Decision No. 33743

BEFORE THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA

SOUTHERN CALIFORNIA FREIGHT LINES, a corporation,

Complainant,

vs.

MARIO PASTRONI, JR.,

Defendant.

Case No. 4471

ORIGINAL

H. J. BISCHOFF, for complainant.

PHIL JACOBSEN, for Dairy Delivery Service, Intervenor on behalf of complainant.

C. C. STRATTON, for California Milk Transport, Intervenor on behalf of complainant.

WILLIAM BROOKS, for The Atchison, Topeka and Santa Fe Railway, Intervenor on behalf of complainant.

T. P. HOGAN, for defendant.

BY THE COMMISSION:

O P I N I O N

The complainant is a certificated highway common carrier, and charges the defendant, Mario Pastrone,(1) an individual, with unlawfully engaging in the business of transporting property as a highway common carrier, for compensation, over the public highways of the State of California between fixed termini or over regular

(1) It was stipulated by defendant's attorney at the hearing that the defendant's name had been misspelled in the title of the complaint and answer, and that the defendant's name is Mario Pastrone. Defendant's counsel further stipulated that the pleadings could be deemed amended accordingly.

routes, to-wit: between San Jacinto and Hemet, on the one hand, and Los Angeles, on the other hand. The defendant filed a formal answer denying the allegations of the complaint and alleging by way of defense that the defendant is engaged in the business of transporting milk for a group of independent milk producers in San Jacinto and Hemet, collectively engaged in a limited partnership business under the fictitious name of San Jacinto Milk Producers Co-operative Milk Hauling Association,(2) and that the defendant is not engaged in the business of transportation for hire, as a common carrier for the public over the public highways of the State of California.

The case was heard on March 20, 1940 before Examiner Broz at Los Angeles. At the conclusion of the hearing, the matter was submitted on the record, and is now ready for decision.

The complainant offered as its first witness, a milk shipper engaged in the dairy business at San Jacinto, who ships about thirty cans of milk daily to Los Angeles. The witness stated that there are seven shippers in San Jacinto and one shipper in Hemet who use the trucking service of the defendant to Los Angeles every day, including Sundays and holidays. These shippers, according to the witness, entered into a co-operative milk hauling agreement(3) with the defendant on May 25, 1939, under which the defendant agreed to transport their milk shipments to Los Angeles by motor vehicle for 16 cents per ten gallon can, and return the empty cans free of charge. The name adopted jointly by the shippers and the defendant was "San Jacinto Milk Producers Co-operative Milk Hauling Association." The witness stated that a short time after the

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(2) The name of this Association has since been changed to San Jacinto Milk Hauling Association.

(3) Exhibit No. 1 received in evidence.

agreement was signed, the defendant began to haul milk for the eight shippers from San Jacinto and Hemet to Los Angeles and that he has continuously rendered this transportation service up to the present time. The shippers who signed the agreement contributed the sum of $1.00 each to the purchase price of the defendant's truck, the defendant having made a $500 down payment thereon. Thereafter, the defendant continued to make payments on the truck from the revenues received for hauling milk for the members of the Association.

According to the witness, the agreement of May 25, 1939 was unsatisfactory to certain shipper members of the Association because it provided that in the event of dissolution of the Association, the truck purchased by the defendant and used to transport the members' shipments would revert to and become the property of the shippers. A new agreement was therefore entered into with the defendant on July 10, 1939, entitled "Limited Partnership of San Jacinto Milk Producers Co-operative Milk Hauling Association," under which the defendant became a general partner and the eight shippers became limited partners.(4) The principal place of business of the partnership was located at 1234 West 5th Street, Pomona, California, which is also the place of residence of the defendant. The limited partners bound themselves to contribute the sum of $1.00 each to the capital of said partnership; they agreed to have their milk hauled by the Association and agreed to pay to the Association the sum of 16 cents for each ten gallon can of milk so hauled, the amount of

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(4) Exhibit No. 2, the articles of limited partnership introduced in evidence, states in paragraph 2 thereof as follows:

