

Decision No. 29581

**ORIGINAL**

BEFORE THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA

McMURRAY TRANSPORTATION SERVICE, LTD.,  
a corporation,

Complainant,

vs.

HERMAN BUCHARDI, PETER AMBY, JOHN  
ROTH, SOPHIE GREGERSEN, BATTESITA  
ERRANOVA, ROBERT ACQUISTAPACE, ISAAC  
SAEM, THOMAS PETERSEN, CARL CHRISTIAN,  
TED CHRISTIAN, OWEN HOLLISTER, A. M.  
HUNT, GEORGE JOHANSEN, and SANTA  
BARBARA MILK PRODUCERS ASSOCIATION,

Defendants.

Case No. 4098

Norris Montgomery and Butcher & Haines,  
for Complainant;

J. J. Deuel, for Defendants;

Ralph E. Taylor, for Agricultural Council of  
California;

Ferrand & Slosson, for California Fruit  
Growers Exchange.

BY THE COMMISSION:

O P I N I O N

Complainant is a highway common carrier transporting freight between Santa Barbara and Santa Ynez, and intermediate points, under a certificate of public convenience and necessity from this Commission. Defendant Santa Barbara Milk Producers Association is incorporated under the Cooperative Marketing Act of California as a non-profit cooperative association without capital stock. Each of the individual defendants is a member of

the corporate defendant, and together they constitute all but one of the entire membership thereof.

The amended complaint alleges that since about November 1, 1935, the defendants have been transporting milk and other commodities by motor vehicle over the public highways between Santa Barbara and Santa Ynez as common carriers without a certificate of public convenience and necessity, as required by the Highway Carriers' Act. Defendant's answer denies the individual defendants are engaged in the transportation of property; admits the association is transporting milk, for its members only, as a cooperative association, and alleges that as such it requires no permit under the Highway Carriers' Act.

A public hearing was held at Santa Barbara before Examiner Elder, the case submitted, briefs filed, and the matter is now ready for decision.

At the close of the hearing complainant moved for the dismissal of the complaint as against all the individual defendants except Robert Acquistapace.

The evidence shows that the members of the association are milk producers having their ranches in the vicinity of Santa Ynez, Buellton, Solvang, and Lompoc. They sell their milk to the Borden Milk Company, the Golden State Creamery Company, and Enterprise Dairy Company, all at Santa Barbara. One of the members, George Johansen, also sells milk to stores at Tajiguas and Caviota. The sales are made by the individual members direct to the purchasers, not through the association either as a marketing agency or otherwise.

Checks issued by the creameries in payment of the milk are made payable to the individual members from whom the milk is purchased. Borden Milk Company and Enterprise Dairy Company, acting upon directions given by the producers, pay the carrier, whoever it may be, the hauling charges for the milk, and deduct the amount thereof from their remittances to the producers. They also deduct therefrom the price of butter sold to the producers for their personal use. Checks for the balance, payable to the members as just stated, are delivered by the distributors to the secretary of the association, who secures thereon the endorsements of the payees, and deposits the funds in the account of the association for the purpose of the prorate, pursuant to Chapter 754, Statutes of 1933, as amended. This being done, the prorated payments are forwarded to the members by check of the association. The Golden State Creamery Company also pays the hauling charges and deducts them from remittances, but does the prorating itself and sends the checks direct to the producers.

Prior to November 1, 1935, the hauling from the producers' ranches to the creameries, and to the stores at Tajiguas and Caviota, was performed by complainant McMurray Transportation Company. The activities of the association until that time had been confined to the prorating above referred to and to representing the members in matters furthering their common interests, such as attempting at various times to bargain for better prices, promoting dairy legislation, and the like. It engaged in no commercial activities.

Shortly prior to November, 1935, however, the producers attempted to secure from the complainant a reduction in its rates for the transportation of their milk. The attempt proving

unsuccessful, it was agreed at a meeting of the Board of Directors of the association that the association should engage in the hauling of milk for the members at cost. A truck was acquired by the association and put into daily service on November 1, 1935. The hauling rate was established at 17 cents per can plus an amount equal to 1 cent per can per mile of distance between Buellton and the ranches of the respective producers. Arrangement was made to provide, out of the proceeds of the hauling, for gasoline, oil, labor, garage rent, trucking insurance, compensation insurance, interest at 5% per annum, depreciation of the truck on a four-year life basis, bookkeeping, tires, and repairs. Provision was also made for compensation to Robert Acquistapace for the hauling by him hereinafter described. It was further arranged that any surplus remaining at the end of a period of one year should be distributed among the members in proportion to the amount of hauling performed for them.

