

Decision No. 27227

ORIGINAL

BEFORE THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA

REGULATED CARRIERS, INC., a corporation,)

Complainant,)

vs.)

P. B. CURTICE, P. B. CURTICE, doing
business under the fictitious name and
style of Curtice Produce Company, FIRST
DOE, SECOND DOE, THIRD DOE, FOURTH DOE,
FIFTH DOE, FIRST DOE CORPORATION, SECOND
DOE CORPORATION, THIRD DOE CORPORATION,
FOURTH DOE CORPORATION, FIFTH DOE CORPOR-
ATION.

Case No. 3419

Defendants.)

Reginald L. Vaughan and Scott Elder, for Complainant.

Edward M. Berolski, for Defendant.

WHITSELL, Commissioner -

OPINION and ORDER on REHEARING

By Decision No. 26194 herein, issued on July 31, 1933, defendant herein was ordered to cease and desist common carrier transportation of property between "the vicinity of Watsonville and San Francisco and intermediate points." Thereafter, on September 1, 1933, petition for rehearing was filed in behalf of defendant and by its order of September 18, 1933, rehearing was granted by the Commission.

Rehearing was conducted at San Francisco, the matter has been duly briefed and now is ready for decision.

Complainant elected to submit the matter upon rehearing upon the record made at the original hearing and introduced no further testimony.

The cease and desist order was based in a large part upon a finding in the original decision that "the common carrier status of defendant is fixed by the contract of hauling with

Levy-Zentner Company for sixty (60) or more growers." This finding was important in my opinion and without it a basis for the order appeared insufficient to find that defendant was at the time the complaint was filed, and prior thereto, a common carrier as alleged. The finding was based upon the conclusion that defendant performed service individually for sixty (60) or more growers and that each paid him compensation for the service performed. In addition to that, transportation of other commodities by defendant was shown, but all the business transacted by defendant was under contracts, except a few movements.

At the rehearing defendant introduced the testimony of defendant Curtice, Alfred R. Francis and A.M. Barr and this testimony, in my opinion, presents a different aspect to the business of defendant. These witnesses and Curtice testified, and the testimony was not refuted, that all movements made by defendant of property between Watsonville or Castroville, (or other points near Watsonville), and San Francisco for Levy-Zentner were under a contract with this company for a specific movement from its warehouses or assembling points and its commission house in San Francisco and for this service contract provided payment by Levy-Zentner Company. Also, none of the movements was made for any individual grower and the compensation was paid to defendant by Levy-Zentner Company only. This testimony considerably modified the testimony of Mr. A. T. Heimah, purchasing agent of Levy-Zentner Company at Watsonville, which formed the basis of the conclusion that the service was performed for the growers. Had the service been performed for the growers, the original order would be justified.

Defendant is in the produce business in Watsonville and has been for many years. He bought on his own account and delivered in San Francisco large quantities of vegetables; he owned one truck which he kept in the garage at his home; he did not solicit business, advertise or conduct any service not under contract.

In all he had four contracts (Exhibits 2, 3, 5 and 9). These contracts were executed in April and August of 1932, except the Levy-Zentner contract, which was executed in February, 1933. While they vary as to form, generally they provide for transportation by defendant of property for each of the parties, at rates set forth therein, between the Watsonville area and San Francisco and Oakland. Defendant does not deny that under these contracts the movements were made. The sole question is whether the movements so made constituted common carrier operations requiring certificate of this Commission. A view of all the records leads me to the conclusion that the original order requiring defendant to cease and desist was based upon the testimony of witness Heimah in a large way, and that this testimony has been so modified by the testimony of Francis and Barr as to the movements conducted under the contract that the ultimate fact is materially altered and that the record does not sustain a finding that Curtice was acting as a common carrier between fixed termini and over regular route. While I reach this conclusion, I recognize in the case some of the elements of disguised common carrier operation, and the operations conducted by defendant are perilously near the line justifying an order to cease and desist. Much has been said herein about the practice of the consignees involved charging back to the grower the transportation cost. The contracts disclosed no understanding on the part of defendant herein that such was the case and his compensation in each instance has been paid by the consignee to defendant for the service performed and without reference to any charge upon the growers.

It is my opinion, therefore, in conclusion, that the record does not justify sustaining the order previously issued and I recommend that Decision No.26194 herein be annulled and set aside and the complaint herein dismissed.

I propose the following form of order:

O R D E R

The above entitled matter having been presented on rehearing of Decision No.26194 herein, submission having been duly made and the matter now being ready for decision,

IT IS HEREBY ORDERED that Decision No.26194 herein, dated July 31, 1933, be and the same hereby is set aside and revoked and,

IT IS HEREBY FURTHER ORDERED that the complaint herein be dismissed.

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 17th day of

July, 1934.

Clarence
Leon

Commissioners
COMMISSIONERS.