

ORIGINAL

Decision No. 34187

BEFORE THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of
N. A. GOTELLI for a certificate of
public convenience and necessity to
operate as a common carrier by motor
vehicle for the transportation of
fresh fruits and vegetables between
Stockton and all points within a
radius of twenty miles of Stockton,
California, on the one hand, and Los
Angeles and points and places on San
Francisco Bay, including Oakland,
San Francisco, Alameda, Emeryville,
Berkeley and Piedmont, on the other
hand.

Application No. 22957

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

LOUTTIT, MARCEAU & LOUTTIT, by Daniel V. Marceau,
for Virgilio Antonini, protestant

DECOTO & HARDIN, by Ezra Decoto, for Pete Rampone,
protestant

McUTCHEON, OLNEY, MANNON & GREENE, by F. W. Mielke,
for The River Lines, protestant

EDWARD STERN, for Railway Express Agency, Inc.,
protestant

WILLIAM MEINHOLD, for Southern Pacific Company and
Pacific Motor Trucking Company,
protestants

H. A. LOCKWOOD and WILLIAM T. BROOKS, for Atchison,
Topeka & Santa Fe Railway Company -
Coast Lines, protestant

L. N. BRADSHAW, for Western Pacific Railroad
Company, protestant.

BAKER, COMMISSIONER:

O P I N I O N

N. A. Gotelli, applicant herein, requests a certifi-
cate of public convenience and necessity to establish and

operate an on-call highway common carrier service for the transportation of fresh fruits and vegetables between Stockton and all points within a radius of twenty miles thereof, on the one hand, and Los Angeles and points and places on San Francisco Bay, including Oakland, San Francisco, Alameda, Emeryville, Berkeley, and Piedmont, on the other hand.

The matter was consolidated for the purpose of taking evidence with Case No. 4435, a formal investigation instituted by the Commission on its own motion to determine whether or not Gotelli was conducting a highway common carrier service between the Stockton area and San Francisco and Oakland without proper authority therefor, and public hearings were thereafter held in Stockton on November 1st, 2nd, and 3rd, December 12th, 13th, 14th, and 15th, 1939, and February 29th, 1940, and in San Francisco on January 19th, 1940. The proceedings were submitted on briefs which have since been filed, and the Commission has already issued its decision in Case No. 4435. ⁽¹⁾

Protests to the granting of the application have been made by Virgilio Antonini, who operates a highway common carrier service for the transportation of fresh fruits and vegetables between the Stockton area and San Francisco and Oakland, Railway Express Agency, Inc., an express corporation operating between all the points in question, and Atchison, Topeka & Santa Fe Railway Company, Southern Pacific Company, Pacific Motor Trucking

(1) Decision No. 33737, issued on December 17, 1940, in which the Commission found that Gotelli had been operating as a highway common carrier between the Stockton area and San Francisco and Oakland, and ordered him to cease and desist therefrom.

Company, and Western Pacific Railroad Company, each of which serves some or all of said points. The protests of Pete Rampone and The River Lines were withdrawn during the course of the hearing.

Applicant in reality seeks authority for two separate operating rights, the one between Stockton and Los Angeles, and the other between Stockton and the San Francisco Bay area, and the evidence relating to each calls in a large measure for separate consideration. Because of various circumstances, it is deemed advisable to rule with respect to the Los Angeles operation at this time and to reserve disposition of the remainder of the application until a future date.

An analysis of the evidence bearing on the proposed Stockton-Los Angeles operation raises three questions, as follows: (1) the public need for the service, (2) the ability of applicant to conduct it on a compensatory basis, and (3) the effect of his prior operations.

Stockton is the center of a rich agricultural area in which fresh fruits and vegetables exceeding \$10,000,000.00 in value are grown annually. Much of this produce moves to eastern points, but great quantities of it, aggregating many thousands of tons, are marketed in San Francisco, Oakland, and Los Angeles. At the present time there is no highway common carrier certificated to transport fresh fruits and vegetables from Stockton to Los Angeles. The need for such a service, however, is clearly evident from the record. Numerous witnesses testified that they consider truck transportation essential to the proper marketing of their commodities, and

pointed to certain advantages of trucks over railroads in handling fresh fruits and vegetables between these points. Such advantages include less handling, direct service from ranch or grower's market to wholesale distributing houses, and delivery in Los Angeles in time for marketing early on the first morning after picking of the produce. These factors combine not only to bring the growers greater returns, but also to give consumers better fruits and vegetables. The record also shows that as a matter of fact practically all of the fresh produce moving between these points is now carried by trucks operated purportedly under the authority of radial highway common carrier and highway contract carrier permits. To grant the application will not, therefore, divert any substantial revenue from the rail carriers.

