

Decision No. 32239.

ORIGINAL

BEFORE THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Investigation, on )  
the Commission's own motion, into the )  
operations, rates, charges, classifica- )  
tions, contracts and practices, or any )  
thereof, of WAYNE F. MALONEY, doing )  
business as PENINSULA MOTOR EXPRESS. )

Case No. 4339.

SANBORN, ROEHL and MAC LEOD, by Clair MacLeod,  
for respondent Wayne F. Maloney.

EDWARD STERN, for Railway Express Agency, Inc.

HARRY A. ENCELL, for Automotive Purchasing Co., Inc.

J. S. VIZZARD, for Highway Transport, Inc.

B. A. WEITE, for Pacific Southwest Railroad Assn.

H. M. HAYS, for Intercity Transport Lines and  
Pioneer Express Company.

BY THE COMMISSION:

O P I N I O N

In this matter the Commission instituted upon its own motion an investigation into the operations, practices, rates, charges, classifications and contracts of Wayne F. Maloney, doing business as Peninsula Motor Express, the respondent herein, for the purpose of determining:

(1) Whether respondent has been operating as a highway common carrier as defined by section 2-3/4, Public Utilities Act, between San Francisco, on the one hand, and Mountain View, Palo Alto, Redwood City, San Mateo and Burlingame, on the other hand, between said termini, respectively, and intermediate points, and

between points intermediate to said termini, without first having secured from the Commission a certificate of public convenience and necessity as required by section 50-3/4, Public Utilities Act;

(2) Whether respondent has been engaged as a radial highway common carrier or as a highway contract carrier as defined by section 1, Highway Carriers' Act, in the transportation of property at rates or charges below the minimum rates established for such transportation by Decision No. 28761, as amended, in Case No. 4088, Part "A", in violation of said decision and of the provisions of sections 2, 10, 12(a) and 12(b), Highway Carriers' Act.

The respondent was directed to appear and show cause why he should not be required to cease and desist from conducting any such operations in violation of law or of the Commission's decisions, and why the operative permit or permits held by respondent as a radial and as a contract carrier should not be revoked.

A public hearing was had before Examiner McGettigan at San Francisco on September 27 and October 3, 1938, and at San Mateo on September 29, 1938, when evidence was received, the matter submitted, and it is now ready for decision.

At the hearing respondent appeared in person and by counsel; interested carriers and others, such as Railway Express Agency, Inc., Automotive Purchasing Co., Inc., Highway Transport, Inc., Intercity Transport Lines, Pioneer Express Company and Pacific Southwest Railroad Association appeared and participated. Some thirty public witnesses and two members of the Commission's staff were called, and respondent voluntarily testified on his own behalf. Voluminous exhibits were received, comprising for the most part, freight bills and contracts.

The record discloses that since December, 1934, prior to the passage of the Highway Carriers' Act,<sup>(1)</sup> respondent has been engaged in the transportation of property by motor vehicle between San Francisco and points on the peninsula as far south as San Jose. Originally he operated under the name of Peninsula Messenger Service, but on September 25, 1937, this was changed to Peninsula Motor Express, the name under which he now functions.<sup>(2)</sup>

Throughout the period involved in this investigation, respondent has held permits issued by the Commission authorizing him to operate as a highway contract carrier and as a city carrier.<sup>(3)</sup> No certificate of public convenience and necessity ever was granted to respondent under section 50-3/4, Public Utilities Act, nor under the Auto Truck Transportation Act, and he never acquired any "prior right" under that statute.

In 1934 respondent entered the field with but 4 shippers. Since then the business has grown steadily until he now serves approximately 41 shippers, purportedly under written contracts. On October 15, 1935, when respondent filed his application for a highway contract carrier permit, form No. 9A, which accompanied that application,<sup>(4)</sup> disclosed there were then in effect 19 contracts of which 10 were written and 9 oral. Supplemental form No. 9A, filed April 25, 1936, listed 20 contracts, of which 9 were written and 11 were oral. At present, so respondent testified, all of his contracts are in writing; no oral agreements remain outstanding.

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(1) Stats. 1935, Ch. 223.

(2) On September 22, 1937, the Commission was advised of this change in respondent's trade name.

