Cs. 4862 - GJG

Decision No. 40595

ORIGINAL

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

PACIFIC FREIGHT LINES, a corporation, and PACIFIC FREIGHT LINES EXPRESS, a corporation,

Complainants

vs.

J. E. FITZGERALD and A. S. FITZGERALD, doing business as FITZGERALD BROTHERS; E. T. CHILDERHOSE and R. E. MAGNUS,

Defendants.

Case No. 4862

WYMAN C. KNAPP, of GORDON & KNAPP, for complainants;
F. W. TURCOTTE, for defendants;
FRED N. BIGELOW, for Pacific Southwest Railroad Association, intervenor on behalf of complainants.

O P I N I O N

This is a complaint by Pacific Freight Lines, a highway common carrier, and its affiliate, Pacific Freight Lines Express, an express corporation, both operating in Southern California. The complaint alleges that Fitzgerald Brothers, a permitted highway carrier, aided and abetted by defendants Childerhose and Magnus, have been acting as a highway common carrier between Los Angeles and points in the Santa Maria Valley without possessing a certificate of public convenience and necessity. (Stats. 1915, Ch. 91, Sec. 50-3/4, as amended). An order is sought directing defendants to cease and desist from such operations unless they first obtain a certificate. Defendants have denied the material portions of the complaint, thus presenting the sole question whether their operations are of the kind that may be lawfully conducted only under a certificate of public convenience and necessity, which they admittedly do

not possess. No question of "grandfather" rights is involved.

The case was submitted following a public hearing before Examiner Gregory at Los Angeles. Defendants A. S. Fitzgerald and E. T. Childerhose, called by complainants, testified concerning the carrier's operations. Defendant Childerhose also testified directly on behalf of all defendants. Documentary evidence of record consists of a list of about 300 shipments of general freight transported by the carrier for various customers from Los Angeles to points in the Santa Maria Valley during January and February, 1947 (Exhibit 1); and a group of transportation agreements between the carrier and some of its patrons (Exhibits 2 to 8). No shipper testimony was offered.

The facts of record indicate that Fitzgerald Brothers,(1) since 1940, have been engaged in the business of buying, selling, and transporting farm produce moving seasonally from the Salinas, Santa Maria, and Imperial Valleys to the Los Angeles market. During 1946, operations were conducted out of the Santa Maria Valley during practically the entire year. On October 14, 1946, the firm secured a permit to operate as a highway contract carrier, having theretofore possessed a radial highway common carrier permit only, and immediately proceeded to enter into written and oral agreements with some thirty customers for the transportation of their goods moving between Los Angeles and points in the Santa Maria Valley.

Written contracts have been concluded with six major

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(1) J. E. Fitzgerald, Jr. has been ill for several years and is not actively connected with the business.

growers in the Santa Maria Valley who market their produce in Los Angeles, and with ten receivers of general freight in the valley (including one of the growers) who are consignees of collect shipments originating at Los Angeles. Los Angeles shippers having written contracts with the carrier consist of three seed and insecticide companies and an oil well supply firm, all of whom ship merchandise prepaid to customers in the Santa Maria Valley.(2) The written contracts are bilateral in form, call for the tender and transportation of not less than certain minimum annual tonnages of named commodities at specified rates, and run for a term of one year, and from year to year thereafter, unless cancelled on thirty days' written notice by either party.

Transportation is also provided under oral contracts for eight shippers of general freight in Los Angeles and adjacent territory, and for three Santa Maria consignees of fertilizer shipments originating at Los Angeles.(3) About four individual farmers in the Santa Maria Valley are also served under oral arrangements.

Defendants' facilities and manner of operation were described in some detail by A. S. Fitzgerald and E. T. Childerhose, the latter the carrier's office manager and dispatcher at Los Angeles.(4) Their testimony shows that the carrier commenced operations

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(2) Commodities transported under written contracts, in addition to those mentioned, include hardware, tires, auto and tractor parts, steel, coal, nails, paper, sacks, shook and crates.

(3) Commodities transported under oral contracts, in addition to those mentioned, include tires, tubes and batteries, miscellaneous hardware, wire cable, oil and grease, and oil filters. A few isolated shipments of a rather unusual nature will be discussed later.

(4) Defendant Magnus acts as dispatcher at Santa Maria. Both Childerhose and Magnus are paid flat weekly salaries, but neither has a financial interest in the business. There is also a bookkeeper at the Los Angeles office.

in 1940 with four tractor-semi-trailer combination units, and that the firm now has the same number of units plus an additional semi-trailer. A small pickup truck is maintained at Los Angeles. Terminal facilities, located at 2115 East 25th Street, Los Angeles, consist of office space, a truck park and a loading dock, covering a total area of some 25,000 square feet. The Santa Maria base of operations is situated on an unnamed street one-half mile south of the city and one-quarter mile east of U. S. Highway No. 101. Garage facilities are maintained chiefly at Santa Maria.

