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Decision No. 23784

BEFORE THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of

CHARLES KUPFINGER,

for a certificate of public convenience and necessity to operate an auto truck service for the transportation of property as a common carrier between Lakeport and San Francisco via Hopland and certain intermediate points; also to enlarge his present operative right between Hopland and C. B. Williams Packing Shed so as to permit the establishment of an auto truck service for the transportation of property as a common carrier between Lakeport and Kelseyville via Annette and Finley, and intermediate points, with permission to serve all ranches and packing sheds situated within a zone extending two miles on each side of the main highway traversed; also to operate an auto truck service for the transportation of property as a common carrier between Lakeport and Clear Lake Villas and Lucerne, and intermediate points; also to unify and consolidate the lines herein sought to be established with applicant's existing operative rights for the general transportation of property.

ORIGINAL

Application
No. 16948

Bagicalupi, Elkus & Salinger, by Frank B. Austin and Sanborn and Roehl, Smith and Brookman, by Arthur B. Roehl, for Applicant.

H. W. Hobbs, for Northwestern Pacific Railroad Company, Protestant.

W. S. Johnson, for Southern Pacific Company, Protestant.

R. S. Elliott, for Railway Express Agency, Inc., Protestant.

Burt W. Busch, for Guido de Ghetaldi.

BY THE COMMISSION:

OPINION

CHARLES KUPFINGER has made application to the Railroad Commission for a certificate of public convenience and necessity to operate automotive service for the transportation of property

between San Francisco, Petaluma and Santa Rosa on the one hand, and Lakeport, Upper Lake, Lucerne, Finley and Kelseyville on the other hand. Applicant also seeks the right to transport live-stock between Lake County points as above indicated, to and from South San Francisco.

Public hearings were conducted by Examiner Williams at San Francisco and Lakeport; the matter was duly submitted on briefs which, having been filed, places the matter now ready for decision.

Applicant has been engaged in the transportation of property under authority of this Commission for many years, and now possesses the following operative rights:

Between Hopland and Lakeport and Upper Lake;

A seasonal service between packing houses at Finley and Kelseyville and Hopland, largely for the transportation of fruit;

For the transportation of household goods between San Francisco and East Bay cities and points along the Redwood Highway as far as Ukiah on the one hand, and Lake County points on the other.

In these proceedings applicant seeks to have whatever certificate may be granted under the instant application consolidated with all his other rights into a single united operation. At the hearing applicant stipulated that he would accept an in lieu certificate fixing all his rights and terminating the old grants. Not only the instant application, but the consolidation of any new certificate with the old rights was opposed by protestants.

Applicant proposed rates, routes and time schedules for the instant application in Exhibits "A" and "B" attached thereto, and these exhibits were not protested as such, but in connection with the general protest against the necessity for the establishment of any additional service.

The record discloses that the area in Lake County sought as the termini of the operation applied for is now without, and never has had, railroad service direct. Lake County is served in the north merely by its connection with the Northwestern Pacific Railroad, protestant herein, at Hopland and Ukiah. At either point freight is deposited for delivery in Lake County by either the service maintained by applicant between Hopland and Lakeport, and by J. A. Kiethley between Hopland and Kelseyville, or between Ukiah and Upper Lake and Lucerne by protestant Chetaldi, or from either point by such private carriers as may be giving service. Under these established operations, property from San Francisco is transported by Northwestern Pacific Railroad, including from Petaluma and Santa Rosa and all other points on its line between Ukiah and San Francisco to either Hopland or Ukiah, by an overnight service, usually reaching Hopland at from 6:00 to 8:00 o'clock the morning, and Ukiah possibly a half-hour later. In addition, protestant, Railway Express Agency, Inc. transports property on passenger trains reaching Hopland and Ukiah, where it has arrangements with common carriers at each point for the transportation of its shipments. From Hopland express shipments are transported to Lakeport and return by Geo. S. Held, proprietor of the Lakeport Transportation Company, operating passenger and express service only; between Ukiah and Upper Lake similar service is performed by Pacific Greyhound Lines. Both freight and express services are daily except Sundays, and second day delivery is accomplished, according to the record, but not with regularity as to schedule. The distances are not great,--that from Hopland to Lakeport being about 22 miles, while from Ukiah to Upper Lake is approximately 35 miles, due to the circuitous mountain route.

