Decision No. 38737

BEFORE THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA

ORIGINAL

In the Matter of the Investigation on the Commission's own motion into the operations, rates, charges, contracts, and practices of N. A. GOTELLI.

Case No. 4435

WARE & BEROL, by Edward M. Berol and Marvin Handler, for respondent;

LOUTTIT, MARCEAU & LOUTTIT, by Daniel V. Marceau, for Virgilio Antonini, interested party;

DECOTO & HARDIN, by Ezra Decoto, for Pete Rampone, interested party;

McCUTCHEON, OLNEY, MANNON & GREENE, by F. W. Mielke, for The River Lines, interested party;

EDWARD STERN, for Railway Express Agency, Inc., interested party;

WILLIAM MEINHOLD, for Southern Pacific Company and Pacific Motor Trucking Company, interested parties;

H. K. LOCKWOOD and WILLIAM T. BROOKS, for Atchison, Topeka & Santa Fe Railway Company -- Coast Lines, interested party;

L. N. BRADSHAW, for Western Pacific Railroad Company, interested party.

BAKER, COMMISSIONER:

O P I N I O N

The purpose of this proceeding, which was instituted by the Commission on its own motion, is to determine whether or not respondent, N. A. Gotelli, has been operating as a highway common

carrier between Stockton and territory proximate thereto, on the one hand, and San Francisco and Oakland, on the other hand, without a certificate of public convenience and necessity or other operative right therefor; whether or not he should be ordered to cease and desist therefrom; and whether or not his radial highway common carrier and highway contract carrier permits should be cancelled, revoked, or suspended for and on account of such operation.

Subsequent to the issuance of the order instituting investigation herein, and following one day's hearing in San Francisco on July 31, 1939, respondent filed an application for authority to operate as a highway common carrier between the points in question (Application No. 22957), and the two matters were then consolidated for the purpose of taking evidence and further hearings were held on November 1, 2, and 3, and December 12, 13, 14, and 15, 1939, and February 29, 1940, in Stockton, and on January 19, 1940, in San Francisco, after which the matters were submitted on briefs which have since been filed. Although consolidated for the purpose of taking evidence, the matters will receive separate disposition, and only the investigation proceeding will be considered herein.

Respondent entered the trucking business in 1932 and has operated between the points in question each year since. Following the enactment of the Highway Carriers' Act in 1935, he obtained a radial highway common carrier permit, issued on December 6, 1935, and a highway contract carrier permit, issued on June 9, 1936. He holds no certificate of public convenience and necessity to operate as a highway common carrier, nor was he operating as such on or prior to July 26, 1917; accordingly, if he has been operating as a highway common carrier between the points in

question, he should be ordered to cease and desist therefrom.

Respondent operates between the points in question daily throughout the fresh fruit and vegetable seasons each year, commencing on April or May and continuing to September or October. His trucks are loaded in Stockton and the adjacent rural area included within a radius of approximately fifteen miles from Stockton during the afternoon and early evening of each day except Saturday, depart from his Stockton terminal between seven and nine o'clock P.M., arrive at Oakland and San Francisco approximately three and five hours, respectively, after the departure time, and make deliveries to the San Francisco and Oakland wholesale fruit and vegetable dealers early each morning except Sunday. The route regularly traversed is U.S. Highway 50. It is clear from these facts that respondent has operated over a regular route and between fixed termini during the fresh fruit and vegetable seasons each year since he commenced operations. His contention that his Stockton-San Francisco-Oakland operation is not conducted between fixed termini or over a regular route, and that he should have been permitted to introduce evidence of his operations to other points in order to show that the operation in question is but one spoke of an operation which radiates out of Stockton in many directions, is untenable. Whether or not a particular operation is conducted "between fixed termini or over a regular route" must be determined by reference to the regularity and frequency of that operation, and the existence of other operations is immaterial. (Regulated Carriers, Inc. v. Triola, Case No. 3335, Decision No. 25959, dated May 22, 1933; Regulated Carriers, Inc. v. Contract Carrier Corporation, et al., Case No. 3556, Decision No. 27090, dated May 24, 1934.) The evidence was properly excluded.

There remains to be considered whether respondent was operating as a common carrier -- that is, serving the general public -- or, as he contends, as a contract carrier. It is clear that until August, 1939, at least, respondent operated between the points in question as a common carrier. He testified that from the time he commenced operating in 1932 until the early part of 1939, he actively solicited traffic from growers in the Stockton area and, subject to the sufficiency of his equipment and the making of a profit on the transaction, transported all shipments tendered him. No effort was made to restrict the availability of the service to any limited group of shippers. Early in the 1939 season, he testified, he discontinued solicitation but nevertheless continued, until some time subsequent to the institution of this proceeding, to transport all shipments tendered to him.

During 1937, 1938, and 1939, he advertised his service in the program of the annual picnic of the Italian Gardener. Society, which includes in its membership a large number of growers in the Stockton area. His Stockton terminal bears large signs stating that he is engaged in trucking to San Francisco, Oakland, and Los Angeles. It is significant in this connection that his office and terminal are located on the premises of the San Joaquin Marketing Association, where each day during the season 150 or more growers arrange for the marketing of their produce. Growers who are unable to sell their produce outright usually ship it on consignment to San Francisco, Oakland, and Los Angeles, and the location of respondent's terminal at this market place, coupled with the signs referred to above, obviously is an invitation to the public to use respondent's services. The record shows that many growers have tendered shipments to respondent under such circumstances, and that he has customarily accepted all such traffic.

