Cs 4597 - JR

ORIGINAL

Decision No. 36404

BEFORE THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Investigation on the Commission's own motion into the operations, rates, charges, contracts, and practices of A. C. Woodard, doing business as CIRCLE TRANSPORTATION COMPANY.	)))))	Case No. 4597

JOHN M. GREGORY, for Transportation Department

JAMES R. AGEE, for Respondent.

JOHN A. HENNESSEY, for Pacific Southwest Railroad Association, Interested Party.

GLENN C. HOLTWICK, for Merchants Express Corporation, Interested Party.

BY THE COMMISSION:

O P I N I O N

In this proceeding the Commission instituted on its own motion an investigation into the operations, charges and practices of respondent A. C. Woodard, doing business as Circle Transportation Company, to determine whether he was conducting a service as a highway common carrier as defined by section 2-3/4, Public Utilities Act, between San Francisco and Oakland, on the one hand, and Lafayette, Orinda, Walnut Creek, Concord, Martinez, Pittsburg and Antioch, on the other hand, without having obtained from the Commission a certificate of public convenience and necessity, under section 50-3/4 of that act, authorizing such operation.

A public hearing was had before Examiner Austin at Oakland and Martinez, when the matter was submitted on briefs, since filed. The Commission's Transportation Department was represented by counsel and respondent appeared personally and by counsel. The Transportation Department called twenty-eight witnesses comprising representatives of thirteen wholesale distributers, thirteen retail dealers,

one cannery and one veterinarian.[1] Respondent neither took the stand nor did he call any witnesses.

The Transportation Department contends that respondent, though professing to be a highway contract carrier, was nevertheless actually operating as a highway common carrier. This is so, it is claimed, because of respondent's solicitation of business; the frequency with which new shippers were added; defects in the form of contract employed, which assertedly was uncertain and lacked mutuality; non-observance of the contract by the shippers; respondent's acquiescence in the failure of the shippers to observe their obligations; and the extension of service to shippers who had not entered into contracts with respondent.

Respondent, on the other hand, asserts that the Transportation Department failed to establish that he had conducted his business generally as a highway common carrier. It is not sufficient respondent alleges, to prove an occasional or inadvertent deviation from his status as a highway contract carrier. The record shows, so respondent contends, that invariably he had refused to serve any shipper in the absence of an agreement with him to carry all the freight over which the latter exercised exclusive control; that where any shipper had employed another carrier, knowledge of that fact had not been brought home to respondent; that respondent's solicitation of business was not inconsistent with his status as a highway contract carrier, since he had sought merely to secure a selected and exclusive clientele recruited from the supply houses and their customers; that mere number of patrons served is not

---

(1) The shippers, represented by the witnesses called, handled a variety of commodities, including grocery supplies, drugs, liquor, furniture, plumbing and hardware supplies, electrical goods and machinery parts. The shipments transported, comprising a wide variety of commodities, ranged in weight from a few pounds up to five hundred pounds each.

determinative of his status as a private or as a common carrier; and that he consistently had rejected shipments tendered by those with whom no contractual relationship existed.

In determining the major issue presented, i.e., whether respondent's operations were those of a private carrier, or those of a highway common carrier conducted without authority, we shall consider the evidence dealing with the solicitation of business by respondent; the increase in the number of shippers served and the frequent changes that occurred in their composition; respondent's insistence upon a contract before engaging in transportation for any shipper; the service accorded shippers not holding contracts; the sufficiency of the contract as to form; and the extent to which the contract had been observed by the shippers. Admittedly, respondent holds no certificate of public convenience and necessity authorizing operation as a highway common carrier.

It is an established fact that since April, 1940, respondent, operating under the name of Circle Transportation Company, has been engaged regularly and continuously in the transportation of property for hire, by motor vehicle, between San Francisco and Oakland, on the one hand, and Orinda, Lafayette, Walnut Creek, Concord, Martinez, Pittsburg and Antioch, on the other hand. Though the record shows that respondent also served other points lying northeast of Oakland, such as Port Chicago, Danville, Alamo, Diablo, Nichols, and Pacheco, this evidence will be disregarded since that territory is not within the scope of the Order Instituting Investigation. Throughout the period involved in this inquiry,(2) respondent held a permit as a highway contract carrier, issued by the Commission

---

(2) This investigation related to the period extending from the issuance of respondent's permit as a highway contract carrier on April 11, 1940, until June 24, 1941.

on April 11, 1940. To provide the service in question, he operated two trucks, comprising one Chevrolet 1½-ton flat rack truck and one 1½-ton Ford pickup truck.