"The character of the business and the purpose of said partnership is to haul milk for its members from their dairies to the plants of distributors who purchase said milk and to acquire and own a truck or trucks and other equipment recuired for such purpose." (Emphasis supplied)

said payments to be deducted from the milk checks of the limited partners by the buyer or buyers of said milk and paid by the latter directly to the general partner, i.e. the defendant. The second agreement also required the defendant as a general partner, to devote all of his time and effort to the active management and operation of the business of the said partnership; to procure and maintain workman's compensation insurance for employees of the partnership; to procure public liability and property damage insurance on equipment maintained by the partnership. The agreement moreover provided in paragraph 12 that:

> "The general partner shall contribute to said partnership assets his equity in the Chevrolet delivery truck which he is now purchasing and using in said business. The balance of the purchase price of said truck and payment of all other obligations and indebtedness incurred by said partnership shall be made from the receipts for milk hauled by the Association."

For his services as general partner, the defendant agreed to accept the net profits from the business after payment of all indebtedness and obligations of the partnership and the limited partners agreed to receive no share of said profits with the understanding that:

> "The principal benefit accruing to the limited partners from their membership in the Association is the lower than prevailing rate at which they will be able to have their milk hauled."

The agreement assertedly created the partnership for a period of ten years, but it also carried a provision for dissolution by the general partner or any three limited partners upon thirty days written notice to each of the other partners. Upon dissolution, the limited partners would receive back the $1.00 contribution which they originally made, but the remaining assets of the partnership, namely the trucks and other tangible and intangible property of the partnership would become the property of the general partner, i.e., the defendant herein.

It was testified that the proposed partnership agreement was discussed with an attorney for certain milk buyers in Los Angeles. Said attorney advised the shippers that the agreement would be legal and that the transportation service to be rendered by the defendant for the limited partners would be outside the jurisdiction of the Commission and not subject to its regulation, provided the shippers had a "financial interest" in the trucking equipment. For that reason, the members agreed to contribute the sum of $1.00 each toward the purchase price of a truck. The witness commenting upon this feature testified:

> "The reason we did not like the first agreement was because it provided that the truck would become the property of the Association upon dissolution of the partnership. We did not want to own a truck because we don't want to be liable for bills or insurance or other expenses and because the ownership of a truck by the shippers was not contemplated in our original understanding with Mr. Pastrone."

In September, 1939, the defendant's charge for hauling milk was increased from 16 cents to 20 cents per can, without amending or modifying the partnership agreement and without holding a meeting of the members of the partnership, according to the witness.(5) He stated, however, that it was generally understood by all the shippers that the increase in rate was necessitated by virtue of the defendant's increased operating expenses due primarily to the fact that defendant had been compelled by the State Board of Equalization to procure B.E. license plates and to pay a 3 per cent gross receipts tax upon revenues received from hauling milk for the members of the partnership subsequent to June 21, 1939.

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(5) The rate was recently reduced by defendant to 18 cents per can in the same manner.

Upon cross examination, the witness conceded that in April, 1939, the defendant had solicited the transportation business of all the milk shippers in San Jacinto and had offered to haul their milk for 16 cents per can, and that he had asked for a contract for one year to protect himself.

The next witness called by the complainant was an employee of the Commission's transportation staff in Los Angeles, who testified that no permits had been issued to the defendant or to the Association authorizing the transportation service involved, and moreover, that no certificate of public convenience and necessity had been issued to either of said parties authorizing them to engage in truck transportation service as a highway common carrier. Upon cross examination by defendant's attorney, the witness stated that defendant had applied to the Commission for a permit to operate as a highway contract carrier, using the name of the San Jacinto Milk Hauling Association as applicant, and had presented such application to the Commission for filing on January 25, 1940,(6) but that defendant was informally advised at that time that a permit was not required in so far as his operations were concerned. The witness also admitted that thereafter a citation had been issued to defendant requesting him to appear at the Commission's Los Angeles office on February 5, 1940 to discuss the nature of his operations with a representative of the Railroad Commission, and that prior to the latter date, the defendant's attorney was advised by telephone that it would not be necessary for the defendant to appear in answer to the citation in view of the pending complaint proceeding.

