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Decision No. 54610

**ORIGINAL**

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Commission Investigation into the)  
Operations and Practices of )  
Frank E. Wills, doing business as )  
WILLS APPLIANCE DELIVERY SERVICE.)

Case No. 5849

Marcum C. George, for respondent. ✓  
Willard S. Johnson, in propria persona.  
Cyril M. Saroyan, Arthur Lyons, for the  
Commission's staff.

O P I N I O N

On November 19, 1956, the Commission issued an order instituting an investigation into the operations and practices of Frank E. Wills, doing business as Wills Appliance Delivery Service, for the purpose of determining whether he may have operated or may be operating as a highway common carrier without having obtained a certificate of public convenience and necessity and without having possessed or acquired a prior right so to operate, as required by Section 1063 of the Public Utilities Code, between Oakland, on the one hand, and San Francisco, on the other hand; and between Oakland, on the one hand, and Berkeley, San Leandro and Hayward and intermediate points, on the other hand.

A public hearing was held before Examiner Thomas E. Daly at San Francisco on January 17, 1957, and January 29, 1957, with the matter being submitted on the latter date.

Respondent presently operates under the authority of City Carrier Permit No. 1-7411, Radial Highway Common Carrier Permit No. 1-6674 and Highway Contract Carrier Permit No. 1-8861. The Contract Carrier permit authorizes service within a radius of 50 miles from Oakland and San Francisco and is limited to the transportation of household appliances; radio, television and phonograph

sets; and miscellaneous electrical merchandise. He maintains office and terminal facilities in Oakland and owns and operates approximately seven pieces of equipment.

The record shows that respondent serves ten contract accounts under oral agreements. The agreements are substantially the same. They provide for a minimum monthly guarantee of approximately 2500 pounds. Service is provided at the minimum rates as set by this Commission and freight charges on collect shipments are guaranteed. The contracts continue in effect until terminated by either party on thirty days' notice. The contract accounts are businesses primarily engaged in the manufacture and wholesale of electrical appliances and supplies.

Exhibit No. 4, which was introduced by the staff, consists of a printed or mimeographed schedule of routes and a partial list of cities served by respondent. It contains respondent's name, address and telephone number and indicates two daily schedules to the following points: Alameda, Castro Valley, Centerville, Decoto, Hayward, Newark, Niles, Oakland, San Leandro, San Lorenzo, Albany, Berkeley, El Cerrito, El Sobrante, Emeryville, Oakland, Piedmont, Richmond, San Pablo and San Francisco. A single daily schedule is indicated to the following points: Alamo, Antioch, Avon, Concord, Danville, Lafayette, Martinez, Orinda, Pinole, Pittsburg, Pl. Hills, Rodeo and Walnut Creek. Respondent stated that he had about a dozen copies of Exhibit 4 prepared for the use of his contract accounts.

Exhibit 5 was prepared and introduced by the Commission's staff. It tabulates shipments transported by respondent between the points herein considered for the period July 5, 1956, to July 31, 1956. In many instances it indicates a daily service between the major points in the Bay Area. It further indicates service to numerous shippers other than those designated as contract accounts. For the purpose of the exhibit, the staff determined the shipper as

the one paying the freight charges. Thus many consignees of collect shipments were designated as shippers. Respondent stated that all shipments set forth in Exhibit 5 were transported under oral contracts. He stated that his service is used whenever his accounts control the routing regardless of whether the shipment is prepaid or collect. In many instances the consignee will designate another carrier in which case respondent's accounts honor the request.

Because of the daily frequency, it is apparent from the face of Exhibit 5 that the operations covered therein could not have been performed under respondent's radial highway common carrier permit. Nor could they have been performed under his city carrier permit because of the intercity nature of the service rendered. Said operations were admittedly and uncontradictorily performed pursuant to respondent's highway contract carrier permit and at the instance of ten contract accounts. The terms of the ten oral agreements referred to do not appear to be illusory.

The staff's case is predicated upon the fact that in many instances respondent transported collect shipments. It was asserted that when the consignees of collect shipments paid the freight charges they in effect became the shippers. Because respondent had no contract with them it was contended that he was operating unlawfully.

Such a theory may be applied in the law of sales for the purpose of determining when title passes, but in the field of regulation it cannot per se be the only factor considered in determining the legal status of a highway contract carrier. To disregard the uncontradicted fact that respondent entered into contractual relations with these ten accounts, to disregard the uncontradicted fact that said accounts were the consignors of the shipments included in Exhibit 5 and to further disregard the uncontradicted fact that said accounts engaged respondent's services, controlled the routing and

guaranteed the payment of collect shipments would be to disregard reality in favor of an oversimplified theory which, if applied as the controlling factor, could lead to unjust and inequitable results.

After consideration of the evidence herein, the Commission is of the opinion and so finds that Frank E. Wills, doing business as Wills Appliance Delivery Service, is not operating and has not operated as a highway common carrier between the points heretofore mentioned.

O R D E R

An order of investigation having been issued, a public hearing having been held thereon and the Commission being informed in the premises,

IT IS ORDERED:

1. That Case No. 5849 is hereby dismissed.
2. That the Secretary of the Commission is hereby directed to cause a certified copy of this decision to be personally served upon respondent.

The effective date of this decision shall be twenty days after the date hereof.

Dated at San Francisco, California, this 5<sup>th</sup> day of March, 1957.

[Signature]  
President

[Signature]

[Signature]

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Commissioners