

Decision No. 23721

BEFORE THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA

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Sierra Railway Company of California,

Complainant,

vs.

Thomas Berg and E. Christensen, doing
business under the fictitious name
of SONORA FAST FREIGHT COMPANY,

Defendants.

Case No. 2896

ORIGINAL

Rowan Hardin, for Complainant
Hilary H. Crawford and J. C.
Webster, for Defendants.

LOUTHER - Commissioner:

OPINION

Sierra Railway Company of California operates a railroad between Oakdale and Tuolumne, and an automotive truck service between Stockton and Tuolumne. Its complaint alleges that Thomas Berg and E. Christensen, under the fictitious name and style of Sonora Fast Freight Company, are operating in violation of Statutes 1917, chapter 213, as amended, between San Francisco and Jamestown, Sonora and Tuolumne.

Defendants allege that they are operating as private carriers under contract, doing business under the name of Sonora Fast Freight.

Fifteen witnesses were called, most of whom were receivers of freight. Witness Paschini, a grocer at South Sonora, first knew of defendants' service through receipt of a shipment from Hills Bros. of San Francisco. After a few deliveries, witness signed a mimeographed form entitled "Transportation Contract" providing for a rate of 40 cents per hundred between San Francisco and Sonora (Ex. No. 1.) The witness is now paying 37 cents per hundred. His understanding of the arrangement with defendants is that the latter would haul from Oakland or San Francisco. Freight charges are paid on delivery, with the exception of prepaid shipments.

Witness Anderson, upon delivery of a shipment by Sonora Fast Freight, was requested by the driver to sign a piece of paper and did so under the impression that it was a freight bill. Upon examination, he found it was a "Transportation Contract" form (Ex. No. 12.)

Exhibit No. 20 reads as follows:

"Transportation Contract

5/20/30

This is to confirm our understanding that the Sonora Fast Freight agrees to transport commodities consigned by you between San Francisco and Oakdale, Jamestown, Sonora, Tuolumne for a period beginning the above date and to and including Jan. 31, 1931.

Charges to be paid by you or by your instructions to the Sonora Fast Freight, for truck transportation between above mentioned points, at the following rates:

Oakdale	21½¢	per hundred
Jamestown	40¢	"
Sonora	40¢	"
Tuolumne	47½¢	"

It is further understood that if the service rendered under this agreement is not satisfactory to you, then upon five days notice to us you may terminate this agreement.

(Signed) Fryer Trading Co.
Per G. K. Dennett

We hereby approve the terms of the foregoing agreement

(Signed) Sonora Fast Freight"

The above form is mimeographed, the words underlined being written in. All "Transportation Contracts" are identical, the only variance being the names of the termini and the rate to be charged. On certain of these forms the following language is written in immediately preceding the signatures; "Cargo insurance is carried by the above Truck Co."

As exhibits herein copies of this form of agreement signed by the following were introduced:

Leo Paschini	Monteverdi, Rolandelli Parodi Inc.
Hills Bros. Coffee Inc.	Chas. Anderson
M.J.B. Co.	Wellman, Peck & Co.
Haas Bros.	California Supply Co.
Jacobson Sheely Co.	Safeway Stores
Sussman Wormser & Co.	J. A. Folger & Co.
Equitable Cash Gro. Co.	I. Drabkin
B.A. Whittaker	Western Meat Company
Kingan & Co.	Fryer Trading Co.
D. Servente	

Many other agreements in addition to the above have been entered into.

From the testimony of Thomas Berg, one of the defendants, it appears that Sonora Fast Freight was organized about March 1, 1930. In February Berg solicited business in Sonora and also among the wholesale houses in San Francisco, seeking freight for Riverbank, Escalon, Oakdale, Jamestown, Sonora and Tuolumne. The plan was to furnish truck service twice a week. After this solicitation, a truck was purchased on time, and an office established in San Francisco. The first trip was made about March 20, 1930. Goods have been picked up in Oakland and Berkeley, as well as San Francisco. Deliveries have been made to all the grocery stores in Jamestown.

The rates charged vary and larger shippers are accorded a more favorable rate. On soliciting cards were distributed, reading as follows (Ex. No. 19):

"SONORA FAST FREIGHT
Contract hauling
Daily truck service to

OAKDALE-JAMESTOWN-SONORA

Thos. Berg.

942-44 Folsom Street
San Francisco."

