

Decision No. 39404

BEFORE THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA

ORIGINAL

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

Case No. 4339

PACIFIC SOUTHWEST RAILROAD ASSOCIATION
and HIGHWAY TRANSPORT INC.

Complainants

vs.

Case No. 4743

WAYNE F. MALONEY, doing business as
PENINSULA MOTOR EXPRESS.

Defendant.

BEROL & HANDLER, for Highway Transport, Inc. complainant
in Case No. 4743 and for Highway Transport,
Inc., Valley Motor Lines, Inc. and Valley
Express Co., interested parties in Case No.
4339.

JOHN E. HENNESSY and FRED M. BIGELOW, for Pacific South-
west Railroad Association, complainant in
Case No. 4743 and interested party in Case
No. 4339.

WM. MEINHOLD, for Southern Pacific Company and Pacific
Motor Trucking Company, interested parties.

HAROLD M. HAYES, for Intercity Transport Lines, inter-
ested party.

DOUGLAS BROOKMAN, for Peninsula Delivery Service and
Automotive Purchasing Co. Inc., interested
party.

CLAIR W. MACLEOD, CARL R. SCHULZ and ARTHUR GLANZ, for
Wayne F. Maloney, doing business as Peninsula
Motor Express, defendant in Case No. 4743,
and respondent in Case No. 4339.

WYMAN C. KNAPP, for Transportation Department, Railroad
Commission.

O P I N I O N

In these proceedings the Commission is called upon to
determine whether respondent Wayne F. Maloney, doing business as
(1)

(1) For convenience, Wayne F. Maloney, respondent in Case No. 4339
and defendant in Case No. 4743, will be referred to as respondent

Peninsula Motor Express, has been, and is, operating without authority as a highway common carrier between San Francisco and San Jose and intermediate points. With respect to the points involved, the proceedings are complementary, Case No. 4743 being more comprehensive than Case No. 4339.

Case No. 4339, initiated June 27, 1938, was brought by the Commission on its own motion to determine whether Maloney had been engaged in the transportation of property for compensation, as a business, by means of motor vehicles over the public highways, between San Francisco and Mountain View and intermediate points, including Burlingame, San Mateo, Redwood City and Palo Alto, without first having obtained from the Commission a certificate of public convenience and necessity, as required by Section 50-3/4, (2) Public Utilities Act. An order was sought requiring the discontinuance of such operations, and revoking or suspending Maloney's operating permits both as a radial highway common carrier and as a highway contract carrier, as provided by Section 14 $\frac{1}{2}$, Highway Carriers' Act.

By their complaint in Case No. 4743, filed August 28, 1944, complainants Pacific Southwest Railroad Association and Highway Transport, Inc. have alleged that Maloney had been operating as a highway common carrier, without first having obtained the necessary certificate, between San Francisco, San Jose and Los

(2) The order of investigation also instituted an inquiry concerning Maloney's observance, as a highway contract carrier, of the minimum rates which had been prescribed by the Commission. At the earlier hearings, the evidence failed to establish any violation of the Commission's minimum rate orders. During the later phases of the case, the subject was not even mentioned. Consequently, it will not be regarded as an issue, presented for our consideration.

(3)
Gatos, and intermediate points. Several fictitiously named defendants were joined, none of whom was served nor appeared. An order was sought requiring the discontinuance of the alleged unlawful operations. Defendant filed no answer to this complaint.

Public hearings were had in Case No. 4339 during 1938, when the matter originally was submitted. By Decision No. 32239, rendered August 8, 1939, the Commission found that respondent had been operating unlawfully as a highway common carrier between San Francisco and Mountain View and intermediate points, and a cease and desist order was issued. Following oral argument, had before the Commission en banc upon respondent's petition for reconsideration, rehearing was granted by order dated March 12, 1940, which also directed that the investigation originally undertaken be extended to include Maloney's operations conducted subsequent to June 27, 1938. Thereafter, the matter was further heard before the late Commissioner Baker and was resubmitted on briefs, September 6, 1940. By order dated June 20, 1944, the submission was set aside and the proceeding reopened. Further hearings were had before Examiner Austin at San Francisco, Palo Alto and San Jose, extending from July 1944 to February 1945, when the matter once more was submitted. During the course of the hearing, Cases Nos. 4339 and 4743 were consolidated for hearing and decision. The determination of these matters, however, was held in abeyance

