Decision No. [illegible]

BEFORE THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA

CALIFORNIA MILK TRANSPORT, INC., a corporation,

Complainant,

vs

STANDARD TRUCKING COMPANY, INC., FIRST DOE, SECOND DOE, THIRD DOE, FIRST DOE CORPORATION, SECOND DOE CORPORATION and THIRD DOE CORPORATION,

Defendants.

ORIGINAL

Case No. 4373

REGINALD L. VAUGHAN and CHARLES C. STRATTON, for Complainant.

GERALD WILLIS MYERS, G. B. HUGHES and TENNY & HALVA, by Allen Keith Halva, for Defendants.

BY THE COMMISSION:

O P I N I O N

By complaint filed herein by California Milk Transport, Inc., on November 2, 1938, defendant, Standard Trucking Company, Inc., is charged with operating as a highway common carrier, as such term is defined in sections 2-3/4 and 50-3/4 of the Public Utilities Act, usually and ordinarily, between Huntington Park, Bell, Southgate, Lynwood, Compton, Long Beach, Downey, Clearwater, Bellflower, Rivera, Santa Fe Springs, Norwalk, Artesia, Buena Park, Cypress, Stanton, Westminster and Gardon Grove, and the vicinity thereof, on the one hand, and the city of Los Angeles, on the other hand, without a certificate of public convenience and necessity or other operative right which would authorize defendant to operate as a highway common carrier,

In the answer of defendant filed on the 28th day of November, 1938, it is admitted that an operation is conducted between these points, but the contention is made that such operation should be classified as that of a highway contract carrier as such term is defined in the Highway Carriers' Act, Statutes of 1935, Chapter 223, as amended, rather than as a highway common carrier as defined in Section 2-3/4 of the Public Utilities Act.

On the issues thus raised a public hearing was held before Examiner Paul at Los Angeles, on December 20, 1938, and January 17 and 18, 1939, at which evidence was introduced and the matter having been submitted upon the record and concurrent briefs, which were filed on February 25, 1939, is now ready for decision.

During the course of the hearing evidence was introduced by complainant with respect to certain alleged operations by defendant from particular points which were not set forth in the complaint. This evidence was permitted in the record over the objection of defendant. However, in the determination of this proceeding consideration has been given exclusively to, and the conclusions and finding based solely upon, the record adduced upon the issues as raised in the complaint.

By its answer defendant alleges that the operations conducted by it between the points mentioned in the complaint do not require a certificate of public convenience and necessity in that they are private contract carrier operations as distinguished from highway common carrier operations.

At the conclusion of complainant's showing defendant submitted the case without any testimony in defense of the complaint.

It was shown through the testimony of Mrs. B. F. Anslyn, office manager of Standard Creamery Company, the plant of which is located at 7016 Avalon Boulevard, Los Angeles, that defendant had delivered milk in cans at such plant during the period from about January 16, 1938, to and including December 1938, and that the origins of most of such shipments were at, or in the vicinity of, Compton, Buena Park, Norwalk, Hynes, Bellflower, Artesia, and Long Beach.

She further testified that during the period from about January 16, 1938, to August 1, 1938, her company had an oral agreement with defendant under which such milk was transported; that during the month of July 1938 such agreement was terminated upon the receipt of information that any agreement in regard to such transportation should be between the shipper and the carrier. She also testified that her company paid to defendant the transportation charges on such shipments at the rate of 10 cents per can which charges, with the consent of the shippers, were deducted from the remittances to said shippers of the purchase price of the milk received. It was further shown through the testimony of Mrs. Anslyn, and the evidence of record, that defendant had transported the milk of the following named persons, among others, from their dairies to the Standard Creamery at Los Angeles, during the months of 1938 as indicated:(1)

August	September	October	November
J. Bokma	A. Zualet	L. Crevalin	L. Crevalin
F. Thompson	J. Bokma		
A. Zualet	L. Crevalin		
L. Crevalin	F. Thompson		

The record also shows that the dairies of these shippers are located in the producing area indicated in the complaint. In addition, witness Sleger testified that defendant was transporting his milk from his dairy at Bellflower, to Standard Creamery, at Los Angeles, up to the latter part of August 1938 and that he had no contract with the defendant.

