

ORIGINAL

Decision No. 28611

BEFORE THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA.

PETE RAMPONE, doing business under the firm name and style of RAMPONE BROS., a corporation,

Complainant,

vs.

Case No. 3994.

THOR KOFOD, FIRST DOE, SECOND DOE, THIRD DOE, FOURTH DOE, FIFTH DOE, FIRST DOE CORPORATION, SECOND DOE CORPORATION, THIRD DOE CORPORATION, FOURTH DOE CORPORATION, and FIFTH DOE CORPORATION,

Defendants.

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In the Matter of the Application of THOR KOFOD for certificate of Public convenience and necessity for the operation of an automobile truck line for the transportation of farm products between San Francisco and Oakland on the one hand, and points in the Sacramento Delta on the other hand.

Application No. 19984.

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In the Matter of the Application of L. P. KERNER, JR., doing business under the fictitious name and style of KERNER MOTOR COMPANY, for a certificate of public convenience and necessity to operate an automotive truck line.

Application No. 20154.

Decoto and St. Sure, by E. W. Decoto, for Fete Rampone, complainant and protestant.  
Gwyn H. Baker for Thor Kofod, defendant and applicant.  
Reginald L. Vaughan for L. P. Kerner, Jr., applicant.  
H. W. Hobbs and R. S. Myers for Southern Pacific Company and Pacific Motor Transport Company, protestants.  
L. I. McKim for The River Lines, protestant.  
E. M. Berol for Truck Owners Association of California, Morris Draying Co., and J. J. Leonardini, interested parties.

BY THE COMMISSION:

O P I N I O N

Pete Rampone, a certificated truck carrier of asparagus and field products, between the Delta region, -- in and about Walnut Grove and Oakland and San Francisco -- complains of Thor Kofod, defendant, and alleges that he is conducting common carrier transportation service for the same commodities from the Delta region aforesaid to Oakland and San Francisco over and along the route used by complainant without legal authority therefor. The defendant answered denying any operation "in violation of any law."

Each applicant herein seeks a certificate of public convenience and necessity for the establishment of a common carrier trucking service between the Sacramento Delta district, and Oakland and San Francisco. Only fresh fruits and vegetables are to be transported and only to markets at each city. Neither protested the other's application -- in fact, each urges that both applications should be granted. Both are protested by Pete Rampone now conducting similar operations under authority of Decision No. 26894 on Application No. 19311, dated March 26, 1934. Applicants propose the same rate now established by Rampone -- 30 cents per 100 pounds, through from point of origin to destination and free return of empty containers. The routes adopted by Rampone will be followed.

Public hearings thereon were conducted by Examiner Williams at Rio Vista and Walnut Grove.

The relationship of applicants and protestant may be summarized as follows:

Thor Kofod began transportation of fresh vegetables and fruits from the Delta region to Oakland and San Francisco in 1925 when such transportation was exempt from the jurisdiction of this Commission under the Crittenden Act. Some of this transportation, in addition, was from field to packing houses in the Delta region. When the Crittenden Act was declared unconstitutional by the California Supreme Court<sup>(1)</sup> Kofod filed application with this Commission for a certificate<sup>(2)</sup> to operate in a radius of 25 miles of Rio Vista and to Oakland and San Francisco. This application was dismissed by counsel for Kofod who maintained that Kofod's operations were those of a private carrier.

L. P. Kerner's operation has a similar history through his predecessors, Fenton and Francioni, though none named has previously made application to this Commission for any certificate covering such service.

In addition the record shows that many other truck operators served the Delta area from time to time during the past decade, none being possessed of a certificate of public convenience and necessity except Tony Rampone who obtained a certificate to transport asparagus only from Sherman Island in 1926,<sup>(3)</sup> and Pete Rampone who in 1928 acquired a one-half interest with Tony. In 1934 this service was enlarged to cover the whole Delta area south of Freeport (included in the instant applications) and later this area was extended to include the area south and east of Antioch, north of Tracy and west of Stockton, this extension of area not being included in the instant application.<sup>(4)</sup> The three operators involved in the in-

- (1) Franchise Motor Carriers' Association vs. Seavey, 196 Cal. 77.  
(2) Decision No. 17372, Application No. 12132.  
(3) Decision No. 16521, Application No. 12498.  
Decision No. 19474, Application No. 14480.  
(4) Decision No. 26894, Application No. 19311 and  
Decision No. 28313, Application No. 19928.

stant proceedings seem to represent a survival of the fittest and each has a continuity of service in excess of ten years.

