

Decision 11009

ORIGINAL

BEFORE THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA

In the matter of the application of C. H. PENNOYER and WILLIAM A. BERKEY for the transfer of an automobile freight franchise between San Diego and Alpine Store and intermediate points, in the County of San Diego, California, and for the issuance of a certificate of public convenience and necessity for the operation of the same by the said William A. Berkey,

Application of C. H. PENNOYER and WILLIAM A. BERKEY for a finding of the Commission that said C. H. Pennoyer has a prior operative right to operate automobile freight service between Alpine Store and Descanso in the County of San Diego, State of California, and for the transfer thereof to said William A. Berkey, or in the absence of such a finding, that said William A. Berkey be granted a certificate of public convenience and necessity to operate between Alpine Store and Descanso in the County of San Diego, California.

Application No. 8118.

Warren E. Libby for Applicants.
H. J. Bischoff for Rombauer Transportation Company, Protestant.

BY THE COMMISSION.

OPINION

In the above entitled application, William A. Berkey seeks a certificate of public convenience and necessity to operate an automobile freight service between San Diego and Descanso, in San Diego County, via Alpine. The application sets forth that one C. H. Pennoyer operated an automobile freight service

between San Diego and Alpine, and Alpine and Descanso, prior to May 1, 1917. The operative rights said to have been acquired by reason of this operation it is desired here to transfer to Berkey, and in the event of a finding that Pennoyer possessed no such rights, we are asked to issue a certificate as prayed for.

A public hearing was held before Examiner Eddy at San Diego on August 28, 1922, at which time the matter was submitted and is now ready for decision.

Pennoyer began operating an automobile truck line between San Diego and Alpine in August, 1916, and continued to operate between these points for about two years. Descanso is 12 miles beyond Alpine, and although not running through to that point regularly, Pennoyer did make trips to Descanso when the volume of freight warranted. By virtue of that operation prior to May 1, 1917, he claims to have acquired operative rights over that route under Chapter 213 of the Statutes of 1917. It appears that in the fall of 1918, probably some time in November, Pennoyer ceased operating over the route in question. Late in 1920, he told William A. Berkey it was all right to "go ahead", which statement Berkey construed as a transfer to him of Pennoyer's operative rights. Berkey began operating over the route shortly thereafter and continued to operate until May of this year when he was informed by us, and subsequently by the District Attorney, that he was operating illegally, since which time he has continued to haul for certain individuals, but under contract. By this application, he now seeks our approval of what he regards as a transfer to him by Pennoyer in 1920 of certain operative rights possessed by the latter.

Berkey, who owns the hotel, general store and garage at Descanso, in 1914 began operating a motor truck between San

Diego and his place of business, hauling also for the public. This service was discontinued after about two years and his freight was then hauled for him by one Shipley. Later his hauling was performed by Pennoyer, and still later by one Sherman. The latter on July 20, 1918, purchased the automobile stage line between San Diego and Hurlburt Grove, 1½ miles from Descanso, and in January, 1921, sold it to A. B. and K. Rombauer. The Rombauers are now operating over that route under the name of the Rombauer Transportation Company, and appeared at the hearing to protest granting the certificate to Berkey.

The first question to be answered, therefore is: What rights, if any, did Berkey secure as the result of his understanding with Pennoyer? The latter, as has been seen, abandoned the line fully two years prior to the date of his understanding with Berkey. Having abandoned the line, such operative rights as he may have had were lost and he could not himself resume service without first securing a certificate of public convenience and necessity from us. This he failed to do. Had this step been taken and the certificate secured, the same could not have been transferred without our written consent. It will be seen, therefore, that Pennoyer having abandoned the service had lost the operative rights which, if he had possessed them, could only have been transferred with our permission. From whatever angle the case be viewed, the applicant has no standing before us and must be regarded merely as an illegal operator.

As to the application for a certificate to operate between San Diego and Descanso, the record is clear that no additional service is warranted at this time. Berkey is the largest receiver of freight at that point. It is his practice to take orders from people in that neighborhood and for all sorts of commodities. Berkey makes the purchase in San Diego on his own

account and sells the goods at Descanso at a price which returns him a profit on the transaction in addition and aside from the Trucking charges. Four-fifths of the goods which he hauls are for his own account, and admittedly he would continue to operate trucks even at a loss in order to take care of this business.

The Rombauers are operating a 3½ ton truck between San Diego and Descanso, making a round trip every Tuesday and Friday. In addition to this schedule, their truck leaves San Diego every Sunday morning, making a special trip to Descanso to deliver ice and ice cream. Berkey leaves Descanso for San Diego Monday and Tuesday mornings, returning to Descanso Thursdays and Saturdays. A special trip is made from Descanso to San Diego late Saturday night to bring in perishable products on Sunday morning. The traffic from Descanso to San Diego is light, except during the fruit season. There are times when it is difficult to handle all of the business offered with one truck; at other times, one truck can handle three or four times the freight then moving. The service rendered by the Rombauers seems to be generally satisfactory and more efficient than that performed by Berkey. The net income of the Rombauer line for the calendar year 1921 was \$1605.71, out of which wages must be paid to one of the Rombauers, who drives the truck. There was ample testimony introduced to show that the community will support but one trucking line. Rombauer is in a position to put on such additional trucks as may be necessary to handle the business and expressed a willingness so to do. The testimony indicates clearly that Berkey's service to the public is incidental to his private operations as a storekeeper.

We, therefore, conclude and find:

1. That Pennoyer definitely discontinued the service and abandoned the route between San Diego and Descanso in November, 1918; and,

2. That public convenience and necessity do not at this time require the operation of an additional freight service between San Diego and Descanso.

The application for a certificate of public convenience and necessity will be denied, as will also the application to transfer operative rights.

O R D E R

A public hearing having been held upon the above entitled application, the matter being submitted and now ready for decision,

THE RAILROAD COMMISSION HEREBY DECLARES that public convenience and necessity do not require the operation by William A. Berkey of an additional freight service between San Diego and Descanso.

IT IS HEREBY ORDERED that the application be and it is hereby denied.

IT IS HEREBY FURTHER ORDERED that the application of C. H. Pennoyer to transfer his operative rights to William A. Berkey be and it is hereby denied.

Dated at San Francisco, California, this 20th day of September 1922.

H. B. Lundie
Dwight Martin
J. F. Pennoyer
Commissioners.