No hauling has been performed by the association for anybody but members, and only milk has been hauled for them to Santa Barbara. All the members were served except one who hauls his own milk. On the return trip there has been hauled, to members only, empty milk cans, skimmed milk, parchment paper for use under the lids of the milk cans, and butter for the members' personal use. No charge has been made for the return hauling.

The ranches of two of the members, Robert Acquistapace and Owen Hollister, are located along a county road between Lompoc and Highway 101. For convenience, the association arranged with Acquistapace to haul their milk from the ranches to Highway 101, where it is picked up and taken to Santa Barbara by the association's

truck. For this service the association pays Acquistapace the sum of \$90. per month out of the gross revenue from its transportation activities, as above stated. Acquistapace, as well as Hollister, pays the association the same rate as the other members for the hauling of their milk.

The allegations of the complaint that the association is a common carrier, either highway common or radial highway common, is but faintly urged by complainant and is not supported by the evidence. The issue as to contract carrier status appears not to have been distinctly raised by the pleadings, but as all parties have treated the proceeding as involving the point, we shall do likewise.

In opposition to the contention that the association is a highway contract carrier, it is urged that because the association is cooperative, it cannot be deemed a legal entity distinct from its individual members, and that the case is one in which the members are "persons hauling their own products," within the meaning of the exempting clause in Section 1 of the Act. But it seems clear that associations organized under the Cooperative Marketing Association Act are corporations in every essential respect. The members of this association appear to have treated it and thought of it as a corporation; and it was stipulated at the hearing that the association is a corporation. We must hold, therefore, that the association cannot be considered as identical with its members; that the milk is being transported by the association, which has no interest in the milk, and not by the members, and that in shipping their milk on the association's truck the members are not engaged in hauling their own products within the meaning of the Highway Carriers' Act.

It is further contended on behalf of the association that, as it is cooperative and does not function for profit in the accepted sense of the word, it is not engaged in the transportation of property "as a business," which, under Section 1 (f), is an essential feature of a "highway carrier." It is true that profit is usually the motive for conducting a business; but we do not believe that motive is essential to the existence of a "business" in the ordinary meaning of the word and as it is used in the Highway Carriers' Act. Webster's New International Dictionary defines business as:

- . . . . .
- "2. That which busies or engages time, attention or labor, as a principal serious concern or interest. Specif.:
- a. Constant employment; regular occupation; work; as, the business of life; business before pleasure.
  - b. Any particular occupation or employment habitually engaged in, esp. for livelihood or gain.
- . . . . .
7. A commercial or industrial establishment or enterprise; as, he sold out his business.
- Syn. - See trade."

The transportation of property for compensation over the public highways by motor vehicle is clearly a business of the association in the light of the foregoing definition and within the meaning of the Act.

There is abundant authority sustaining the jurisdiction of regulatory boards, under statutes similar to the Highway Carriers' Act, over cooperative corporations transporting property for compensation by motor vehicle for their members (Rutledge Cooperative Association v. Baughman (Md), 138 Atl. 29; Parlett Cooperative Inc. v. Tidewater Lines, Inc. (Md), 165 Atl. 313;

Madonna & Shawsville Cooperative Co. v. West (Md), 176 Atl. 611;  
Merchants Mutual Association v. Matthews (Fla), 149 So. 27;  
North Shore Fish & Freight Co. v. North Shore Businessmen's  
Trucking Association (Minn), 263 N.W. 981.

In Rutledge Cooperative Association v. Baughman, supra,  
it is said:

"The appellant and its stockholders are different persons and not one and the same person. It has a distinct existence separate and apart from its stockholders, and, while they are members of it for the purposes stated in the statute (sections 419-446, art. 23, Bagby's Code), nevertheless for all other purposes its identity is distinct from theirs. Cook on Corp. par. 1. In serving its stockholders, it is not serving itself, but a group of persons holding one or more shares of its stock. Its earnings from such service are distributable in dividends to its stockholders in proportion to the number of shares held by them, just as the earnings of a railroad company would be distributed to its stockholders. Its business requires it to use for private gain the public highways of the state, which are maintained by the general public. The incidental effects of its operation are identical with those of common carriers operating under section 258, art. 56, Bagby's Code, the wear and tear on the highways is the same, the danger to the travelling public is the same, the difficulty of maintaining reasonable rates and adequate service in the face of severe and exhausting competition is the same, and the appropriation of public property for private gain is the same."