The Delta area to be served is approximately 225,000 acres, the most intensive cultivation being on the many islands between the San Joaquin and Sacramento Rivers, and between Freeport and Sherman Island. Of this area 62,000 acres are planted to asparagus, which crop ripens and moves to market in a period of from 60 to 90 days, according to the testimony of James Van Tonnigen, district superintendent of California Packing Corporation for many years. He also estimates that each acre produced 1.25 tons, yielding a transportable total of 77,500 tons of asparagus alone. This product being fragile and perishable must be moved with care and speed under moderate temperature to local markets. Of this total Mr. Van Tonnigen testified 28 per cent. moves to eastern and to local markets, while fresh, the remainder moving to canneries. The local consumption varies from year to year.

In addition the record shows the production of about equal tonnage of vegetables and fruits and also forage crops such as Egyptian corn, etc. While not all the 225,000 acres are under cultivation the record indicates a gross production of approximately 200,000 tons. If the ratio of 28 per cent. indicated by Mr. Van Tonnigen is preserved, the local movement to rail shipment, canneries and the Bay Region markets is about 55,000 tons. Protestant estimated a peak load of 15,000 packages daily to San Francisco and Oakland.

The important question in these applications is whether or not the record justifies the claim of protestant that one certificated carrier can efficiently handle this vast production to

the Bay Area. No one carrier in the past has done so and the record herein does not indicate that one carrier can perform exclusive service. The witnesses testifying for applicants expressed the belief that one carrier could not render adequate service and that all three are needed.

Neither Kofod nor Kerner opposed each other -- in fact, each urged that all of the above three services were necessary. In view of the fact that Kofod has headquarters at Rio Vista, Kerner at Isleton and Rampone at Walnut Grove, it appears that practical convenience of shippers has made a reasonable division as to the three carriers. The conclusion that all are needed is found from the record. <sup>(1)</sup> We have not discussed the complaint of Rampone against Kofod, for a discussion of it is unnecessary in view of the conclusions reached concerning the application of Kofod. The record reasonably supports the conclusion that both Kofod and Kerner, and the latter's predecessors, operated a transportation service in good faith during many years when this Commission exercised no jurisdiction over radial highway common carriers or highway contract carriers. Both of said applicants claim that their operations were those of carriers over whom this Commission had exercised no jurisdiction prior to the filing of the applications herein. The record is similarly clear that both applicants operated in good faith and in a manner comparable, if not identical, to the historical operations of protestant Rampone. The record is also clear that the shippers in the territory involved in the above entitled matters require the transportation services of each of the three carriers named herein, Rampone, Kofod and Kerner. In view of the fact that Kofod and Kerner now desire to widen the scope of their transportation activities and dedicate

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(1) Kofod produced 23 and Kerner 25 growers and shippers who agreed that several carriers are needed. Rampone produced 25 shippers satisfied with his service. 5.

their services as defined in their applications to the general public, we believe that public convenience and necessity will be best subserved by the issuance of certificates by this Commission to each of said applicants as prayed for.

In view of the foregoing, the complaint in Case No. 3994 will be dismissed.

Applicants entered into stipulation with rail and water carriers restricting the service to be performed as in the Rampone certificates and such protestant carriers thereupon withdrew protest.

We find, therefore, that public necessity and convenience require the services of both Kofod and Kerner in the areas proposed, with the exception noted above, and an order making this finding effective will be entered.

Thor Kofod and L. P. Kerner, Jr., are 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

Thor Kofod, having made application for a certificate of public convenience and necessity for the establishment and operation of automotive truck service for the transportation of certain

farm products between Sacramento Delta Region, on one hand, and San Francisco and Oakland, on the other hand, a public hearing having been held and 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 require the establishment of "on call" service for the transportation of fresh asparagus, fresh fruits and vegetables as hereinafter restricted, with a return movement of empty containers from the points and termini, on the one hand, as specifically set forth as follows:

Sherman Island; Twitchell Island; Brannen Island; Andrus Island; Bouldin Island; Staten Island; Tyler Island; Grand Island; Ryer Island; Sutter Island; Prospect Island; Egbert Tract; Liberty Farms Unit No. 1; Liberty Farms Unit No. 2; Little Holland Tract; Merritt Island; Holland Land Company Tract; and all other points in territory bounded by highway from Walnut Grove to Thornton-Highway, Thornton to Franklin-Highway, Franklin to Hood, thence Sacramento River south to Walnut Grove, including points intermediate, to Oakland and San Francisco, on the other hand;

over and along the following routes:

Via Antioch Bridge and Main Highway via Pittsburg, Willow Pass, Concord, Walnut Creek, Tunnel Road to Oakland and San Francisco; or

Via Pittsburg, Bay Point, Martinez, Franklin Canyon Road to Oakland and San Francisco; or

Via Rio Vista, thence via Suisun, Fairfield, Carquinez Bridge, Richmond and Oakland and San Francisco.

