

Decision No. 35419

BEFORE THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Investigation)
by the Commission upon its own motion)
into the operating rights, operations) Case No. 4394
and practices of common carriers by)
vessel operating between points in)
California over the high seas.)

BY THE COMMISSION:

ORIGINAL

Appearances

J. Richard Townsend and H. R. Bolander, Jr., for
San Diego-San Francisco Steamship Company,
San Diego-San Francisco Steamship Line and
James K. Nelson.
A. L. Whittle, for Southern Pacific Company,
Pacific Motor Trucking Company and North-
western Pacific Railroad Company.
W. G. Stone, for Sacramento Chamber of Commerce.
Charles A. Bland, for Board of Harbor Commission-
ers of Long Beach.

OPINION ON REHEARING

This investigation was instituted by the Commission on its own motion to determine, among other things, the nature, scope and extent of intrastate operating rights held by coastwise common carriers by vessel and the extent to which, if at all, any such rights should be revoked for unauthorized discontinuance or suspension of service. Based upon the record made at public hearings had in the matter, Decision No. 33548 (43 C.R.C. 50) was entered. In that decision it was found that James K. Nelson, operating the San Diego-San Francisco Steamship Company, also known as the San Diego-San Francisco Steamship Line, had, since January, 1938, performed service under an arrangement whereby Nelson was assigned space in the vessels of an interstate carrier; that inasmuch as these vessels were not owned, controlled, operated or managed by Nelson, any service he had

having obtained from the Railroad Commission a certificate declaring that public convenience and necessity require such operation, but no such certificate shall be required as to termini between which any such corporation or person is lawfully operating vessels in good faith under this act as it existed prior to this amendment, under tariffs and schedules of such corporations or persons, lawfully on file with the Railroad Commission."

Nelson and Stahlbaum held no certificate of public convenience and necessity for their operations; nor has Nelson obtained such a certificate authorizing him to operate vessels between any of the points in question. Accordingly any operating rights which Nelson may now possess must consist of prescriptive authority acquired from the former copartnership. The copartnership's vessel operations were suspended early in 1936.³ Subsequently, Nelson acquired Stahlbaum's interest in any prescriptive operating authority theretofore held by the copartners,⁴ and in January, 1938, Nelson commenced to operate under the arrangements hereinbefore referred to, handling traffic in cargo space assigned to him by coastwise interstate carriers in the vessels used in their operations.⁵

³ Authority to suspend service until March 13, 1937, was granted by Decision No. 28657 of March 23, 1936, (unreported) in Application No. 20417. Subsequently, Decision No. 30044 of August 16, 1937, as amended, in that proceeding authorized a further suspension of service from August 26, 1937, to February 1, 1938. No showing was made of the rendition of any service after the initial suspension authority lapsed and before further suspension authority was granted. Shortly after the initial suspension authority lapsed, Nelson applied for the further authority. At the hearing had on this application it was explained that the authority had been allowed to lapse through inadvertence; that an accounting of the dissolved partnership of James K. Nelson and Eberhard Stahlbaum had been ordered by the Superior Court but had not been completed; and that upon settlement of the then pending court action service would be resumed.

⁴ Stahlbaum's interest in such rights as may have been held by the copartners was transferred to Nelson from Milner J. Anderson, Trustee in Bankruptcy of Eberhard E. Stahlbaum (Decision No. 30532 of January 17, 1938, in Application No. 21678, unreported). In authorizing this transfer the Commission said "It should be specifically understood that the Commission is not by this order passing upon or determining the character or extent of the operative rights here involved or the interest in such rights which Anderson may now possess."

⁵ At the rehearing it was brought out that Nelson had engaged space in other vessels than those used by the Consolidated Olympic Line, the only interstate carrier with which such arrangements had previously been said to have been made.

Nelson testified that he had been furnished with such vessel space as he had required without advance reservation or notification under verbal understandings with the interstate carriers; and that he had solicited the cargo shipped in that space, issued the shipping documents and collected the transportation charges. The consideration paid the interstate carriers for the space used, he said, had been a percentage of the gross revenue received for the transportation.

Operations such as these, Nelson argues, are those of a common carrier by vessel. He contends that the statutory requirement that vessels be "owned, controlled, operated or managed" (Section 2(1) of the Public Utilities Act) by the carrier is satisfied by these arrangements, citing a decision of the United States Maritime Commission in re Agreements 6210, 6210-A, 6210-B, 6210-C and 6105 (2 U.S. M.C. 166). The Maritime Commission there held that the transportation of property in chartered vessel space constituted common carriage by the party chartering the space. Court decisions were also cited holding that the owning or leasing of the equipment used to transport the property was not essential to a common carrier undertaking. Nelson argues further that he controlled parts of the vessels used in the operations in question and that in view of the control said to be thus exercised it is not material that the remaining parts of these vessels are controlled by others.

