

ORIGINAL

Decision No. 40337

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

SOUTHERN CALIFORNIA FREIGHT LINES,
 SOUTHERN CALIFORNIA FREIGHT FORWARDERS,
 PACIFIC FREIGHT LINES, and PACIFIC
 FREIGHT LINES EXPRESS

Complainants

vs.

Case No. 4846

DORIS N. THORILDSEN doing business as
 SOUTHERN EXPRESS

Defendant

Wallace K. Downey for Pacific Freight Lines and Pacific Freight Lines Express; W. A. Steiger for Southern California Freight Lines and Southern California Freight Forwarders, complainants. Joseph H. Cummins for The Atchison, Topeka and Santa Fe Railway Company and Santa Fe Transportation Company, intervenors in behalf of complainants. Scott Elder for defendant.

O P I N I O N

Complainants Southern California Freight Lines and Pacific Freight Lines are corporations organized under the laws of the State of California and are engaged in the business of transporting property as highway common carriers under jurisdiction of this Commission, between Los Angeles and San Diego and intermediate points. Complainants Southern California Freight Forwarders and Pacific Freight Lines Express are also incorporated under the laws of the State and are engaged in the business of

transporting property as freight forwarder and an express corporation, respectively, between Los Angeles and San Diego and intermediate points. Said corporations operate also between other points within this State, not material in the consideration of this complaint.

Complainants' charge that Doris N. Thorkildsen, doing business as Southern Express, defendant herein, is engaged in the business of transporting property by auto truck as a highway common carrier, between Los Angeles and San Diego and intermediate points, in violation of the Public Utilities Act of this State; that said defendant conducts a daily scheduled service in competition with complainants; that said defendant does not have a certificate of public convenience and necessity issued by this Commission, nor prescriptive rights, authorizing her to transport property as a highway common carrier; that said defendant claims that she is conducting said operations as a highway contract carrier and, therefore, is not required to have a certificate of public convenience and necessity; that the claim of defendant is a sham and mere pretense.

Complainants ask this Commission to order defendant to cease and desist from transporting property as a highway common carrier until she obtains a certificate authorizing her to perform such transportation service.

Defendant duly filed her answer denying each and every allegation except the allegations that defendant has no certificate of public convenience and necessity issued by this Commission, and the allegation that defendant claims that she is a highway contract carrier. Defendant further alleges that she is a highway

contract carrier and is engaged in the transportation of property, as such, under and pursuant to the authority of a highway contract carrier permit, duly issued by the Public Utilities Commission.

The issues having been joined, a public hearing was held before Examiner Chiesa, in Los Angeles. Evidence, oral and documentary, having been adduced, the matter was duly submitted for decision.

The evidence shows that defendant operates a daily (except Sunday) scheduled service between Los Angeles and San Diego; that terminal facilities are maintained in both cities; that from one to three trucks are operated in each direction daily, along U. S. Highway No. 101, via Santa Ana, with occasional trips northbound via Long Beach; and that practically all of defendant's transportation service consists of the transportation of general commodities in less-than-carload lots.

Defendant offered in evidence a summary of her business for the last four months of 1946 (Exhibits Nos. 42, 43, 44, and 45), which shows shipments between Los Angeles and San Diego, as follows:

<u>Month</u>	<u>No. Shipmts. L.A. to S.D.</u>	<u>Wt. Lbs.</u>	<u>No. Shipmts. S.D. to L.A.</u>	<u>Wt. Lbs.</u>
Sept.	412	393,639	60	74,859
Oct.	581	625,241	108	136,285
Nov.	420	509,674	88	124,988
Dec.	407	581,740	106	149,826
Total	1,820	2,110,294	362	485,958

During said four-month period, defendant transported an additional 116 shipments weighing 389,928 pounds between Los Angeles and points in the vicinity thereof, on the one hand, and San Diego and points in the vicinity thereof, on the other hand. All the above shipments aggregate approximately 96% of the shipments and

99% of the tonnage handled by defendant during said period.

It is defendant's contention that the services were performed as a highway contract carrier and in support of this position 41 contracts were offered in evidence. The evidence shows that, in addition to the transportation of shipments for the parties with whom defendant claims to have had contracts, prepaid shipments were transported for 13 consignors and collect shipments for 10 consignees with whom defendant had no contracts.

Although Doris N. Thorkildsen has been authorized by this Commission to engage in the business of transporting property as a radial highway common carrier, highway contract carrier, and city carrier, she has no certificate of public convenience and necessity authorizing her to transport property as a highway common carrier, as required by Section 50 3/4 of the Public Utilities Act, nor does she possess prescriptive rights.

The business of Southern Express has, since 1942, been managed by Orin Thorkildsen, husband of defendant.