(3) On November 15, 1935, permit No. 38-402 was issued to respondent authorizing him to operate as a highway contract carrier, and on November 8, 1935 city carrier permit No. 38-403 was issued to him.

(4) Both the original and the supplemental 9A forms were received in evidence by reference.

Respondent's equipment has increased from one unit in 1934, to three which are now used in this service. The second truck was acquired late in 1934 or early in 1935, and the third in 1936. Though this equipment was not always filled to capacity, it clearly was essential to accommodate all the tonnage offered. Moreover, the necessity of observing a daily scheduled service for an increasing number of patrons necessitated an enlargement of these facilities.

This service has not been confined to the transportation of specific commodities nor those falling within any well defined class. Aside from some extremely heavy commodities, rejected because they were difficult to handle and unsuited to the equipment, freight of a widely diversified character has been handled. The commodities accepted include automotive parts, radios, auto batteries, tires, hardware, wallpaper, paper products, musical instruments, phonograph records, paints, plumbing supplies, glassware, stoves, washers, ironers, feed, seed, sprays, pipe, and candy. Thus there has been insured a more or less constant flow of traffic in each direction.

Throughout the period involved in this investigation, respondent has operated regularly between San Francisco and peninsula points as far south as San Jose, including Burlingame, San Mateo, Redwood City, Palo Alto, and Mountain View.<sup>(5)</sup> The trucks ran daily except Sunday. For this service, compensation was exacted; aside from some minor undercharges, respondent observed the minimum rates prescribed by the Commission for highway contract carriers.

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(5) The record shows that traffic was picked up and delivered at San Bruno and at Mountain View less frequently than at the other points. Operations conducted by respondent at points south of Mountain View are beyond the issues of this proceeding.

At present, so respondent testified, transportation is performed exclusively under contracts entered into between him and the shippers.. There are now some 41 contracts outstanding, of which 15 were received in evidence. Though formerly it had been the practice to negotiate oral agreements with some of the shippers, this is no longer true; all of these agreements, respondent stated, have been reduced to writing. Many of the existing contracts represent revisions of agreements previously in effect, designed to reflect changes mutually agreed upon and to comply with the Commission's rate orders. (6)

These agreements fall within two groups, i.e., those providing for transportation alone, and those authorizing respondent to purchase and transport goods for the shipper.

Considerable testimony was offered concerning the solicitation of traffic by respondent. The latter denied he had ever engaged in this practice. His testimony, however, was contradicted by that of a former employee who stated that pursuant to respondent's directions, he had solicited business throughout the peninsula area. (7) Corroboration of this appears in the testimony of six shippers who stated respondent had called upon them and requested their patronage. (8) Moreover, it

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(6) The contracts bearing date April 1, 1937, of which six were introduced, together with another dated April 3, 1937, (Exhibits Nos. 21, 22, 23, 30, 34, 36 and 37) manifest the influence of Decision No. 30370.

(7) Witness Max Wilbur, who formerly had been employed by respondent, testified that between January and July, 1938, and particularly during the last three months of this period, he had solicited business for respondent at the latter's direction. As a result, he had succeeded in obtaining traffic from some of the shippers in the territory served by respondent. This evidence stands unimpeached in the record, unshaken by cross-examination.

(8) Such was the testimony of witness R.R. Howry, traffic manager for Blake, Moffat & Towne of San Francisco; John E. Briel, manager of the Purity Candy Company, San Francisco; Richard K. Hubbard, Nash Motor car dealer of Palo Alto; J.M. Mundell of Mundell Paper Company, San Jose; Mr. Hartman, an automobile parts dealer of Palo Alto; and J.T. Roi, an office supply dealer of Palo Alto.

appears that respondent, in September, 1934, when he first established this business, broadcast to the shippers generally a circular letter describing the nature of his service and soliciting their business. (9) But subsequently, and in particular during the year immediately preceding the hearing, respondent engaged in no such widespread solicitation. Most of his patrons, it appears, called upon him and requested that he undertake the transportation of their traffic. Many of his present shippers, it was shown, first heard of respondent through others whom he had served. (10)

Though respondent does not appear to have indulged in any widespread solicitation of business, he has not entirely abstained from this practice. It is impossible to reconcile his denial with the positive testimony of his former employee, Max Wilbur, that over a period of six months he had solicited traffic at respondent's direction. Wilbur was entirely disinterested; he was no longer connected with respondent. The shipper witnesses who testified that respondent had called upon them and requested their patronage were likewise disinterested. Weighing this conflicting testimony, as we must, in the light of these circumstances, we find the fact to be that respondent has engaged in the solicitation of traffic from shippers with whom he was willing to enter into contracts for transportation. In this respect he has held himself out as willing to serve the public generally. By this means, he has, in part, developed his business to its present volume.

