24185 NM

Decision No. 35049.

BEFORE THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA

ORIGINAL

In the Matter of the Application of J.C. FREESE CO., for a permit under the "For Hire Vessel Act" for the transportation of bulk petroleum products.) Application No. 24185

BY THE COMMISSION:

Appearances

Pillsbury, Madison & Sutro, by Eugene Prince, for applicant.
McCutchen, Olney, Mannon & Greene, by F.W. Mielke, for The River Lines, protestant.
Starr Thomas, for The Atchison, Topeka and Santa Fe Railway Company, protestant.

O P I N I O N

J.C. Freese Co., a copartnership composed of Constance Mogan and Ruth Freese Conway, seeks a permit under the For-Hire Vessel Act (Statutes 1933, Chapter 223) to transport petroleum products, in bulk, by vessel for Richfield Oil Company, General Petroleum Corporation of California, The Texas Company, Standard Oil Company of California, Union Oil Company of California, and Shell Oil Company, Incorporated, from their refinery loading docks located on San Francisco, San Pablo, and Suisun Bays to various destinations located on these bays and on adjacent waters, including Sacramento and San Joaquin River points north and east to Sacramento and Stockton.

The matter was submitted at a public hearing held before Examiner Knapp at San Francisco

The antecedents to the instant proceeding are found in Case No. 3770, California Inland Water Carriers Conference vs.

J.C. Freese Co. and in Application No. 19148, In re Application of J.C. Freese Co. for (1) a Permit to Transport Bulk Molasses by Vessel and (2) a Determination of Applicant's Status Concerning the Transportation of Petroleum Products in Bulk. Complainant in Case No. 3770 alleged that the applicant herein was operating as a common carrier by vessel without authority from the Commission. By Decision No. 27808 of March 11, 1935, the Commission sustained complainant's position. Subsequent thereto, however, a rehearing of the matter was held. At the rehearing J.C. Freese Co. established that it was then engaged only in transporting molasses under special arrangements and in transporting gasoline, in bulk, for the Signal Oil Company, Richfield Oil Company, and The Texas Company in accordance with contracts negotiated with these companies. Two barges were utilized in handling the gasoline transportation. Accordingly, the Commission, by Decision No. 29154 of September 28, 1936, found that J.C. Freese Co. was not at that time conducting a common carrier operation by vessel and that it should take steps to obtain a For-Hire Vessel Permit.[1]

By Decision No. 32659 of December 19, 1939, in Application No. 19148, the Commission granted J.C. Freese Co. a permit to transport molasses in bulk by vessel. At the same time, it rejected a contention made by applicant that it was within the exemption provisions of Section 22 of the For-Hire Vessel Act in so

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[1] In Decision No. 29154, the Commission pointed out that based upon the record upon which Decision No. 27808 was issued, as supplemented, "The pattern of operations complained of, as depicted by the evidence is not such as to bring them within the inhibitions of the Public Utilities Act and to support a cease and desist order. That they approach closely to the line which separates inhibited operations and those not banned by the Act may hardly be gainsaid, and slight changes in the character of the operations might lead to a different conclusion." (Emphasis supplied.)

far as its petroleum hauling operations were concerned.[2] A permit to transport petroleum products by vessel was not sought.

In support of its request that a permit be now granted for the hauling of petroleum products, applicant's manager testified that his company's operations had not changed since the issuance of Decision No. 29154, supra. He stated that the proposed transportation for the six companies named above would involve the hauling of gasoline, diesel oil, and fuel oils from refinery loading docks to bulk distributing points. The witness submitted copies of contracts negotiated with five of the companies; one entered into with a sixth company, he said, was verbal. The proposed hauling, he testified, would be performed with four tow barges and one self-propelled tanker, especially equipped for the transportation of bulk petroleum products.

Applicant's manager explained that J.C.Freese Co. hauled practically all of the output of Standard Oil Company, Richfield Oil Company and The Texas Company on San Francisco Bay and its tributaries, that it hauled for General Petroleum Company, Union Oil Company and Shell Oil Company to a lesser extent, and that, in addition, it transported bulk petroleum under contract for the United States Government. The applicant, he stated, holds itself out to transport only for the "major" oil companies other than the Tide Water Associated Oil Company, whose business has not been handled in recent years. Even though the property transported for these companies was assertedly covered by contracts negotiated with

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[2] Section 22 of the For-Hire Vessel Act reads as follows: "The provisions of this act shall not be deemed applicable to persons or corporations, their lessees, trustees or receivers who furnish water transportation service between points in this State for their affiliated companies or for the products of other persons or corporations, their lessees, trustees or receivers engaged in the same industry, if and so long as such water transportation service is furnished in tank vessels or barges specially constructed to hold liquids or fluids in bulk, and provided further, that such service is not furnished to others not engaged in the same industry."

the companies, the witness explained that such business was actively solicited from time to time. He pointed out that in contrast to the applicant's efforts to serve the major companies, it had rejected requests for transportation service made by certain smaller oil companies and one air transport company. He admitted,however, that equipment was generally utilized to capacity under present arrangements and that additional business might impair the service now being rendered.

