

Decision No. 23120

BEFORE THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of  
 L. A. THORNEWILL for a certificate of  
 public convenience and necessity to  
 operate a common carrier auto freight  
 service from San Francisco to Santa Cruz  
 and Capitola.

)  
 )  
 ) Application  
 ) No. 16389  
 )

SOUTHERN PACIFIC COMPANY,  
 Complainant,

vs.

L. A. THORNEWILL,  
 Defendant.

ORIGINAL  
 Case No. 2859

Douglas Brockman for Applicant in Application  
 No. 16389, and for Defendant in Case No. 2859.

H. W. Hobbs and W. S. Johnson for Southern  
 Pacific Company and Pacific Motor Transport  
 Company, Protestants.

Edward Stern for Railway Express Agency, Inc.,  
 Protestant.

Gwyn E. Baker, for the Highway Transport Company,  
 interested party.

C. W. Cornell, for Pacific Motor Transport Company,  
 interested party.

LOUTTIT, Commissioner -

OPINION

The above entitled complaint (Case No. 2859), in which  
 Southern Pacific Company appears as complainant, charges  
 that L. A. Thornewill is transporting general freight between  
 San Francisco and Santa Cruz notwithstanding that the  
 authorization for a trucking service he obtained from the  
 Railroad Commission limits to mill feeds and empty containers  
 the commodities he may transport southbound from San Francisco.

The Commission is asked to issue its order directing defendant to cease and desist from such general freight service and, further, to issue an order revoking the certificates of public convenience and necessity heretofore granted to defendant. In the application (No.16389) L. A. Thornewill asks from the Commission authorization to transport general freight southbound from San Francisco.

Public hearings were held at Santa Cruz, the matters were consolidated at the hearing held at Santa Cruz on October 3, 1930, counsel for the defense agreeing by stipulation that all evidence taken in the matters at previous hearings be considered in connection with the consolidated proceedings.

The records of the Commission, all of which were made part of this consolidated proceeding by the introduction, as exhibits, of various formal orders of the Commission, show that applicant Thornewill by Decision No.17451, dated October 23, 1926, and issued on Application No.12407, was authorized to operate a trucking service for the transportation of berries, fruits, vegetables, poultry and eggs from Santa Cruz and Capitola to San Francisco, and grapes and plums from Alma to San Francisco, and a return movement of mill feed in sacks, and empty containers (free) from San Francisco to Santa Cruz and Capitola, and for no other commodities or service. By Decision No.19368, dated April 20, 1928, and issued on Application No.14428, he was authorized to operate a service for the transportation of berries, fruits, vegetables, poultry and eggs from Swanton to San Francisco by way of Davenport and Santa Cruz, and to serve points intermediate between Swanton and Santa Cruz, with the right to return empty containers without charge from San Francisco to Swanton and intermediate points, as an extension of the service he was authorized to perform by Decision No.17451. On August 20, 1929, by

Decision No.21474, issued on Application No.15249, the Commission denied Thornewill's application for authority to transport general freight between Santa Cruz and Capitola and San Francisco, declaring in said decision:

"It does not appear that applicant has refused to handle any business if the vacant spaces on his trucks would permit of such carriage and all such handling has been done prior to application for the necessary certificate and has continued after filing application for the certificate and without waiting for a decision. Under such circumstances we cannot ignore the applicant's violation of his certificate and permit such restrictions to be removed.

We are not, therefore, at this time passing on the matter of public convenience and necessity other than to conclude that an applicant should not receive such certificate based on evidence which is conclusively to the effect that the authority sought has been already anticipated and assumed by the applicant who has operated and now is operating for compensation, and without the necessary authority as prescribed by the statutory law. For this reason the application will be denied."

On the same date (August 20, 1929), the Commission, by Decision No.21473, on Case No.2651, (Southern Pacific Co. vs. Thornewill), revoked the Thornewill right and ordered him to cease and desist the operation authorized by Decision No.17451 and No.19368.

This order was not complied with and on November 5, 1929, an action was begun by the Commission in the Superior Court of the City and County of San Francisco against Thornewill to collect the penalty provided by the Auto Stage and Truck Transportation Act. An agreed judgment of \$750.00 was entered and satisfied by defendant. On March 24, 1930, the decision in Case No.2651 was revoked and the case dismissed, and Application No.15249 was denied without prejudice, leaving Thornewill in possession of his original rights. On March 24, 1930, he filed Application No.16389, in effect a renewal of his application for authority to transport general freight.

on May 8, 1930, Southern Pacific Company filed the complaint now under consideration, practically renewing the charges contained in Case No.2651.

In the present proceeding some 37 witnesses were examined, 15 called by applicant Thornewill and 22 by complainant, Southern Pacific Company.