Applicant contends that this service is inadequate for a volume of freight now moving by truck, and that it can and has

been moved between San Francisco and Lake County points with greater rapidity and direct store-door delivery by truck through than by the combination of rail and truck service. In this connection and presented in support of applicant, the record shows the following facts:

Sometime previous to December, 1929, applicant, Kuppinger, established a so-called "contract" freight service between San Francisco and Lake County points. He testified that he acquired a considerable volume of business under private arrangement with shippers in San Francisco and receivers of freight in Lake County, but that he was informed that the establishment of this service over a route where he had certificated authority (for furniture only) was in violation of law. He testified that he "consulted the Commission" and was advised that it, probably was in violation of the certificated rights, whereupon, he testified, he sold the refrigerator truck which had been used in this service to its driver, W. E. Chapman, and turned over this "contract" business to Chapman, who has since conducted it; that Chapman acquired no interest from him except title to the truck, and that he ceased to have any further interest in the business.

The contract itself calls only for the transfer of the equipment (Exhibit No. 7). Applicant further testified that he made arrangements with Chapman, by which he (Kuppinger) would take the truck back when a certificate hereunder should be granted applicant, and reimburse Chapman in full for the amount he had paid for the truck and employ Chapman as driver.

The record further shows that during all the period Chapman has continued the "contract service" alluded to he has had offices with Kuppinger both at San Francisco and Lakeport; that in San Francisco the telephone was listed jointly under their names (Kuppinger-Chapman Truck Service); that the expenses of

offices and terminals used by both were shared, and that Kuppinger, at Lakeport, received orders for business for Chapman, although Chapman had a telephone at his home. It was further admitted by both Kuppinger and Chapman that all the business conducted by both over the Golden Gate Ferries had been upon commutation freight books held in Kuppinger's name and for which Kuppinger paid. Kuppinger explained that this was a convenient arrangement because he had always had such books in his name, and that all charges had heretofore been made to him and that all his other public and private business moving over the ferry between Sausalito and San Francisco had been carried in his account and that it was a mere matter of convenience, and that he always collected from Chapman the proportion due for his freight and equipment. In this connection it will be noted also that the record is replete with the statements of witnesses called by applicant who spoke of the present-day service as the Kuppinger service. Few in San Francisco seemed to know there had been any change. The obvious fact from all the testimony received in this respect is that so far as the shipping patrons were concerned there had been no change in the transfer of the freight except that Chapman was conducting the service. In addition to this, bills of lading produced were made out to the "Kuppinger Truck Service" and accepted by Chapman and the property transported.

As against this apparent connivance, if not collusion, between Chapman and Kuppinger, each testified that neither had any interest whatever in the other's business, shared no profits or losses with each other, and that the businesses were conducted in the manner set forth merely as a matter of convenience and economy. There was no testimony that there had been any settlements as to traffic revenue between them between December, 1929, and the date of the hearings. It was developed, however, that

the payments under the contract had not been made as provided for, and that applicant, after 15 months of operation, still owed \$1,000.00 on the truck. It was further shown that he was given credit by Kuppinger on monthly account for gas, oil, tires and for garage service.

Protestants joined in declaring this to be a subterfuge arrangement by which applicant herein has been able to build up a considerable volume of traffic without jeopardizing either his present operative right or facing prosecution for illegal operation, and that his whole purpose has been to build up a volume of traffic illegally in order to sustain the application for the certificate sought herein. Also, that there is no offer to suspend or terminate what protestants call the illegal operation of Chapman until, and unless, the Commission grants a certificate to applicant, at which time Chapman, as he testified, will turn his business over to Kuppinger and resume his status as driver.