Daily service was not rendered because of insufficient business and trips are made twice a week. If business warranted daily service would be given. Some five or six shipments have been refused "because their shipment wasn't worth the contract." (Tr. p. 104) The object in securing contracts was "to keep within the law" (Tr. p. 105) and all merchants approached would have been "signed up" if they had sufficient business.

Defendant Christensen testified that the reason a few shippers were refused service was that

"Some of them called us to pick up and only had a few small packages going, and other times they would not deliver their stuff and their shipments were irregular, and it was not enough to warrant us taking them as a customer." (Tr. p. 113)

W. H. Booker, and F. W. Viester, employees of Sierra Railway Company, testified in detail as to shipments delivered by Sonora Fast Freight.

An analysis of the standard form of "Transportation Contract" shows that it does not provide for any specific volume or amount of tonnage. It does not impose upon the shipper any obligation to patronize this particular service. It affirmatively appears that defendants carefully solicited the field of possible shippers and receivers of freight in an effort to build up a profitable and regular business.

All within the territory served might receive service provided only that their shipments were sufficiently frequent and in such quantity as to be profitable.

A very careful and studied attempt has been made by defendants to bring the operation within the purview of Frost v. Railroad Commission, 271 U. S. 581. Their difficulty has been that from the very inception of the service it has been common carrier in nature and not that of a "private carrier." (See Rasmussen & Co., 34 C.R.C. 497, and cases there cited.)

Receivers of freight at Sonora and other points were actively solicited prior to the commencement of operations in an effort to ascertain if sufficient business might be obtained to warrant the installation of the proposed service. Wholesale houses in San Francisco were also canvassed and an effort made to have either the shipper or receiver enter into a "Transportation Contract." A paying business apparently has been built up in this manner, and the record shows a "holding out" to that portion of the public located at the termini and offering a sufficient frequency and volume of tonnage as, in the opinion of defendants, may prove profitable for them to transport.

Since the decision in Frost v. Railroad Commission, supra, the Commission has been confronted with many instances of so-called "contract hauling" claimed to be that of a private carrier. The mere fact that a truck operator enters into verbal or written contracts or agreements with his customers will not change a common carrier status to that of a private

carrier (Thornwill v. Gregory, 33 C.R.C. 455, 459.) Nor is it a prerequisite that one must undertake to serve all persons without limitation in order to be classed as a common carrier. If a particular service is offered to all those members of the public who can use it, the public is in fact served, and the business is affected with a public interest, although the actual number of persons served may be limited. (Re Jack Hiron, 32 C.R.C. 48, 51.) The Commission has heretofore held that where, as in the instant proceeding, the only limitation upon the right to receive service (otherwise common carrier in nature), is that the business of an individual shipper shall "prove profitable", such operation is unlawful in the absence of a certificate. (P. & S.R.R.Co. v. Deysher, 32 C.R.C. 141, 145)

It may be that the existing authorized service is inadequate to meet the needs of the public, and that public convenience and necessity could be shown for an additional service. If such be the case, the proper procedure is to apply to the Commission for the necessary certificate rather than to initiate a common carrier service which may (and has in this instance) seriously curtail the ability of the existing service to continue by taking from it a substantial portion of its business. The following form of order is recommended.

O R D E R

A public hearing having been had and the above entitled matter being submitted on briefs,

IT IS HEREBY FOUND AS A FACT that THOMAS BERG and H. CRISTENSEN, operating under the fictitious name and style of SONORA FAST FREIGHT, are operating as a "transportation company"

within the meaning of chapter 213, statutes of 1917, as amended, between San Francisco, Oakland, and Berkeley and Escalon, Riverbank, Oakdale, Knights Ferry, Jamestown, Sonora, Standard and Tuolumne without first having obtained a certificate of public convenience and necessity therefor.

IT IS HEREBY ORDERED that said Thomas Berg and E. Christensen immediately cease and desist such common carrier operations until they shall have obtained the requisite certificate of public convenience and necessity from this Commission, and

IT IS HEREBY FURTHER ORDERED that the Secretary of this Commission cause a certified copy of this decision to be served upon said Thomas Berg and E. Christensen, and that certified copies of this decision be mailed to the District Attorneys of San Francisco, Alameda, San Joaquin, Stanislaus and Tuolumne Counties.

This decision shall become effective twenty (20) days from and after the date of service above mentioned.

The foregoing opinion and order are hereby approved and ordered filed as the opinion and order of the Railroad Commission of the State of California.

Dated at San Francisco, California, this 29th day of November, 1930.

C. L. Seaver
Leon O'Connell
W. H. ...
M. J. ...
Commissioners