FBA:DD C.4820

Decision No. 42558

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

PACIFIC SOUTHWEST RAILROAD ASSOCIATION and MERCHANTS EXPRESS CORPORATION (successor to MARIN-SONOMA FAST FREIGHT),

Complainants,

vs.

J. P. NIELSEN, doing business under the firm name and style of NIELSEN FREIGHT LINES, FIRST DOE AND SECOND DOE,

Defendants,

ORIGINAL

Case No. 4820

Fred N. Bigelow, for Pacific Southwest Railroad Association, Complainant. Douglas Brookman, for Merchants Express Corporation (substituted for Marin-Sonoma Fast Freight) Complainant. Edward Stern for Railway Express Agency, Inc., Intervenor on behalf of Complainants. Berol and Handler, by Marvin Handler, for J. P. Nielsen, doing business as Nielsen Freight Lines, Defendant.

O P I N I O N

The complainants, Pacific Southwest Railroad Association and Merchants Express Corporation (which has been substituted for Marin-Sonoma Fast Freight, originally one of the complainants), allege in their amended complaint, that defendant J. P. Nielsen has been operating as a highway common carrier, without proper authority, between San Francisco, on the one hand, and Novato, Petaluma, Santa Rosa and points intermediate to Novato and Santa Rosa along U. S. Highway No. 101, on the other hand. An order is sought requiring the discontinuance of such operations. By his answer, defendant denies this accusation and alleges affirmatively that his intrastate operations have been performed as a highway contract carrier. Railway Express Agency, Inc. intervened on behalf of complainants.(1)

(1) Complainant, Pacific Southwest Railroad Association, is a voluntary association composed of both trunk line and short line railroads as well as Railway Express Agency, Inc., which is designed to represent the interests of its members. The intervenor, Railway Express Agency, Inc., serves the territory as an express corporation. Complainant, Merchants Express Corporation operates as a highway common carrier between the points involved. At the hearing, it was substituted for Marin-Sonoma Fast Freight, which originally was joined as one of the complainants; since the commencement of this proceeding, Merchants acquired the latter's operative rights. Defendant, J. P. Nielsen, is an individual engaged in business under the trade name of Nielsen Freight Lines. None of the fictitiously named defendants appeared.

Public hearing was had before Examiner Austin at San Francisco, Santa Rosa and Petaluma. The matter was submitted on briefs, which have been filed.(2)

In support of their contentions, complainants produced 37 shipper-witnesses representing distributors and dealers whom defendant had served. In addition, an officer of a connecting truck line, a special agent employed by Northwestern Pacific Railroad Company, and the defendant himself, were called by complainants. Defendent also testified in his own behalf, and he called Mrs. Nielsen, as well. The facts revealed by their testimony are summarized in the following pages.

Defendant embarked in the truck transportation business during 1931, hauling eggs southbound from Petaluma to San Francisco under a written contract with a single shipper. Some five years later, he undertook the transportation of canned goods northbound from San Francisco to Santa Rosa, pursuant to a written agreement with a wholesale grocer at Santa Rosa. By December, 1941, he was serving from six to ten shippers, with whom he had entered into contractual arrangements.

During the war-period, defendant substantially enlarged the field of his activities. At a given time, he served as many as sixty shippers under oral agreements. This was necessary, he stated, to accomodate war-time needs; the regulations of the Office of Defense Transportation required that, wherever possible, equipment be loaded to capacity.

Following the termination of the war, defendant, acting under advice of counsel, sought to curtail and limit the scope of his operations. By April, 1947, he had eliminated some thirty shippers,

(2) Hearings were held at San Francisco, on August 15, 1947; at Santa Rosa, on October 14 and 15, 1947; at Petaluma, on October 16, 1947; and at San Francisco, on December 18 and 19, 1947, and on February 25, 26 and 27, 1948. The matter was submitted on concurrent briefs, which were filed by the parties on September 15, 1948.

who had supplied about one-third of the intrastate tonnage previously handled. As a rule, the smaller and less important shippers were dropped. Thereafter, defendant testified, the service was confined to shippers with whom he had negotiated written agreements covering the transportation of their products; no shipper, he stated, was served under an oral agreement. During 1947, the number of shippers who had signed such agreements reached a total of thirty-eight. Of these agreements, two have since been cancelled, leaving thirty-six still outstanding. Most of these shippers, defendant stated, have been served for several years.(3)

Defendant commenced operations with a single truck. When the war broke out, some five or six units were required. During the war, the fleet was enlarged to fourteen units,(4) which are still available to provide the service. Terminals are maintained at Pier 3 in San Francisco, and also at Petaluma, where defendant's headquarters are located.