In North Shore Fish & Freight Co. v. North Shore  
Businessmen's Trucking Association, supra, it is said:

"There is much to be said in support of plaintiffs' claim to the effect that defendant is in truth and in fact either a common or contract carrier. \* \* \*

"Defendant is obviously a corporate body - a legal entity. As such when it engages itself to transport the goods of another, even if such other is called a "member," nevertheless there is a contract relationship between them. The person so dealing with it undoubtedly has the right to sue in event of breach of contract by defendant and similarly may sue for damages in event defendant happens to be negligent so that loss occurs. \* \* \*

"The right to form a cooperative association to engage in the transportation of the goods and products of its members is not involved and is not questioned. All that we hold is, that having formed such association, before defendant can enter into the transportation field it must apply to and receive from the railroad and warehouse commission authority to transact such business; this for the simple reason that the law has placed with that body jurisdiction and control of such business for the safety and protection of the highways and the public in general. Nor do we think defendant is justified in its claim that it will be injured thereby because of the higher rates it may be required to charge by the Commission. Under its articles the profits derived from the business are distributed amongst the members in proportion to the amount of business furnished, hence, on that score, defendant's members will be in no worse position than they are now, excepting only that there is deferment of division of profits as and when made, whereas under its present operation it is giving its members a lesser rate to begin with."

The cases fully recognize that were any other result reached upon such facts, nullification of the regulatory statutes would surely follow. In the North Shore case (supra) it is further said:

"Were we to sustain defendant's claim that it is free from official regulation because it is cooperative, we must necessarily permit the scrapping of our carriers' acts. We think defendant should not be permitted to accomplish the purpose for which it now seeks judicial sanction. Obviously there will be nothing under such circumstances to prevent farmers, merchants, manufacturers - in fact, industries and business of practically every type - to organize similar 'cooperatives' making them of state-wide ramification, and thereby because of lack of regulation, permit them to enter into active competition with regularly organized and officially regulated transportation agencies. To so hold, it seems to us, is to deny the existence of any legislative purpose in adopting the carrier acts. Thereby such enactments become mere scraps of paper."

Interveners, representing numerous agricultural marketing cooperatives throughout the State, evidently assume that a holding that this association is a highway contract carrier will of necessity apply equally to all cooperatives, including those engaged in actual marketing operations on behalf of their members.



Such a result does not necessarily follow. Whether transportation is carried on as a business or merely incidentally to or as a part of the conduct of some other business is a question of fact, and a question, moreover, which is not peculiar to cooperatives; it may arise with respect to any company or person. It is common knowledge that many cooperatives receive delivery of their members' produce at the farms, transport it to drying yard or packing plant, and, after processing or packing, market and distribute the produce. It might well be contended that motor vehicle transportation conducted merely in the course of and incidentally to such processing, packing, and marketing activities of a cooperative, or any other company or person, does not constitute the transportation of property "as a business." That, however, is not the case here; the defendant association here does not process, pack, or market any goods, and the trucking operation is its only commercial or industrial activity. The operation is thus a transportation service, pure and simple, a business separate and complete in itself, distinct from and independent of any of the association's other activities. It is used by the members in place of complainant's service merely because of lower rates. Its conduct is in no manner dependent upon or related to the association's character or functions as an agricultural cooperative marketing corporation, and it could as well be carried on by any other organization, even a cooperative organized solely for the purpose of transportation. As above pointed out, if this can be lawfully accomplished, the Highway Carriers' Act is of little value in accomplishing the purpose for which it was intended.

Defendant urges it was not the legislative intent to include cooperative corporations within the Highway Carriers' Act. But it was expressly the legislative intent to include all cor-

porations, cooperative or not, transporting property for compensation as a business over public highways by motor vehicle, and any exemption of cooperatives as such would be of doubtful constitutionality. As was said in the North Shore case, supra, quoting from the syllabus in Parlett Cooperative, Inc. v. Tidewater Lines, supra:

"A statute exempting cooperative associations, transporting freight for their members for hire, in competition with common carriers, from the operation of a statute, passed for the protection of the public highways, which requires public carriers for gain to obtain a permit from the Public Service Commission, would be unconstitutional as involving an arbitrary and unreasonable classification."

Certainly the Commission cannot read into the Act any such exception.