The fact that so-called radial highway common and highway contract carriers are now transporting substantially all of the produce moving between these points does not detract from the need for a highway common carrier service. Operators of the former type are under no duty to maintain adequate and continuous service, and the public is not protected against discriminatory practices on their part. As the record shows, they frequently refuse to accept small shipments during the off-peak seasons when full loads are not always available. The traffic in question is large in volume, amounting to many thousands of tons annually, and the public is entitled to enjoy the services of a highway common carrier who will be required at all times to provide adequate, nondiscriminatory service whenever needed. I am of the opinion that public convenience and necessity require the establishment of the proposed service from the Stockton area to Los Angeles. No need for a return movement has been shown,

however, and accordingly no authority therefor should be granted.

No serious question has been raised as to applicant's ability to conduct the proposed operation to Los Angeles on a compensatory basis. The large volume of traffic and applicant's experience in transportation matters warrant the expectation that the proposed operation will yield a reasonable return.

The chief ground of protest to the granting of the application to serve Los Angeles is that respondent allegedly has been conducting such an operation unlawfully in the past and that the Commission, in line with the principle announced in numerous decisions, should deny a certificate to a carrier who has wilfully violated the law in building up the service which he seeks to have certificated. It is true that, as a general policy, regard for the law and fairness to competing carriers call for a denial of a certificate to such an operator. The application of this principle is always subject, however, to the convenience and necessity of the public, the promotion of whose interests is of paramount concern. While it appears that applicant has regularly served the general public between the points in question and has accordingly been operating as a highway common carrier without proper authority therefor, it is also true that a compelling public need for his proposed service has been shown. Furthermore, it is not certain that applicant was aware of the illegality of his Los Angeles operations. While he had previously been told that his San Francisco operations appeared to be those of a highway common carrier, there

is no indication that he was ever so advised with respect to the Los Angeles service. It is not to be understood, of course, that his unlawful operations are to be condoned. On the contrary, the Commission's decision in the investigation proceeding directed its attorney to file a penalty suit against applicant herein for his illegal operations to San Francisco, and that has been done.⁽³⁾

In view of all the circumstances I believe that the public need for the service is sufficiently great to overcome the taint of illegality attached to his prior operations to Los Angeles and that a certificate authorizing applicant to establish a highway common carrier service from Stockton to Los Angeles, as prayed for in the application, should be granted.

N. A. Gotelli, applicant herein, is 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.

(2) See Note 1, supra.

(3) People v. N. A. Gotelli, S.F. Superior Court No. 296263.

The following form of order is recommended:

O R D E R

Public hearings having been held, evidence having been received, the matter having been duly submitted and it having been found as a fact that public convenience and necessity so require:

IT IS ORDERED that a certificate of public convenience and necessity be and it is hereby granted to N. A. Gotelli for the establishment and operation of an automotive service as a highway common carrier of fresh fruits and vegetables only from Stockton and all points within a radius of twenty (20) miles thereof, on the one hand, to Los Angeles, on the other hand.

IT IS FURTHER ORDERED that in the operation of said highway common carrier service N. A. Gotelli shall comply with and observe the following service regulations:

1. File a written acceptance of the certificate herein granted within a period of not to exceed thirty (30) days from the date hereof.
2. Subject to the authority of this Commission to change or modify such at any time by further order, conduct said highway common carrier operation over and along the following route:

Via U. S. Highway No. 99.
3. File in triplicate and concurrently make effective within a period of not to exceed sixty (60) days from the effective date of this order, on not less than five (5) 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, rules

and regulations which in volume and effect shall be identical with the proposed rates, rules and regulations shown in the exhibits attached to the application herein in so far as they conform to the certificate herein granted, or rates, rules and regulations satisfactory to the Railroad Commission.

4. File, in triplicate, and make effective within a period of not to exceed sixty (60) days from the effective date of this order on not less than five (5) days' notice to the Commission and the public, time schedules covering the service herein authorized in a form satisfactory to this Commission.

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 13th day of May, 1941.

[Signature]
Ray & Berry
Justus J. Carver
Frank R. Havenor
[Signature]
 COMMISSIONERS