

Decision No. 2714

BEFORE THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA

**ORIGINAL**

In the Matter of the Application of JOHN FLEMING for certificate of public convenience and necessity to operate motor freight transportation service between Fresno, Parlier, Reedley, Orange Cove, Orosi, Cutler, Yettam, Sultana and intermediate points.

Application No. 15706

In the Matter of the Application of C. L. FORTIER & SONS to extend its present automobile, freight and express line, operated from Fresno, via Del Rey, Parlier to Reedley, to Orange Cove, Orosi, Cutler and Sultana, and intermediate points.

Application No. 15755

In the Matter of an Investigation on the Commission's own motion into the practices and operations of HENRY SMITH, operating an automotive trucking service between Fresno and Orange Cove and other points.

Case No. 2714

- G. L. Aynesworth, for C. L. Fortier & Sons, Applicants.
- John Fleming, in propria persona.
- Ernest Klette, for H. C. Smith, Respondent.
- W. S. Johnson, for Southern Pacific Company, Protestant in Application No. 15706 and Application No. 15755, and Interested Party in Case No. 2714.
- Edward Stern, for Railway Express Agency, Inc., Protestant in Application No. 15706 and Application No. 15755, and Interested Party in Case No. 2714.
- Earl A. Bagby, for California Transit Company, Interested Party in all of said proceedings.
- C. G. Fluhr, for The Atchison, Topeka and Santa Fe Railway Company, Interested Party in all of said Proceedings.

BY THE COMMISSION:

O P I N I O N

Two applications, providing for freight transportation between Fresno and Orange Cove, and other points, and a proceeding instituted on the part of the Commission, wherein Henry Smith is respondent, investigating a certificate and operations between

the same points, are involved in this proceeding, and by stipulation of all parties, the three matters were consolidated for hearing before Examiner Williams at Fresno.

The application of John Fleming to conduct service between Fresno, Parlier, Reedley, Orange Cove, Crosi, Cutler, Yettam, Sultana and intermediate points is based upon a public necessity for the service, and also, on the fact that applicant attempted to acquire, by purchase from Henry Smith, a certificate granted by Decision No. 15,476 on Application No. 11,000, dated October 1, 1925. Subsequent to the filing of Fleming's application, Fortier & Sons of Reedley, sought permission to extend their certificated service between Fresno and Reedley to Orange Cove and points applied for by Fleming and previously served by Smith, but excluding Yettam. At the hearing applicant Fleming stipulated that the inclusion of Parlier and Reedley (now served by Fortier & Sons) in his application was a mistake, and asked to withdraw these points, leaving the operation without intermediates between Fresno and Orange Cove. Upon this stipulation, applicant Fortier & Sons expressed the attitude that they could not persist in their application if a certificate be granted to Fleming, but that if for any reason such a certificate could not be granted to Fleming, Fortier & Sons desired to extend their services as proposed in their application.

After the applications were filed, the Commission ordered an investigation into the practices and operations of Henry Smith and ordered him to show cause why the rights heretofore granted by Decision No. 15,476, or otherwise, should not be revoked and annulled. Respondent was present in court with his counsel and gave his testimony. According to the testimony, Smith was operating the line between Fresno, Orange Cove and other more distant points, in August, 1928, when he undertook a sale of the business to John Fleming, applicant herein. A part of the agreement

(Exhibit No. 2) provided that the transaction was to be valid only when the approval of the Railroad Commission was received. Fleming paid \$1,000. cash under the contract and agreed to pay \$150. per month thereafter until the total purchase price of \$5,000. with interest at six per cent on deferred payments was completed. Of the purchase price, \$3,000, represented the value of the truck and \$2,000. the value of the certificate rights.

Fleming testified that the truck used by Smith was turned over to him and he began operation late in August, 1928, and continued the operation until February, 1929, when Smith repossessed the truck. Fleming also testified that during the period between August and February he had repeatedly demanded of Smith the Railroad Commission's sanction of the transaction, and that after three monthly payments, as agreed, he refused to make any more payments until this portion of the contract was carried out. When Smith repossessed the truck in February, 1929, Fleming leased another truck and continued the operation, and was continuing it in this manner at the time of the hearing. In June, 1928, Fleming was advised that he was operating unlawfully, and made his application to the Commission for a certificate, alleging substantially the facts as borne out in the testimony.

Respondent Smith testified that he had sold the certificate and truck to Fleming, as stated by Fleming, and that it was part of the agreement that the consent of the Railroad Commission should be secured and that he was to undertake the filing of the application for transfer. He testified that he had not filed the application because he wanted to "see if Fleming would make the payments." He further testified that in February, 1929, he served written notice of rescission of contract (Exhibit No. 1) upon Fleming, and thereafter repossessed the truck, immediately returning to the route and attempting to exercise all the rights granted him by his certificate. He remained for only two weeks

in this attempt because, he testified, he could not acquire business enough to justify continuance.

It is within the judicial knowledge of this Commission (Decision No. 15476) that respondent Smith herein obtained a certificate to conduct the service now in question upon a showing of public convenience and necessity at a hearing before Examiner Austin at Fresno on July 8, 1925. Previous to this time Smith had attempted to acquire from Schmidt & Emich a certificate held by them for an operation from Fresno to Orange Cove and other points. This was in 1923. In 1925, when he was advised that his operations were unlawful, as no application for approval of transfer had ever been made, he filed his Application No. 11,000. The Commission, in determining this application, considered the situation in which Smith found himself as well as public necessity for the operation, and granted a certificate to him. The certificate originally granted to Schmidt & Emich was revoked by Decision No. 15,168 on Case No. 2091, July 10, 1925.

