Decision No. 29294

ORIGINAL

BEFORE THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA

THE RIVER LINES (The California Transportation Company, Sacramento Navigation Company, and Fay Transportation Company), Complainants, vs. CHICHESTER TRANSPORTATION COMPANY, a corporation, Defendant.	Case No. 4119.

McCutchen, Olney, Mannon & Greene and F. W. Mielke for Complainants;

Carl R. Schulz for Defendant.

DEVLIN, Commissioner:

O P I N I O N

By a complaint filed April 14, 1936, complainants charge Chichester Transportation Company, a corporation, with unlawful common carrier operations by auto truck between San Francisco and Oakland on the one hand and Sacramento and Stockton on the other hand. Defendant filed its answer May 7, 1936 wherein it denied generally and specifically all the allegations of the complaint.

Public hearings were conducted at San Francisco on August 11, 12, and 14, 1936, and the matter was duly submitted on briefs, which have been filed, and now is ready for decision.

The evidence presented at the hearing discloses the following facts: Chichester Transportation Company, defendant herein, maintains its place of business at No. 1717 Seventeenth Street, San Francisco. It was incorporated in 1933 and has developed a large volume of business, using twelve transportation units of its own in addition to subcontracting many of the movements. It has storage facilities and operates under radial and contract permits and also possesses a permit as a city carrier in the City and County of San Francisco. In 1935 defendant began to develop a large amount of business between San Francisco and Oakland, on the one hand, and Sacramento and Stockton, on the other hand.(1) It is these movements between said points only that are involved in the present complaint. That the movements as alleged were made between the termini named and generally over regular routes is not disputed by defendant; in fact, exhibits filed by defendant show an excess of 400 such movements between January 7 and March 6, 1936 and concededly this is only a portion of the movements that were made.(2) These movements were in both directions, were constantly of large volume and showed a tendency to somewhat gradually increase the number of shippers.

Discussion of the movements as made is unnecessary in view of their admission by defendant. Of themselves they would appear to constitute a violation of Section 50¾ of the Public Utilities Act. Defendant, however, seeks to bring them within the scope of private contract operations based on the permit issued to it as a contract or private carrier - May 11, 1936 - and for the further reason that a portion of the shipments transported

(1) Some of the defendant's present patrons were acquired during the marine strike of 1934 with the consent of complainant herein.

(2) Exhibits Nos. 8, 12 and 13.

moved in interstate commerce. It is my opinion that the record justifies rejection of the theory of Interstate Commerce as there is no proof tending to show the through origin and destination of the shipments which are said to be immune as interstate movements.

The main contention of defendant is that it was protected by contracts which are consistent with the definitions of a contract carrier as enunciated by this Commission in Rampone v. Leonardini. The status of contract carrier as defined in this decision reads:

> "A 'highway contract carrier' is distinguished as one who does not dedicate and hold out his transportation services generally to the public, or a substantial portion thereof, but who is employed by a selected and limited group of shippers, as a private carrier for an agreed compensation, to the exclusion of all others, by a mutually binding contract, entered into and performed in good faith, for an agreed term, and which contract mutually binds the carrier to transport and the shipper to supply a specific category of freight, and which contract is definite as to the following:
>
> 1. The time involved in the performance of the contract;
>
> 2. The route and/or termini and/or area involved in the performance of the contract;
>
> 3. The kind of commodity or commodities involved in the contract;
>
> 4. The tonnage to be hauled;
>
> 5. The compensation to be paid and received."

The contracts in force between the shippers and defendant during 1936 and particularly after May 11, 1936 (the date on which defendant obtained contract carrier permit) provide:

> "12. It is understood by the respective parties hereto that the Company is not hereby obligated to designate any rate hereunder in the event that the operations of the Company shall be such as to make such hauling inadvisable in the discretion of the Company; provided, however, that the Company agrees not to engage any other motor truck contractor or carrier to do the hauling covered hereunder in the territory hereinabove referred to.
>
> "13. This agreement shall remain in effect for a period of thirty (30) days and thereafter until cancelled upon ten days' notice by either party."
> (NOTE: Company means Shipper; Contractor means Carrier.)