Respondent has emphasized the fact that on many occasions he has rejected traffic tendered him by would-be shippers. In corroboration of his testimony to this effect, he offered a record of rejected

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(9) Exhibit No. 44

(10) Some 11 public witnesses testified that applicant's service had been recommended to them by other shippers than patronizing him, and they had requested respondent to call upon them with a view to discussing arrangements under which he could serve them.

shipments, said to have been kept in the ordinary course of business, extending back as far as February, 1937. This appears in two books,<sup>(11)</sup> which contain entries naming the persons by whom the shipments were tendered, specifying the dates, and describing the circumstances under which the offers were refused. To a large degree, the entries appearing in these books are duplications. A typewritten summary of these entries covering the period extending from February, 1937 to August, 1938 was also received,<sup>(12)</sup> but this is incomplete, since the notebooks contain in addition entries relating to shipments offered during August and September, 1938.

Making due allowance for the numerous inaccuracies appearing on the face of this record,<sup>(13)</sup> an analysis of the entries discloses that a preponderance of the tendered shipments were rejected because they were of a casual nature.<sup>(14)</sup> Traffic of this character obviously

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(11) Exhibits 41 and 42.

(12) Exhibit 43

(13) Both of these notebooks (Exhibits 41 and 42) contain many inaccuracies. Entries which apparently relate to the same transactions are often inconsistent and sometimes bear different dates. Frequently the dates do not appear in any consecutive order; obviously, they could not have been made when the inquiries were actually received, thus lending credence to the conclusion that these entries were copies rather than originals. At best this record is merely self-serving.

(14) The summary contained in exhibit 43 covers the period, February 25, 1937, until and including August 4, 1938--approximately 18 months. Though exhibit 41 contains some entries--24 altogether--covering refusals of business which occurred following August 4 and extending to September 26, 1938, these have been omitted in the following computations. During this 18-month period, as shown by exhibit 43, 260 shipments were rejected. While exhibits 41, 42 and 43 do not always disclose clearly the reasons for the alleged rejections, and in some instances the reasons appearing in these exhibits are inconsistent, an analysis of these exhibits discloses that of the total number, 189 shipments were rejected because of their casual nature, 4 because the prospective traffic was insufficient to justify the execution of a contract, 6 because of the absence of a contract and the shipper's objection or refusal to enter into one, 2 because of the shipper's objection to the rates, 6 because respondent did not serve the points between which the shipper desired to have his traffic transported, and 53 for other reasons.

(15)

would be unprofitable to handle. It readily may be understood why a carrier would not be willing to enter into a contract with any shipper whose business was so uncertain and unreliable.

Considering the nature of the shipments offered, it is not at all remarkable that respondent rejected them. They were of such a character that their acceptance would stamp him indelibly as a common carrier. Since respondent's name appeared in the telephone directory, it is not surprising that in the ordinary course of business a considerable number of calls for service were received. In view of the circumstances disclosed by the record, little weight can be attributed to these refusals of business.

Respondent's relations with the shippers were governed, so he testified, wholly by written contracts of which there are now some 41 outstanding. Of these, fifteen, executed during the period extending from April 1, 1937, to March 1, 1938, <sup>(16)</sup> were received in evidence. They were cast in varying molds, some stipulating for the performance of transportation only, while others provided for a purchasing service as

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(14) (Continued)

Of the shipments tendered, 189, or 72.7 per cent of the total were rejected because they were of a casual or sporadic nature. Over this period there were approximately 14.4 refusals per month for all the reasons shown, or, on the basis of 25 working days per month, 0.577 per day. Exhibit 43 discloses that 24 shippers tendered 57 of the rejected shipments. Allowing for those duplications, it appears that during the 18-month period, 260 shipments tendered by 203 separate shippers were rejected, or an average of 11.3 shippers per month.

