

McS

Decision No. 20349

BEFORE THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA

-000-

ORIGINAL

PIONEER EXPRESS COMPANY,
a corporation,

)
)
)
)
)
)
)
)
)
)
)
)

Complainant

vs.

) Case No. 2508

THOMAS KELLER, K. B. PURCHASING
AGENCY, THOMAS KELLER doing business
under the fictitious name of KELLER
BROS. and doing business under the
fictitious name of K. B. PURCHASING
AGENCY,

Defendants.

Walter H. Robinson for Complainant
J. F. Vizzard for Defendants.

BY THE COMMISSION:

O P I N I O N

The complaint of Pioneer Express Company, a corporation,
against Thomas Keller, and K. B. Purchasing Agency, et al., al-
leges unlawful operation by defendants in transporting freight
and express matter between San Francisco and San Jose and way
points for hire, without having obtained a certificate of
public convenience and necessity. It is alleged that Thomas
Keller is so operating individually and under the fictitious
names of "K. B. Purchasing Agency" and "Keller Bros." The
complaint asks that defendants and each of them be ordered to
desist and refrain from such operation.

Defendants deny operation in violation of law, and claim
to be contract carriers hauling only under private contract with

individual firms. A public hearing was held before Examiner Handford at San Francisco.

Complainant, Pioneer Express Company, operates as a common carrier of freight and express between the points mentioned in the complaint, under the jurisdiction of this Commission. Thomas Keller is the manager of the K. B. Purchasing and Delivery Service. The business is owned by Mrs. G. M. Adams of Chowchilla, and operated under a fictitious name. It was originally established by Lawrence and George Keller, brothers of Thomas Keller, and sold to Mrs. Adams some four years ago. Shipments are delivered at a terminal at 509 Eighth Street, San Francisco, and five trucks are now being operated over the Bay Shore Highway, defendant maintaining two schedules each way daily.

There are some 70 patrons in Redwood City, Palo Alto, Sunnyvale, Mountain View, Santa Clara, and San Jose. Approximately one-half are located in San Jose. Garage owners and radio stores constitute the bulk of defendant's customers, and most of the shipments carried are southbound.

It appears that orders are given to drivers, telephoned in, or taken to wholesalers, jobbers, or supply houses in San Francisco, and shipments picked up and transported to destination. Compensation for this service is on a monthly basis, arrived at by verbal agreement. Adjustment of the charges is made if the business warrants. Line haul trucks render a pick-up and delivery service at San Jose, and drivers are furnished keys to seven establishments in that city where orders are picked up during the early morning hours, and goods are at times delivered after business hours. Shipments are refused unless consigned to patrons with whom an arrangement has been entered into similar to that described. North-bound business is negligible, consisting principally of repair parts or returned merchandise.

Complainant's witnesses testified that former patrons have transferred their business to defendant, and upon investigation complainant's traffic solicitor was informed by eighteen or twenty of whom he inquired that their reason was because a cheaper rate was available. The business was solicited by defendant, who promised better service at lower rates. While Redwood City and South San Francisco have called upon defendants for licenses, none have been paid. One shipment for the Pacific Wholesale Radio Company was lost, and is now being paid for by monthly payments.

Upon these facts defendants claim to be a private contract carrier not subject to the jurisdiction of the Railroad Commission, and offered no witnesses.

It is to be observed that the alleged "contracts" are not in writing, but are mere verbal agreements, the terms of which may vary from time to time. They are not entered into for any specific period of time nor for any specific volume or amount of tonnage. Neither is there any obligation on the part of the shipper to patronize this particular service. Clearly defendants are holding themselves out to serve that portion of the public willing to patronize their service. This Commission has recently held such operations to be common carrier in nature. (see Bakersfield, etc. Co. v. Willhour, 31 C.R.C. 367; Thornewill v. Gregory, 31 C.R.C. 843, and cases there cited)

Other than the pickup and delivery service mentioned, and the fact that drivers have keys to seven San Jose establishments for this purpose, the only additional service performed is the transmission of orders to wholesale supply houses in San Francisco. The transportation service and the "ancillary" service (if it may be so termed) are not so closely interrelated that they can not be separated, although the latter is undoubtedly

of some convenience to shippers. Therefore, it can hardly be said that this case falls within the ruling in Hare v. Gilboy, 31 C.R.C. 566, where the transportation was merely incidental to the personal ancillary services performed for the theatres there involved.