Southbound traffic consists primarily (almost exclusively) of truckload movements of produce originating at various grower shipping points in the Santa Maria Valley and delivered directly to the Los Angeles produce terminals in the carrier's linehaul equipment. Northbound movements, earlier described, consist of less-than-truckload lots of mixed freight of a general nature. No regular or predetermined schedules are maintained. Instead, whenever the Los Angeles consignors have shipments available, they call defendants' office. The pickup truck is then sent out to bring the shipments to the terminal, where an effort is made to segregate the tonnage so as to dispatch linehaul units to the Santa Maria Valley approximately four days a week. The terminal is open five and one-half days a week for the receipt of freight. On arrival at destination points, the northbound traffic is unloaded directly from linehaul equipment.

Defendants' northbound traffic, the nature and development of which formed the major part of the testimony, appears to have had its inception in movements of fertilizer purchased by defendants from the Inland Fertilizer Company in Los Angeles and hauled to

the Santa Maria Valley in connection with their produce business. Shipments by Inland Fertilizer Company for others in the Santa Maria Valley thereafter gravitated to defendants. Those shipments, the evidence shows, were handled by defendants at the time they were operating under their radial highway common carrier permit, and consisted chiefly of full truck loads. The evidence does not disclose the frequency of those movements. After securing their contract carrier permit in October, 1946, defendant Fitzgerald and the owner of the Inland Fertilizer Company entered into an oral arrangement under which, it was testified, the carrier has since hauled all of Inland's prepaid traffic into the Santa Maria Valley.

Other oral arrangements followed. For example, shipments were received by the carrier from Goodyear Tire and Rubber Company at Los Angeles following conclusion of negotiations in October, 1946, with that company's traffic manager. The negotiations were initiated, the evidence shows, by the tire company's Santa Maria agent, who had originally approached Fitzgerald with the proposition of hauling his tires into Santa Maria and surrounding territory. Arrangements were effected in a similar manner with the Texas Company, near San Pedro, for shipments of oils and greases to Santa Maria. Other such arrangements, initiated by the shippers, were negotiated by defendant Childerhose at Los Angeles with a fertilizer company, another tire and rubber company, and with various concerns having traffic destined to the Santa Maria Valley.

A few isolated shipments, listed in the exhibit (Exhibit 1) as having moved under oral contracts, were of an emergency or

special nature. An instance of such transportation was that performed for Emil Brown of Los Angeles, who was installing equipment at the Santa Maria Penitentiary. Brown's truck broke down on the road. Defendants rescued the load and thereafter arranged to haul other loads for Brown until completion of the job. Again, a man who was building a restaurant in Santa Maria asked defendant Fitzgerald if he would haul the necessary equipment from Los Angeles. Fitzgerald agreed to do so. The restaurant builder then arranged to purchase the equipment, notified defendant Childerhose where to pick it up, and the carrier thereafter hauled it to Santa Maria in one load.(5)

A group of seven isolated shipments, described in Exhibit 1 as "Long Steel", merits special mention in view of complainants' interest in the circumstances of their origin. Those shipments, consisting of steel shapes, bolts, castings and pipe, ranging in weight from 30 to 2619 pounds per shipment, were apparently picked up in error from the plant of the Southern Steel Company in Los Angeles and transported on four separate days in January and February, 1947, to Santa Maria Valley destinations along with other shipments from Southern Steel Company consigned to defendants' regular patrons in the valley. Defendant Fitzgerald frankly

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(5) In response to questions by his counsel, defendant Fitzgerald stated that only rarely did the carrier accept single isolated shipments, and then only when such shipments consisted of "heavy weights" or complete loads, in which cases an oral agreement would be made with the prospective customer prior to acceptance of the shipment. A number of prospective customers in Santa Maria offering occasional single shipments have been refused service, Fitzgerald testified, since the handling of such business would, he believed, be inconsistent with his general policy of requiring, as a condition of accepting traffic, that shippers assure him of some definite volume or all of their tonnage which they control between certain points, moving in a series of shipments during a given period of time.

admitted that a mistake had been made due, he said, to lack of knowledge on the part of the pickup driver of the character of the shipments. He stated that the error was discovered only after the shipments had moved and an examination of the freight bills of regular customers had revealed the extra freight. Defendant Childerhose corroborated Fitzgerald's testimony on the subject of those shipments, and there is nothing in the record to suggest that the circumstances under which they were transported were otherwise than as stated by the witnesses.