AND IT IS HEREBY ORDERED that a certificate of public convenience and necessity therefor be and the same hereby is

granted to Thor Kofod, subject to the following conditions:

1. Applicant shall have the right to transport from the points and termini, hereinabove set forth, fresh fruits and fresh vegetables, including melons and fresh potatoes and fresh onions in boxes, to the commission and brokerage market districts in San Francisco and Oakland, and to canneries in the producing districts with a return movement of empty containers.
2. Applicant shall not haul as a common carrier any commodities to the canneries and/or packing houses situated in the vicinity of San Francisco Bay originating in territory situated within one mile of the present location of the rails of Southern Pacific Company, except asparagus.
3. Applicant shall not haul as a common carrier dried onions and/or potatoes in sacks.
4. Applicant shall not haul as a common carrier the commodities herein authorized to any shipping terminal or state refrigeration terminal at San Francisco or Oakland.
5. Said transportation service shall be an "on call" service afforded by the equipment operated by applicant through the growing season in the territory affected.
6. Applicant shall file his written acceptance of the certificate herein granted within a period of not to exceed fifteen (15) days from date hereof.
7. 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 the exhibit attached to the application insofar as they conform to the certificate herein granted, or rates satisfactory to the Railroad Commission.



8. 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.
9. 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.
10. 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 in all other respects, except as specifically herein granted, the application be and the same hereby is denied.

L. P. Kerner, Jr., having made application for a certificate of public convenience and necessity to establish and operate "on call" automotive truck service for the transportation of perishable farm products between the Delta Region, on one hand, and Oakland and San Francisco, on the other hand, a public hearing having been held and 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 require the establishment of service for the transportation of fresh asparagus, fresh fruits and vegetables as hereinafter restricted, with a return movement of empty containers, from the points and termini, on the one hand, as specifically set forth as follows:

Sherman Island, Twitchell Island, Brannon Island, Andrus Island, Bouldin Island, Staten Island, Tyler Island, Grand Island, Ryer Island, Sutter Island, Prospect Island, Egbert Tract, Liberty Farms Unit No. 1, Liberty Farms Unit No. 2, Little Holland Tract, Merritt Island, Holland Land Company Tract, New Hope Tract and McCormick-Williamson Tract;

to Oakland and San Francisco, on the other hand,  
over and along the following routes:

- (a) Via the Antioch Bridge, thence via Main Highway, via Pittsburg, Willow Pass, Concord, Walnut Creek, Tunnel Road to Oakland and San Francisco.
- (b) Via Pittsburg, Bay Point, Martinez, Franklin Canyon Road to Oakland and San Francisco.
- (c) Via Rio Vista, Suisun, Fairfield, Carquinez Bridge, Richmond, to Oakland and San Francisco.
- (d) Oakland or Berkeley to San Francisco via auto ferry from Oakland Pier or Berkeley Pier;

AND IT IS HEREBY ORDERED that a certificate of public convenience and necessity therefor be and the same hereby is granted to L. P. Kerner, Jr., subject to the following conditions:

- (1) Applicant shall have the right to transport from the points and termini, hereinabove set forth, fresh fruits and fresh vegetables, including melons and fresh potatoes and fresh onions in boxes, to the commission and brokerage market districts in San Francisco and Oakland, and to canneries in said producing districts with a return movement of empty containers.
- (2) Applicant shall not haul as a common carrier any commodities to the canneries and/or packing houses situated in the vicinity of San Francisco Bay originating in territory situated within one mile of the present location of the rails of Southern Pacific Company, except asparagus.
- (3) Applicant shall not haul as a common carrier dried onions and/or potatoes in sacks.
- (4) Applicant shall not haul as a common carrier the commodities herein authorized to any shipping terminal or state refrigeration terminal at San Francisco or Oakland.
- (5) Said transportation service shall be an "on call" service afforded by the equipment operated by applicant through the growing season in the territory affected.
- (6) Applicant shall file his written acceptance of the certificate herein granted within a period of not to exceed fifteen (15) days from date hereof.

- (7) 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 the exhibit attached to the application insofar as they conform to the certificate herein granted, or rates satisfactory to the Railroad Commission.
- (8) 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.
- (9) 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.
- (10) 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 in all other respects, except as herein specifically granted, the application be and the same hereby is denied.

IT IS HEREBY FURTHER ORDERED that Complaint No. 3994, Pete Rampone v. Thor Kofod, be and the same hereby is 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 22 day of

March, 1936.

M B Harris  
Leon Whittell  
M. A. Cunningham  
W. H. ...  
W. R. ...  
 Commissioners.