But one additional fact remains to be noted. It appears from the testimony that four shippers in San Francisco are served under written contracts, although copies of such contracts were not introduced in evidence. The arrangements made with these four shippers were outlined by defendant Keller as follows:

California Baking Company, transporting bread to Palo Alto at rate of \$150.00 per month, arrangement having existed since August 15, 1927.

Ernest Wilson Company, transporting candy from San Francisco factory to branch stores at Palo Alto and San Jose, and to agencies at South San Francisco, San Mateo and Mountain View, compensation \$100.00 per month; service having been rendered since February 10, 1928.

Ernest Smith, District Agent for "Ladies Home Journal" to agencies on Peninsula to and including Los Gatos; compensation \$70.00 per month; service having been rendered since October 27, 1927.

Roos Brothers transporting shipments to their branch stores at Palo Alto and San Jose; compensation 35 cents per cwt. with 35 cents minimum, returning empty carriers free; service commenced in February, 1928.

The Supreme Court of the United States has recently held (State of Washington ex rel Stinson L. Co. v. Kuykendall, 72 L. ed. 50, P. U. R. 1928 B, 258), that "regulations would be of little value if the state law permitted the shippers by private contract with public carriers to obtain the towing of their logs for less than the prescribed rates." It is true that the defendants here have no uniform or prescribed rates on file, but we cite the above case as decisive of the proposition that a common carrier can not, by entering into written contracts, grant preferential rates to particular shippers. We are of the opinion that the existence of these

contracts does not in any way affect the common carrier status of the operations here involved.

We find that defendants, Thomas Keller and K. B. Purchasing and Delivery Service, owned by Mrs. G. M. Adams and operated under the above fictitious name and style, are operating motor trucks used in the business of transportation of property, as a common carrier, for compensation, over the public highways of this State between fixed termini and over a regular route, without first having obtained from this Commission a certificate declaring that public convenience and necessity requires such operation, in violation of the Auto Stage and Truck Transportation Act.

An order directing said defendants to cease and desist from such operation will be issued.

O R D E R,

Complaint as above entitled having been filed, a public hearing having been held, the matter having been submitted and now being ready for decision, and basing its order upon the conclusions and findings in the opinion above,

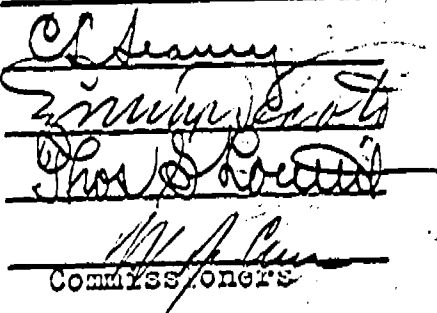
THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA
HEREBY ORDERS said Thomas Keller and K. B. Purchasing and Delivery Service to cease and desist from operations between San Francisco and San Jose and intermediate points, or vice versa,

as above described, unless and until a certificate of public convenience and necessity shall have been obtained from this Commission, and

IT IS HEREBY FURTHER ORDERED that the Secretary of this Commission mail certified copies of this Opinion and Order to the District Attorney of the City and County of San Francisco, and to the District Attorneys of the Counties of Santa Clara and San Mateo.

IT IS HEREBY FURTHER ORDERED that the effective date of this order shall be twenty (20) days from the date hereof.

Dated at San Francisco, California, this 18th day of October, 1928.


Commissioners