

ORIGINAL

Decision No. 18079

BEFORE THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA.

S. BRICE COWAN,  
Complainant,

vs.

RICHARDS TRUCKING & WAREHOUSE  
COMPANY,  
Defendant.

CASE NO. 1946.

Warren E. Libby and H. N. Blair, for  
Complainant.

C. H. Tribit, Jr., for Defendant.

BY THE COMMISSION:

O P I N I O N

In this proceeding the complainant, S. Brice Cowan, doing business under the fictitious name of Triangle - Orange County Express under proper authority from this Commission to conduct an automotive transportation service between Los Angeles and Santa Ana and other points, complains of the defendant, Richards Trucking & Warehouse Company, a corporation, successor to the interest of Thomas Richards, also conducting under proper authority from this Commission an automotive transportation service between Los Angeles and Santa Ana and other points, and alleges that defendant is furnishing service under prescriptive right, or otherwise, to the communities of El Modena, Olive, Santa Fe Springs, Villa Park, Placentia,

Rivera, Olinda, Richfield and Yorba Linda, and that, by reason of publishing tariffs of rates to these points and furnishing service thereto, defendant is invading, without legal authority, rights possessed by complainant, to his injury. Complainant prays that defendant be required to desist from further service to the points named.

Defendant answered the complaint, denying each and every allegation and asking that the complaint be dismissed.

Upon the issue thus joined between the parties, a public hearing was conducted by Examiner Williams at Los Angeles.

Originally this complaint was heard by <sup>former</sup> Commissioner Shore, at which time the parties consented to submit an agreed statement of facts, and map, upon which the subject matter might be briefed and submitted. Failure to agree upon such statement of facts necessitated the reopening of the proceeding and a further hearing, as indicated above.

Complainant bases his complaint mainly upon the variation of tariffs filed by defendant and its predecessor in interest.

Complainant, in paragraph 1 of his complaint, alleges that the original tariff filed by Thomas Richards, predecessor of defendant corporation, as filed March 8, 1919, as of May 1, 1917, did not contain El Modena, Olive, Santa Fe Springs and Villa Park. In a subsequent tariff filed, effective March 1, 1922, these points were included, and it is alleged that defendant has since then illegally conducted transportation service to each point.

Testimony was introduced by complainant to show that defendant had not given service on or prior to May 1, 1917, to many of the points disputed by complainant. Thomas Richards, called as a witness under cross-examination by complainant, was subjected to a searching inquiry as to all points served by him on May 1, 1917, and subsequently. Mr. Richards testified that his records for that period are not now in existence, but independent of these records his testimony is clear that defendant was giving, and offering to give, service to El Modena, Olive and Santa Fe Springs. At that time (May 1, 1917), Villa Park was not so designated, but was on one of the routes which Richards testified was followed when deliveries via Olive were being made. Richards also testified that he pursued two routes on May 1, 1917:

Route No. 1 followed the main highways, serving Montebello, Whittier, La Habra, Brea, Fullerton, Placentia, Anaheim, Yorba Linda, El Modena, Olive, Orange, Santa Ana, Tustin, Delphi, Garden Grove and Downey.

Route No. 2 served Huntington Park, Bell, Artesia, Hynes, Clearwater, Downey, Norwalk and Buena Park.

One truck leaving at midnight visited all points on both routes when there were deliveries to make, Richards testified, and also made deliveries to intermediate and adjacent points by the shortest route possible. Witness testified that from the establishment of his business, in 1916, he had delivered groceries, meats, bread and canned goods to Olive, El Modena and Santa Fe Springs. He could recall no shipments to Villa Park. He also testified that he bought from one

Gunsaulus, vehicles and established operation between Los Angeles and Santa Ana and other points in Orange County, prior to May 1, 1917; also, that independent of this purchase, he had used his own vehicles to the points named. At the time this purchase was made the law did not require approval of the transfer by this Commission.