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- (3) Specifically, complaints charged that such operations had been conducted by Maloney "between San Francisco, on the one hand, and Los Gatos, Saratoga, Cupertino and Los Altos, on the other hand, and points intermediate thereto; and between San Francisco, on the one hand, and South San Francisco, San Bruno, Lomita Park, Millbrae, Broadway-Burlingame, Burlingame, San Mateo, Belmont, San Carlos, Redwood City, Menlo Park, Palo Alto, Mountain View, Sunnyvale, San Jose, and points intermediate thereto, on the other hand."

pending completion of the hearings in a companion proceeding, viz., Application No. 24468, where Maloney sought a certificate of public convenience and necessity authorizing the establishment of a highway common carrier service between San Francisco, San Jose and intermediate points. Briefs in that proceeding were received during November 1945.

In general, the issue presented involves the lawfulness of respondent's operations between San Francisco, San Jose and intermediate points. Both the complainants in Case No. 4743 and the Transportation Department, in Case No. 4339, as well as those who have intervened on their behalf,⁽⁴⁾ contend that respondent long has operated throughout this territory, without the Commission's sanction, as a highway common carrier. On the other hand, respondent asserts that he has operated lawfully as a highway contract carrier, under a permit duly issued by the Commission.

The record deals with two distinct phases of respondent's activities. The testimony offered at the earlier hearings relates to the operations which respondent conducted between 1934 and 1940. At the final hearings, the evidence was confined to the operations carried on during 1943, 1944 and the early part of 1945. In our appraisal of the testimony taken at the earlier hearings, we shall bear in mind the long delay which has since ensued.

(4) During the course of the final cycle of hearings, various carriers affected by respondent's operations intervened, as interested parties, on behalf of both complainants and the Transportation Department. They comprised Southern Pacific Company, Pacific Motor Trucking Company, Valley Motor Lines, Inc., Valley Express Co., Intercity Transport Lines, Peninsula Delivery Service and Automotive Purchasing Co. Inc.

At the hearings held in 1938, various shipper witnesses related the circumstances under which respondent had undertaken the transportation of their freight. In 1938, and again in 1940, respondent testified, describing in detail the nature of the operations then conducted.

During 1934 respondent embarked in the transportation business between San Francisco and Mountain View, serving also the intermediate points of Burlingame, San Mateo, Redwood City and Palo Alto. At the outset, a single truck sufficed to accommodate the traffic offered; by 1940, however, the business had expanded to such a degree that three trucks were required. Between these points a daily service was afforded. Throughout this period, respondent held permits issued by the Commission, authorizing operation both as a highway contract carrier and as a city carrier.

During this period, substantially all of the traffic carried by respondent comprised shipments weighing less than 200 pounds each, approximately one-half being less than 50 pounds in weight. Thus respondent was engaged essentially in conducting a parcel delivery service. A wide variety of commodities was accepted for transportation.

From the outset respondent professed to operate solely as a private carrier. In the beginning, the record discloses, he entered into oral agreements with the shippers, running from month to month. Later, these contracts were reduced to writing. A specified monthly transportation charge was imposed, regardless of the volume of freight handled. During 1937, assertedly because of the establishment of minimum rates by the Commission, thus

invalidating the monthly rates previously maintained, the contracts were revised to provide for the exaction of charges on a weight basis.

Although varying extensively in details, and to some degree in their substantive provisions, these contracts followed a common pattern. Essentially they meet the tests prescribed by our previous decisions. Under these agreements the shipper is bound to offer, and respondent is required to transport, traffic of a specified character; San Francisco shippers are obligated to deliver to respondent all shipments destined to certain points in the peninsula territory, upon which they may pay the transportation charges, and peninsula shippers bind themselves to deliver to respondent all shipments of a designated type which they may purchase at San Francisco. The agreement continues in effect for a definite term, ranging from one month to six months, and thereafter until cancelled on thirty days' written notice by either party to the other. Transportation charges are predicated upon the minimum rates which the Commission may establish. Under the agreements executed with many peninsula shippers, respondent undertook to act as a purchasing agent. However, the record does not indicate that respondent ever performed these duties.

