

Decision No. 27535

BEFORE THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA

SOUTHERN PACIFIC COMPANY, a corporation,
et al.,

Complainants,

v.

H. FRASHER, VALLEY EXPRESS COMPANY, a
corporation, John Doe, Richard Roe and
Doe Company, a corporation,

Defendants.

Case No. 3691

ORIGINAL

In the Matter of the Application of
H. FRASHER for a certificate of public
convenience and necessity to operate
a motor truck line between Fresno
and Tulare and intermediate points.

Supplemental
Application
No. 6673

Sanborn & Roehl, by Harvey A. Sanborn, for Applicant
and Defendant.

H. W. Hobbs and Edward Stern, for Southern Pacific
Company, Pacific Motor Transport Company and
Railway Express Agency, Inc.

Robert Brennan and Wm. F. Brooks, by Wm. F. Brooks,
for The Atchison, Topeka & Santa Fe Railway
Company.

BY THE COMMISSION -

O P I N I O N

By complaint filed on September 19, 1933, complainants charge H. Frasher and Valley Express Company, a corporation, with unlawful common carrier operations by auto truck between Fresno and Tulare, serving as intermediate points various cities and towns enroute. Defendant H. Frasher, by written answer herein, denies generally and specifically all the allegations contained in said complaint and alleges further that he is operating a motor truck service between Fresno and Tulare and certain intermediate points as a certificated contract carrier, pursuant to Decision No. 9463 of this Commission, dated September 3, 1921, in Application No. 6673, and has in all re-

spects and at all times complied with the orders of this Commission in said decision.

Valley Express Company, by written answer, denies generally and specifically all the allegations contained in said complaint and alleges further that it is engaged in the business of operating an express corporation, as defined in Section 2(k) of the Public Utilities Act, under proper tariffs lawfully on file with this Commission and alleges that its operations between Fresno and Tulare and intermediate points are pursuant to a contract with defendant H. Frasher, lawfully on file with this Commission.

In the above named Application No. 6673, H. Frasher has filed a supplemental petition, praying that the Commission make its Supplemental Order and Decision granting to applicant a certificate of public convenience and necessity to operate an auto truck service as a common carrier of freight between Fresno and Tulare, between Tulare and Cochen and intermediate points and between Tulare and Traver and intermediate points, in lieu of said certificate to operate as a contract carrier granted in said Decision No. 9463, dated September 3, 1921.

As justification for the granting of this supplemental petition applicant alleges that the public convenience and necessity require the continued operation of his service and that it is just and equitable at this time for the Commission to modify and correct its opinion and order.

Applicant proposes to charge rates in accordance with applicant's tariff C.R.C. No. 3, now in effect and on file with this Commission. Applicant proposes to use the same equipment now being operated in said service.

A public hearing was held by Examiner Satterwhite at Tulare, the matters were submitted and are now ready for decision. Said matters were consolidated for receiving evidence and decision.

H. Frasher was called as a witness by the complainants herein and his testimony constitutes the only oral evidence in the record. The record shows that ever since September 15, 1921, H. Frasher, defendant and applicant herein, has operated a motor truck freight service between Fresno and Tulare and certain way points/^{under}and by virtue of a certificate of public convenience and necessity granted in said application No.6673, Decision No.9463, dated September 3, 1921.

This Commission, under the belief and opinion that it had at the time the authority and jurisdiction so to do, granted H. Frasher the privilege and right to operate as a contract carrier between the communities named. For thirteen years Mr. Frasher has operated this truck service in good faith and has built up a substantial business and during this period has entered into contracts with many patrons and shippers totaling about 134 persons and business firms. In order to maintain his equipment and facilities for the adequate performance of this transportation service, Frasher has expended a large sum of money involving a very substantial investment of capital.

Complainants contend that Decision No.9463 never became effective because the defendant at the outset failed to comply with the conditions and orders in said decision, particularly as to the filing of his contracts within the time prescribed, or at any time since and also as to the filing of the so-called form of contract and lists of patrons. Decision No.9463 contains the following provisions:

"It is hereby ordered that applicant shall, within fifteen days from the date hereof, file with the Railroad Commission a copy of each form of contract under which applicant operates or proposes to operate, with a list of patrons served under each form or class of contract, with a statement of the rate or rates applicable to each patron or group of patrons; and shall, within said time, file a statement showing usual method of operation or proposed operation, including usual schedule or time of operation, which said statement shall further set forth the date upon which the operation of the line hereby authorized will commence, which date shall be within thirty days from date hereof, unless time to begin operations is extended by formal supplemental order."

