C.4371 - RLC

Decision No. 24386

ORIGINAL

BEFORE THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA

CALIFORNIA MILK TRANSPORT, INC., a corporation, Complainant, vs. GREGORY G. PANOPULOS, Defendant.	Case No. 4371

REGINALD L. VAUGHAN and CHARLES C. STRATTON, for Affiant Charles W. Brinckley.

HUGH GORDON, L. M. PHILLIPS and CLARENCE G. WEISBROD, for Respondent.

CRAEMER, Commissioner:

OPINION ON ORDER TO SHOW CAUSE WHY GREGORY G. PANOPULOS SHOULD NOT BE PUNISHED FOR CONTEMPT

Decision No. 33465 (September 3, 1940) found that Gregory G. Panopulos was operating as a highway common carrier, as defined in section 2-3/4 of the Public Utilities Act, without a certificate of public convenience and necessity authorizing such operation, and in violation of section 50-3/4 of the statute.(1) Mr. Panopulos was ordered to cease and desist such operation unless and until he

(1) Between Los Angeles, on the one hand, and Artesia, Bellflower, Hynes and Clearwater and points in the vicinity thereof or intermediate thereto, on the other hand, and between Los Angeles, excluding Associated Dairies Creamery at 917 Hemlock Street, on the one hand, and El Monte and Baldwin Park and points in the vicinity thereof or intermediate thereto, on the other hand.

should have obtained a certificate therefor. The desist order was personally served upon said defendant on September 17, 1940 and by its terms became effective on October 7, 1940.

The affidavit and application for order to show cause of Charles W. Brinckley was filed on January 16, 1941. Such affidavit, in addition to reciting the filing of the original complaint, hearing thereon and the issuance of Decision No. 33465, alleged that respondent Panopulos, notwithstanding the "cease and desist" order, was continuing to operate as a highway common carrier between the points named in said order. Five specific instances of alleged violations are set forth in the affidavit, the prayer being that respondent Panopulos be required to appear and show cause why he should not be punished for contempt for each of the alleged violations of Decision No. 33465 and of the laws of the State of California.

On January 21, 1941 the Commission issued its order directing respondent Panopulos to appear on February 26, 1941 and show cause, if any he had, why he should not be so punished. The affidavit, to which was attached the order to show cause, was personally served on Gregory G. Panopulos on January 27, 1941. Hearings were held at Los Angeles on February 26 and 27 and on March 5, 6 and 24, 1941, the matter being submitted after oral argument in Los Angeles on the latter date. Respondent filed an answer to the order to show cause at the hearing on March 5, 1941.

It is alleged in the affidavit that Gregory G. Panopulos operated between fixed termini and over specified regular routes subsequent to October 7, 1940, and more specifically it is alleged that he did so on November 13 and 17, 1940 and on January 3, 4 and

5, 1941; that he offered his service as a highway common carrier for compensation between said termini and over said routes for the public generally; that he intentionally violated the cease and desist order when he could have complied therewith; and that such violation under the above circumstances constitutes contempt of the Commission and its order.

Respondent, by his answer, does not deny that he transported milk for compensation on the five days mentioned in the affidavit. However, he does deny that any of the operations described in the affidavit were unauthorized or in violation of law. The answer avers that respondent operates as a highway common carrier pursuant to a certificate granted by this Commission and as a highway contract carrier under a permit issued by this body, and that all transportation services performed by him have been conducted in accordance with such authority.

Thus, the primary question to be determined is whether, subsequent to the effective date of the cease and desist order, respondent operated as a highway common carrier between the points specified in said order.

The affiant, Charles W. Brinckley, is employed by California Milk Transport, Inc., a competitor of respondent Panopulos. Brinckley testified that he followed the trucks of the respondent on the five days to which specific reference is made in his affidavit. He stated that on each occasion he saw a truck belonging to Panopulos drive into the dairies named in the affidavit and that there, empty 10-gallon milk cans were unloaded from the truck and full 10-gallon cans were placed thereon. Brinckley stated that each truck took the cans containing the milk to the Central Milk Sales Agency Surplus Plant located at 917 Hemlock Street in Los Angeles.