At the outset of the hearing in this proceeding, counsel for defendant stated that some months previously a representative of the Railroad Commission had informed defendant that its operations were being conducted illegally as a highway common carrier, and that immediately thereafter (presumably August 1, 1938) defendant had reformed its operations so as to fully comply with the requirements

(1) Exhibit No. 18.

of the law. Counsel further stated that, however, thereafter, between the points mentioned in the complaint, defendant had entered into eight (2) written contracts with shippers for the transportation of milk and that these were the only operations which it had conducted between these points after the date of reformation.

It was shown that the first alleged contracts that defendant had with its shippers for the transportation of milk between the points set forth in the complaint were five in number, each of which is dated August 1, 1938. (3) It was further shown that subsequent to August 1, 1938, three additional alleged contracts were entered into between defendant and shippers, for the transportation of milk between points set forth in the complaint, which were dated September 3, 1938, September 26, 1938, and October 25, 1938, respectively. (4) These, presumably, are the eight contracts to which counsel for defendant made reference when he stated that defendant had reformed its operations from that of an alleged common carrier to that of a private contract carrier. August 1, 1938, appears to be the date of reformation as that is the first date appearing on any of the contracts which are of evidence and considered herein.

It was not shown nor did defendant contend that the transportation provided for Bokma, Thompson, Zualet, Crevalin and Sleger was provided under a private contract. It follows, therefore, that, contrary to the statement of counsel for defendant, subsequent to August 1, 1938, defendant has transported milk for compensation between points set out in the complaint for Bokma, Thompson, Zualet, Crevalin and Sleger, in addition to those for whom it was alleged that defendant was providing service under contract (see footnote 2).

---

(2) The eight shipper witnesses for whom defendant was transporting under contractual arrangement were: Bartsma, VanderMuellen, Snyder, DeVries, Cardoza, VandenBerg, VanderPol and Plooy-Brandsma.

(3) Exhibits Nos. 10, 12, 15, 16 and the testimony of H. VanderMuellen.

(4) Exhibits Nos. 11, 13 and 14.

One claiming to be a private contract carrier should have a mutually binding, bilateral, contractual relationship with those whom he serves. Even if it were assumed that the only patrons served by the defendant are the eight with whom it has alleged contracts, nevertheless, such contracts must meet the test required as a legitimate bona fide contract. Upon such assumption defendant may not escape regulation by obtaining eight identical contracts which are subject to cancellation upon the mere whim of either party thereto. The contracts between defendant and these eight shippers fall short of constituting a mutually binding, bilateral relationship which is required of a person contending to be a private carrier. The form of these contracts as introduced by the witness Bartsma (Exhibit 10) provides for the transportation of milk from points of origin within the territory embraced in the complaint to the creamery located at Los Angeles purchasing said milk; provides for a rate "as established and fixed by the Railroad Commission of the State of California;" has a specified term of five years but is "subject, however, to the right of either party to cancel and terminate this agreement for any reason whatsoever, at their sole discretion, upon giving notice in writing to the respective parties thereto of fifteen (15) days prior to the termination thereof."

This form of contract is subject to these infirmities:

Despite the recital that the contract will run for a term of five years such term is only a fifteen days' period because it may be terminated by either party for any reason whatsoever by the giving of a written fifteen days' notice.

The rates specified are those "established and fixed by the Railroad Commission of the State of California."

The Commission has not, to date, established and fixed any rate for the transportation of milk by radial highway common, highway

contract, or highway common carriers between the points named in each contract. This being so, the contracts, and each of them, are indefinite because no definite rate was stated in the contract, mutuality of consent between the parties is lacking as to an essential feature of the contract.

It is not possible for one to escape the requirement of obtaining a certificate of public convenience and necessity by merely showing that he has contracts for the transportation of property which may be cancelled within fifteen days "for any reason whatsoever, at the option of either party." During the period from January 1, 1938, to August 1, 1938, there were no contracts of carriage in existence between defendant and its shippers. An examination of defendant's operations during such period, as shown by the testimony of witness Anslyn, compared with a period subsequent thereto, definitely shows that there is no material change in the character of defendant's operations from and after August 1, 1938.