The granting of the application was protested by The River Lines with respect to service proposed to be rendered to Sacramento (shown to approximate two million gallons per month). Its counsel contended that the agreements executed with the oil companies consisted of mere rate quotations instead of contracts obligating the companies to ship their products and the applicant to transport them. He asserted, moreover, that the common carrier status of the applicant was established by reason of the fact that it proposed to serve all but one of the major oil companies. The Atchison, Topeka and Santa Fe Railway Company also protested on the ground that applicant's proposed operations are in the nature of a common carrier service but offered no evidence in support of its protest.

The evidence adduced in this proceeding discloses that J.C. Freese Co. has made its application for a permit under the For-Hire Vessel Act in compliance with that statute and that it proposes to transport bulk petroleum products in vessels of the type which are within the scope of said statute. As a consequence, the permit herein sought should issue unless the proposed operations would constitute a common carrier service as contended by protestants or unless they would be over the whole or any part of any

route operated by applicant as a common carrier.[3]

The record on which Decision No. 29154, supra, was based discloses that the applicant was then hauling petroleum products for but three oil companies. Only two barges were employed in the service. But the applicant has since increased its fleet to five barges. And it now proposes to haul for all of the major oil companies but the Tide Water Associated Oil Company. It does not appear from the record, moreover, that the applicant has refused or would refuse to haul for Associated; in fact, it has hauled for this company also, but not in recent years. Clearly the proposed operations differ from those conducted at the time Decision No. 29154, supra, was issued. In our opinion, the proposal of J.C. Freese Co. to transport petroleum products for six out of seven of the major oil companies supplying marine storage facilities on San Francisco Bay and adjacent inland waters would involve transportation for a substantial portion of the public engaged in shipping those products. In short, it would constitute a common carrier service by vessel for which a certificate of public convenience and necessity should first be obtained.

While J.C. Freese Co. refused to transport for certain shippers, it was admitted that these shippers would have substantially less tonnage to offer than the major oil companies and that applicant's equipment would be fully utilized in hauling for the latter. The limitation on service appears to have been made not with an intent to operate in a restricted manner but only to confine operations within the limits of available vessel equipment and

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[3] In re Application of The Bay Shore Freight Lines, Inc., for a Permit to Operate For-Hire Vessels (39 C.R.C. 229), the Commission said (page 231:

"It is clear that permits can be issued only to private carriers as distinguished from common carriers and that a permit must be issued to (1) any private carrier whose application (2) complies with the requirements of the act, (3) who proposes to operate on the inland water vessels of the type provided by the Act and (4) whose proposed operation shall not be over the whole or any part of a route operated by it as a common carrier."

available marine storage facilities.[4]

Manifestly, the business of contract shippers need not be solicited to the same extent as the business of common carrier patrons. Once hauling contracts are obtained, adequate and dependable service is the chief requisite to holding these contracts. However, a review of the so-called contracts which were introduced in evidence discloses that in the majority of cases the oil companies would not be obligated to ship any of their products via the applicant.[5] The need for constant and vigorous solicitation is at once apparent. These documents, moreover, are not entirely consistent from a rate standpoint with the proposed rates contained in the application of J. C. Freese Co.[6] In the main, they appear to be in the nature of rate quotations instead of binding agreements.[7]

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4 The position of the applicant was expressed by its witness on cross-examination, as follows (transcript, pages 20, 21):

"Q. Now, the reasons you are not transporting any products for those companies to either of those points, Sacramento or Stockton, is that they have not asked you to. Isn't that correct? They haven't requested your services? A. That is not correct.

"Q. Have you any objection to serving those companies with respect to those points. A. Well, some of the companies that you are mentioning haven't facilities at those points.

"Q. Have they requested you to serve them and you have refused? A. They have never requested me to serve them."

5 In this respect, paragraph 9, page 5, of the agreement negotiated between J. C. Freese Co. and The Texas Company (Exhibit No.4) reads as follows:

"It is hereby expressly understood and agreed, everything herein contained to the contrary notwithstanding, Texas reserves the right at all times during the term of this contract to ship all or any part of its requirements of bulk gasoline and other petroleum products to the stations named via tank truck or via tank car."

6 For example, the agreement negotiated with General Petroleum Corporation (Exhibit 5) specifies rates of compensation for transportation from Oakland to Rio Vista and Stockton only. Yet the Freese application contains Sacramento and San Rafael as additional points.

7 In Decision No. 29116 of September 21, 1936, (Case No. 4129), the Commission pointed out that hauling arrangements which provide no term of existence, obligate the shipper to deliver no definite amount of tonnage, obligate the carrier to haul no definite quantity, and can be terminated upon a moment's notice without liability on the part of one party to the other, are no more than rate quotations, and cannot arise to the dignity of contracts for transportation.

In view of the foregoing circumstances, we are of the opinion and find that the service herein proposed to be rendered by J. C. Freese Co. is not transportation service within the scope of the For-Hire Vessel Act. The application will be denied. Applicant's attention is directed to the fact that operating as a common carrier without first obtaining a certificate of public convenience and necessity from the Commission is in violation of Section 50(d) of the Public Utilities Act.

O R D E R

A public hearing having been held in the above entitled application and based upon the evidence received at the hearing and upon conclusions and findings contained in the preceding opinion,

IT IS HEREBY ORDERED that the application of J. C. Freese Co. for a permit to operate as a for-hire vessel carrier in the transportation of bulk petroleum products be and it is hereby denied.

Dated at San Francisco, California, this 24th day of February, 1942.

Commissioners