

Decision No. 30184

ORIGINAL

BEFORE THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Investigation)
by the Commission on its own motion)
into the operative rights of Nickols) Case No. 4257
Transportation Company.)

- Thomas S. Louttit and Tom H. Louttit (of Louttit, Marceau & Louttit), for respondent Nickols Transportation Company
- F. W. Mielke of McCutcheon, Olney, Mannon & Greene, for The River Lines
- A. L. Whittle, for Southern Pacific Company
- A. L. Whittle and E. S. Graham, for Northwestern Pacific Railroad Company and Petaluma & Santa Rosa Railroad

RILEY, Commissioner:

O P I N I O N

This is an investigation instituted by the Commission on its own motion for the purpose of determining the extent to which John Nickols and Henry Nickols, co-partners doing business under the name and style of Nickols Transportation Company, may lawfully operate vessels for the transportation of property on the inland waters of this state.

A public hearing was held at Stockton on November 30, 1937.

Respondents claim a right to operate an "on-call" service for the transportation by vessel of property of all kinds, between numerous points on the inland waters.¹ They hold no certificate of

¹ The general territory in which respondents claim operative rights is that comprising San Francisco, San Pablo and Suisun bays, Sacramento and San Joaquin rivers and tributaries thereto. At the hearing respondents waived whatever rights they may have had for transportation to and from points north of Sacramento, and for transportation of general merchandise in "less-carload" quantities, between San Francisco on the one hand and Petaluma, Stockton and Sacramento on the other hand, between Stockton and Sacramento, and to and from points south of San Francisco Bay terminals.

public convenience and necessity from this Commission but claim such right by prescription, based on alleged operations in good faith prior to August 17, 1923, under tariffs lawfully on file with the Commission.²

The record shows that John and Henry Nickols have been engaged since 1919 in the business of transporting property by vessel on the inland waters, such operation having been conducted as a co-partnership under the name "Nickols Transportation Company". Henry Nickols testified that from the inception of this service his company has at all times been ready, willing and able to transport and has transported any and all commodities offered for transportation, between all points on the inland waters. Similar testimony was given by Mrs. V. J. Dervin, the secretary and office manager of the company, by J. C. Sommers, traffic manager of the Stockton Chamber of Commerce, and by shippers who have had occasion to use the service of Nickols Transportation Company in the past.

Records of actual shipments handled prior to January 1, 1928, were not available; however, respondents did produce comprehensive exhibits showing all shipments transported during the years 1928 to 1936 inclusive, except that for the years 1930 and 1931 only those shipments differing from shipments transported during 1928 and 1929 were shown. Several witnesses testified that the service of Nickols Transportation Company prior to 1928 was similar in its inherent features to the operation conducted during that year, except that by

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On August 17, 1923, Section 50(d) was added to the Public Utilities Act, requiring a certificate of public convenience and necessity as a condition precedent to the commencement of operation as a common carrier by vessel on the inland waters. As to carriers then operating, the Act provided:

"But no such certificate shall be required of any corporation or person which is actually operating vessels in good faith, at the time this act becomes effective, between points exclusively on the inland waters of this state under tariffs or schedules of such corporations or persons, lawfully on file with the railroad commission."

reason of changing conditions, such as the introduction of new crops and the building of new roads, bridges and ferries, the movement of a few commodities had ceased and of others had commenced.

In addition to stating that his company had accepted all commodities offered for transportation between all points on the inland waters, Henry Nickols asserted that he could remember having transported, during the period 1923 to 1928, a wide variety of commodities between a great number of points. Among them were shipments of hay and cattle from delta points to South San Francisco, mill feeds, hay, grain and bags from delta points, Stockton and Sacramento to Vallejo and Port Costa; and dried milk, molasses, bags, mill feeds and grains from Petaluma to delta points, Stockton and Sacramento.

Walter A. Perry, a wholesale dealer in potatoes and onions, testified that he used the service of this carrier as early as 1921, and has continued to use it thereafter, shipping potatoes and onions between delta points and from delta points to Stockton, Sacramento and San Francisco, and seed potatoes from Sacramento to delta farms. He had no recollection of having made shipments from Stockton to San Francisco.

Sol D. Klein, grain and bean dealer, stated that he commenced to use the service of Nickols Transportation Company in 1921, his shipments having consisted of grain, beans and farm produce, moving from delta points to Sacramento, Stockton, San Francisco and Petaluma; beans between Sacramento and Stockton, from Sacramento to San Francisco and from Stockton to San Francisco; and bags, from San Francisco to Stockton, Sacramento and delta points and from Petaluma to Stockton. He also stated that as early as 1923 he had shipped fertilizer and machinery from Stockton to delta points and from Stockton to Sacramento.