To operate the equipment, five drivers and one helper are employed. Defendant manages the business and, on occasion, acts as an extra driver. Mrs. Nielsen performs the office work.

An overnight service is furnished between San Francisco and the Novato-Santa Rosa territory, which is afforded daily except Saturdays, Sundays and holidays. Of the five complete units of equipment available daily for this service, only three are used ordinarily.

Defendant is engaged, as a common carrier, in the transportation of general commodities moving in interstate commerce between San Francisco and Santa Rosa and the intermediate points of San Rafael and Petaluma. This operation was acquired in January, 1946, pursuant to authority granted by the Interstate Commerce

(3) As of the date of execution of the agreements currently in effect, the record shows, one shipper had been served twelve years; one, nine years; and one, eight years. Some thirty-one shippers had been served for periods ranging from one to seven years. Of these, approximately ten had been served for one year or less.
(4) The equipment now available comprises five tractors, five semi-trailers, three pickup trucks and one solid-rack-side truck.

Commission.[5] His right to perform that service is not challenged here. Defendant testified that the shippers accommodated by his interstate operations differ materially from those whom he serves as an intrastate carrier; not over five per cent of them are identical, he stated.

In the performance of his intrastate operations, defendant has transported a variety of products between the points involved. Southbound, the movement consisted largely of eggs, with a sprinkling of containers and return-shipments. Northbound, certain commodities preponderated, such as electrical supplies and appliances, hardware and hardware supplies, paint and paint supplies, and plumbing supplies. Others moved less frequently and in smaller quantities.[6] Although the volume of the movement was not definitely shown, it nevertheless was substantial. Since the war, the intrastate tonnage has decreased markedly, and the interstate movement has grown correspondingly, it was stated.

During 1947, as stated above, defendant entered into written agreements with 38 shippers relating to the transportation of their freight. These agreements, were submitted to the shippers by defendant, and were executed at his request. With most of them, the arrangements were consummated early in the year.[7] Two contracts, signed later, replaced two others which subsequently were cancelled. Thus, there are now in effect a total of 36 agreements. The

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(5) Certificates of public convenience and necessity authorizing the operation above described were acquired by defendant Nielsen from Harper H. Branstetter, doing business as Harper Express & Transfer Co., The Interstate Commerce Commission approved this transfer in Dockets Nos. M.C.73903 and M.C.73903, sub. 1.

(6) These commodities comprised appliances (in general), building supplies, cheese and its products, cleaning compounds and supplies, coffee and tea, farm equipment and supplies, furnaces and heaters (including supplies), groceries, sheet metal products (including venetian blind supplies), soap and wallpaper.

(7) Thirty two of these agreements were signed between May 2d and 12th; one, on March 31; one, apparently, on April 10; one, on June 10; one on August 28; and two, on October 1, 1947. It was suggested that the agreement bearing date of April 10th actually was executed during May, but the record is not clear as to this circumstance. The two agreements signed on October 1st replaced two executed earlier in the year, both of which subsequently were cancelled.

signatories to these agreements are widely distributed throughout the area served.(8)

With a single exception,(9) these agreements followed a common pattern. The form observed was drafted, early in 1947, by defendant's attorney. A few deviated from this standard in certain respects.(10) By its terms, the agreement specified the date and identified the parties; it defined the carrier's status, and bound him to supply an adequate service; it described the commodities to be offered by the shipper and transported by the carrier;(11) it named the points between which the service would be performed; it prescribed the measure of the carrier's compensation;(12) it fixed the period during which the agreement would endure; and it specified the contingencies which would excuse performance by the parties of their respective obligations.(13) Save in a few instances,(14) the shipper undertook to offer, and the carrier to transport, all shipments of the specified commodities which the former might make between the designated points

(8) The 35 shippers who had entered into written agreements with defendant are distributed throughout the affected territory, as follows: San Francisco, 15; Novato, 1; Petaluma, 10; Cotati, 1; and Santa Rosa, 11. The two shippers whose contracts were cancelled, as stated above, are situated at San Francisco and at Santa Rosa, respectively.

