next rule and in Section 1740.* This presumption is applicable, although by the terms of the contract the buyer is to pay the price before receiving delivery of the goods, and the goods are marked with the words "collect on delivery" or their equivalents.
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> "Rule 5. If the contract to sell requires the seller to deliver the goods to the buyer, or at a particular place, or to pay the freight or cost of transportation to the buyer, or to a particular place, the property does not pass until the goods have been delivered to the buyer or reached the place agreed upon."

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* Section 1740 of the Civil Code relates to the reservation of right of possession or property for security purposes.

From the presumptions raised by this Section of the Civil Code, which were not overcome by the defendant, it appears that the defendant transports the property of many other persons besides the twelve with whom he has written contracts. Moreover, he indirectly receives his compensation for transporting such shipments from such other persons.

It further appears from the record that the parties with whom the defendant has entered into written agreements make a practice of requesting these third persons to ship by the defendant.

In the case of In Re Hirons (1928) 32 C.R.C.48, it was said:

> ".....If the particular service rendered by the carrier is offered to all those members of the public who can use that particular service, the public is in fact served, and the business is affected with a public interest though the actual number of persons served is limited."

This principle was also adhered to in: Re Lehigh Valley Transit Company, (Pa) P.U.R. 1928 A; 606 Producers Transportation Company vs. Railroad Commission, 251 U.S. 228, 64 L.Ed. 239; Sanger vs. Lukens, 24 Fed. (2d) 226; State vs. Washington Tug Company, 250 Pac. 49.

In the case of the United States vs. Brooklyn Eastern Terminal, 249 U.S.296, 263 L.Ed. 613, the Court in holding the defendant who operated a belt line railroad, to be a common carrier, said:

> " The relation of agency may preclude contractual obligations to the shippers, but it cannot change the obligations of the carrier concerning the physical operations of the railroad."

Now in the case at hand, it appears that the defendant, E.H.Robinson, is transporting property between fixed termini or over regular routes for many shippers other than the twelve persons with whom he has written contracts. It further appears

that the defendant holds himself out as being willing to transport property for all who deal with the twelve persons with whom he has contracts and who will pay the freight to him through those persons rather than to him directly.

Thus, the defendant is holding himself out as willing to serve and is serving indiscriminately a substantial class of the public. The twelve parties with whom defendant has written contracts would appear to be nothing more than mere agents for the defendant for the purpose of obtaining business and making collections.

In this connection, consideration should be given to the case of Regulated Carriers, Inc., vs. Curtice, Case No. 3419, Decision No.27227. In that case the defendant was likewise charged with illegal operations as a transportation company under Chapter 213, Statutes of 1917, between Watsonville and Castroville on the one hand, and San Francisco on the other hand. Defendant transported the products of sixty or more growers. All of these movements were made, however, on a contract with Levy-Zenter Company in San Francisco. The record indicated that there was no knowledge on the part of Curtice that freight allowances were made to that company by the individual growers. The complaint was dismissed. The Commissioner said, however,

> "While I reach this conclusion, I recognize in the case some of the elements of the disguised common carrier operations, and the operations conducted by the defendant are perilously near the line justifying an order to cease and desist."

In the instant case, the defendant's contracts are with twelve persons rather than just with one as in the Curtice case. Here, consequently, the evidence of disguised common carrier operation is much stronger. In this case, the alleged contract

shippers make a practice of soliciting from the persons to whom they sell and from whom they buy commodities, to ship by the defendant, although the title to such commodities is in the third persons rather than in the alleged contract shippers at the time of the shipments. These factors place the instant defendant's operations on the other side of that line of demarcation between the highway common carrier and the highway contract or private carrier which was referred to in the Curtice Case.

The above conclusion is strongly supported by the nature of the contracts entered into between the defendant and the twelve shippers. These contracts described above are in no way effectively binding upon the shippers. In fact, they are nothing more than mere rate quotations. Defendant testified that he would enter into such contracts with any responsible person with whose credit he was satisfied and whom he thought would provide him with a sufficiently large amount of business. This, together with the defendant's admitted willingness to transport truck load lots of commodities over the route and between the points in question, for anyone who will pay him his usual compensation therefor, makes it impossible to escape the conclusion that the defendant's operations between Los Angeles and the metropolitan area adjacent thereto on the one hand, and San Diego on the other hand and over the intervening route, are the operations of a Highway Common Carrier as defined in Section 2 3/4 of the Public Utilities Act.

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 Co., vs. Bray, 37 C.R.C 224; re Ball and Hayes 37 C.R.C.407; Rice vs. Betts 38 C.R.C30; re Victor on Habeas Corpus 220 Cal. 729.

It should also be noted that under Sections 76 and 77 of the Public Utilities Act, a person who violates an order of the Commission is guilty of a misdemeanor and is punishable by a fine not exceeding $1,000.00 or by imprisonment in the county jail not exceeding one year, or by both such fine and imprisonment. Likewise under Section 70 of the Public Utilities Act, a shipper or other person who aids and abets in the violation of an order of the Commission is guilty of a misdemeanor and is punishable in the same manner.

O R D E R

Complaint herein having been duly heard, the matter being ready for decision, and the Commission now being advised in the premises,

IT IS HEREBY FOUND that E.H.ROBINSON, an individual doing business under the fictitious name and style of the ARROW TRANSFER is, and during the times mentioned in the complaint was, operating as a highway common carrier as defined in Section 2 3/4 of the Public Utilities Act, which succeeds Section 1 (c) Chapter 213, Statutes of 1917, as amended, with common carrier status between

fixed termini or over regular routes, over public highways between Los Angeles and the metropolitan area, adjacent thereto, on the one hand, and San Diego on the other hand, without having first obtained from this Commission, a certificate of public convenience and necessity or without a prior right authorizing such operation.

Based upon the opinion and findings herein,

IT IS HEREBY ORDERED that the following designated highway common carrier, to-wit: E.H.ROBINSON doing business under the fictitious name and style of ARROW TRANSFER, cease and desist, directly and indirectly, or by any subterfuge or device from operating as a highway common carrier between any or all of the following points, or any two or more of the said points, to-wit: Los Angeles and the metropolitan area adjacent thereto, on the one hand, and San Diego on the other hand, unless and until he has first obtained from this Commission a certificate of public convenience and necessity authorizing such operations.

The Secretary of the Commission is directed to cause personal service of a certified copy of this decision to be made upon said defendant E.H.ROBINSON, and to cause certified copies thereof to be mailed to the District Attorneys of Los Angeles, Orange and San Diego Counties and the Board of Public Utilities and Transportation of the City of Los Angeles, and to the Department of Motor Vehicles, California Highway Patrol, at Sacramento.

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

Dated at San Francisco, California, this 11th day of May 1936.