Respondent, it appears, has called upon many shippers, including both consignors and consignees, for the purpose of soliciting their patronage. The majority of these interviews, however, occurred at the instance of the shipper himself, or at the suggestion of some other person interested in the transportation service.(3) The representatives of three wholesale firms and of two retail institutions testified that respondent called upon them and sought the privilege of transporting their shipments. Some fifteen shippers stated that arrangements with respondent had been consummated following visits made at the request of the shipper himself, or at the instance of the supply house or the customer, as the case may be. Interviews falling within the latter category were neither sought nor inspired by respondent; they occurred entirely at the suggestion of others.

Respondent has served an expanding and constantly changing body of shippers. Their number grew from five, who were named in the original application for a permit as a highway contract carrier, filed April 4, 1940, to thirty-eight, as shown in the supplemental 9-A schedule of shippers filed August 21,1940. Between May 6, 1940 and April 28, 1941, inclusive, seven

---

(3) Frequently these interviews occurred when respondent called to deliver prepaid shipments originating at the supply houses in Oakland or San Francisco. During these conversations, respondent arrived at an understanding with the consignee to handle his shipments. On other occasions the supply houses requested respondent to call, after having received from the consignees complaints regarding the inadequacy of the transportation service which they then used.

supplemental 9-A schedules were filed, listing the shippers served.(4) During this period many changes occurred in the identity of these shippers. The number thus accommodated throughout this period aggregated fifty-one. Of these, approximately twenty-two were dropped from the rolls, leaving a net of twenty-nine shippers served at the time of the hearing.

As a general practice, respondent exacted from prospective shippers a contract, either written or oral, relating to the transportation service to be undertaken. However, there were some exceptions. Four wholesale firms and two retail dealers were served notwithstanding the absence of such an arrangement, and a few collect shipments were delivered to concerns with whom respondent had entered into no contracts. On several occasions, so the record discloses, respondent rejected shipments because they were consigned from or to shippers with whom no contract had been negotiated.

These contracts, as we shall show, are objectionable as to matters of form. Though but one written agreement was produced,

---

(4) The following summary, based on the 9-A schedules filed between April 4, 1940 and April 28, 1941, discloses the number of shippers added, those cancelled, and the number actually served during the periods covered by these lists, respectively:

	Added	Cancelled	Net
April 4, 1940	5	-	5
May 6, "	11	-	16
May 21, "	7	-	23
June 17, "	5	1	27
June 15, "	-	5	22
Aug. 21, "	16	-	38
Jan. 1, 1941	2	9	31
April 28, "	5	7	29

i.e., that executed by respondent and Incandescent Supply Co., the record indicates that respondent entered into written agreements with eleven other shippers, including three whose representatives were called as witnesses. The remaining shippers (excepting those with whom no contractual relationship existed) were served under oral contracts.

We shall consider first the formal aspects of the written agreement. It provides, in substance, (a) that the carrier would transport between designated points, at the shipper's request, and at rates prescribed by the Commission, commodities handled by the shipper; (b) that the shipper would tender to the carrier a definite percentage "of L.C.L. shipments moving by truck;" (c) that the carrier would provide adequate cargo insurance upon the shipments transported; (d) that the contract should remain in force "until cancelled by agreement of either party;" and (e) that the contract should be terminated if the Commission rendered a decision not in accordance with its terms.

A mere inspection of this instrument reveals an outstanding defect. On its face it appears to be terminable by "agreement of either party." However, one party alone is powerless to consumate an "agreement" relating to the contract unless the other party joins in such an understanding. Obviously, the latter cannot be required, against his will, to participate in any such agreement. Therefore, this provision, if it is to be accorded any significance whatever, must be construed as authorizing the cancellation of the contract, at any time, at the volition of either party. Thus construed, the contract becomes a mere undertaking by respondent to continue the transportation only so long as either he or the shipper may so desire. In effect, no term whatever has been provided during which it should subsist as a binding obligation.