Otherwise the contract appears to be ordinary in its mutuality except that paragraph 1 recites that the contractor (defendant) "agrees to haul or transport for the Company such merchandise as may be designated by the Company while this agreement remains in effect and in accordance with the terms and conditions of this agreement in the territory described in Exhibit "A", which exhibit is hereto attached and made a part hereof." (4)

Exhibit "A", alluded to in the foregoing, contains the following designation of the "territory" specified:

> "Territory: This agreement applies to shipments between San Francisco, Oakland, Berkeley, Alameda, Richmond and South San Francisco, on the one hand, and Stockton, Sacramento, Marysville, Tarke and Josephine, on the other hand, and also between points intermediate to said named points via San Mateo or San Leandro, thence via Tracy."

The exhibit also provides for rates, the character and volume of which are not involved in this proceeding. Analysis of the testimony of witnesses and the exhibits introduced by defendant and others indicate that the defendant maintained a constant movement between San Francisco, Oakland and Stockton - Sacramento. This movement has existed since December, 1935 and has been conducted for shipments tendered by those with whom

(4) Defendant's contracts before it received permit as highway common carrier are not defended. Defendant depends on the contracts (some verbal) executed after this permit was issued (May 11, 1936). Eleven (11) large shippers are now served under contract, as above set forth, with some variations as to term, -- some providing 60 and some 30 days, with 10 or 5 days termination notice etc. One contains the provision that it "shall remain in effect until terminated by either party upon sixty (60) days written notice" etc. Another: "This agreement shall remain in effect until August 1, 1937," without mention of cancellation. These contracts do not include patrons whose traffic is assumed by defendant to be "interstate" and immune from intrastate regulation, and which assumption it is found herein is unsupported.

defendant had written contracts in various forms or with whom it had no contracts. That a negligible portion of this traffic was Interstate commerce appears probable, but that any large volume was immune by reason of this characteristic is not sustained by the record. The movements were ordinarily those conducted by common carriers and the volume varied from as low as 92 pounds to as high as 47,000 pounds in a single consignment in a single day. This business moved mainly over the route via San Mateo Bridge and San Leandro when moving from San Francisco and it appears from the record that incidental to such movements additional cargo was loaded at other Bay Region points enroute to either of the termini. Paulding A. Chichester, president of defendant corporation, testified that the routes were left to the discretion of the driver; that the routes were followed at the driver's will to insure safety of operation which he said has a high rating. The fact remains, however, that the movements were made in the most expeditious and economical manner over one of three routes and that in this respect they were over regular routes. (5)

Defendant does not deny that the trucks thus moving contained mixed cargo of different shippers and that deliveries were made to different consignees at each of the termini. In all respects as to the delivery of shipments to this carrier, their assembly upon trucks, their transportation over available and direct routes possessed all the essentials and features of common carriers' transportation. Approximately 47 shippers have been served more or less frequently and about half of that number constantly have used the service either with or without contract. The only differentiation

(5) Mr. Chichester testified that other routes used were via Vallejo ferry and East Bay ferries.

to common carrier service contended for by defendant is that the contracts now in existence and which were made on or before August the 10th, 1936, bring them within the scope of private contract carriage and hence not subject to the requirements of Section 50-3/4 of the Public Utilities Act requiring a certificate of public convenience and necessity for highway common carriers.

There has been set up in the foregoing the Commission's definition of a contract carrier enunciated in Rampone v. Leonardini, supra, and in contrast also has been quoted the features of the contract relied upon by defendant to vest it with only a duty of private carriage and immunize itself from the necessity of procuring a certificate.

The contrast is sufficient to make clear that the contracts entered into with defendant utterly fail to accomplish this result. The language quoted provides for a contract (except for variations noted) for thirty days with a provision for continuance thereafter unless and until either party, on ten days' notice, cancels the same. This has the effect of giving an ambulatory character to the contracts with an indefiniteness of term that reduces them at best to ten day periods any time succeeding the first thirty days. If good for a ten day termination, in principle it could be for one day. In the past the Commission has held that similar contracts not obligating the shipper to provide all shipments to the carrier reflect nothing more than the carriers' willingness to adopt certain rates for such carriage from time to time and represent mere rate quotations rather than valid contracts of carriage.

But it appears that the contracts on their face provide additional reason for declaring them ineffective by reason of the fact that the shipper "is not obligated" to furnish any freight when the shipper decides "such hauling inadvisable, in the discretion of the Shipper." By this phraseology it appears that the contract is stripped of all exclusiveness and leaves the shipper free to use the services of any other carrier, rail, water, or air, for the same commodities, which defendant, in this case, undertook to transport. Under this exception, even though the contract were for a period of a year, or longer, the shipper would not be obligated to furnish a single pound to the contractor. What the shipper would do would be to use the carrier only when the rates or emergencies justify such use.