It should be observed that, as stated in the North Shore case, supra, there is no question as to the right of any group of persons to form a cooperative corporation or association to transport the property of its members as a private carrier, or of this defendant to perform such a service. All that is held is that before engaging in that business such an association must first obtain authority to operate as a highway carrier, and must thereafter comply with the requirements of the law respecting the operation of such a business. No appreciable burden upon defendant or any other such association will result therefrom. The fee for the filing of the application is only \$3.00, and the permit is issued as of course. The required protection against public liability and property

damage would ordinarily be secured by any prudent concern, regardless of the provisions of the law. Should the association, being subject to the Act, be compelled to charge its members rates in excess of the association's bare cost of rendering service, such excess would in any event be returned to the members in proportion to the amounts paid by them, in accordance with the cooperative nature of the enterprise. The amount of the fee of 1/4 of 1% of the gross operating revenue for which the association would become obligated under the provisions of the Transportation Rate Fund Act (Chapter 683, Statutes of 1935) is hardly large enough to constitute a burden to the association. On the other hand, should such cooperative enterprises be exempt from the Act, it may reasonably be anticipated that industries and businesses of every type would organize cooperatives and enter into unregulated competition with regularly organized and regulated transportation companies, to the practical nullification of the legislation.

We must therefore conclude that the defendant association is operating as a highway contract carrier, and should be directed to obtain the required permit.

There remains for consideration the activities of Robert Acquistapace. The evidence shows that all the elements of a highway contract carrier are present in his operation, and that he is engaged in the transportation of property for compensation as a business over public highways by motor vehicle. As he

transports Hollister's milk, he is not exempt as a person hauling his own produce, nor can it be said, in view of the regularity of his operation, that he is rendering casual transportation services as an accommodation and not in the usual and ordinary course of his business. He also must be required to desist from the operation until he obtains a permit.

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, the Public Utilities Act, the Highway Carriers' Act, and the City Carriers' 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. v. Bray, 37 C.R.C. 224; In re Ball and Hayes, 37 C.R.C. 407; Wermuth v. Stamper, 36 C.R.C. 438; Pioneer Express Company v. Keller, 33 C.R.C. 571.

It should also be noted that under Section 14 of the Highway Carriers' Act any person, or any director, officer, agent, or employee of a corporation who violates any of the provisions of these acts, respectively, or of any operating permit issued thereunder to any highway carrier, or any order, rule, or regulation of the Commission, is guilty of a misdemeanor and is punishable by a fine not exceeding \$500, or by imprisonment in the County Jail for not exceeding three months, or by both fine and imprisonment.

O R D E R

A public hearing having been held in the above entitled matter, evidence having been introduced, the matter having been submitted, and the Commission now being fully advised,

IT IS HEREBY ORDERED:

(1) That defendant Santa Barbara Milk Producers Association, a corporation, be and it is hereby required and directed to cease and desist, directly or indirectly or by any subterfuge or device, from conducting or continuing any and all operations for the transportation of property for compensation or hire as a business, over any public highway of the State of California, by means of any motor vehicle or motor vehicles, as a Highway Contract Carrier, as defined in Chapter 223, Statutes of 1935 of the State of California, unless it shall first have secured from the Railroad Commission a proper permit authorizing it to operate as such.

(2) That defendant Robert Acquistapace be and he is hereby required and directed to cease and desist, directly or indirectly or by any subterfuge or device, from conducting or continuing any and all operations for the transportation of property for compensation or hire as a business, over any public highway of the State of California, by means of any motor vehicle or motor vehicles, as a Highway Contract Carrier, as defined in Chapter 223, Statutes of 1935 of the State of California, unless he shall first have secured from the Railroad Commission a proper permit authorizing him to operate as such.

IT IS HEREBY FURTHER ORDERED that the complaint be and it is hereby dismissed as to defendants Herman Buchardi, Peter Amby, John Roth, Sophie Gregersen, Battesita Erranova, Isaac Sahn, Thomas Petersen, Carl Christian, Ted Christian, Owen Hollister, A. M. Hunt, George Johansen, and the Secretary of the Commission is directed to cause service of this Order to be made upon each of said defendants Santa Barbara Milk Producers Association and Robert Acquistapace.

The effective date of this Order, as to each of said defendants, shall be twenty (20) days from and after said service upon said defendants.

Dated at San Francisco, California, this 1<sup>st</sup> day of March, 1937.

W. H. ...  
John ...  
Ray ...  
Ray & Riley  
Commissioners.