The oral agreements, so the record shows, are vague and uncertain. In most instances no definite term was fixed, nor did the shipper obligate himself to tender any definite quantity of freight. Four shippers testified that they had undertaken to use respondent's service for the transportation of all traffic destined to the points involved or to some of them;(5) two asserted that respondent would handle whatever shipments they desired to have transported to this territory; and two stated merely that respondent would handle shipments consigned to these points. Some testified that no provision had been made for the cancellation or termination of their agreements.

The evidence dealing with the observance of the contracts discloses performance by some shippers of their obligations and non-performance on the part of others. Some thirteen shippers, it was shown, have substantially complied with their agreements. Respondent, so they stated, had handled all the traffic they controlled which moved to the points involved. In another instance, it appears, respondent refused to accept further shipments where the tonnage previously offered was deemed insufficient by him to satisfy contractual requirements and the shipper had declined to accede to respondent's request that he join in the execution of a written agreement. Although four shippers used other carriers, they were at liberty to do so, since they had not agreed to use respondent exclusively. Two shippers terminated their arrangements with respondent, one because he had found it more profitable to use his own truck, and the other because the freight could be handled more conveniently by rail. In the latter instance, respondent complained to the shipper but took no further steps.

---

(5) Aside from the four agreements mentioned, which provided that the shippers should use respondent's service to transport all of their shipments, none of them bound the shipper to use respondent's service exclusively.

Under the facts disclosed, has respondent been operating as a common carrier or as a private carrier? A common carrier, as we have held, engages to transport property for hire for those who may choose to employ him, the service being available to all who can use it. He need not offer to serve all the public; it is sufficient if he holds himself out to serve those within a particular class.(6) A private carrier, on the other hand, undertakes to carry for selected individuals only; his service is not available to others who might have occasion to use it.(7) Here we must determine whether or not the limitations sought to be imposed by respondent upon the scope of his undertaking are effective to prevent him from serving those he actually would have served in the absence of such restrictions.(8) To arrive at an answer to this question, it is necessary to consider the circumstances surrounding respondent's operations. The details have been reviewed in the preceding discussion.

Even though a carrier may exact from every shipper a contract, prescribing the terms under which the transportation would be furnished, this does not conclusively establish his status as a private carrier.(9) If he will carry for all who may offer freight of the character he has undertaken to handle, provided each of them will enter into such an agreement with him, he is, nevertheless, offering to serve a particular class, and must therefore be deemed a

---

(6) Re Hirons, 32 C.R.C. 48, 51; Motor Freight Term. Co. v McClain, 38 C.R.C. 669; Regulated Carriers, Inc. v Cohen, 38 C.R.C. 713; Re Pacific Motor Transp. Co. 38 C.R.C. 874.

(7) Anderson v. United Parcel Service of S.F., 29 C.R.C. 531; Coronado Transfer v United Parcel Service of San Diego 31 C.R.C. 208; Hare v Gilboy, 31 C.R.C. 566; Railway Express Agency, Inc. v Castaglio, 38 C.R.C. 621.

(8) 36 Mich. Law Rev. 805 (Marcus L. Plant); Re Gotelli, 43 C.R.C. 193, 196.

(9) Haynes v McFarlane, 207 Cal. 529; Forsyth v San Joaquin L. & P. Corp., 208 Cal. 397; Re Hirons, 32 C.R.C. 48, 51; Re Doss, 41 C.R.C. 359, 363.

common carrier. Very definitely such a service has not been limited to selected individuals.

As we have stated, respondent did not exact from every shipper a contract governing their relations. There were some exceptions but not many. Assuming that respondent's failure to secure these contracts was due to inadvertence and therefore excusable, the most that can be claimed for these agreements is that they are merely evidence of his status, to be considered in conjunction with the other facts of record.

The solicitation of business from prospective shippers tends to establish a willingness, on the part of the carrier, to serve the public generally. But this alone is not sufficient proof of that fact. A private carrier, without jeopardizing his status as such, may also solicit traffic, but he must stay within proper bounds. This, of course, is a question of fact.

Here it was shown that but few shippers, comparatively, were induced to patronize respondent as the result of direct solicitation on his part. His contacts with most of them resulted from interviews occuring at the request of the shippers themselves or at the instance of other parties interested in the transportation. However, respondent took full advantage of the opportunities thus afforded to acquaint prospective patrons with the scope of his service, thus disclosing an intention on his part to extend it to the public generally. This, of course, is inconsistent with any purpose to limit the service to selected patrons.