Ralph H. Johnson testified that he was employed as a driver by Gunsaulus in March, 1917, and continued with Richards after his purchase of the line; that he traveled over both routes and at no time saw trucks of Richards until after August, 1917. John Ernst testified that he drove a truck for Richards for nineteen months in 1918 and 1919 over the same general route, and that he made no deliveries at Olive, Olinda, Villa Park or El Modena. As to the latter point, witness testified that meat intended for El Modena was left at Santa Ana. Once he had picked up a consignment of iron rails near Olive. Witness testified that another truck belonging to defendant was in operation, but he did not know what points it served.

Ralph C. Best testified that he had driven a truck for Richards for three months in the latter part of 1917, having the 2:00 p. m. run from Los Angeles. He testified that Richards took over the Gunsaulus operation, for which he also drove a truck, after May 1, 1917, and that Richards did not operate into Santa Ana before acquiring the Gunsaulus line. He further testified that shipments off the direct route which exceeded 1000 pounds in weight were refused.

Olin Townsend, testifying in behalf of defendant, said that he began driving for Richards in September, 1916, and continued in this capacity for seven years. He testified that deliveries were made to Santa Fe Springs, Olive and Olinda as frequently as consignments were in transport, but that there was no daily service to any of these three points. In other words, witness drove from Los Angeles to Santa Ana via Whittier and returned via Downey, and delivered to the three points whenever necessary, as far back as his employment originated. He further testified that Richards put another truck into service in November, 1916. He corroborated Richards' testimony as to the miscellaneous nature of merchandise transported.

G. Oliver testified that he began driving a truck for Richards in 1916 and worked as a "swamper" on Townsend's truck for a period. He testified that during his service in both capacities, deliveries were made to Olive, El Modena and Santa Fe Springs.

P. W. Benton, who was traffic manager in 1917 for Wilson & Company, meat packers, testified that Richards had transported merchandise to Olive for his company in 1917.

In rebuttal, complainant introduced testimony to contradict specific statements made by defendant Richards in his testimony, wherein he stated that early in 1917, or before, shipments had been made for Wilson & Company, Hauser Packing Company and the H. Jevne Company, grocers. Witnesses from each of these establishments testified that shipments had been made over the Richards line as early as June 22, 1917, and other shipments on July 9, July 14 and July 30. The testimony was based on the disbursement accounts of each shipper and did not pretend to account for any consignments

on which the freight was collectible. from consignee. None of the records produced by these witnesses, however, indicated service to the four points in question here.

Considering all the evidence as adduced from the testimony of these witnesses, it does not appear that complainant has affirmatively demonstrated that defendant did not operate into Olive, El Modena and Santa Fe Springs originally; and there is affirmative proof that defendant did operate into these points; but there is no proof that defendant operated into Villa Park, and, in fact, there is no proof that Villa Park existed in 1917 or prior thereto.

In the second paragraph of his complaint, the complainant alleges that defendant included in its tariff effective March 8, 1919, (as of May 1, 1917), Placentia and Rivera; that such points were not included in the tariff of rates embraced in defendant's tariff effective March 1, 1922; and that the omission of points and rates in the last-named tariff constitutes an abandonment of service to these points, which are alleged to be not intermediate. It is not disputed that defendant has continued operation to both places, but it is contended that the withdrawal of each from the tariff of March 1, 1922, invalidates the operation. We think the record is clear that defendant has conducted service of continued frequency to both places from 1917 to the time of hearing. The question as to the effect of not including the points named in the tariff will be discussed in another paragraph of this opinion.

In paragraph III of his complaint, the complainant

alleges that defendant corporation has enlarged its operation by performing service to Olinda, Richfield and Yorba Linda without proper authority from this Commission, said points not having been included in any of the tariffs filed by defendant. Defendant depended upon the testimony of Thomas Richards that these three points had been served as "intermediates", and there is no testimony in the record that he gave service to them prior to 1922 or that he procured a certificate authorizing the service subsequent to that year. Each of the points is distant from any point served or established by defendant in the testimony, and none of the points is intermediate to any other point upon the basic route which Richards claims to have followed on May 1, 1917. We think the record is clear that this is an enlargement of service wholly without authority. To some extent Olive and El Modena are beyond the range of intermediate points, but there is positive testimony of Richards and his driver, Olin Townsend, of service to these points prior to May 1, 1917, and continuously thereafter, so that the defendant's claim of prescriptive right to both places is not shaken by negative testimony on the part of complainant.