On August 17, 1923, and for several months prior thereto, rates of Nickols Transportation Company were contained in Bay & River Boat Owners' Association Local Freight Tariff No. 4, C.R.C. No. 2 of John S. P. Dean, agent, hereinafter referred to as "the Dean tariff." Some thirty other inland water carriers participated in the filing of the Dean tariff, its scope being broad enough to embrace collectively the operations of each individual carrier. It was canceled on October 1, 1924, and the rates republished by Nickols Transportation Company in an individual tariff issue, with but little change. Tariffs filed subsequently by this carrier have been nearly as broad in territorial scope as the Dean tariff, although the volume of many rates has been changed and several new commodity rates have been added. The Dean tariff and all subsequent tariffs filed by respondents named class rates between nearly all points on the inland waters, as well as numerous "less-carload" and "carload" commodity rates for particular hauls.

The principles by which the Commission must be guided in measuring the extent of respondents' operative rights were discussed in detail in Decision No. 28263, dated October 14, 1935, and Decision No. 29778, dated May 24, 1937, in Case No. 3624. As stated in each of those decisions, " * * * where a carrier demonstrated that it has transported in good faith and under tariffs on file with the Commission on August 17, 1923, all or substantially all commodities then offered for transportation in the territory it served, it should not be deprived of the right to haul such other articles of commerce as might be offered later, but that where the articles transported clearly indicate that the carrier has restricted its operations to commodities of a certain class or of a limited number of classes the carrier must be regarded as holding itself out to transport only commodities in

that class or classes and cannot later without express authority change the essential and inherent nature of its service by transporting other commodities."

Moreover, as pointed out in Decision No. 29778, supra, " * * * the fact that over a considerable period of time, during which a great variety of articles moved between two given points, a carrier has actually handled only a limited group of commodities, or commodities of a certain type or class, is in itself persuasive evidence of an intention on the part of such carrier to restrict the scope of its operations to the transportation of such limited group or class of commodities. Similarly, the fact that for such period a carrier's operations have been confined to performing transportation service between a limited group of points is strongly indicative of an intention to restrict its service to transportation between such termini."

It should also be observed that, inasmuch as the Dean tariff, in which respondents' rates were published, was intended to embrace the operations of a number of carriers, it cannot be used as an infallible measure of the extent of the offer to serve of any single participating carrier.

While respondents claim they have always carried all commodities offered them for transportation, an analysis of the exhibits submitted indicates that the traffic actually handled has consisted chiefly of farm, orchard and garden products, such as potatoes, onions, beans, grain, hay and livestock, moving from the delta areas to markets or distributing centers, and of farm produce, seed, farming implements and farm supplies, moving between delta points or from Stockton to delta points. It is significant that during the year 1928, for example, despite the great volume of movement of commodities of all kinds between Stockton and San Francisco, handled by other carriers,

this carrier transported but two shipments between these points, one being a shipment of barley weighing in excess of 100 tons and the other being a shipment of 300 sacks of beans. Not a single shipment was transported between Stockton and Sacramento nor between Sacramento and San Francisco. The conclusion is inescapable that the solicitation of Nickols Transportation Company, its "holding out" or active offer to serve (as distinguished from whatever constructive offer to serve may be attendant upon the mere filing of a tariff with the Commission) was confined during that year at least to transportation of a limited group of commodities within a limited territory. While respondents may actually have transported all commodities offered, their business undoubtedly was so conducted that only such limited classes of shipments were tendered to them. The failure to transport any shipments between Stockton and Sacramento or between Sacramento and San Francisco during the entire year of 1928 is certainly a strong indication that respondents were not seeking such traffic. The exhibits covering operations since the year 1928 indicate a progressive broadening of the scope of the operations of this company. However, prescriptive rights cannot be increased by an unauthorized enlargement of operations. In view of the testimony that the inherent features of the Nickols operation in 1923 were similar to those of the operation conducted during 1928, it is fair to adopt the showing for the latter year as representative of their operation prior to August 17, 1923, giving consideration also to the general recollection of the several witnesses as to shipments made prior to 1923, at least to the extent that such recollections are supported by the showing of movements during 1928.

In Decision No. 29778, dated May 24, 1937, Case No. 3824, in which the rights of all carriers operating on the inland waters

were under investigation, the Commission found that Nickols Transportation Company possessed the right to operate an "on-call" service for the following transportation:

"1. Potatoes from Delta points to Sacramento and San Francisco and between Delta points on the one hand and Stockton on the other.