(15) Respondent asserted he had not accepted isolated shipments for transportation; on the contrary, he required some assurance there would be a constant flow of traffic.

(16) Exhibits 21, 22, 23, 30, 36, and 37 were executed April 1, 1937; exhibit 34, on April 3, 1937; exhibits 16 and 27 on June 28, 1937; exhibit 11 on July 1, 1937; exhibit 18 on January 10, 1938; exhibits 8 and 39 on February 1, 1938; and exhibits 10 and 14 on March 1, 1938.

well. Variations appear not only between these two classes, but also in the contracts falling within each group.

In form, most of these contracts are sufficient to impose upon both carrier and shipper alike mutual and binding obligations. This cannot be said of the contracts between respondent and Claude Goodman,<sup>(17)</sup> and Hobbs Battery Company,<sup>(18)</sup> respectively, each of which seems to lack the essential elements of mutuality. However, respondent's status as a carrier, whether common or private does not hinge upon the legal sufficiency of these contracts. If respondent is willing, to the extent of his facilities and within the limitations of his equipment to serve anyone who will comply with the requirement that he enter into a contract governing the performance of the transportation, he is none the less a common carrier even though he may refuse to serve those who will not enter into such an arrangement. The execution of the contract is merely a condition imposed by respondent upon all who would avail themselves of his service. Those who comply with this condition comprise the class he is willing to serve. This being so, the presence or the absence of a contract, under the circumstances here shown to exist, is not of controlling importance in determining whether or not respondent is holding himself out as a common carrier.

As this Commission has said:

"It is obviously not a prerequisite that, to be classed as a common carrier, one must undertake to serve all persons without limitation of any kind as to the place where his services are given or the class of goods which he professes to haul. Neither does a limitation imposed regarding the number of shippers served, or the requirement of an express contract in each case prior to the rendition of the service, necessarily fix a carrier's operations as purely private. In other words, if the particular service rendered by a 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."

Re Jack Hiron, 32 C.R.C. 48, 51.

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(17) Exhibit 34

(18) Exhibit 8

And our Supreme Court, commenting upon its decision in Haynes v. MacFarlane, 207 Cal 529, pointed out that the position of the defendant therein, who claimed to be transacting business as a private carrier under special contracts, would have remained unchanged had he carried on his business without these contracts.

As to this, the Court said:

"It was the manner in which he carried on his business that determined his status as a common carrier and not the fact that he was transacting business with his customers under a written contract."

Forsyth v. San Joaquin Light & Power Corporation, 208 Cal 397, 408, 409.

It is not necessary here to consider the extent to which respondent has observed or has failed to comply with the obligations which these contracts purport to impose upon him. This might become important in those cases where it is shown that the respondent apparently is operating as a highway contract carrier pursuant to contracts executed with his patrons. There, it is pertinent to inquire whether he or the shippers actually are living up to the terms of those agreements. If the contracting shippers, to the knowledge of the carrier, fail to observe the provisions of their agreements, his acquiescence in such a breach points to the conclusion that the stipulations of the contract binding the parties to the performance of certain obligations, are but a sham designed to disguise a common carrier masquerading as a contract carrier. The presence or the absence of a protest on the carrier's part, is indicative of the true value which he places upon these agreements; his failure to object to a wilful breach by the shipper, which has been brought to his attention, discloses the light regard he holds for his assumed status as a private carrier. In short, this goes to the question of his good faith. But where, as in the present investigation, the evidence establishes a general holding out on the part of the carrier to serve such persons as choose to employ him, we shall not undertake to inquire into the performance of the contracts.

The evidence wholly failed to show that respondent had exacted transportation charges predicated upon rates below the minimum rates established by the Commission. A check made by the Commission's inspector of some 210 items revealed that in only two instances had any undercharges resulted and these aggregated but sixty-four cents. This record does not justify a finding that respondent has wilfully violated the Commission's rate orders.

From the foregoing summary of the evidence, it appears that over a period of four years respondent has steadily increased his business from four patrons to forty-one, and his equipment likewise has been increased from one unit to three. To a substantial degree, this traffic has been secured by the solicitation of prospective customers. Though respondent has rejected many shipments which have been offered, these were of so casual a nature that they could not have been handled profitably. In the main, the contracts negotiated by respondent have been sufficient to impose upon both shipper and carrier alike obligations which are mutual and binding. For the most part, these obligations have been observed by the shippers; diversion of traffic to other carriers has not been a regular practice.

