

Decision No. 35077

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, con-
tracts and practices of Constance
Mogan and Ruth Freese Conway, co-
partners doing business as J. C.
Freese Co.

Case No. 4558

Scott Elder and John M. Gregory,
for Transportation Department,
Railroad Commission.

Pillsbury, Madison & Sutro, by
Hugh Fullerton, for Respondents.

McCutchen, Olney, Mannon & Greene,
by F. W. Mielke, for The River
Lines.

BY THE COMMISSION:

O P I N I O N

The purpose of this investigation is to determine whether respondents are engaged in operating any vessels, within the meaning of the For-Hire Vessel Act (Stats. 1933, ch. 223), without having secured the permit required by that statute.

In December of 1939 respondents were granted a permit for the transportation of bulk molasses, between certain points upon the inland waters of California, under private contracts with three shippers. (Re J. C. Freese Co., 42 C.R.C. 404.) The grant was conditioned upon the filing of a written acceptance of the permit within a specified time, together with a tariff "containing rates and rules which in volume and effect shall be identical with those

referred to in the preceding opinion or rates and rules satisfactory to the Commission." Such acceptance and a tariff were filed within the time specified.¹ The tariff was rejected because it contained no rules, was indefinite as to rates, and was not in proper form. No further tariff filing was made.

In addition to the request for a permit for the transportation of molasses, respondents, in the 1939 proceeding, requested a declaration that a permit was not required for the transportation of petroleum products. This request was based upon the contention (hereinafter discussed at greater length) that respondents and the oil companies for which they hauled were all engaged in the same "industry" (transportation of petroleum products by vessel), and hence, under section 22 of the Vessel Act, respondents' activities in hauling petroleum products were not subject to the statute. The Commission did not so construe the statute, but found that the hauling of petroleum products by respondents did not fall within the statutory exemption. (42 C.R.C. 404.) Respondents' petition for a rehearing of that issue, filed some months after the 1939 decision had become final, was denied. (Dec. No. 33424, App. No. 19148.)

The evidence in the present investigation was directed almost entirely to the transportation of petroleum products. Respondents have one self-propelled barge, and a number of tow barges, all specially constructed for the transportation of fluids, in bulk,

¹ The time within which to file the acceptance and tariff, as required by the 1939 order, was extended to February 1, 1940. The filed acceptance bears the receipt stamp "1940 FEB - 2 PM 3:18." However, the testimony of John D. McComish, who filed the acceptance and tariff, and whose testimony was supported by production of a diary and carbon copies of the acceptance and tariff, with notations thereon made immediately after the filing, indicates that such documents were delivered to and filed with the Commission about 4:55 p.m. on February 1, 1941, and that the "received" stamp was not placed thereon until the following day.

such as petroleum products. The smallest of these barges has a dead weight carrying capacity of 75,000 gallons, approximately 300 tons. Respondents' business consists solely of the carriage of bulk fluids, which have been handled since 1910. Present activities are confined principally to the transportation of bulk petroleum, under written contracts with Richfield Oil Corporation, The Texas Company, and General Petroleum Corporation of California; and under oral agreements, the major points of which have been confirmed by letters, with Standard Oil Company of California, Union Oil Company of California, and Shell Oil Company. Until March of 1940 respondents also hauled, under contract, for Signal Oil Company. Very little transportation is now performed for Shell Oil Company.

The service rendered is between points on San Francisco Bay and its tributaries,² and is performed for compensation.

The For-Hire Vessel Act provides that one may not transport property, for compensation, by vessel and between points on the

2

Richfield Oil Corporation -- From Richmond to San Rafael, Vallejo, Napa, Sacramento, San Francisco. The contract also specifies Isleton and Oakland.

The Texas Company -- From Oakland to Petaluma, Napa, Sacramento, Stockton, Walnut Grove, San Francisco. The contract also specifies a number of other points, such as Richmond, Avon, Amorco, Martinez and Oleum to Oakland or San Francisco.

General Petroleum Corporation -- From Oakland to San Rafael, Rio Vista, Sacramento, Stockton.

Standard Oil Company -- From Richmond to Alameda, Treasure Island (Pan American Airways), Napa, Vallejo, San Rafael, Redwood City, San Francisco, Navy Department vessels in stream. The agreement also covers transportation to Sacramento and Petaluma.

Union Oil Company -- From Oleum to vessels in stream, Benicia Ferry, San Francisco. The agreement also covers transportation to Sacramento, Oakland, and Alameda.

Shell Oil Company -- From Martinez to Alameda Air Base. The agreement also covers transportation to a number of other points.

inland waters, without first securing a permit.³ But respondents contend that the statute does not apply to their carriage of petroleum products, because of section 22, which 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." (Emphasis - added.)

Respondents assert that they are "engaged in the same industry" as the oil companies for which they haul, namely, the business of transporting petroleum products by water. Most of the oil companies mentioned possess their own vessel equipment and are engaged in proprietary transportation, and also carry petroleum products, in bulk, for their affiliates or subsidiaries, as well as for certain of the other oil companies. Because of these facts, and using respondents' "industry" as the measure of similarity, although transportation is conceded to constitute but a very small part of the oil companies' business operations, respondents assert that their own transportation activities fall within the statutory exemption. We cannot so construe the statute, for, as stated in the 1939 opinion, the words "same industry" refer to the industry in which the products transported are produced.

3

The Commission has no discretion in the issuance of a permit to a private carrier whose application and proposed operation comply with the statute. (Bay Shore Freight Lines, 39 C.R.C. 229.)

Freese Co. is not engaged in the petroleum production or refining business, and is not an affiliate or subsidiary of any oil company. The primary business of the oil companies is the production and refining of petroleum. Their incidental transportation activities are restricted to the carriage of products of that industry for themselves and for others engaged in the same industry, and are the transportation activities intended to be reached by the exemption provisions of section 22.

The next issue is whether respondents' transportation activities are those of a private carrier, for the Vessel Act does not apply to common carriers. The Transportation Department contends that Freese Co. has held itself out to carry for all shippers of bulk petroleum on San Francisco Bay and its tributaries, and is in fact a common carrier, operating without a certificate of public convenience and necessity. The scope of the present investigation is limited to a determination of whether respondents are operating "for-hire" vessels, within the meaning of the Vessel Act, without a permit. Hence, it is suggested in the brief of the Transportation Department that if the Commission is of the opinion that the operations are those of a common carrier, the present investigation be discontinued, and a new proceeding instituted to develop a more complete record as to respondents' status.

Under the circumstances, and in the light of the present record and the scope of the proceeding, we cannot find common carrier status nor issue a desist order based upon such a finding. We must find, however, that private carrier status of respondents' activities in transporting bulk petroleum and its products has not

been clearly established.

O R D E R

Evidence in the above investigation having been taken at a public hearing before Examiner Cassidy, briefs having been filed and the matter submitted, and based upon the record and upon the factual findings contained in the above opinion, IT IS ORDERED as follows:

1. That Constance Mogan and Ruth Freese Conway, co-partners, doing business as J. C. Freese Co., file a tariff containing rates, rules and regulations applicable to the transportation of bulk molasses, as contemplated by Decision No. 32659 in Application No. 19148, within twenty days after the effective date of this order.

2. That Case No. 4558, in so far as it relates to the transportation of bulk petroleum and petroleum products, is hereby discontinued.

3. That the Secretary cause service of certified copies of this order to be made upon respondents.

4. That this order shall become effective on the twentieth day after service upon respondents.

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

Justin J. Claussen
Walter L. Riley
H. J. P. Hall
Francis J. Hayward
Richard L. Lusk
Commissioners