While it may well be that Nelson engaged in a common carrier undertaking under his arrangements with the interstate vessel lines, that does not necessarily establish that his operations under these arrangements were those of a common carrier by vessel as defined in the Public Utilities Act. Section 2(1) of the Act provides that:

"*** every corporation or person *** owning, controlling, operating or managing any vessel *** engaged in the transportation of persons or property for compensation ***"

is a common carrier. Admittedly, Nelson did not own the vessels in which he engaged cargo space; nor does he claim that he operated or managed those vessels. With respect to the control which Nelson assertedly exercised over the vessel space, it appears that other persons or corporations concurrently exercised like control over other space in the same vessels. The exercise of such control, it seems apparent, is not "controlling a vessel" within the meaning of the above quoted statutory provision. The wording of the provision is unequivocal and it is clear that although Nelson may have exercised some sort of divided control over the vessels' cargo space, he did not control the vessels.

Here, it seems evident, Nelson neither owned, controlled, operated nor managed the vessels used in performing the service he rendered and, therefore, contrary to his contention he did not resume common carrier by vessel service in 1938.⁶ It follows that because Nelson discontinued common carrier by vessel service any operating authority he may have acquired to render such service should be revoked for unauthorized discontinuance of service.⁷ Under the circumstances no detailed discussion of the nature and extent of this operating authority seems necessary. The claimed rights, however, appear much broader than those measured by the "good faith" operations conducted by the former copartnership on August 21, 1933, as

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The service rendered by Nelson may well be, however, a common carrier undertaking under provisions of the Public Utilities Act other than those hereinbefore discussed. Similarly, it may well be that the interstate carriers or other persons or corporations connected with Nelson's service may have been operating as common carriers by vessel. However, the lawfulness of these undertakings is not in issue in this proceeding. Should they be continued it may become necessary to inquire into their lawfulness.

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As pointed out in Decision No. 33548, supra, the Commission has consistently held that unauthorized discontinuance of service was a sufficient ground for revocation of operating rights and operating authority has been revoked in numerous such instances. Service of De Luxe Transportation Company (17 C.R.C. 565) and other decisions were cited therein by way of illustration.

disclosed by this record. ⁸ The record shows, moreover, that Nelson's operations during 1938 did not include service between all of the points from and to which service was formerly rendered ⁹ by the copartners.

Upon consideration of all the evidence of record, we are of the opinion and find that any and all coastwise common carrier by vessel operating rights which may be held by James K. Nelson, San Diego-San Francisco Steamship Company or San Diego-San Francisco Steamship Line should be revoked because of unauthorized discontinuance of service; that any and all tariffs and schedules of these respondents on file with the Commission should be canceled; and that James K. Nelson should be ordered to cease and desist and thereafter abstain from transporting persons or property for compensation as a coastwise common carrier by vessel.

O R D E R

A rehearing having been had in the above entitled proceeding and based upon the conclusions and findings contained in the preceding opinion on rehearing,

IT IS HEREBY ORDERED that any and all operating rights as common carriers by vessel which may be held by James K. Nelson, San Diego-San Francisco Steamship Company and San Diego-San Francisco Steamship Line be and they are hereby revoked and that any and all

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The record shows that on and prior to that date the copartnership's operations were confined to transportation between San Francisco on the one hand and San Diego and Long Beach on the other, from Monterey and Stockton to San Diego and Long Beach, from Long Beach to Stockton and from San Diego to Monterey. No showing has been made of the handling of any traffic at that time between other ports for which operating authority is claimed.

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According to the showing made, Nelson's operations during 1938 were limited to transportation from Long Beach to San Francisco and Stockton.

tariffs and schedules of these respondents be and they are hereby canceled.

IT IS HEREBY FURTHER ORDERED that James K. Nelson be and he is hereby directed on or before the effective date of this order to cease and desist and thereafter abstain from transporting persons or property for compensation upon the high seas between ports in this state as a common carrier by vessel.

The effective date of this order shall be thirty (30) days from the date hereof.

Dated at San Francisco, California, this 26th day of May, 1942.

Justus F. Calver
Ray H. Riley

Richard H. Locke

Commissioners.