In the present instance Smith has unquestionably attempted to do the same thing and to place Fleming in the same erroneous position in which he (Smith) had been placed years before. He received Fleming's money, approximately \$1500., and made no effort to obtain the sanction of this Commission which, from his own experience, he well knew was necessary.

The testimony of Fleming and Smith agree that from August, 1928, to February, 1929, Smith abandoned his service under the purported sale and conducted no operations. And, further, that from March, 1929, until the date of hearing, Smith had made no further effort to conduct the service.

We believe these facts justify the revocation of the permit heretofore granted to Smith.

The application of Fortier & Sons was not pressed except to the extent indicated before, that they were ready, able and

willing to establish service as an extension of their line from Fresno to Reedley if applicant Fleming was denied a certificate. All parties, including protestants, agreed that the necessity of the maintenance of service had already been established in previous hearings and that further proof of this was unnecessary. After hearing the facts, protestants, Southern Pacific Company, Railway Express Agency, Inc., and California Transit Company, withdrew their protests. Fleming did, however, stipulate that he would receive no packages of less than 50 pounds weight for transportation in either direction, to eliminate protest of California Transit Company.

Protestant, The Atchison, Topeka and Santa Fe Railway Company, introduced no testimony. By Decision No. 15,476, this Commission found that this service was inadequate and, in the absence of any proof by protestant otherwise, it may still be regarded as inadequate.

While the Commission does not countenance irregular proceedings of this character, it finds that applicant Fleming has acted in good faith, but that due to his ignorance and poor advice, he has been abused. Notwithstanding this abuse, the record shows he has given satisfactory service for a year and appears able and willing to continue. He should, however, obtain proper advice as to his duties under the law and adhere closely thereto.

We find, therefore, as a fact, based upon the foregoing opinion, that public convenience and necessity require the service applied for by Fleming and a certificate granting his request accordingly will be issued. The order will also provide for the denial of the application of Fortier & Sons and the revocation of the certificate granted to Smith by Decision No. 15,476.

John Fleming is hereby placed upon notice that "operative rights" do not constitute a class of property which should be capitalized or used as an element of value in determining reasonable rates. Aside from their purely permissive aspect, they

extend to the holder a full or partial monopoly of a class of business over a particular route. This monopoly feature may be changed or destroyed at any time by the state, which is not in any respect limited to the number of rights which may be given.

#### O R D E R

JOHN FLEMING having made application to the Railroad Commission of the State of California for a certificate of public convenience and necessity for the establishment and operation of an automobile truck service for the transportation of freight between Fresno and Orange Cove, a public hearing having been held, the matter having been duly submitted and now being ready for decision,

The Railroad Commission of the State of California hereby declares that public convenience and necessity require the establishment of an automobile freight service for the transportation of freight in packages or weights in excess of fifty (50) pounds between Fresno and Orange Cove, Oroqui, Cutler, Yettam and Sultana and all points intermediate to Orange Cove, Yettam and Sultana, over and along the following route:

From Fresno via main highway through Parlier and Reedley to Orange Cove, thence south to Oroqui, Cutler and Yettam, thence west from Cutler to Sultana, returning over the same identical route; and

IT IS HEREBY ORDERED that a certificate of public convenience and necessity therefor be, and the same hereby is granted to JOHN FLEMING on the following conditions:

- 1.- Applicant shall file his written acceptance of the certificate herein granted within a period of not to exceed ten (10) days from date hereof.
- 2.- Applicant shall file, in duplicate, within a period of not to exceed twenty (20) days from the date hereof, tariff of rates and times schedules, such tariffs of rates and time schedules to be those attached to the application herein, or rates and time schedules satisfactory to the Railroad Commission,

and shall commence operation of said service within a period of not to exceed twenty (20) days from the date hereof.

- 3.- The rights and privileges herein authorized may not be discontinued, sold, leased, transferred nor assigned unless the written consent of the Railroad Commission to such discontinuance, sale, lease, transfer or assignment has first been secured.
- 4.- No vehicle may be operated by applicant herein unless such vehicle is owned by said applicant or is leased by him under a contract or agreement on a basis satisfactory to the Railroad Commission.

C. L. Fortier & Sons having made application to extend their authorized service between Fresno and Reedley to Orange Cove, Orosi, Cutler and Sultana,

The Railroad Commission of the State of California hereby declares that public necessity and convenience do not require such extension, and

IT IS HEREBY ORDERED that the application be, and the same hereby is denied without prejudice.

By its order issued on the 18th day of June, 1929, the Railroad Commission cited Henry Smith to appear and show cause, if any, why any or all of the operative rights possessed by him under Railroad Commission's Decision No. 15476, or otherwise, for the operation of an automotive trucking service between Fresno and Orange Cove and other points, should not be revoked by this Commission, and fixing hearing thereon at Fresno on August 12, 1929; and at said time and place said Henry Smith, appearing personally and by counsel, responding to said citation, a hearing having been held, the matter being duly submitted and now being ready for submission,

IT IS HEREBY ORDERED that the certificate heretofore granted Henry Smith by said Decision No. 15,476 on Application No. 11,000, as aforesaid, and all rights thereunder, be, and the

same is hereby revoked and annulled and no further operation thereunder may be conducted.

For all other purposes the effective date of this order shall be twenty (20) days from the date hereof.

Dated at San Francisco, California, this ~~4<sup>th</sup>~~ day of ~~August~~, 1929.

Thos S Lattin  
C Seamer  
Ernesto  
Leon Whittell  
M J Carr  
Commissioners.