As to the legality of the operation of Chapman, it appears that his operations are no different from those of scores of other so-called "contract" carriers who have transported large volumes of mixed merchandise between fixed termini and over a regular route under verbal or written contracts and who have been required to cease and desist by this Commission. The business conducted by Chapman has been in his name without written contract of any kind. It appears that any one offering shipments to Chapman could have them transported to Lake County points; that this carrier accepted standard railroad bills of lading with the shipments, which are all in effect common carrier agreements. While there were some written contracts, they were not produced or identified as to particular shippers except in one instance (Exhibit No. 8), where the contract appears as the usual form of rate quotations from the carrier to the shipper without obliga-

tion on the shipper's part to furnish any quantity and with the privilege of cancellation of this so-called "contract" within five days.

Applicant contends that this operation has never been brought within the purview of Chapter 213, Statutes 1917, as amended, and that the service performed has been that of a private carrier and not of a common carrier. The record does not justify such a conclusion on our part. The facts related in the foregoing are of such a nature as to forbid condonation unless paramount public necessity so justifies.

In addition to the record cited, the record further discloses that applicant is the owner of a prescriptive right for the transportation of freight between Hopland and Lakeport, and also a right between Lakeport and Upper Lake. This long established right appears to have been satisfactory to applicant until practically two years ago and about the time direct service from San Francisco to Lakeport was established by applicant and later transferred to Chapman. In the past two years, according to the testimony of applicant himself, this exclusive hauling between Hopland and Lakeport has diminished until now not over 15 per cent of the volume is transported by him. The remainder is transported by Lee D. Stoddard under alleged private contract, and his business has grown in two years sufficient to absorb 85 per cent of the volume between Hopland and Lakeport, while applicant's volume has decreased to approximately 15 per cent. This is the testimony of Stoddard as well as Kuppinger. It is the contention of applicant that the authorized service conducted by him between Hopland and Lakeport was broken down by illegal competition on the part of Stoddard. The validity of Stoddard's operations in the instant proceeding is not before us except incidentally, and the record is not sufficient to pass judgment upon it at this time, but it is significant that during the two

years Stoddard has been conducting service it has been without protest on the part of applicant, Kuppinger.

It is our opinion that reading these facts in connection with the facts of the Chapman operation the conclusion is justified that applicant was not averse to letting this situation continue in order to build up direct transportation from San Francisco. Applicant is an experienced operator under a certificate from this Commission, is presumed to be thoroughly familiar with his rights and also with the means of protecting his authorized service against unlawful invasion. He also knew of the rate at which the operations of Stoddard were conducted and made no effort, by adjustment of his own rates, to meet competition at the beginning or at any time. Stoddard testified that he hauled for practically every receiver of freight in Lakeport at different times and made distribution at an early hour in the morning.

Exhibit No. 10 of Northwestern Pacific Railroad covering the period from January 26, 1931, to February 28, 1931, of arrivals and departures of trucks at Hopland for the purpose of transporting freight to Lakeport showed great irregularity in the appearance of applicant's truck at Hopland; in fact, for 13 days during this period there is no record in the exhibit of the Kuppinger truck appearing at Hopland at all. This, it was explained by applicant, was due to the fact that on those dates in all probability no shipments were consigned to him for transportation. Attempts were made to show that Stoddard had the goodwill of protestant Northwestern Pacific Railroad, but the record does not disclose that this carrier had done other than deliver freight at Hopland and indiscriminately delivered it to all carriers upon the same terms.

Northwestern Pacific Railroad Company service to Hopland and Ukiah, as has heretofore been stated, ^{is} daily, with receipt of freight in San Francisco up to 5:00 p.m. and delivery early next

morning at both Hopland and Ukiah. The service proposed by applicant is three times weekly and in addition he proposes to make direct deliveries of Upper Lake, Lucerne, and also at Kelseyville and Finley, points already served by public carriers. Applicant's entire case rests almost wholly upon the testimony of witnesses now using the Chapman service, in fact, all the witnesses from San Francisco are users of the service.

As against the witnesses produced by applicant, the protestant produced many witnesses at Lakeport, Kelseyville and Upper Lake to show that the services of J. A. Keithley to Kelseyville are satisfactory; that the services of Stoddard and Held between Hopland and Lakeport are satisfactory, and that the service of Chetaldi between Ukiah and Upper Lake, also serving Upper Lake Villas and Lucerne, are adequate and satisfactory.

