

Decision No. 22573

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, contracts,  
and practices of WILLIAM M. CAPEN. )

**ORIGINAL**  
Case No. 4360

HARRY A. ENCELL, for respondent

FRED N. BIGELOW, for Pacific Southwest  
Railroad Association

BY THE COMMISSION:

O P I N I O N

This is an investigation on the Commission's own motion into the operations, rates, charges, contracts, and practices of William M. Capen, respondent herein, for the purpose of determining whether or not he is or has been owning, controlling, operating or managing any motor vehicle used in the transportation of property for compensation over any public highway in this state between fixed termini, or over a regular route, viz., between Sacramento and North Sacramento, on the one hand, and State Line, Al Tahoe, Bijou, Fallen Leaf, Camp Richardson, Meyers, Echo Summit, Kyburz, Riverton, Vade, Twin Bridges, 46 Mile Post, Camp Sacramento, and intermediate points, on the other hand, as a highway common carrier, as defined by Section 2-3/4 of the Public Utilities Act, and by Section 1(g) of the Highway Carriers' Act (Stats. 1935, Ch. 223, as amended), without first having secured from the Railroad Commission a certificate of public convenience and necessity, and without possessing any other

operative right therefor, in violation of the provisions of Section 50-3/4(c) of the Public Utilities Act, and in violation of the provisions, conditions, and restrictions of radial highway common carrier permit No. 34-462 and of highway contract carrier permit No. 34-459 which previously had been issued to respondent by the Commission.

A public hearing was had before Examiner McGettigan on September 12, 1938, at Bijou Lodge, Lake Tahoe, and on March 20, 1939, at Sacramento, when evidence was received and the matter was submitted; it is now ready for decision.

At the hearing twenty-seven public witnesses testified and fourteen exhibits were filed. Included among the witnesses, all called by the Commission, were thirteen resort owners from the Lake Tahoe region, a number of retail merchants from the same area, and representatives of wholesale houses in Sacramento distributing throughout that territory.

The record shows that respondent, operating under the trade name of Lake Valley Truck, is now and for some time past has been conducting a tri-weekly seasonal motor truck transportation service, from approximately May to September, between Sacramento and the Lake Tahoe points enumerated, over the American Canyon Placerville route, on U. S. Highway 50.

The record further shows that a rather varied and comprehensive group of commodities has been transported, including groceries, paper products, electrical and plumbing supplies, fresh and smoked meats, produce, liquors, tobacco, dry goods, and sundry other commodities useful in and necessary to the conduct of a resort business. Respondent has also served various local merchants who cater

to such places of business, their patrons and employees, and the more permanent residents of the Lake Tahoe region.

Respondent formerly was employed by the El Dorado Motor Transportation Co., Ltd., a certified highway common carrier operating between Sacramento and Lake Tahoe resorts. Either in the fall of 1936 or the spring of 1937 respondent decided to go into the transportation business for himself, and, in the early spring of 1937, with the idea of developing such business, respondent called upon merchants and resort owners at Lake Tahoe and along the Sacramento-Lake Tahoe route via the American River Canyon and told them that he would operate a tri-weekly round trip service between Sacramento and Lake Tahoe resorts, and intermediate points where traffic was available for handling, and asked for their patronage. As hereafter pointed out, many of those having shipments originating at Sacramento or coming from Bay Area points via Sacramento, turned all or part of such traffic over to Capen for hauling, either out of friendship for him, or because of his active solicitation. It is significant that almost without exception those witnesses who testified to having entered into arrangements with respondent for hauling their commodities, had formerly dealt with El Dorado Motor Transportation Co., Ltd., and in many cases continued to give it some business after Capen commenced hauling for them.

That Capen actively solicited this business is not open to question. Several witnesses testified that they gave Capen all or part of their business after he approached them in the spring of 1937 and asked them to use his truck. Among these were Selden Willis, of Connolly's Bijou Inn, Meiger, an electrical supply and gasoline dealer of Bijou, Albert Martin, a general store resort owner of Riverton, on the highway to the Lake, Fred Spriggs, a resort owner, located about 36 miles east of Placerville, Al Eyburz, owner of Kyburz' resort, also on the American River Canyon Highway, and Harvey Gross, manager of the

Sacramento Meat Co., wholesale butchers, who promised to patronize respondent after Capen told him at Lake Tahoe that he was going into business for himself.

Other witnesses testified that they had heard of Capen's service and that when they saw him they requested him to haul for them. Such were Harold Matthias, of Echo Summit Lodge, who had known Capen for 25 years, Ralph Plimpton, a resort owner located 5 miles south of Bijou, who started using Capen's service following his brother's recommendation, H. F. Lewright, of the Grove Resort, and John P. Spencer of Twin Bridges Resort, 43 miles east of Placerville.