(9) The agreement between defendant and Kraft Food Co. differed both in form and substance from those entered into with all the other shippers. As stated, those agreements followed the standard form.

(10) In five instances, the agreements depart in certain particulars from the standard form which otherwise was followed. As to four of them, these variations related to the tonnage to be handled. One of these also specified with greater precision than usual, the rates to be observed. The fifth agreement contained "slight changes", the nature of which was not shown by the record.

(11) In a few instances, the agreements failed to provide for the transportation of return shipments, and one inadvertently omitted any reference whatever to the commodities to be transported. These errors have since been rectified, the agreements having been modified to supply the omitted provisions. This was accomplished by letters exchanged between defendant and the shippers concerned.

(12) The standard form of agreement provided that the carrier would be compensated by the shipper, for transportation services to be performed thereunder by the carrier, in accordance with the minimum rates prescribed by the Commission, then in force or which might subsequently be established.

(13) Performance by either party is excused should his operations be interrupted because of strikes, lockouts, fire, acts of God, acts of the public enemy, or other causes beyond his control.

(14) In four of these agreements the shipper obligated himself to offer, and the carrier to transport, a specified minimum tonnage of the described commodities instead of all shipments of such commodities which the shipper might make between designated points, as provided in the standard form. Thus, Mailer Frey Hardware Co., of Santa Rosa, agreed to ship a minimum of 50,000 pounds during the life of the agreement; Dixon Hardware Co., of that city, and Holm Tractor and Equipment Co., of Petaluma, each undertook to ship a minimum of 50,000 pounds per year; and Poultry Producers of Central California, of San Francisco, promised "to place with carrier for transportation from Petaluma to San Francisco shipments [of eggs] totaling [400,000] pounds per year."

during the life of the agreement. The contract would remain in effect for one year after its date, and thereafter until terminated by either party upon thirty days' written notice to the other. Each of these agreements was signed both by the defendant and by the shipper or his representative.

Prior to the adoption of the form currently used, defendant had entered into written agreements with many of the shippers served. However, their provisions were not clearly shown. As a rule, defendant stated, they lacked uniformity. Several shippers testified that they had in their possession agreements of this character but had not produced them because they had not been requested to do so. Defendant had destroyed most of his older agreements but was able to produce three, which were received in evidence. It does not appear that these were typical of others which were negotiated. All three of these agreements could be cancelled on short notice, and one was indefinite regarding the volume of tonnage to be carried.

The record, we believe, is convincing that since defendant tightened up his operations, following the conclusion of the war, he has not engaged in the solicitation of intrastate business. Defendant's testimony to this effect is corroborated by that of the shippers themselves. It was not shown that he had requested any shipper to enter into contractual arrangements, other than those with whom written agreements were negotiated during 1947. The consummation of these agreements, it is clear, was motivated by defendant's desire to place his business upon a more secure legal footing; no shipper whom he did not then actually serve was requested to sign a contract. On many occasions, it appears, defendant has rejected shipments offered by persons who had not joined in agreements covering the transportation of their products.

The evidence concerning the performance of these agreements covered an extensive field. Defendant asserted that he had served only shippers holding written contracts. Many shippers testified

generally that they had complied with all contractual provisions by which they were bound. Several Marin-Sonoma retail dealers stated they had instructed their San Francisco suppliers to route all collect shipments over defendant's line. The detailed showing, however, was confined to the circumstances surrounding the payment of transportation charges by the contracting shippers upon traffic handled for them by defendant.

The record shows that, with few exceptions, freight charges were paid by shippers who were obligated to do so under the terms of their agreements. Of the six San Francisco distributors holding contracts, three had prepaid the charges upon all of their shipments, and the remaining three had shipped both prepaid and collect. Their collect shipments moved only to contract-consignees.(15) An additional four of these city distributors had not entered into agreements with defendant. Of these, two shipped collect to contract-consignees. Two shipments offered by a third supplier did not move prepaid, as claimed; instead, one was handled by another carrier, and the other actually moved collect.(16) Only from the remaining supplier had defendant accepted shipments upon which charges were paid by some one not a party to any transportation agreement.(17)

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(15) For convenience, we shall designate as a "contract-consignee" any consignee of freight transported by defendant, who has entered into a written agreement with defendant covering the transportation service. Similarly, a consignor of freight carried by defendant, who has joined in such an agreement, will be referred to as a "contract-consignor." Conversely, the terms "non-contract consignor" and "non-contract consignee" indicate that neither has entered into such an agreement.