Between 1934 and 1940, Maloney, so he testified, entered into written agreements with some 55 shippers. Of these, 22 contracts were cancelled during March 1940. Assertedly, the number of shippers served was curtailed, on advice of counsel, in an effort to remove any doubts as to the lawfulness of respondent's operations. Included among the contracts cancelled were some which previously had become ineffective, owing to the shippers'

discontinuance of respondent's service. To the 33 contracts which, respondent testified, then remained in effect should be added three additional written agreements which, the record shows, had also been executed.

The solicitation of business, actively pursued at the outset, was somewhat ameliorated during the latter part of this period, it was shown. During 1934, transportation agreements admittedly were secured as the result of direct solicitation of the shippers on respondent's part. Subsequently, so Maloney testified, this practice was discontinued. Thereafter, such agreements were negotiated and consummated only with those referred to him by shippers served under existing contracts. Respondent called upon some prospective shippers, at their request; others however, called upon him. Respondent, apparently, was able to satisfy those with whom he entered into agreements as to the desirability of the service; to that extent, it is clear, he engaged in solicitation for new patrons.

Throughout this period, it was shown, respondent rejected many shipments offered to him for transportation. A record of such rejections (assertedly incomplete), kept in the ordinary course of business and covering the periods, February 1937 to August 1938, and July 1939 to August 1940, was received in evidence. These entries, made when the requests for transportation were received, disclose the names of the prospective shippers, a description of the shipments tendered and the reasons for their rejection. During the periods mentioned, some 457 shipments offered by 290 shippers were declined, according to this record. In addition, 128 requests received by telephone were refused. Of those indicated as having

been thus rejected, seven subsequently entered into written contracts with respondent, four of which remained outstanding after March 1940.

These shipments were declined, respondent testified, because of a desire to limit his operations to those of a private carrier. There is no support in the record for the contention that these shipments were refused primarily because they were casual in nature or were not the kind of traffic respondent undertook to carry. Each offer related to a single shipment, it is true, but there is no evidence of any disclosure by the shipper regarding the extent of the traffic he would be willing to offer, or the regularity and frequency of the movement. Under the circumstances, respondent's action must be attributed to a desire to curtail the number of shippers whom he undertook to serve.

During this period, it was shown, respondent engaged, though not extensively, in the transportation of collect shipments destined to consignees not holding transportation agreements with him, and of prepaid shipments received from consignors with whom he had made no contractual arrangements. A small share, amounting approximately to 2%, of the shipments offered by California Electric Supply Company, under its contract, were billed collect to consignees with whom respondent occupied no contractual relationship. Respondent testified that in accordance with a recognized trade practice, of which he assertedly had full knowledge, these shipments subsequently were rebilled by the consignee to the consignor. Of some 300 shipments handled during a selected weekly period, 34 shipments of the character described above, were received from or consigned to 12 contract shippers.

Thus the record stood when the matter was submitted in 1940. At subsequent hearings, following the reopening of the case, the Transportation Department called a Transportation Representative, of the Commission's Staff, who supplied the information gained through an investigation he had conducted into respondent's operations. Various shipper witnesses, engaged in business in San Francisco and at peninsula points, were called by the Transportation Department and also by the complainants in Case No. 4743. Respondent neither testified nor offered any evidence, choosing rather to submit the case immediately following the conclusion of the showing made by the Transportation Department and by complainants. No transportation contract, in addition to those offered at the earlier hearings, was received nor does the record disclose the existence of any such agreement.

To measure the scope of respondent's operations, an investigation of its records was undertaken, so the Transportation Representative testified. A spot check of respondent's transportation records was made, covering certain weekly periods during the months of March, July and November 1943 and March and June 1944. Through this witness an abstract was presented covering all shipments which respondent had transported between San Francisco, Mountain View and intermediate points, during the weeks indicated. A wide variety of commodities was transported, it appears. In weight, the shipments ranged from a few pounds to one ton, the latter, however, being relatively infrequent. A total of 599 shipments, received from 188 shippers, were transported from San Francisco to peninsula points; and 1056 shipments, received from 581 shippers, moved from peninsula points to San Francisco. Allowing for duplication, the individual shippers numbered 62 and 366,

respectively. Thus, during the periods shown, 1655 shipments were received from 398 individual shippers, in the aggregate. Only a small minority of the shippers indicated by the abstract had entered into transportation agreements with respondent, it appears. Of the San Francisco shippers, no more than nine had executed contracts; and of the peninsula consignees, 17 alone had entered into such arrangements. Thus only 26 out of a total of 398 shippers had joined with respondent in executing written agreements.