Three witnesses testified in this proceeding. They all were employees of defendant; Orin Thorkildsen, the manager, V. W. Runyon, traffic manager, and C. R. Anderson, accountant or bookkeeper. Their testimony shows that defendant maintains an office and terminal in Los Angeles and San Diego and operates from one to three trucks daily in each direction, between said cities, performing pickup and delivery service with both line-haul and pickup and delivery equipment, and that the rates charged by defendant are those prescribed as minima, by the Commission, in Decision No. 31606, as amended, in Case No. 4246.

The testimony of Orin Thorkildsen and V. W. Runyon also shows that defendant's policy and practice in procuring shipping contracts was to regularly contact and solicit shippers for traffic so as to maintain a high load factor, in each direction, and thereby utilize the full capacity of her trucks.

Such solicitation is nothing more nor less than a dedication or a holding-out that defendant is engaged in the business of supplying a transportation service to the public or a portion thereof. The contracts were procured merely as an attempt to cloak the defendant as a highway contract carrier.

Of the 41 contracts offered in evidence by defendant, 16 did not specify the tonnage to be hauled. All contracts called for the transportation of shipments by auto truck, between Los Angeles and San Diego, and none of the contracts named the kind of commodities to be transported. It is significant, also, that the contracts were prepared by defendant and signed by the shippers at defendant's request.

The following statement of this Commission in the matter of Leland Doss, 41 C.R.C. 359,363, is uniquely applicable to this case:

"Respondent appears to believe, however, that if he holds written contracts with all his patrons he may thereby avoid common carrier status and remain within the category of a contract carrier. This is not necessarily true. The essential test of a common carrier is a public holding-out or offer of service. Such a holding-out may exist even when written contracts are made with all shippers or receivers served. It is normally encountered where, as here, the nature of the traffic and the needs of the shippers involve none of the special, unique or individualized service which is the natural field of the contract or private carrier, and the same or similar

service could as well be rendered by an avowed common carrier. Any limitation of service or withholding of public holding-out under such conditions is usually artificial and unnatural to that type of traffic and operation. Moreover, from a practical standpoint, it is difficult to maintain if the operation is to succeed financially. But in the absence of such limitation of service or withholding of public dedication, the essential common carrier nature of the operation is not altered or successfully disguised by the use of any written contracts, whatever may be their form."

Complainants' charge that defendant Doris N. Thorkildsen, doing business as Southern Express, defendant herein, is engaged in the business of transporting property as a highway common carrier, between Los Angeles and San Diego and intermediate points, is substantiated by the evidence.

Upon full consideration of all the facts we find that Doris N. Thorkildsen, doing business as Southern Express, operated auto trucks used in the business of transporting property as a highway common carrier, as defined in Section 2 3/4 of the Public Utilities Act, for compensation, over the public highways of the State of California, between fixed termini, to-wit; between Los Angeles and San Diego, California, during the months of September, October, November, and December, 1946, without having obtained from the Public Utilities Commission a certificate of public convenience and necessity therefor, in violation of Section 50 3/4 of said Act.

An order of the Commission directing the suspension of an operating right and directing an illegal practice to cease and desist is, in its effect, not unlike an injunction by a court. A violation of such order constitutes a contempt of the Commission.

The California Constitution and the Public Utilities Act vest the Commission with power and authority to punish for contempt in the same manner and to the same extent as courts of record. In the event a party is adjudged guilty of contempt, a fine may be imposed in the amount of \$500, or he may be imprisoned for five (5) days, or both.

Public Utilities Act, Section 81.
Code of Civil Procedure, Sections 1209, 1218.

O R D E R

A public hearing having been held in the above-entitled proceeding, evidence having been received, the matter having been duly submitted, and the Commission being fully advised,

IT IS ORDERED that defendant Doris N. Thorkildsen, doing business as Southern Express, cease and desist from operating, directly or indirectly, or by any subterfuge or device, any auto truck as a highway common carrier, as defined in Section 2 3/4 of the Public Utilities Act, for compensation, over the public highways of the State of California, between fixed termini, to-wit; between Los Angeles and San Diego, California, unless and until said Doris N. Thorkildsen shall have obtained from the Public Utilities Commission a certificate of public convenience and necessity therefor.

IT IS FURTHER ORDERED that the Secretary of the Commission cause service of this Order to be made upon the defendant, Doris N. Thorkildsen.

The effective date of this Order shall be twenty (20) days from the date of service hereof upon said defendant.


Dated at San Francisco California, this 27th day of May, 1947.

Hiram D. Kelly
Frederic J. Culver
R. J. [unclear]
Henry A. [unclear]
[unclear]
 COMMISSIONERS

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Commissioner Rowell dissenting:

I cannot concur wholly in the decision here rendered. The reasons for my dissent are given in connection with a similar decision this day issued, Case 4789, Investigation of M. L. Morris. They need not be repeated here.



IRA H. ROWELL
Commissioner.