Although respondent contends that he has limited his service since early in the 1939 season, and also to some extent previously thereto, to a group of shippers with whom he had allegedly entered into contracts (oral in almost every instance), the record shows no such limitation. Over twenty growers who used respondent's service between the points in question during 1939 testified that they did so without having entered into any such contract with him relative thereto. While numerous other witnesses stated that they had entered into such oral contracts, both respondent's and their descriptions of the conversations in the course of which the purported oral contracts were made indicate that, in substance, the growers merely stated that they would like to have respondent haul for them and respondent stated that he would be glad to serve them and would try to render a good service. Furthermore, respondent apparently entered into such "agreements" with all growers who were willing to do so. Obviously such arrangements are insufficient, even if required of all shippers served, to constitute an effective limitation on the availability of his service to the general public. From the facts of record the conclusion is inescapable that respondent held his services out to the general public as a highway common carrier.

Respondent testified that subsequent to the institution of this proceeding he entered into written contracts with approximately fourteen shippers and thereafter confined his services between the points in question to traffic tendered him by those shippers, refusing to serve all others. These contracts, copies of which are in evidence, are all dated August 21, 1939. Since his operations after that date were not covered by the evidence of record, except incidentally in connection with other periods, no opinion is expressed here as to the status thereof. The record

clearly shows, however, that from May 1, 1939, to August 21, 1939, and during the fruit and vegetable season from approximately May to September, inclusive, annually for several years prior thereto, respondent operated as a highway common carrier between the points in question without proper authority therefor and should accordingly be ordered to cease and desist therefrom.

Respondent contends that if he has been operating unlawfully, he has done so without any unlawful intent and has believed in good faith that his operations were within the purview of his permits. The record, however, affirmatively shows the absence of any such extenuating circumstances. On at least three occasions (October 21, 1938, February 23 and June 14, 1939) staff members of the Commission's Division of Investigation discussed with respondent the status of his operations between the points in question, advised him in detail as to the authority conferred by his radial highway common carrier and highway contract carrier permits, and expressed their opinion that if, as he had told them, he was accepting all shipments tendered to him and was operating regularly between the points in question, he was conducting a highway common carrier service and should desist therefrom until such time as he obtained a certificate of public convenience and necessity therefor. On the first two of these occasions he expressed complete willingness to abide by the law as it had been explained to him, and even went so far as to say that he would restrict his services to a limited group of shippers by entering into contracts with ten or eleven of them and serving them to the exclusion of all others. He nevertheless imposed no such restriction. The record shows, on the contrary, that he served more than forty shippers between May 1st and June 15th, 1939. Furthermore, during the third interview referred to above,

he admittedly stated he would not change his method of operation unless and until he received a "written notice" from the Commission to do so. These facts clearly reveal the wilfullness of respondent's unlawful conduct, and impel the application of other remedies provided in the Public Utilities Act for violations thereof, in addition to the issuance of a cease and desist order. The Commission's attorney should accordingly take appropriate action for the collection of penalties in a Superior Court action against respondent.

An order of the Commission directing that an unlawful operation cease and desist is in effect not unlike an injunction 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 a contempt he may be fined in the amount of $500. or imprisoned for five (5) days, or both. C.C.P. Sec. 1218; Motor Freight Terminal Co. v. Bray, 37 C.R.C. 244; re Ball & Hayes, 37 C.R.C. 407; Wermuth v. Stamper, 36 C.R.C. 458; Pioneer Express Co. v. Keller, 33 C.R.C. 471.

Public hearings having been held in the above-entitled proceeding, evidence having been received, and the matter having been duly submitted, I hereby find that respondent, N. A. Gotelli, has been owning, controlling, operating, and managing auto trucks used in the business of transportation of property as a common carrier for compensation over the public highways in this State between fixed termini, to-wit, Stockton and territory proximate thereto, on the one hand, and San Francisco and Oakland, on the other hand, and over a regular route, to-wit, U.S. Highway No.

50, as a highway common carrier as defined in Section 2-3/4 of the Public Utilities Act, and was engaged in such operation between May 1 and August 21, 1939, without first having obtained from the Commission a certificate of public convenience and necessity therefor and without having a prior right to do so resulting from a good faith highway common carrier operation conducted on July 26, 1917, and continuously thereafter.

The following form of order is recommended:

O R D E R

IT IS HEREBY ORDERED from the foregoing findings of fact that respondent, N. A. Gotelli, cease and desist from conducting, directly or indirectly or by any subterfuge or device, any and all operations as a highway common carrier as defined in Section 2-3/4 of the Public Utilities Act over the public highways of this State between Stockton and the rural area proximate thereto, on the one hand, and San Francisco and Oakland, on the other hand, unless and until he first obtain from the Railroad Commission a certificate of public convenience and necessity authorizing such operations.

IT IS HEREBY FURTHER ORDERED that the Secretary of the Railroad Commission cause a certified copy of this decision to be personally served upon respondent, N. A. Gotelli, and this opinion and order shall become effective twenty (20) days after the date of such service.

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 17th day of December, 1940.

Commissioners.