The distribution of the traffic, covered in part by the survey (itemized in Exhibit A-1), is indicated by the following tabulation:

	(5)	
From contract consignor to contract consignee		29
From contract consignor to non-contract consignees:		
(a) Prepaid		136
(b) Collect		63
From non-contract consignor to contract consignees:		
(a) Prepaid		16
(b) Collect		94
From non-contract consignor to non-contract consignee		962
	Total	1300

Some 31 shipper witnesses were produced, who described their relationship with respondent, and the extent to which they had used his facilities. Spokesmen for 19 San Francisco shippers were called by the Transportation Department, and complainants called the representatives of 12 shippers engaged in business at

(5) The terms "contract-consignor" and "contract-consignee", as used in the foregoing tabulation, indicate that the consignor or the consignee, as the case may be, has entered into a transportation agreement with respondent. The terms "non-contract consignor" and "non-contract consignee", on the other hand, are designed to show that neither has entered into such an arrangement.

(6) various peninsula points. Very few of these firms had entered into transportation agreements with respondent; at San Francisco there were four and at Palo Alto only two, making a total of six contract shippers among the group who testified.

The record discloses the existence of no oral arrangement between respondent and any shipper which might rise to the dignity of a contractual relationship. The arrangements referred to by a small minority of the shippers lacked both mutuality and certainty; they were vague and indefinite as to the character and the volume of the traffic to be offered for transportation; and they imposed no obligation upon respondent to furnish any transportation service. Moreover, no definite term of existence was provided.

The extent to which the shippers had used respondent's service is disclosed by their testimony. In general, all had employed him to carry their shipments from San Francisco to peninsula points. Aside from the San Jose shippers, all had used the service regularly and frequently. Those engaged in business at San Jose, it was shown, made but little use of respondent's facilities. As a rule, the traffic moved in substantial volume. Some also had used other carriers to transport their traffic between these points.

Under the facts shown of record, has it been established that respondent has operated as a highway common carrier, or should he be regarded as a highway contract carrier?

(6) The shipper witnesses produced by complainants were engaged in business in the following communities:

Redwood City	1
Menlo Park	1
Palo Alto	4
San Jose	6
Total	12

Under Section 50-3/4, Public Utilities Act, no one may enter the field as a highway common carrier without having first obtained from the Commission a certificate of public convenience and necessity. As defined by Section 2-3/4 of that Act, a highway common carrier comprehends every one operating as a common carrier by motor vehicle over the public highways between fixed termini or over a regular route (exclusive of those operating wholly within a municipality). Unquestionably, respondent has been, and is now engaged in the business of transporting freight for compensation by motor vehicle over the public highways between definite points, viz.: between San Francisco and San Jose and intermediate points. To fall within the inhibitions of Section 50-3/4, however, it must also appear that in so doing he is operating as a common carrier.

A common carrier undertakes to transport property, for hire, for those who may choose to employ him; within the limitations of his facilities, the service is available to all who can use it. This offer may extend to the public as a whole, or it may be confined to those falling within a particular class. A private carrier, on the other hand, serves selected individuals only; his service is not available to others who might have occasion to use
(7)
it.

Although a carrier may undertake to serve only those with whom he has entered into written contracts for the transportation of their goods, such a limitation is insufficient to stamp him as a private carrier. If he is willing to transport the property of

(7) Re A. C. Woodard (Circle Transportation Co.), 44 C.R.C. 711, 715.

any responsible shipper offering tonnage moving regularly and in substantial volume, provided only that the shipper execute such an agreement, he is, nevertheless, a common carrier. Since this limitation would not effectually prevent the carrier from serving any shipper whom he would otherwise be free to serve, it must be regarded as illusory. Unquestionably, the carrier holds himself out to serve a definite class of the public, viz., all those willing to enter into transportation agreements with him, and who may offer a substantial volume of traffic, moving regularly.