(16) The testimony of this shipper regarding these two shipments was refuted, we believe, by defendant. The preponderance of the evidence clearly shows that one of these shipments actually was handled by the steamer "Gold" (operated by Petaluma-Santa Rosa Railroad Co.,) instead of by defendant, and that the other, though billed by defendant as a prepaid shipment, actually moved collect.

(17) During 1946 and early in 1947, certain shipments offered by a San Francisco supplier and destined to a contract-consignee at Santa Rosa, moved prepaid. Defendant then contemplated entering into an agreement with this shipper, but eastern headquarters would not sanction the plan. Following the breakdown of these negotiations, defendant continued to handle freight offered by this shipper and consigned to the same dealer. The latter, however, now pays the charges.

As to traffic received by the Marin-Sonoma dealers, the freight charges were paid, for the most part, by those who had entered into agreements with defendant. Shipments destined to some fifteen contract-consignees located in this territory had all moved collect, it was shown. Another such consignee had received prepaid shipments, both from its San Francisco office and also from a contract-consignor. Two non-contract consignees had received prepaid shipments from city contract-consignors. Freight delivered to still another dealer, at Santa Rosa, had originated at Eastern points exclusively, being thus interstate in character.

In some instances, the record shows defendant has accepted shipments which were not covered by any agreement. These moved during 1946 and early 1947 from San Francisco distributors to six Marin-Sonoma non-contract consignees, who paid the freight charges. Of the ten suppliers who participated in this traffic, only one had joined in an agreement with defendant. In the aggregate, these shipments were few in number.

Shipments of this character, defendant testified, no longer are handled. Formerly, when his drivers had called to pick up collect shipments destined to contract-consignees, these city suppliers had exerted pressure upon them also to accept collect shipments intended for non-contract-consignees. At times, they had done so. To remedy this situation, defendant visited these suppliers and discussed with their shipping clerks the necessity for limiting the shipments he should handle, in order that his operations would be lawful. On these occasions, he stated, the shippers' representatives had manifested very little desire to cooperate with him in this respect; on the contrary, they usually had insisted that he accept this traffic. Finally, defendant stated, he had furnished these suppliers with lists of his contracts, at the same time advising them that no other shipments would be accepted. This occurred early

in 1947. Since then, he testified, such shipments uniformly have been rejected.(18)

Traffic originating at Los Angeles and other Southern California points, it was shown, has been interchanged at San Francisco between defendant and other carriers. Both Western Truck Lines, Ltd. and Charles P. Hart Transportation Company --- each operating as a highway contract carrier --- have participated in this movement. Upon some of these shipments, delivered to a few non-contract consignees in the Marin-Sonoma area, defendant formerly collected from the consignees the through freight charges from Southern California to the ultimate destination. This practice, it was stated, no longer is followed. At present, defendant accepts only prepaid shipments from the connecting carrier, which in turn pays defendant his full local charges for the movement beyond San Francisco. Admittedly, defendant has no contract with the original consignor, from whom the freight is received by the connecting carrier. Defendant testified he had been advised by his counsel that such a course would be lawful. Defendant and Western regularly interchange interstate traffic at San Francisco.

A special agent of Northwestern Pacific, called by complainants, described the operations conducted by defendant on two consecutive days during May, 1947, when he had followed the latter's truck. He related the names and locations of both the San Francisco shippers and the Marin-Sonoma consignees, where freight had been picked up and delivered on each of these occasions. Defendant described his operations on these dates, producing freight bills covering the shipments handled and offering a statement showing them in detail. With only two exceptions, he testified, all these shipments were delivered

(18) Several shipper-witnesses corroborated defendant's testimony, pointing to letters they had received from defendant refusing to handle their shipments, and also to conversations with their suppliers during which the latter stated that defendant no longer would accept traffic of the character described above.

to consignees holding written contracts, who paid the freight charges. One of the excepted shipments was delivered to a consignee with whom defendant had entered into an oral agreement; the other was an interline shipment originating at Los Angeles and interchanged with defendant at San Francisco by Hart, who paid defendant's charges.