By this method the shipper places the carrier in the same category as other common carriers any or all of whom he may select when he has shipments to make.(6)

This has been a discussion of the contract forms as shown by Exhibit No. 3 and Exhibit No. 18, which presents the same form of contract with other shippers. Scrutiny of all of these contracts, which are substantially the same as the provisions above quoted, justifies the conclusion that they are intended more to circumvent the effect of the law than to comply with it. If such contractual processes are valid then the whole purpose of regulation would be vitiated and no carrier would need to do more than agree to carry for another when and as the other wills and, undoubtedly, only when the rate advantage was in favor of the shipper.

(6) Defendant cites Petaluma-Ft. Bragg Motor, etc. v. Ft. Bragg Cooperative,etc. 40 C.R.C. 34 as determining the validity of trucking contracts not exclusive of other carriers. While the contract in the case cited provided the shipper could "by special instructions" require transportation by railroad, the contract was declared to be of no controlling importance. Besides shipments between Petaluma and Ft.Bragg by rail cannot actually be made, Ft. Bragg being about 70 miles from rail connection.

The rates prescribed in these contracts have been avoided because if the contracts are invalid per se the volume of compensation is immaterial. However, it appears patent that on certain commodities in a large volume the rates as fixed in the contract would tend to the use of the contract carrier whenever the rate advantage was against the established common carrier. Assuming that many or all highway contract carriers adopted the same form of contract and subsisted under it, the established common carrier services operating on fixed schedules and with abundant equipment in public interest soon would find themselves without sufficient volume of business to sustain their public duty.

Therefore, I find as a fact that defendant herein has been and is now conducting common carrier transportation of property between the points specified in the complaint and that an order to cease and desist should be entered.

The attached form of order is proposed.

An order of this Commission finding an operation to be unlawful and directing that it be discontinued is in its effect not unlike an injunction issued by a court. A violation of such order constitutes a contempt of the Commission. The California Constitution and the Public Utilities Act vest the Commission with power and authority to punish for contempt in the same manner and to the same extent as courts of record. In the event a party is adjudged guilty of contempt, a fine may be imposed in the amount of $500, or he may be imprisoned for five (5) days, or both. C.C.P. Sec.1218; Motor Freight Terminal Co. v. Bray, 37, C.R.C. 224; re Ball and Hayes, 37 C.R.C. 407; Wermuth v. Stamper, 36 C.R.C. 458;

Pioneer Express Company v. Keller, 33 C.R.C. 571.

It should also be noted that under Section 79 of the Public Utilities Act a person who violates an order of the Commission is guilty of a misdemeanor and is punishable by a fine not exceeding $1000.00, or by imprisonment in the county jail not exceeding one year, or by both such fine and imprisonment. Likewise a shipper or other person who aids or abets in the violation of an order of the Commission is guilty of a misdemeanor and is punishable in the same manner.

O R D E R

Public hearings herein having been duly had, the matter being ready for decision, and the Commission now being advised in the premises,

IT IS HEREBY FOUND THAT Chichester Transportation Company, a corporation, is, and during the times mentioned in the Order Instituting Investigation herein was, operating as a highway common carrier as defined in Section 2-3/4 of the Public Utilities Act, with common carrier status between fixed termini or over regular routes, over public highways between San Francisco and Oakland, on the one hand, and Sacramento and Stockton, on the other hand, without having first obtained from this Commission a certificate of public convenience and necessity or without a prior right authorizing such operation.

Based upon the opinion and findings herein,

IT IS HEREBY ORDERED that Chichester Transportation Company, a corporation, cease and desist, directly and indirectly, or by any subterfuge or device from operating as a highway common carrier between any or all of the following points, or any two or more of the said points, to-wit: San Francisco and Oakland, on the one hand, and Sacramento and Stockton, on the other hand, unless and until said Chichester Transportation Company has first obtained from this

Commission a certificate of public convenience and necessity authorizing such operations.

IT IS HEREBY FURTHER ORDERED that the Secretary of this Commission shall cause a certified copy of this decision to be personally served upon Chichester Transportation Company, a corporation, that he cause certified copies thereof to be mailed to the District Attorneys of San Francisco, San Mateo, Alameda, Contra Costa, Solano, San Joaquin and Sacramento Counties, and to the Department of Public Works, Division of Highways, Sacramento.

The effective date of this order shall be twenty (20) days after the date of service upon Chichester Transportation Company.

Dated at San Francisco, California, this 16th day of November, 1936.

Commissioners.