The record is convincing that respondent did not limit his service to shippers, whether consignors or consignees, with whom he had entered into contracts governing the transportation of the freight. As stated, he has transported from consignors holding contracts, shipments upon which the charges were paid by consignees with whom he had entered into no contracts; and he also has transported from non-contract consignors prepaid shipments destined to consignees holding contracts. In the absence of any showing to the contrary, the party paying the transportation charges, whether consignor or consignee, is presumptively the owner of the freight and, as such, is entitled to control the mode of transportation. In short, the consignor must be deemed the owner of

(8) Rules 4 and 5, Civil Code, Section 1739 (Uniform Sales Act), provide in substance that where, in pursuance of a contract to sell, the seller delivers goods to a carrier for the purpose of transmission to the buyer, he is presumed (subject to certain exceptions not material here) to have unconditionally appropriated the goods to the contract. However, if the sale contract requires the seller to deliver the goods to the buyer, or at a particular place, or to pay the freight or cost of transportation to the buyer or to a particular place, the property does not pass until the goods have been delivered to the buyer or reached the place agreed upon.

prepaid shipments until delivery to the buyer; on the other hand, title to collect shipments passes to the buyer upon delivery to the carrier. Consequently, the consignor, in delivering collect shipments to the carrier, acts as the consignee's agent. In the absence of a special agreement, neither of them is entitled to control the transportation of the freight, where the other has borne the transportation charges.

By far, the larger share of the traffic, so the record shows, moved between consignors and consignees, neither of whom had entered into any transportation agreement. These shipments, obviously, did not fall within the terms of any such contract, since the service was performed independently of any contractual arrangement. The fact that such shipments were accepted and carrier without regard to any agreement, governing the terms under which they would be transported, indicates a willingness on respondent's part to serve the public generally.

From the record in this case, we find that respondent, in the transportation of freight, did not undertake to limit or select the shippers whom he served; on the contrary, it is clear that he has held himself out, within the limitations of his facilities, to serve any one offering him freight for transportation between San Francisco, San Jose, and intermediate points. Under the circumstance, his operations must be viewed as those of

(9) Re Hiron, 32 C.R.C. 48, 52.

a common carrier.

In the order which follows, respondent will be required to discontinue the operations found to be unlawful. We are restrained from cancelling his operating permit, as a highway contract carrier, only because of the fact that the expansion of his operations was to a large extent attributable to war conditions.

ORDER

The above entitled proceedings being at issue, a public hearing having been had, said matters having been duly submitted, and the Commission now being fully advised,

IT IS ORDERED as follows:

(1) That defendant and respondent, Wayne F. Maloney doing business as Peninsula Motor Express, or otherwise, be, and he is hereby required to cease and desist, and hereafter to refrain from conducting, directly or indirectly or by any subterfuge or device, any operation as a highway common carrier as defined by Section 2-3/4, Public Utilities Act, over the public highways between San Francisco and San Jose and intermediate points, including South San Francisco, San Bruno, Lomita Park, Millbrae, Broadway-Burlingame, Burlingame, San Mateo, Belmont, San Carlos, Redwood City, Menlo Park, Palo Alto, Mountain View, Sunnyvale; between said termini and intermediate points; and between said intermediate points themselves; unless and until he shall have obtained from the Commission a certificate of public convenience and necessity under the provisions of Section 50-3/4, Public Utilities Act, authorizing such operation.

(2) That the Secretary of the Railroad Commission shall cause a certified copy of this decision to be served upon respondent and defendant, Wayne F. Maloney, and shall cause certified copies thereof to be mailed to the District Attorneys of the City and County of San Francisco, and of the Counties of San Mateo and Santa Clara, to the Department of Motor Vehicles and to the California Highway Patrol, at Sacramento.

This order shall become effective 20 days after the date of service thereof upon respondent.

Dated at San Francisco, California, this 10th day of September, 1946.

Harold A. Huls
Justin F. Quillen
Francis J. ...
W. H. Powell
A. E. ...
Commissioners