"The authority herein contained shall not become effective until and unless the above mentioned copies of contracts, lists and statements are filed within the time herein limited."

The record shows that the time prescribed for filing copies of contracts and statement of rates was extended to October 15, 1921. The testimony of applicant shows that within the time prescribed he filed with the Commission the forms of contract under which he was then operating and proposed to operate, together with a list of his customers. It appears that on or about February 1, 1922, he also filed an additional list of patrons with whom he had a similar contract. This form of contract is on file with the Commission. No additional list of shippers or contracts has been filed with the Commission since 1922, but applicant has written contracts with practically all the customers with whom he does business.

The record is not entirely clear as to the circumstances under which applicant first filed a tariff in lieu of filing additional lists of shippers or contracts.

Applicant testified, however, that his best recollection was to the effect that the Commission had requested him to file and operate under a tariff rather than to file contracts and additional lists of patrons from time to time. It also appears that applicant, under the advice of his attorney, filed a tariff soon after commencing his truck operations and has continued to operate under tariffs, charging the same rates to all of his customers up to the present time. It is clear that the Commission imposed no limitations upon the number of contracts which applicant might enter into nor prescribed any particular kind or character of contract which should be made with any class of patrons. The record shows that the truck operations of applicant from the very outset were those of a common carrier and the extension of his truck business was carried on in good faith under the authority erroneously granted to applicant to operate as a contract carrier. Many similar certificates were granted to

other applicants at or about the same period of time, many of whom have since been authorized to continue their operations under the Commission's jurisdiction as common carriers.

The record shows, as already indicated above, that applicant, H. Frasher, built up a transportation business in response to public demand, pursuant to the purported authority of this Commission and has substantially complied with all the requirements of the certificate in question and has also been treated during the intervening years as a common carrier by the Commission.

We are of the opinion that the unusual and peculiar circumstances, as shown in these proceedings, justify a revocation of and setting aside of the certificate in question and in lieu thereof the granting of a certificate of public convenience and necessity as prayed for in said supplemental petition. The above named complaint should also be dismissed.

Applicant is hereby placed upon notice that "operative rights" do not constitute a class of property which should be capitalized or used as an element of value in determining reasonable rates. Aside from their purely permissive aspect, they extend to the holder a full or partial monopoly of a class of business over a particular route. This monopoly feature may be changed or destroyed at any time by the state which is not in any respect limited to the number of rights which may be given.

O R D E R

Public hearing having been held in the above entitled proceedings, the matters having been submitted, and the Commission being fully advised,

IT IS HEREBY ORDERED that the certificate of public convenience and necessity granted under said Decision No.9463, in said Application No.6673, be and the same is hereby annulled and set aside.

THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA HEREBY DECLARES that public convenience and necessity require the operation

by H. Frasher of an automobile truck line as a common carrier of freight between Fresno and Tulare, serving Fowler, Selma, Kingsburg, Traver, Goshen and intermediate points, and

IT IS HEREBY ORDERED that a certificate of public convenience and necessity be and the same is hereby granted to H. Frasher for the operation of the services above described, and subject to the following conditions:

1. Applicant shall file his written acceptance of the certificate herein granted within a period of not to exceed fifteen (15) days from date hereof.

2. Applicant shall file, in triplicate, and make effective within a period of not to exceed thirty (30) days after the effective date of this order, on not less than ten days' notice to the Commission and the public a tariff or tariffs constructed in accordance with the requirements of the Commission's General Orders and containing rates and rules which, in volume and effect, shall be identical with the rates and rules shown in applicant's tariff C.R.C. No.8, filed June 23, 1931, effective July 25, 1931, now on file with the Commission insofar as they conform to the certificate herein granted, or rates satisfactory to the Railroad Commission.

3. Applicant shall file, in duplicate, and make effective within a period of not to exceed thirty (30) days after the effective date of this order, on not less than five days' notice to the Commission and the public, time schedules covering the service herein authorized in a form satisfactory to the Railroad Commission.

4. The rights and privileges herein authorized may not be discontinued, sold, leased, transferred nor assigned unless the written consent of the Railroad Commission to such discontinuance, sale, lease, transfer or assignment has first been secured.

5. No vehicle may be operated by applicant herein unless such vehicle is owned by said applicant or is leased by him under a contract or agreement on a basis satisfactory to the Railroad Commission.

IT IS HEREBY FURTHER ORDERED that Case No.3691 be and it is hereby dismissed.

For all other purposes the effective date of this order shall be twenty (20) days from the date hereof.

Dated at San Francisco, California, this 19th day of November, 1934.

Jean A. [Signature]
[Signature]
[Signature]
[Signature]
COMMISSIONERS.