

Decision No. 25493.

BEFORE THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of BENJAMIN S. GOLDBERG and J. H. GOLDBERG, doing business under the fictitious firm name and style of Goldberg Film Delivery, for a certificate of public convenience and necessity to operate an express service between Los Angeles and Chula Vista, and points intermediate and contiguous thereto, and between Los Angeles and Cal-exico and intermediate points.)
Application No. 18271.

Phil Jacobson, for applicants.
William H. Sherwood for C. E. Kimbrough, protestant.
Edward Stern for Railway Express Agency, protestant.
H. W. Hobbs for Southern Pacific Company and Pacific Motor Transport Company, protestants.
Wallace K. Downey, for Motor Freight Terminal Company, protestant.
Henry J. Bischoff, for Motor Service Express and Coast Truck Line, interested parties.
Fred C. Athearn and Douglas Brookman, appearing as friends of the Commission.
Robert F. Brennan and W. F. Brooks, for The Atchison, Topeka and Santa Fe Railway Company, protestant.
Rex W. Boston, for San Pedro Special Delivery, interested party.
C. C. Smith, for J. N. Anderson Theatre Service, intervener.

BY THE COMMISSION:

OPINION AND ORDER

Applicants Benjamin S. Goldberg and J. H. Goldberg seek a certificate of public convenience and necessity authorizing the transportation of "special commodities" (particularly

motion picture films) between Los Angeles on the one hand and San Diego and intermediate points and El Centro, Holtville and Calexico on the other hand.

A public hearing thereon was conducted by Examiner Kennedy at Los Angeles and the matter was submitted on briefs.

Submission was limited to the question of the Commission's jurisdiction to issue a certificate for the operations as described by applicant Benjamin S. Goldberg. No testimony was received at this hearing in support of public convenience and necessity.

Applicants have been in business for many years and use five vehicles, specially constructed for protection against fire. The operations for which they now apply for a certificate have been conducted without authority from this Commission and under advice of counsel that their operations are such as do not require a certificate, being analogous in all respects to the service of one Thomas Gilboy, operating similarly out of San Francisco. The Commission in Charles A. Hare et al. vs. Gilboy, 31 C.R.C. 566, decided that Gilboy's operations were private and not subject to certification by this Commission. The only witness presented by applicants was Benjamin S. Goldberg, who described his business substantially as follows:

Applicants offer to theatres and the public generally a continuous service for the supply of films, advertising matter and articles used in and about moving picture places, including machine parts. They propose a daily schedule at rates varying according to the weight of the shipments, the distances from Los Angeles, and the number of changes in program required. Between Los Angeles and San Diego and between Los Angeles and the Imperial

Valley and intermediate points applicants now serve 28 theatres. By arrangement each theatre is required to furnish in advance a monthly schedule of the films that it will require during that period. The Goldbergs obtain the films at the proper time from the distributing agency and transport them to the theatre and return them to the agency when their use has ended. Occasionally such films are not returned to the film agency for redistribution but may be transferred to two or more theatres on one route in what is called a "circuit".

To facilitate the delivery and pickup of films applicants are entrusted with keys to parts of the theatres where the film packages may be received or left. They also have access to the film exchange storage vaults, from which in emergency they may take films for distribution. The relationship in this respect is asserted to be a confidential one and not an attribute of transportation itself.

Applicants are acting under written contract with most of their shippers but some are served only through verbal arrangements. This contract form - Exhibit "X" attached to the application - refers throughout to the Goldbergs, party of the first part, as the "carrier". The contract is executed by the Goldberg Film Delivery as carrier. The other party is named as owner. It is a fact however that the consignee of the goods, who pays the bill, is not the owner thereof but the lessee for the period required for exhibition, although the Goldbergs have contracts with some film exchanges which are the owners. The contract to all appearances is one for carriage only and to facilitate the carriage and delivery it requires the owner to provide access to the theatre at any time day or night. The consideration of the contract is compensation payable at such times as

may be stipulated therein or weekly, but on a flat rate for each point served, regardless of the number of theatres. Applicants also desire to serve in addition to motion picture theatres, all other "theatres, churches or places of amusement" using films at all points set out in the application.

The evidence further shows that frequently a motion picture theatre desires to substitute one film for another, that in some cases applicant makes the exchange at the film distribution agency but does not in so doing, do more than obey the instructions of the shipper as to what film to substitute. All deliveries from film exchanges are checked with the orders to see that the order is either complete or that no error has been made in the agency selection. Each evening as the programs of the various theatres are filled from the film distributing agency applicants load them on a truck which delivers them at the various destinations and a large portion of the deliveries and pickups are made after midnight. The rate charged heretofore by applicants and set up in the application is inclusive of all the service above described.

Protestants contend that the service conducted by applicants is a private service not requiring certification and that the Commission is without jurisdiction to grant a certificate of public convenience and necessity for the reason that the transportation feature is only incidental to the larger service of procuring the films at the exchanges and correcting errors, if any, by arranging exchanges of films for the consignees. It is pointed out that in the Gilboy case, supra, the Commission declined to hold that Gilboy was a common carrier within its jurisdiction on the ground that no offer was made of a public service by Gilboy; that the "ancillary" services rendered by Gilboy resulted in the

transportation being merely incidental; that he would haul for such shippers as were satisfactory to him and had rejected others, and that the service was a matter of private contract and was not impressed with any public character.

The instant proceeding differs in many respects from the Gilboy case. Applicants herein offer to dedicate their service to the public generally and to transport films and other property to and from Los Angeles and more than a score of other points and at fixed rates. Generally the rules and regulations attached to the application relate to a public transportation service. The rates set forth in the application "cover films, advertising matter, records and accessories necessary for complete change of program". That the rates are fixed upon a weekly, monthly, or "per change" basis is not material in determining the scope and purpose of applicants. It appears to us on this record that the Commission has jurisdiction over the subject matter of the application and that the proceeding should be placed upon the calendar for further hearing to determine if public convenience and necessity require the service proposed; therefore, good cause appearing,

IT IS HEREBY ORDERED that the above entitled proceeding be and it is hereby assigned for further hearing before Examiner Kennedy on Thursday the 2nd day of February, 1933 at 10:00 o'clock a.m. in the Court Room of the Commission, No. 708 State Building, First and Broadway, Los Angeles, California.

Dated at San Francisco, California, this 27th day of December, 1932.

W. C. Brown
John C. Whipple
W. J. C.
M. B. V.
Fred G. Stewart
Commissioners.