

Decision No. 36382

BEFORE THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Investigation
 on the Commission's own motion, into
 the operations, rates, charges, con-
 tracts and practices, or any thereof,
 of FRED BELLI, doing business as
 B & R Transportation Company.

Case No. 4252

ORIGINAL

Fred Belli, Respondent, in propria persona

BY THE COMMISSION:

O P I N I O N

By the above proceeding, instituted September 7, 1937, Fred Belli, respondent herein, was cited to appear before the Railroad Commission for the purpose of determining whether or not he should be ordered to cease and desist from operating as a highway common carrier, as defined in Section 2 3/4 of the Public Utilities Act of the State of California, between Los Angeles and Santa Barbara and intermediate points, unless and until he shall have obtained a certificate of public convenience and necessity therefor under Section 50 3/4 of the Public Utilities Act.

Public hearings in this matter were held at Los Angeles and Santa Barbara and the matter having been duly submitted is now ready for decision.

Respondent appeared at the hearing, without counsel, and participated in the proceedings. No testimony in behalf of the respondent was introduced.

The evidence presented at the hearings disclosed the following facts:

Respondent Belli, operating under the name of B & R Transportation Company, owns trucks which he operates on a daily

schedule except Sunday, for the transportation of property for compensation, including pick-up and delivery service, between Los Angeles and Santa Barbara. He has been operating for more than a year, transporting miscellaneous merchandise, particularly hardware and paints over the public highways from Los Angeles to Santa Barbara, and incidentally serving Ventura and Oxnard and intermediate points. Many of the shipper patrons of respondent in Santa Barbara were acquired at a time when Pacific Freight Lines, a highway common carrier, operating between Los Angeles and Santa Barbara and intermediate points, was impeded by a truck strike which lasted two months. The movement of property from Santa Barbara to Los Angeles is almost negligible, consisting largely of returned containers.

Witnesses produced in behalf of the Commission established the fact that respondent had solicited business in Santa Barbara during the strike period and at other times; that he urged rates and service as the advantage of using his service. Usually the Santa Barbara patrons of respondent, who were in fact the consignees of shipments from Los Angeles, directed all their shippers at Los Angeles to route shipments over respondent's line regardless of whether or not the shipments were collect or prepaid. The record also shows that respondent transported property for all who tendered it to him, without at any time having refused any shipment.

Respondent entered into a purported contract with the majority of shippers, which purported contract reads as follows:

THIS SHIPPING AGREEMENT, made by and between the undersigned shipper, herein referred to as the Shipper, and the undersigned B & R Transportation Co. herein referred to as the Carrier,

WITNESSETH: That the Shipper in consideration of the transportation of its merchandise by the Carrier, and the Carrier in consideration of the transportation of Shipper's merchandise, agree on the following covenants:

That the Shipper will during the life of this agreement where and when possible, utilize the service of said Carrier.

That the Carrier will pick up shipments at the Shipper's designation, and transport same by auto trucks, deliver to its destination, take receipts for deliveries, and collect charges when requested to do so by the Shipper.

That the Carrier shall deliver shipments in good order and condition, and be responsible for losses and breakage due to negligent handling of the merchandise.

That the Carrier shall be ready, able and willing at all times on call by the Shipper for transportation of merchandise, upon reasonable notice.

It is mutually agreed that the charges for said transportation of merchandise shall not be less than those established by the Railroad Commission of the State of California.

It is mutually agreed that this agreement shall remain in full force and effect for one year from date hereof.

It is mutually agreed that this agreement may be cancelled by either the Shipper or the Carrier with or without reason, upon the presentation to the other party.

This Commission in Rampone vs Leonardini, 39 C.R.C. 562, 567, stated in part as follows:

"Section 1. (i) of Highway Carriers' Act is as follows:

Section 1. (i) The term "highway contract carrier" when used in this act means every highway carrier other than a highway common carrier as defined in subsection (g) and every radial highway common carrier as defined in subsection (h).

" 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.

"In determining whether such a carrier is in fact a "highway contract carrier," it is of controlling importance to determine by his conduct, in the matter of soliciting and procuring the contract or contracts, that he has not made available his services generally to the public or a substantial portion thereof. Does such conduct display a willingness to serve generally the public, or a substantial portion thereof? If so, the carrier is not a "highway contract carrier" but is a common carrier. Such carrier's conduct constitutes evidence of controlling importance. It is from this evidence of conduct, as presented in each case, that the Commission may determine his true status.

"It is also important, in determining whether such a carrier is in fact a "highway contract carrier," to scrutinize the scope and conduct of his shipper in the matter of how the shipper determines and distributes his freight movements. Such shipper crosses the boundary of private carriage and enters the field of common carriage if he diverts, in violation and disregard of the terms of the contract, with the acquiescence and sufferance of the carrier, the identical quantum and category of freight which constitutes the subject of private contract to a promiscuous group of carriers, promiscuously and competitively soliciting and bidding for the same. Plainly, a shipper cannot preserve the true status of "highway contract carriage" if he hazards, in violation and disregard of the terms of the contract, and with the acquiescence and sufferance of the carrier, any public bidding or competition that may result in diverting from such a "highway contract carrier" any of the specific freight that comprises the specific object of his contract. Correspondingly, such shipper's conduct constitutes evidence of importance, and it is also from this evidence of conduct, as presented in each case, that the Commission may determine the carrier's true status."

It will be seen from the purported contract that no obligation exists on the part of the shipper to furnish to the carrier any specified tonnage during a certain period of time and that there is no obligation to use the service of respondent exclusively, in fact, witnesses testified that they did not deem themselves obligated to use the services of respondent at all, and actually were employing other carriers, including truckers, to transport their shipments between the same points, and that they had informed respondent that they would so do at their option.

Since the agreement may be cancelled by either party, at his discretion, immediately upon notice to the other, the provision that it shall remain in force for one year from date is meaningless. The contract, therefore, must be construed as though no term had been specified.

The record shows that the shipments were paid for by the consignees in about 90% of the cases, only a small proportion having been prepaid and then only from occasional consignors at Los Angeles. Examination of the record and a full consideration thereof must result in a finding that respondent herein has been and now is conducting a highway common carrier service between Los Angeles and Santa Barbara and intermediate points and that an order to cease and desist should be entered.

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, 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 held, the matter having been duly submitted and now being ready for decision, and the Commission being fully advised in the premises,

IT IS HEREBY FOUND THAT Fred Belli, operating under the fictitious name of B & R Transportation Company, and during the times mentioned in the order instituting the investigation herein, was operating as a highway common carrier, as defined in Section 2 3/4 of the Public Utilities Act, between fixed termini or over regular routes between Los Angeles and Santa Barbara and intermediate points via Oxnard and Ventura, without first having 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 Fred Belli, and/or B & R Transportation Company, a fictitious name, cease and desist, directly or indirectly, or by any subterfuge or device, from operating as a highway common carrier between any and all of the following points or any two or more of said points, to-wit: between Los Angeles and Santa Barbara or any point intermediate thereto by any route, unless and until said Fred Belli and/or B & R Transportation Company has 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 Fred Belli and/or B & R Transportation Company; that he cause certified copies thereof to be mailed to the District Attorneys of Los Angeles, Ventura and Santa Barbara

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 Fred Belli and/or B & R Transportation Company.

Dated at San Francisco, California, this 6th day of December, 1937.

Walter A. ...
Leon ...
Frank ...

COMMISSIONERS