The existence of contracts does not necessarily disprove common carrier status, nor does it prove private carrier status. As was said in Producers Transportation Co. vs. Railroad Commission 251 U.S. 228 (affirming 176 Cal. 449):

> "A common carrier cannot by making contracts for future transportation, or by mortgaging its property or pledging its income, prevent or postpone the exertion by the State of the power to regulate the carrier's rates and practices." (Emphasis Supplied.)

Defendant's written contracts do not alter its common carrier status if they are being used merely as a means to escape regulation. And it is clear, both upon principle and authority, that if defendant's business is unlawful without contract, their existence do not make the operations legal. An analysis of the evidence

respecting these contracts and the conduct of the parties to them, give the contracts all the earmarks of sham and subterfuge.

Defendant's state of mind regarding the contracts is indicated by the testimony of witnesses Bartsma, VandonBerg, VanderMuellen, Snyder, VanderPol, Plooy and Cardoza.

Each of these witnesses testified that defendant's representative, Paul Gentle, called upon him and requested that he sign the form of contract which was presented by Gentle. Witnesses Bartsma, VanderMuellen, VanderPol and Plooy definitely stated that Gentle called upon them and that they had not requested him to do so. Witnesses Bartsma, VanderMuellen and Cardoza testified that Gentle told them that defendant had to have a contract with each of them in order to be able to haul their milk.

The testimony of witnesses VandenBerg and VanderPol shows that Gentle solicited their business in so many words. The fact that Gentle approached both of these shippers and requested them to sign contracts, constitutes active solicitation for business.

The form of contract used by defendant, as heretofore discussed, completely fails as private transportation contracts. The form is not suggestive of private contract designed for private transportation needs, but rather indicates some other purpose upon the part of defendant who prepared them.

The following quotation from Regulated Carriers vs. Federighi, Decision No. 27020, dated May 7, 1934, in Case No. 3701, seems peculiarly appropriate:

> "After advice by counsel, the defendant secured a large number of blank contracts which he presented to his customers and secured signatures thereon. These contracts were not drawn for any particular shipper but were simply carried by the defendant to

various shippers and presented with the object, as he stated, of being protected from interference. Such contracts have been heretofore held by the Commission to be a subterfuge."

From the testimony of the witnesses who signed the contracts it is apparent that they really mean nothing, and to defendant they are nothing but the badge of a private carrier, whereby defendant attempts to clothe its operations in the garb of legality. They constitute the keynote of defendant's entire method of operation and plainly brand that operation as a subterfuge. The status of a carrier is determined by what he does, not by whether he demands and obtains contracts from shippers. It has been so held repeatedly.

In re Jack Hirons, 32 C.R.C. 48.

Thornewell vs. Gregory, 31 C.R.C. 843.

Forsythe vs. San Joaquin, etc. Co., 208 Cal. 397.

Haynes vs. McFarland, 207 Cal, 529.

State of Washington vs. Kuykendall, 275 U.S. 207.

In the latter case it was said:

"A common carrier is such by virtue of his occupation, not by virtue of the responsibilities under which he rests. Even if the extent of those responsibilities is restricted by law or by contract, the nature of his occupation makes him a common carrier still. A common carrier may become a private carrier, or a bailee for hire, when, as a matter of accommodation or special engagement, he undertakes to carry something which it is not his business to carry. But, when a carrier has a regularly established business for carrying all or certain articles--it is a common carrier; and a special contract about its responsibility does not divest it of that character."

There are other circumstances of record that show clearly that defendant cannot be classed as a private contract carrier merely because of the existence of these alleged contracts, which may be appropriately characterized as sham and subterfuge. These circumstances are as follows:

(1) Paul Gentle, general manager of defendant company is, as the evidence shows as indicated by the testimony of Bartsma, VanderPol and Plooy, also a representative of the Standard Creamery Company. Mr. Gentle, in the course of his activities as such representative, would contract on behalf of said Standard Creamery for the purchase of the milk of a certain dairyman and would, at the same time, hand said dairyman a form of contract and advise him that his milk could be transported by the defendant corporation. This not only gives rise to an inference, but actually establishes as a fact that defendant is ready and willing to transport the milk of anyone who sells it to the Standard Creamery Company. Obviously, the defendant is willing, and holds itself out to serve that portion of the shipping public which will sell its milk to the Standard Creamery.