Two witnesses called by affiant were officers of the Central Milk Sales Agency, a non-profit co-operative milk marketing association. It was learned from their testimony that the agency is composed of individual dairymen and small producer co-operative associations. The agency and the co-operative associations which are members thereof were organized under the co-operative marketing laws of California. The agency has a membership of 540 dairymen. Numerous functions are performed by the agency for its members such as marketing the milk, collecting their accounts, taking weights and samples for the different butterfat tests, appearing at public hearings and undertaking to stabilize market prices, consulting with the members and assisting them with their producing and marketing problems. A fee of one dollar is charged for each application for membership. The agency deducts certain sums from the amount paid to its members for the milk they produce. These deductions are for various purposes, such as carrying on the functions and operations of the agency, weighing milk, testing samples and transporting the milk. They include also deductions for the purchase of supplies by the dairymen or bank deductions where an assignment has been made to a feed company. By the terms of the agreements existing between the agency and its members the former has title to the milk as soon as it is extracted from the cow. Furthermore, the agency has the right to select the carrier to transport the milk from the dairies of its members to its plant and frequently does so. Often this right is delegated to members. The agency is concerned with securing the services of milk haulers who are satisfactory both to the producers and to the distributors. The agency pays the hauler for transporting the milk although, as indicated above, this sum is deducted from the remittance which the dairyman receives from the sale of the milk he produces.

Thirteen dairymen were called as witnesses on behalf of affiant. All testified that they were members of Central Milk Sales Agency. These witnesses stated that their milk was picked up twice each day at about the same time and transported to the agency by the respondent's trucks. Eleven of the thirteen witnesses said that they had signed contracts with respondent governing the hauling of their milk. The other two witnesses were members of the Country Fresh Milk Producers Association which is a producer co-operative holding membership in Central Milk Sales Agency. The testimony shows that the Country Fresh Milk Producers Association had a contract with respondent to haul the milk of the association to the agency. Pursuant to the contract respondent transported the milk of such members of the association as desired his service.

The affidavit of Brinckley alleged that Panopulos transported milk for sixteen dairymen in the five days specified. The evidence shows that seven of that number were served by virtue of the certificate granted to the respondent. One of the remaining nine is no longer a dairyman. The other eight have contracts with Panopulos to haul their milk.

The testimony of witnesses appearing at the hearing indicated that Panopulos hauled milk for some dairymen not named in the affidavit. The record is not clear as to the exact number. It appears that some of the dairymen for whom respondent is said to have hauled are no longer in business. Also, due to confusion as to the first name or initials of several producers, the same dairyman was named twice in two or three instances. Furthermore, it appears that respondent had a contract with the Country Fresh Milk Producers Association to haul the milk of its members, of

which there are seventeen. The secretary of the association testified that some of the members hauled their own milk but said he did not know how many did so. The individual members of this co-operative had no contract with respondent. The Central Milk Sales Agency paid Panopulos for this hauling as well as for all other transportation mentioned in this proceeding.

Although the record is not clear as to the number of dairymen for whom Panopulos transported milk, it shows definitely that his operations since the cease and desist order became effective are quite different from the activities he conducted prior thereto. Aside from those served by virtue of his certificate, Panopulos transports milk, pursuant to contract, for only two men that he previously had agreements with. The evidence shows that whereas he formerly hauled approximately 1,140 cans of milk a day, he now carries about 820. The record shows that respondent has seven trucks of the kind used for milk hauling but that he uses only four now and two of these are never fully loaded.

It is evident from the record that Panopulos advised dairymen requesting his service he was limited in his hauling operations to shippers with whom he had written contracts. A letter written prior to the effective date of the cease and desist order to a dairyman for whom he had hauled without a contract was introduced as an exhibit. Therein Panopulos told the addressee that the milk hauling would have to be discontinued unless an arrangement could be made for a definite period of six months or a year at a fixed rate.