Several wholesale houses at Sacramento, in addition to the Sacramento Meat Co., also used Capen's service. J. E. Vanderhoff, sales manager of Bert McDowell Co., wholesale grocers, stated that while many shipments were transported by respondent during the 1936 season, several other carriers were also employed. On many occasions, routings were controlled by his customers, who preferred to use carriers of their own selection.

Reginald Tipper, shipping clerk for McKesson Robbins, Inc., Kirk-Geary Division, testified that respondent's service was used primarily to handle shipments of liquor requiring expedited delivery. Previously, he stated, this traffic was carried by El Dorado.

Edward Bummell and T. R. West, Y.M.C.A. executives connected with the summer camp located 96 miles from Sacramento, stated that following conversations with Capen, it was decided to give him practically all traffic moving to the Camp, because he delivered directly to the camp, as opposed to the roadside delivery rendered by other carriers, principally El Dorado.

Some 15 other shippers described the arrangements with respondent to transport their tonnage. Included among them were other Sacramento wholesale distributors, and grocers, bakers, plumbers, service station operators, and resort owners engaged in business at points in the Lake Tahoe region involved in this inquiry. These arrangements consisted generally of a proposal by respondent to transport all or a part of the prospective patrons's freight, to which the patron responded by turning over to respondent from time to time shipments over which the patron controlled the routing. It can hardly be said that such loose arrangements achieved the dignity of mutually binding contracts, but rather indicate that respondent would take whatever business he could get.

When respondent was offered patronage, either as a direct result of his solicitation or otherwise, the evidence shows it was his practice to present the prospective patron with a written form contract which he would request the patron to sign. In some cases the contract was signed by the patron. In other instances the patron refused to sign the contract, but respondent nevertheless rendered him service. There is no evidence that respondent ever declined to give service for that or any other reason. Eight of the contracts were introduced in evidence, and the terms of others, both written and oral, appear from the testimony of the shippers. In most instances the written agreements fail to describe the commodities to be transported or the tonnage to be handled. Under some agreements calling for the transportation of all shipments by respondent, the shippers turned over to him only a small percentage of their business, continuing to utilize the services of other carriers for the balance. From the shippers' standpoint these agreements, both written and oral, lacked vitality. Nothing in

the form or use of either the written or oral contracts in any manner qualified respondent's holding out as a common carrier so distinctly manifested by the other facts in evidence.

The record is clear that respondent's service is open and available to all shippers of a class which he serves and who desire to use it. It is also conducted usually and ordinarily over public highways between the fixed termini of Sacramento, on the one hand, and State Line, Al Tahoe, Bijou, Fallen Leaf, Camp Richardson, Meyers, Echo Summit, Kyburz, Riverton, Vade, Twin Bridges, 46 Mile Post, Camp Sacramento and points in the vicinity thereof and intermediate thereto, on the other hand, and over a regular route, viz., over the American River Canyon Route via Placerville, on U. S. Highway 50. The operation, therefore, is that of a highway common carrier.

A cease and desist order should issue, and, there being no extenuating circumstances, the attorney for the Commission will be directed to institute proceedings for the imposition of appropriate penalties.

An order of this 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. Section 1218; Motor Freight Terminal Co. v. Bray, 37 C.R.C. 224; re Ball & Hayes, 37 C.R.C. 407; Wermath v. Stamper, 36 C.R.C. 458; Pioneer Express Company v. Keller, 33 C.R.C. 371.

O R D E R

A public hearing having been had in the above-entitled matter, evidence having been received, the matter having been duly submitted and the Commission being now fully advised in the premises:

IT IS HEREBY FOUND that William M. Capen, an individual, operating under the fictitious name and style of Lake Valley Truck, the respondent herein, has been, since 1937, and now is operating a seasonal service as a highway common carrier, as defined by Section 2-3/4 of the Public Utilities Act, between fixed termini or over regular routes, to-wit, between Sacramento, on the one hand, and State Line, Al Tahoe, Bijou, Fallen Leaf, Camp Richardson, Meyers, Echo Summit, Kyburz, Riverton, Vade, Twin Bridges, 46 Mile Post, Camp Sacramento, and intermediate points, on the other hand, and over the public highways designated as U. S. Highways 50 and 40 and State Highways 28 and 89, without having first obtained from the Railroad Commission a certificate of public convenience and necessity, and without other highway common carrier operative rights therefor, in violation of Section 50-3/4 of the Public Utilities Act.

Based upon the opinion and findings herein,

IT IS HEREBY ORDERED that respondent, William M. Capen, an individual, operating under the fictitious name and style of Lake Valley Truck, 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 findings of fact, unless and until he shall have obtained from the Railroad Commission a certificate of public convenience and necessity therefor.

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, William M. Capen, and to cause certified copies thereof to be mailed to the District Attorneys of Sacramento and El Dorado Counties 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 respondent.

Dated at San Francisco, California, this 16<sup>th</sup> day of April, 1940.

Ray A. Berry  
Frank Dwyer  
Justice J. C. Quinn  
COMMISSIONERS.