The record, however, discloses a willingness upon respondent's part to enter into an agreement with any shipper having a substantial volume of tonnage to be moved. This he has done within the limits of his equipment, and to the extent of his capacity to handle the traffic. Because of the liberal provisions of the form of contract employed, permitting as it does a term of but a few months, respondent obviously has experienced no difficulty in inducing shippers to bind themselves to use his service in accordance with its requirements. Essentially, respondent undertook to serve a class of shippers able to offer a substantial volume of traffic which could move continuously throughout the year. Thus he has "skimmed the cream," leaving to the common carriers within this field, operating both by highway and by rail,

(19)  
the less profitable traffic. If operations of this character are to be deemed immune from certification under the provisions of section 50-3/4, Public Utilities Act, there would then arise a type of common carrier free to handle the most lucrative traffic, leaving to the other carriers, who have assumed the burdens and obligations attendant upon certification, the crumbs which remain.

From this record it is clear respondent has undertaken to serve any shipper willing to meet his rather nominal requirements. Subject only to the limitations imposed by the carrying capacity of his equipment and his choice of commodities, respondent has held himself out as willing to enter into a contract with any shipper having a substantial volume of tonnage to transport.

We are of the opinion, therefore, and we hereby find as a fact that respondent's operations have been those of a highway common carrier, conducted without certification or other authority of any character. Though respondent will be required to discontinue such operations, we are not disposed upon this record to revoke the permits which have been issued to him under the Highway Carriers' Act and the City Carriers' Act. We are convinced that respondent has conducted these operations in good faith in the belief that they were lawful. Were this not so, we would direct a suspension of his permits.

An order of the Commission directing the suspension of an operation is in its effect not unlike an injunction by a court. Violation of such order constitutes a contempt of the Commission. The California Constitution and the Public Utilities Act vest the Commission with the power and authority to punish for contempt in the same manner and to the same extent as courts of record. In the event a person is adjudged guilty of contempt, a fine may be imposed in the amount of \$500 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;

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(19) The record shows that this territory is served by five certificated highway common carriers; Pacific Greyhound Lines provides a daily express service; and Southern Pacific Company and Railway Express Agency, Inc., provide a daily service.

re Ball and Hayes, 37 CRC 407; Wermuth v. Stamper, 36 CRC 458;  
Pioneer Express Company v. Keller, 33 CRC 371

O R D E R

The above entitled case having been duly heard and submitted and the matter being ready for decision, and the Commission now being advised in the premises,

IT IS HEREBY FOUND that Wayne F. Maloney, operating under the fictitious name and style of Peninsula Motor Express, is operating as a highway common carrier as defined in section 2-3/4 of the Public Utilities Act with common carrier status between fixed termini or over regular routes, over public highways between San Francisco, on the one hand, and Mountain View, Palo Alto, Redwood City, San Mateo and Burlingame, on the other hand, between said termini, respectively, and intermediate points and between points intermediate to said termini without first having secured from this Commission a certificate of public convenience and necessity or without 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: Wayne F. Maloney, an individual, operating under the fictitious name and style of Peninsula Motor Express, cease and desist, directly or indirectly, or by any subterfuge or device, from operating as a highway common carrier between any or all of the following points, to wit: San Francisco, on the one hand, and Mountain View, Palo Alto, Redwood City, San Mateo, and Burlingame, on the other hand, between said termini, respectively, and intermediate points and between points intermediate to said termini unless and until he has first obtained from the Commission a certificate of public convenience and necessity authorizing such operations.

IT IS HEREBY FURTHER ORDERED that in all other respects the above entitled proceeding be and it is hereby dismissed.

The Secretary of the Railroad Commission is directed to cause personal service of a certified copy of this decision to be made upon said respondent, Wayne F. Maloney, and to cause certified copies thereof to be mailed to the District Attorneys of San Francisco, San Mateo, and Santa Clara Counties and to the Department of Motor Vehicles, Highway Patrol, at Sacramento.

Dated at San Francisco, California, this 8<sup>th</sup> day of August, 1939.

Richard W. Quinn  
Frank D. Miller  
W. H. Baker  
Justus J. Cameron  
Commissioners