So conclusive is the testimony, indicating not only a disregard by Thornewill of the requirements of Chapter 213, but of the Commission's orders that an analysis of the testimony in detail would be superfluous. Applicant himself frankly admitted that he was transporting goods beyond the scope of his certificates, some under contract, some not covered by any sort of an agreement. True, publicly, by means of "ads" published in San Francisco and Santa Cruz newspapers, Thornewill notified the world at large that his service was not open to the public, but he continued, the record shows, to accept general freight for transportation to Santa Cruz, giving the service first, according to his own testimony, as an accommodation and latterly because he felt he should give the merchants of Santa Cruz the service they desired, even in the face of the fact that he had no authority to perform it. To meet his interpretation of the law in the matter he solicited contracts with consignors and consignees, securing four in San Francisco and 8 in Santa Cruz, yet he did not confine himself, the record amply shows, to service to such customers. He testified that he had instructed his employees not to accept shipments from consignees with whom he did not have a contract, except those that fell within the category of emergency shipments which could not, because of the hour of their shipping, be carried by any other means of transportation. That there were many of such "emergency shipments" is evidenced by the record. Mr. Thornewill's desire to be obliging led him far, but it is to be noticed that

the desire to oblige did not obviate a charge for the service. It is also to be noted that all shipments, contracted for or otherwise, were moved under a uniform bill of lading, lending considerable strength to the contention of complainants that the contracts were but a subterfuge, intended to cloud the real operations of Thornewill.

Applicant Thornewill also testified that he moved all contract shipments on equipment not registered with the Railroad Commission as equipment used in his authorized common carrier service; that such shipments were moved on equipment bearing commercial plates, not public service plates, except "in emergencies" such as breakdowns involving his commercial equipment. Just how often such breakdowns occurred witness Thornewill was not prepared to state. The evidence shows, however, that the consignees or consignors receiving the benefits of the Thornewill service were not affected; their goods arrived regularly on Thornewill equipment.

Thornewill laid considerable stress on the fact that he had sought authority from the Commission to transport general freight southbound, his first attempt being made on December 6, 1928, (Application No.15249), and that immediately on the dismissal of said application, on March 24, 1930, he had renewed it by filing Application No.16389. The record does not show any unreasonable delay in the earlier proceeding. The only continuance was sought by applicant himself. In the present proceeding, at the hearing on May 23, 1930, a proposal to consolidate the two matters was opposed by counsel for applicant who advised he was not ready to proceed. Hearing on the application was thereupon set for August 5, 1930. A further continuance was granted to applicant.

There is but one conclusion possible in this proceeding. The facts elicited justify a finding, and it is hereby found as a fact, that applicant Thornewill, notwithstanding public

declaration of his desire to fully comply with the operating limitations imposed on his service by order of the Commission, has performed otherwise. He has been operating in accordance with the desires of shippers and receivers of freight and not along the lines or within the limitations of the certificates authorizing him to operate. Fully advised, through formal orders of this Commission, more fully impressed on his memory by a fine of \$750.00, as to his exact rights and the requirements of the law, he has elected to continue his unlawful operations, anticipating again an order of the Commission granting the necessary authority.

This conclusion is based on a full consideration of the Commission's records in all matters pertaining to Thornewill's operations, including those proceedings inspired by Thornewill himself (Thornewill vs. Gregory, C.R.C. Cases 2484 and 2584), in which he showed a familiarity with the law which cannot be reconciled with his interpretation of the law set forth by him in defense of his own operations.

Counsel for defendant Thornewill made an issue of the dates on the bills of lading. So clear is the proof of unlawful operation that the question of when the illegal acts were performed seems inconsequential. It was continuous even during the pendency of his second application.

The Commission, when it set aside its previous order revoking Thornewill's operating rights, it having considered that Thornewill had been sufficiently punished by a fine of \$750.00, gave to the defendant herein a full measure of leniency. He is entitled to no further grace and it is therefore recommended that his application for a certificate be denied and that an order be made revoking the certificates heretofore granted to him.

O R D E R

Public hearings having been held in the above entitled matters, evidence taken and an order of submission made,

IT IS HEREBY ORDERED that Application No.16389 be and the same is hereby denied, and

IT IS HEREBY FURTHER ORDERED that the certificates of public convenience and necessity heretofore granted to L. A. Thornewill by Railroad Commission Decision No.17451 and No.19368 be and the same are hereby revoked and annulled, and

IT IS HEREBY FURTHER ORDERED that tariffs and time schedules filed with the Railroad Commission by said L. A. Thornewill covering service authorized by said certificates be and the same are hereby canceled.

IT IS HEREBY FURTHER ORDERED that L. A. Thornewill cease and desist all trucking operations performed by him under the certificates of public convenience and necessity herein revoked, and

IT IS HEREBY FURTHER ORDERED that L. A. Thornewill cease and desist all common carrier auto trucking service between San Francisco and Santa Cruz unless and until he shall have obtained a certificate of public convenience and necessity from the Railroad Commission.

IT IS HEREBY FURTHER ORDERED that a copy of the order herein be forwarded to the District Attorneys of Santa Cruz, Santa Clara, San Mateo and San Francisco counties.

The above opinion and order are hereby declared to be  
the opinion and order of the Railroad Commission of the  
State of California.

Dated at San Francisco, California, this 28th day  
of November, 1930.

[Signature]  
[Signature]  
Leon C. [Signature]  
[Signature]  
[Signature]  
COMMISSIONERS.