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(6) Exhibit No. 3 in evidence.

The foregoing testimony completed the complainant's case and defendant's attorney thereupon moved that the instant complaint be dismissed upon the ground that complainant had not proved that defendant had been or is now engaged in the business of transporting property as a common carrier, for compensation, over the public highways of the state, between fixed termini or over a regular route. This motion was taken under advisement by the presiding examiner, whereupon the defendant's attorney called the defendant to testify in his own behalf.

The defendant testified that the truck used by him is registered with the State Department of Motor Vehicles in the name of the San Jacinto Milk Hauling Association, and that he does not haul milk in said truck for any persons other than members of the Association who signed the second agreement of limited partnership. His operations started on about June 1, 1939 and in September, 1939 he opened a bank account with the Bank of America at Pomona in the name of the Association, having first secured signature cards from the various members. He stated that he has full charge of the transportation operations and financial affairs of the Association and is the only member authorized to issue checks and deposit money in said bank account. The defendant testified that the Association now operates two trucks and that he hauls for all milk shippers located at San Jacinto and Hemet; that he, personally, paid the sum of $500 as a down payment on the first truck, and that the remaining payments thereon were paid or are being paid from revenues received for hauling milk for members of the Association. He alleged that when the trucks are fully paid for, they will belong to the Association, but qualified this assertion by stating that in the event of a dissolution of the partnership the trucks would belong to him. He asserted that

he manages the affairs of the Association and keeps the books and records of trucking operations and revenues. His truck makes daily pickups of milk shipments in San Jacinto and Hemet at 11:00 P.M. each night and delivers said shipments to the Beverly Hills plant of the Arden Dairy in Los Angeles at 4:30 A.M. the following morning. His truck travels over regular highway routes and between the same points every day, including Sundays and holidays. The Arden Dairy Company mails checks twice a month to each milk shipper in payment for the milk transported to the dairy by the defendant. The Arden Dairy deducts from each shipper's check the amount of the transportation charges for transportation rendered to each shipper by the defendant, and mails a separate check to the defendant for the total amount of the transportation charges of all the shippers. The defendant then deposits this check in the bank in the name of the Association, and later withdraws money against said deposit to pay for current operating expenses, payments on trucks purchased, and to reimburse himself for services rendered for the Association.(7) Under the present arrangement the defendant regards the bank account as his personal property after operating expenses, maintenance and fixed charges are paid, and no report of these expenditures is made to any shipper member of the Association, nor do the shippers have any equity in said bank account.

The next witness called by the defendant is also a member of the Association engaged in the dairy business in San Jacinto. He testified briefly that the first and the second agreements referred to above were entered into by the milk shippers of San Jacinto and

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(7) Upon cross examination, the defendant stated that during the first three months of his operation, namely in the months June, July and August, 1939, there was no bank account and the defendant collected the transportation charges and retained them after paying operating expenses. At that time the balance of the revenues received for transportation service were regarded by him as his own money.

Hemet to save transportation charges and to secure better transportation service. Following his testimony, counsel for defendant made a brief oral argument in support of his motion to dismiss the complaint and argued that neither the defendant nor the Association have conducted any operations as a common carrier and that the defendant if subject to the jurisdiction and regulation of the Commission, is a highway contract carrier and that in any event the complaint should be dismissed. The complainant submitted the matter on the record without argument.

Upon this record we must first determine whether this operation is being conducted by the defendant as a carrier or whether, as defendant contends, he is engaged as a general partner in transporting property of the purported partnership in its equipment.

We are of the opinion that the record clearly establishes respondent to be engaged on his own in conducting a carrier service and that the agreement of July 10, 1939, purporting to create a limited partnership, is in fact no more than a hauling contract entered into between the defendant as carrier and the so-called limited partners as shippers.