Two other points covered by the testimony should be briefly mentioned as indicative of the conception held by the defendant Fitzgerald concerning the nature of the transportation service provided by the carrier under its contract permit. Those points relate to (a) the occasional use of bills of lading, and (b) the extent of liability assumed by the carrier for loss of or damage to shipments.

With regard to shipments occasionally tendered on bills of lading, the testimony shows that the carrier regarded such documents as mere receipts for transportation, and not as expressing the obligation of a common carrier, and that an understanding to that effect had been reached with customers with whom the subject had been discussed.(6) As to liability for loss or damage, the testimony is to the effect that the carrier maintains cargo insurance to protect shippers against those risks when occuring in transit and due to its own negligence. No liability is assumed for non-

(6) On this subject Fitzgerald testified as follows:
"Well, under normal operations....anyone reading the printed matter on the back of a bill of lading, it is written so as to apply to a common carrier, which we absolutely do not operate as; and therefore, we did not want them to assume that if we signed a bill of lading that we were operating as a common carrier, because to us it is merely a receipt for the goods received." (Tr. pg. 68.)

negligent or concealed damage; however, it was stated, if a shipment received in apparent good order were to arrive damaged, the carrier would undoubtedly regard that as a liability on its part.

The issue to be determined in this case is whether, on the record here made, defendants' operations have been shown to be those of a "highway common carrier" as defined in the Public Utilities Act. If so, an order to cease and desist must issue, since defendants do not possess a certificate of public convenience and necessity. If, on the other hand, defendants' activities as disclosed by the evidence are within the scope of their permits, the complaint must be dismissed. And the burden of establishing the facts warranting the issuance of an order to cease and desist rests, of course, on the complainants.

What constitutes a particular transportation agency a "highway common carrier" must be determined from the evidence presented in each case as it arises, in light of applicable statutes and legal principles. The statutes and principles under which the Commission has from time to time determined the status of a particular operator have recently received careful consideration. (Re Morris, Dec. 40330, Case 4789.) It was pointed out in the Morris decision that the Commission's authority to regulate motor truck transportation is now derived from three legislative acts (Public Utilities Act, Highway Carriers' Act, City Carriers' Act), and that it cannot be said that one was intended to have superior force to the others. Hence, a carrier in possession of operative authority under one or more of those acts, unless the statutes are meaningless, is presumably entitled to conduct some sort of a transportation business over the public highways. The practical

problem arises, however, when a particular operation is under scrutiny, of matching what the carrier is shown to be doing with what the statutes say he may or may not do. That process is rendered difficult by reason of the lack of legislative guides either in the statutes themselves or in Commission rules, and produces an ultimate determination of status based largely on administrative judgment. The uncertainties inherent in such a procedure, needless to say, have had unhappy consequences for the industry and for the efforts of the Commission to lay out an effective program of regulation.

Turning now to the instant case, we find a partnership in possession of permits to operate as a highway contract carrier, a radial highway common carrier, and a city carrier. We may lay aside consideration of whatever service might have been rendered under the radial and city permits, since no point was made by complainants on that score in connection with the particular operation now before us. Our inquiry, hence, is limited to determining whether, under all the evidence adduced, defendants have violated Section 50-3/4 of the Public Utilities Act. It should be pointed out that complainants, who had the burden of proving the issue, were satisfied to rest their case largely on cross-examination of the defendants themselves, and did not see fit to produce any evidence, if there was such, to controvert or enlarge upon that which found its way into the record. Thus we are compelled to decide this case on a record which, though informative in many respects and to our mind fully justifying the conclusion reached, yet lacks that satisfying, well-rounded character that a thorough going presentation might otherwise have given it.

The rather full discussion previously accorded the evidence makes it unnecessary to recapitulate it here. It suffices to say, however, that in our opinion the complainants have not shown that the transportation service performed by defendants between Los Angeles and points in the Santa Maria Valley is of a character that might not be lawfully performed under their present operative rights. The complaint, therefore, must be dismissed.

O R D E R

A public hearing having been held on the complaint herein, evidence having been received, the matter having been submitted, and the Commission now being fully advised,

IT IS ORDERED that the complaint of Pacific Freight Lines and Pacific Freight Lines Express, heretofore filed in this proceeding, be and it is hereby dismissed.

The effective date of this order shall be 20 days from the date hereof.

Dated at Los Angeles, California, this 5th day of ~~July~~ August, 1947.

Harold P. Huls

Justus F. Craemer

Thos. F. Rowell.

Kenneth Potter

COMMISSIONERS