The evidence of record shows that after the cease and desist order was issued and before it became effective, respondent consulted his attorneys and asked them if there was any way he

could continue business in a lawful manner. They told him that proper contracts could be prepared which would constitute the hauling done pursuant thereto legitimate highway contract transportation. A form of contract to be used by Panopulos was prepared by his attorneys. Several contracts, which were substantially the same and follow the form above mentioned, were introduced in evidence as exhibits. These exhibits are copies of the contracts executed between respondent and the dairymen for whom he transports milk. They appear to be mutually binding bilateral contracts drawn in conformance with the legal precepts governing such documents.

It is in evidence that Panopulos, on at least four occasions, refused milk hauling business offered to him. Furthermore, the record shows that respondent serves less than ten per cent of the dairymen situated in the area from which he derives his business. Considering this evidence and the fact that respondent has additional equipment available with which to transport milk, it is manifest that Panopulos is not holding himself out to haul for everyone who requests and is in a position to use his special type of hauling service.

The power vested in the Commission to punish for contempt should be used only when necessary to insure respect for and compliance with its orders. It should be shown clearly by a preponderance of the evidence that a person ordered to cease and desist operations as a highway common carrier has violated such order before he is found to be guilty of contempt. The evidence of record in this proceeding fails to show that the respondent Panopulos violated the cease and desist order contained in Decision No. 33465. It is manifest that respondent

made a sincere effort to comply with said decision. His operations after the cease and desist order became effective were changed materially from what they had been prior to that time. He served only dairymen with whom he had bona fide binding contracts. The volume of milk which he transported was reduced appreciably. Although he had adequate equipment available, he refused the proffered business of several dairymen. His service was confined to the transportation of milk, a specialized operation, yet his customers constituted but 10 per cent of the milk producers in the area in question. Therefore, it must be concluded that the evidence adduced in this proceeding does not show that Panopulos operated as a highway common carrier after October 7, 1940 between the points named in Decision No. 33465.

Although unnecessary to a determination of this case, and so without attempting to decide the legal status of such an arrangement, it is interesting to note that while Panopulos has executed transportation contracts with individual dairymen, all of the milk hauled belonged to a bona fide nonprofit co-operative, the Central Milk Sales Agency. The agency paid the defendant for the hauling performed. It had the right to select the carrier but in the instances mentioned in this proceeding delegated such right to its members, reserving the right to approve or disapprove their choice.

Two contentions broached by the affiant's attorney during oral argument should be mentioned. He claimed that all service rendered by Panopulos at 917 Hemlock Street, Los Angeles, other than to Associated Dairies Creamery, was unlawful because Panopulos' certificate limited his Los Angeles hauling to

Associated Dairies Creamery, 917 Hemlock Street. Associated Dairies is no longer in business. Central Milk Sales Agency now leases the premises which the creamery formerly occupied.

Attorney for affiant argues next that whether or not the certificate is so restricted Panopulos failed to comply with the condition in the decision granting the certificate which required him to file a tariff and make it effective within thirty days. Therefore, it is contended that said certificate is void and all operations of respondent conducted thereunder are unauthorized.

The affidavit contains no allegations which pertain to the claimed defects in respondent's certificate so no issue respecting them is before the Commission. Furthermore, even if the affidavit had alleged that respondent either had no certificate or that it was worthless, such pleading would not have raised issues properly within the scope of this proceeding. Here the Commission is called upon to determine whether respondent violated the terms of an order requiring him to cease operations in a specified territory which does not include the area Panopulos was granted the right to serve by his certificate.

O R D E R

Based upon the record and upon the findings of fact contained in the above opinion,

IT IS ORDERED that this proceeding is dismissed.

The foregoing opinion and order are hereby approved and ordered filed as the opinion and order of the Railroad Commission of the State of California.

Dated at San Francisco, California, this 1st day of July, 1941.

COMMISSIONERS