In re Jack Hirons, supra, it was shown that Hirons was transporting the property of the members of the association making their purchases from United Groceries, Inc. Property was transported from Fresno to the destination points of Hanford and Lemoore. Hirons' hauling was confined to the shipments of six member grocers and all shipments which originated at the United Grocery Inc. in Fresno. In that case, the Commission said at page 51:

> "A public or common carrier has been defined as one who undertakes for hire to transport from place to place the property of others who may choose to employ him. Some courts have said that a common carrier is one who holds himself out to carry goods of all persons indifferently. But the holding out which was so important a factor in earlier definitions seems to imply no more than the existence of a transportation business which may serve such persons as choose to employ it. 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. As was said in the matter of Lehigh Valley Transit Company (Pa.), P.U.R. 1928A, 606),

> 'If a carrier for profit is by circumstances available to a portion of the consignors and consignees in a given territory who are willing to make more or less the same arrangements as prevail with existing patrons, it can not be said that this carrier has so circumscribed his field of operations that he must be regarded as a private carrier.'"

(2) Defendant did not introduce any testimony in defense of the complaint. Counsel for defendant, in his opening statement and elsewhere in the record, contended that since August, 1938, defendant has operated between the points named in the complaint only under eight bona fide contracts and that all milk was shipped to a common destination, to-wit: to the Standard Creamery at Los Angeles. This is not true as shown by the testimony of witness R. E. Osbourne, through whom Exhibits Nos. 1 and 2 were introduced, showing, among other things, that during October of 1938 the milk of DeVries, Bartsma, Cardoza, Crevalin and VanderPol was shipped via the facilities of defendant, and sold to the Knudsen Creamery at Los Angeles. Osbourne, who is Assistant Production manager of Knudsen Creamery, testified that his creamery had no contracts with the defendant for the services performed; that all transportation charges were paid to defendant by said creamery; and that such charges were deducted from the remittances sent to the shipper and that all milk was purchased by said Knudsen Creamery f.o.b. its Los Angeles plant. The record shows that the dairy of De Vries is located near Hynes; that of Bartsma near Artesia; that of Cardoza near Cypress; that of VanderPol near Artesia; and that of Crevalin is located near Bellflower, all of which points are within the scope of the complaint.

(3) The evidence as shown by the testimony of the various shippers with whom defendant has contracts indicates in practically every instance that the contract was a result of the direct request or solicitation for the signing thereof by Mr. Gentle who, from the testimony, is field man for Standard Creamery Company and representative of defendant.

Exhibit No. 18 shows the varied career of defendant in connection with its transportation business. It appears to be very significant that no contracts between the defendant and the various shippers were ever assumed to be necessary until the date of the first contracts, approximately August 1, 1938. We feel that these purported contracts do not constitute so much the desire of the parties thereto to contract, as it was the desire of defendant to circumvent the jurisdiction of this Commission and to attempt to show that a certificate of public convenience and necessity was, and is, not required by it. In other words, by a few scraps of paper, the defendant assumes that it can avail itself of all the advantages of a common carrier but with none of the disadvantages.