The operations of both complainant and defendant began with prescriptive rights to operate between Los Angeles and Santa Ana, going eastward via Whittier Boulevard and returning by Garden Grove and Downey. It appears that defendant, at least, assumed that adjacent or convenient points were intermediate, and that service was given wherever demanded. This led to irregular routing which omitted many of the points on some trips. We cannot, however, permit defendant to assume that points in the vicinity of others which it serves, though

distant a mile or more, may be regarded as intermediate.

After careful analysis of the testimony and research of the tariff filings on record with this Commission, we believe the contention of complainant herein must be sustained in part. The measure of the certainty of a valid operation is the declared intention of the operator in his original tariffs. That tariffs filed later may include additional points vests in the operator no right to serve such additional or intermediate points, unless he has included them by proper authority of this Commission. Such is not the case in the instant proceeding.

Defendant's first tariff, filed March 8, 1919, as of May 1, 1917, did not include El Modena, Olive, Santa Fe Springs or Villa Park, and did not provide for intermediates. Since that date no certificate granting the right to operate to these points has been procured. Defendant's prescriptive right must be accepted by its earliest declaration, and the tariff of March 8, 1919, must be assumed to be a correct declaration of the service maintained by Richards as of May 1, 1917. In this connection, Decision No. 9330 on Application No. 6570 and Case No. 1622, involving the operation of S. B. Cowan, plaintiff herein, is relevant, we believe. Cowan sought a certificate to Glinda, El Modena and Olive in his application, and Richards did not urge any of the rights now claimed by defendant in this proceeding, although he had notice thereof.

Defendant's second tariff, filed March 1, 1922, included the four points above mentioned, and intermediates. This is plainly an enlargement without proper authorization. This tariff also eliminated Placentia and Rivera. As each is at least a mile off the regular route followed by defendant, ac-



cording to the testimony of Richards, they cannot be regarded as intermediates. No tariff filed by defendant includes Olinda, Richfield or Yorba Linda; none of these points is intermediate to other points named in defendant's original tariff, and no certificate to serve them has been procured.

It seems plain that defendant has not had the right to serve El Modena, Olive, Santa Fe Springs, Villa Park, Olinda, Richfield and Yorba Linda, and the record requires that they be stricken from its tariffs and that operation thereto be discontinued. As to Placentia and Rivera, the record shows that defendant has, prior to and since filing the original tariff, furnished continuous service to each. Just as defendant could not enlarge its operations, either as to new points or intermediates, neither can it abandon service to points without the authority of this Commission. The testimony shows that defendant has not, in fact, abandoned service to either point, and we cannot find that the omission to continue the points in a re-issue of the tariff may in this case, or any other, relieve the operator of a duty. Hence these points should not be stricken from defendant's tariff and defendant must continue service to them as continuously as heretofore.

#### O R D E R

This case, being at issue upon complaint and answer on file, having been duly heard and submitted, and the Commission being fully advised in the premises, and having, on the date hereof, adopted and approved the foregoing findings of fact and conclusions thereon, which said findings are hereby made a part hereof,

IT IS HEREBY ORDERED that defendant herein forth-  
with cease and desist from all further automotive service  
for the transportation of property between Los Angeles and  
Olinda, Richfield, Yorba Linda, Villa Park, Olive, El Modena  
and Santa Fe Springs until such time as defendant has pro-  
cured from this Commission proper certificate of public con-  
venience and necessity therefor.

IT IS HEREBY FURTHER ORDERED that defendant, with-  
in twenty (20) days from date hereof, file with this Commis-  
sion corrected rates, routes and time schedules, omitting  
therefrom the points named in the preceding paragraph.

Dated at San Francisco, California, this 14<sup>th</sup>  
day of March 1927.

Ernest G. Smith  
H. B. Branding  
C. Seaver  
L. M. White  
Thos. D. Smith  
Commissioners.