"2. Grain from Delta points to Petaluma, Stockton, Port Costa, and Oakland in quantities of not less than 80,000 pounds.

"3. Livestock from Delta points to San Francisco and Sacramento."

While the operation of that order was suspended as to this particular carrier by a subsequent order, the testimony and exhibit on which it was based were incorporated into the present record by reference.³

It is interesting to note that Exhibit No. 34 in Case No. 3824, supra (reintroduced here as Exhibit No. 2) shows actual movements during the years 1920-1928 inclusive and that at the time such exhibit was prepared (March, 1934) records of actual movements since 1920 were apparently available. The operations of Nickols Transportation Company, as described by John Nickols during the hearings in Case No. 3824, and the rights tentatively accorded to it in that proceeding, were considerably less extensive than those described by the various witnesses in the instant proceeding, and those which said carrier is herein found to possess.

Upon consideration of all the facts and circumstances of record, I am of the opinion and find that John Nickols and Henry Nickols, co-partners doing business under the name and style of Nickols Transportation Company, possess prescriptive rights to operate an "on-call" service as a common carrier by vessel on the inland waters of this state, for the transportation of the following com-

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Exhibit No. 34 and pages 231 to 234, reporter's transcript.

modities and within the following territories:⁴

1. Property of all kinds, between Delta points;
2. Property of all kinds, between Delta points on the one hand and Stockton on the other hand;
3. Potatoes, onions, grain, millfeeds, hay and livestock, from Delta points on the one hand to points on San Francisco Bay, San Pablo Bay, Suisun Bay and to Petaluma and Sacramento;

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The territories referred to herein are more specifically described as follows:

San Francisco Bay

All wharves, docks or landings on San Francisco Bay or navigable waters tributary to San Francisco Bay south of San Pablo Bay.

San Pablo Bay

All landings on San Pablo Bay and navigable waters tributary to San Pablo Bay west of Carquinez Bridge, but excluding Petaluma.

Suisun Bay

All landings on Carquinez Straits east of Carquinez Bridge; Suisun Bay and navigable waters tributary to Suisun Bay, Sacramento and San Joaquin rivers to but not including B. B. Ranch Landing west of Collinsville and not including Middle Slough and New York Slough.

Delta

All landings on the main stream of the Sacramento River below Sacramento to and including B. B. Ranch Landing west of Collinsville.

All landings on navigable waters in the territory west of Sacramento having outlet into the Sacramento River above Collinsville, also landings on Georgiana Slough and landings on Three Mile Slough located between the Sacramento River and Seven Mile Slough.

All landings on the main stream of the San Joaquin River and the Stockton Deep Water Channel below Streckers and above B. B. Ranch Landing, west of Collinsville, and landings on New York Slough and Middle Slough, but excluding territory hereinafter described as Stockton.

All landings on navigable waters tributary to the San Joaquin River below Stockton, as hereinafter described, and above Antioch but not including landings on Georgiana Slough and landings on Three Mile Slough.

Sacramento

All landings on the Sacramento River within the city limits of Sacramento.

Stockton

All landings on the Stockton Channel from the head of the Channel to the first intersection with the San Joaquin River, approximately three miles west of the head of the Channel.

4. Grain, in lots of not less than 30,000 pounds, from Stockton to Vallejo, Port Costa and San Francisco, and in lots of not less than 10,000 pounds from Port Costa to Stockton;

5. Castings, from Stockton to Pittsburg, in lots of not less than 10,000 pounds.

6. Hay, from points on San Pablo and Suisun bays to Stockton.

7. Beans, in lots of not less than 30,000 pounds, from Stockton to San Francisco.

The following form of order is recommended:

O R D E R

This matter having been duly heard and submitted, and basing this order upon the findings and conclusions contained in the preceding opinion,

IT IS HEREBY ORDERED that John Nickols and Henry Nickols, co-partners doing business under the name and style of Nickols Transportation Company, be and they are and each of them is hereby directed to cease and desist on or before the effective date of this order and thereafter abstain from transporting property as a common carrier by vessel on the inland waters of this state, except to the extent that they are lawfully entitled to engage in such transportation, as shown in the findings set forth in the opinion preceding this order.

IT IS HEREBY FURTHER ORDERED that said respondents, and each of them, be and they are and each of them is hereby directed to reissue or amend their tariffs within sixty (60) days from the effective date of this order, on full statutory notice, so as to conform to the operative rights set forth in the opinion preceding this order.

The effective date of this order shall be twenty (20) days from the date hereof.

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 3rd day of Jan., 1938.

Malvina
Iron
Stewart
Karavak
Ray & Baker
Commissioners.