The record shows that the defendant originally solicited the shippers to use a transportation service which he proposed to establish and operate. The so-called limited partners testified that they did not intend to possess any interest in the equipment used to haul their products. Nor did they intend to become responsible for any of the expense incident to such transportation. It is thus apparent that what the defendant originally proposed to the shippers was to transport their property for them. Simply stated, both the

shippers and the defendant desired that the defendant should haul their milk at 16 cents per ten-gallon can and that they, the shippers, should assume no responsibility for or in connection with such transportation other than to pay the agreed hauling charge, but that the defendant, in so operating, should not be subject to the jurisdiction of the Railroad Commission. The design to evade the Commission's jurisdiction is clearly evident from the testimony of one of the shipper witnesses to the effect that the attorney who drew the so-called partnership agreement advised that the transportation service to be rendered by the defendant under the agreement would be outside the jurisdiction of the Commission and not subject to regulation so long as the shippers held some interest in the truck.

That the agreement of July 10, 1939, can have no effect except as a transportation contract is clearly evident. The relationship actually created and existing between the so-called limited partners and defendant under its provisions is in fact that of carrier and shipper and this is not altered because the parties chose to call it a partnership agreement. Under it the defendant transports property, individually owned by each shipper, in trucks operated under his control and in fact owned by him. He alone is personally responsible for all financial obligations incurred in performing the transportation.(8) The gross revenue is entirely controlled by him and the net revenue or profit from the operation is his personal property. In so far as the shippers are concerned, each agrees to ship his own individual milk in defendant's truck and obligates himself to pay only for such transportation service as is performed directly for him. In substance, the defendant under the guise of a general partner is actually

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(8) California Civil Code Sections 2483 and 2485.

engaged as a carrier in serving the transportation needs of the shippers who are parties to the agreement.

The evidence establishes that the operation so conducted by the defendant is that of a highway common carrier. The trucks operated by the defendant are serving all persons shipping milk from San Jacinto and Hemet to Los Angeles. Their patronage was procured and established pursuant to defendant's solicitation. The operation, being daily, is between the fixed termini of San Jacinto and Hemet, on the one hand, and Los Angeles, on the other hand. In view of this record, the essential common carrier status of defendant's operation is not altered by the fact that he is serving his shippers under contract. 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 the 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 Hirons, 32 C.R.C. 48, 51.

The provision of the agreement of July 10, 1939, to the effect that the service may be extended to additional shippers only upon written consent of a majority of the limited partners cannot be considered as any substantial or real limitation upon the service, as the record shows that all milk shippers of San Jacinto and Hemet are already being served thereunder.

The record is clear and convincing that the defendant has held himself out to the public as a highway common carrier and that he does not possess a certificate of public convenience and necessity to so operate, as required by the provisions of the above section of the Public Utilities Act.

Defendant's motion to dismiss the complaint should be denied and a cease and desist order should issue herein.

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 456; Pioneer Express Company v. Keller, 33 C.R.C. 371.

O R D E R

A public hearing having been held on the above-entitled complaint, the matter having been duly submitted and the Commission being now fully advised,

IT IS HEREBY FOUND that Mario Pastrone, an individual, is operating as a highway common carrier and is engaged in the transportation of shipments of milk, for compensation or hire, from San Jacinto and Hemet to Los Angeles, over the public highways, upon regular routes and between fixed termini, without authority from this Commission, and without having a certificate of public convenience and necessity to so operate, as required by paragraph (c) of Section

50-3/4 of the Public Utilities Act.

Based upon the finding herein and the opinion,

IT IS HEREBY ORDERED that the defendant's motion to dismiss the instant complaint, be and it is hereby denied.

IT IS HEREBY FURTHER ORDERED that Mario Pastrone shall cease and desist directly or indirectly or by any subterfuge or device from continuing such operations.

IT IS HEREBY FURTHER ORDERED that the Secretary of this Commission shall cause a certified copy of this decision to be personally served upon Mario Pastrone, and that he also cause certified copies thereof to be mailed to the District Attorney of Riverside and Los Angeles counties and to the Board of Public Utilities and Transportation of the city of Los Angeles.

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

Dated at San Francisco, California, this 30th day of April, 1940.

COMMISSIONERS