(4) Counsel for defendant attaches some significance to the by-laws of the Independent Milk Producers Association, a copy of which was introduced in evidence. In so doing, he directed the attention of the Commission to Article XVII of those by-laws. Apparently, counsel for defendant assumes that the wording of this article places title to all of the milk produced by the members in the Association at the point of production. We fail to see how this article is material to the issues involved for these reasons: First, if title to all milk transported by defendant were in the Independent Milk Producers Association, then a service was performed by defendant for the association as distinguished from the producers. Why, then, did defendant enter into the contracts with the various producers? Second, Mr. McOmie testified emphatically that no contractual

relationship existed between the Independent Milk Producers Association, of which he is Assistant Secretary and Field Manager, and defendant. Third, the testimony of all witnesses indicated that payment to the producing dairyman by the creameries was remitted directly to said producing dairyman, from which remittance was deducted all transportation charges at the rate of 10 cents for each 10 gallon can of shipments originating at the producing point set forth in the complaint. Fourth, assuming that the existence of the Independent Milk Producers Association should be discussed at all in this proceeding, the contention of counsel for defendant in this respect is, in our opinion, fully and completely answered by the language of this Commission in the matter of Jack Hirons, supra, (32 C.R.C. p. 52):

> "*** The Contractor, as we may term the party entering into the agreement with the carrier, may be an association of persons which directly represents or serves its members or the public, and the carrier in such case serves the public just as much as though his arrangement had been with the individual members themselves. If the contractor is not himself the real owner of the goods and does not obligate himself to pay the transportation charges without recourse to others his part in the transaction is merely that of agent for the real shippers. Textile Alliance Co. vs. Keahon, 125 Misc. Rep. 400, 211 N.Y.S. 205; Davis vs. People, 79 Colo, 642, 247 Pacific 801; West vs. Western Maryland Dairy, 151 Md.__, 135 Atlantic 136; Terminal Taxicab Company vs. Kutz. 241 U.S. 252 60 L. Ed. 984; U.S. vs. Brooklyn Terminal, 249 U.S. 296, 39 Sup. Ct., 283; Chicago and E.I. Railway Co. vs. Chicago Heights Terminal. 317 Ill. 65, 147 Northeastern 566; Harlocker vs. Adams Transit Company, P.U.R. 1928A, 12."
> (Emphasis supplied.)

(5) As shown by the record defendant has never refused service to its shippers and defendant's service has always been available when these shippers have required it.

The record is clear and convincing, as we have shown, that defendant's service is open and available to all shippers of a class

which applicant serves and who desire to use it. It is also conducted usually and ordinarily between the fixed termini of Los Angeles, on the one hand, and Long Beach, Cypress, Buena Park, Artesia, Bellflower, Hynes, Norwalk, Clearwater, Compton and points in the vicinity thereof and intermediate thereto, on the other hand. Therefore, the operation is that of a highway common carrier. Defendant should be ordered to cease and desist such operations in the absence of a certificate of public convenience and necessity therefor.

An order of the Commission directing the suspension of an operation is in its effect not unlike an injunction 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 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; re Ball and Hayes, 37 C.R.C. 407; Wermuth v. Stamper, 36 C.R.C. 458; Pioneer Express Company v. Keller, 33 C.R.C. 371.

The following form of finding and order is recommended.

FINDING AND ORDER

Public hearing having been held in the above-entitled proceeding, evidence having been received, the matter having been duly submitted, and the Commission now being fully advised,

IT IS HEREBY FOUND that defendant Standard Trucking Company, Inc., a corporation, has been, and now is, operating as a highway common carrier, as that term is defined in section 2-3/4 of the Public

Utilities Act of the State of California, between Los Angeles, on the one hand, and Long Beach, Cypress, Buena Park, Artesia, Bellflower, Hynes, Norwalk, Clearwater, Compton, and points in the vicinity thereof and intermediate thereto, on the other hand, without first having obtained from the Railroad Commission of the State of California a certificate of public convenience and necessity authorizing such operations, or without other highway common carrier operative rights therefor, in violation of section 50-3/4 of said Public Utilities Act.

IT IS ORDERED that said defendant Standard Trucking Company, Inc., a corporation, shall immediately cease and desist from conducting or continuing, directly or indirectly, or by any subterfuge or device, any and all of said operations as a highway common carrier as set forth hereinbefore in the finding of fact, unless and until said defendant shall have obtained from the Railroad Commission a certificate of public convenience and necessity therefor.

The Secretary of the Railroad Commission is hereby authorized and directed to cause a certified copy of this decision to be served upon defendant.

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

Dated at San Francisco, California, this 6th day of February, 1942.

COMMISSIONERS