The number of shippers served by respondent fluctuated from time to time, ranging from five to thirty-eight. Commencing with five shippers at the outset, their number expanded rapidly. Frequent changes occurred among their personnel. Both of these

circumstances are not consistent with an intention to limit the scope of operations; they disclose a purpose to serve a class rather than a group of selected individuals.

As we have shown, the agreements between respondent and the shippers were objectionable in form. The written agreement was terminable at will; it bound neither party to continue performance for any definite period. The oral contracts were uncertain regarding the volume of traffic to be carried; the term of their existence; and the circumstances under which they could be cancelled As stated, agreements subject to such infirmities do not support a claim of private carrier status.(10)

Evidence dealing with the observance or non-observance of a contract of this nature is received, not to determine the existence or extent of liability of either party for breach of the agreement, but rather to indicate the carrier's frame of mind. Where the carrier complacently acquiesces in the shipper's violation of his contractual obligations, it would seem that he does not regard the contract seriously. This indicates that the contract is merely a sham, designed to disguise the actual character of the operation. Here, the evidence, tending to show acquiescence on respondent's part in the failure of any shipper to fulfill his obligations, may be dismissed as negligible. Several shippers, as we have stated, fully performed their agreements. Others, who

---

(10) Re R. W. Rasmussen Co., 34 C.R.C. 497, 501; Sierra Ry. Co. v Berg, 35 C.R.C. 508, 511; Motor Freight Terminal Co. v Taber, 35 C.R.C. 757, 762; San Rafael Freight & Transfer Co. v Tolentino, 36 C.R.C. 638; Rice Transp. Co. v Independent Truck Owners Service Co., 36 C.R.C. 840; Sacramento Nor. Ry. v Johnson, 38 C.R.C. 569, 571; Regulated Carriers v Triola, 38 C.R.C. 724; Re Jakobsen, 39 C.R.C. 391; Cert. Highway Carriers, Inc. v Robinson, 40 C.R.C. 5, 8, 11; Re Belli, 41 C.R.C. 1, 4; California Milk Transport, Inc. v Standard Trucking Co. 42 C.R.C. 538, 541.

patronized other carriers, thereby violated no provision of their contract with respondent since they did not bind themselves to patronize him exclusively. One contract was actually cancelled by respondent because of the shipper's failure to tender what he considered to be sufficient traffic, and where another shipper discontinued the use of respondent's service, the latter complained, thus indicating that he regarded it as a breach of contract.

Having in mind the rapid expansion in the number of patrons served, the frequent changes that occurred among them, the solicitation of business by respondent, and the infirmities of the contracts negotiated, we conclude that respondent's operations were those of a highway common carrier conducted without proper authority. Therefore, respondent will be required to discontinue these operations and confine them within the limits of his permit as a highway contract carrier.

O R D E R

An investigation having been undertaken in the above-entitled proceeding, a public hearing having been had, the matter having been duly submitted, and the Commission being now fully advised:

IT IS ORDERED as follows:

(1) That respondent A. C. Woodard, doing business as Circle Transportation Company, be and he is hereby required to cease and desist, and hereafter to refrain from conducting, directly or indirectly, or by any subterfuge or device, any operation as a highway common carrier as defined by section 2-3/4, Public Utilities Act, over the public highways between San Francisco and Oakland, on the one hand, and Lafayette, Orinda, Walnut Creek, Concord, Martinez,

Pittsburg and Antioch and each of them, on the other hand, unless and until he shall have obtained from the Commission a certificate of public convenience and necessity under the provisions of section 50-3/4, Public Utilities Act, authorizing such operation.

(2) That the Secretary of the Railroad Commission shall cause a certified copy of this decision to be served upon respondent A. C. Woodard, and shall cause certified copies thereof to be mailed to the District Attorneys of the Counties of Alameda and Contra Costa and the City and County of San Francisco, and to the Department of Motor Vehicles and to the California Highway Patrol, at Sacramento.

This order shall become effective twenty (20) days after date of service thereof upon respondent.

Dated at San Francisco, California, this 1st day of ~~November, 1942.~~ June, 1943

COMMISSIONERS