Accepting the figures of applicant as to the quantity of freight available for a certificated service as proposed, we find that during the year 1930 freight hauled by Chapman under alleged private contract between San Francisco, and Lake County points aggregated 932 tons. In addition, he hauled from Lake County to San Francisco, as a contract carrier, 266 tons of beans. During the same period Kuppinger, under his certificate to transport furniture, hauled about 50 tons, and as a contract carrier approximately 530 tons of beans, the latter under contract with the Clear Lake Cannery at Upper Lake. It is the theory of applicant that the aggregation of all tonnage, both contract and under certificate, will be handled by certificated service, in round numbers, about 1800 tons a year. It is applicant's further theory that the tonnage from Clear Lake Cannery will always be available to him because of his financial interest in that concern and his ability as a certificated operator to make a commodity rate to meet this movement. However, this cannery has heretofore always contracted, and it appears, legally, for the disposition of its products. We

are inclined to believe that the only tonnage available for proposed operations would be the merchandies now available to Chapman, and the furniture probably not greater than a thousand tons. Applicant estimates a quantity of six tons per load, which is based on a division of the gross tonnage, private and public of both operations, but for which the record does not show any certainty as to movement by a certified carrier.

The rates proposed by Kuppinger on freight not otherwise specified, and blanketing Lake County points, are 60¢ per 100 pounds, except in quantities in excess of 20,000 pounds, the rate fixed is 37¢. Applicant intends to use a refrigerator truck in which all commodities, icing free, will be transported. He makes a rate of 75¢ upon fresh meat, salad dressing, mayonnaise, and other refrigerable items. This, of course, is based upon a schedule of three times weekly with similar service for delivery between Lakeport and Kelseyville, and also between Lakeport and Upper Lake and Lucerne. The rate structure does not appear out of line, and is less than the combined rail and truck rates now available.

In contrast, Northwestern Pacific Railroad Company maintains daily service to Hopland and Ukiah, and there is daily service between each point and Lake County points by authorized carriers. There is also daily service over the express trains of Northwestern Pacific by the Railway Express Agency, Inc., with daily connection to Lake County points.

Exhibit No. 16 of protestant, Northwestern Pacific Railroad Company, shows that its tonnage for its entire system has decreased from 125,692 tons in 1921, with a revenue of \$919,320 to 152,789 tons with a revenue of \$434,758 in 1930. Exhibit No. 17 of the same protestant, shows that in 1921 it operated at a profit of \$204,156. In 1922, its profits were \$173,853; in 1923 it lost

\$10,208, and since that period its total annual losses have aggregated \$1,453,388 to and including the year 1930. It appears, therefore, that the granting of the certificate would, in a measure, impair an already adequate service by protestant and in addition tend to impair the service now maintained from Hopland and Ukiah by authorized truck and express carriers to Kelseyville, Lakeport, Upper Lake and Lucerne to Lake County points, and would result in slower and less efficient service than now exists.

Upon consideration of the whole record herein, it appears to us of doubtful value to authorize the service proposed based upon the palpable connivance between applicant and Chapman for a service which appears to us outside of the warrant of law, and in view of the doubtful need of the establishment of the service proposed at all, it is our conclusion, and we find as a fact, that the application does not present either the necessary qualifications of the applicant himself nor the affirmative proof of the necessity of the public itself, to authorize a certificate herein. Accordingly, an order denying the application will be entered.

O R D E R

CHARLES KUPFINGER having made application to the Railroad Commission for a certificate of public convenience and necessity to establish auto truck service for the transportation of property between Lakeport and San Francisco, via Hopland and certain intermediate points and to consolidate such certificate with applicant's existing operating rights, public hearings 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 do not require the establishment of service as proposed by applicant, and

IT IS HEREBY ORDERED that the application be, and the

same hereby is denied.

Dated at San Francisco, California, this 9th day of
June, 1931.

C. C. Seaver
Leon Overhiser
W. J. L.
M. B. Harris
Fred G. Stewart
Commissioners.