There was some testimony relating to certain characteristics of defendant's service which, it is claimed, reflects an element of specialization. These statements emanated from both San Francisco suppliers and Marin-Sonoma dealers. In general, they referred to the expeditious service which defendant had provided, affording fast pickup in the city and same-day distribution and delivery in the receiving area; to the infrequent occurrence of damage to shipments, and to the prompt adjustment of loss and damage claims whenever they were presented; and to defendant's practice of unloading shipments at locations on the consignee's premises which would best serve the latter's convenience. It was the concensus of their views, though all did not unanimously so express themselves, that in these respects defendant's service is superior to that afforded by the other carriers in the field.

Upon this record, may it be held that defendant has been operating as a highway common carrier? In a recent decision, we pointed out the distinctions between common carriage and private carriage;(19) it is not necessary to repeat what was said there. Whether or not defendant must be deemed a common carrier should be determined from the evidence presented, when viewed against the background of applicable legal principles.

The record shows that, since the reorganization of his business accomplished during 1947, defendant has endeavored to confine his intrastate operations to the transportation of freight for shippers with whom he has entered into written agreements mutually obligating the shipper to offer, and the carrier to

(19) Re M. L. Morris, (Dec. No. 40330) 47 Cal. P.U.C. 267, 277

transport, a definite tonnage of specified commodities during a prescribed term. To a large degree, defendant has served only those shippers who are parties to such agreements. There have been instances, however, where he has accepted shipments upon which the charges were paid by others.(20) On many occasions he has rejected tonnage offered by others.(21)

In our judgment, this is not sufficient to stamp defendant as a private carrier. There is lacking here those elements of specialization which differentiate the private from the common carrier.(22) It is contended that defendant's service is specialized in character because of its expeditiousness, the small number of damage claims incurred, and the effort made to deliver freight in such a manner as to best suit the consignee's convenience. We are not impressed by any of these claims. It is true that defendant provides a speedy service, but this is attributable primarily to the relatively small number of patrons accommodated. Comparatively few damage claims arise from defendant's operations, but in this respect he differs from no other efficient carrier; self-interest alone would dictate such a course. And good public relations would require a carrier, competing with others throughout a given area; to deliver freight in such a manner as to satisfy his customers. In none of these respects can the service shown to have been provided by

(20) As stated above, defendant has sought to avoid the transportation of shipments upon which the charges were paid by those who had not entered into written agreements. His efforts in this behalf - undertaken in good faith, we believe - have been instrumental in reducing such shipments to the minimum. He has continued, under advice of counsel, to interchange with connecting carriers, at San Francisco, traffic originating at Los Angeles and other Southern California points. The propriety of that practice has been challenged by complainants; however, we believe it unnecessary to determine that question here.

(21) During the period preceding the reorganization mentioned, defendant frequently had collected charges from shippers who had not joined in any agreement with him. At that time he had not undertaken to limit his operations as extensively as he did later.

(22) Re M. L. Morris, supra; Re Thorkildsen, 47 Cal. P.U.C. 287; Re Doss, 41 C. R. C. 359.

defendant be distinguished from that offered by any efficiently operated common carrier. Moreover, the absence of specialization is indicated by the stereotyped form of contract used, which is not designed to accomodate the shippers' varying requirements.

The circumstance that defendant may have exacted from each shipper whom he serves a written contract is not alone sufficient to distinguish him as a private carrier; he cannot thus escape falling within the category of a common carrier.(23) However, defendant has not shown himself wholly unwilling to serve new contract-shippers. When two such shippers dropped out, agreements were entered into with two others, who replaced them.

From the record, it appears that defendant has served a substantial part of the public. In so doing, we believe, he has operated as a common carrier between the points involved. Since this operation was conducted without proper authority, its discontinuance will be required.

We accordingly find, upon full consideration of the evidence, that defendant J. P. Nielsen, doing business as Nielsen Freight Lines, has operated, and is still operating, auto trucks used in the business of transporting property as a highway common carrier (as defined by 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 San Francisco, California, on the one hand, and Novato, Petaluma, Santa Rosa and points intermediate between Novato and Santa Rosa, California, along U. S. Highway No. 101, on the other hand; that said defendant has conducted, and still conducts, such operations without possessing a prior operative right therefor, and without first having obtained from the Public Utilities Commission a certificate of public convenience and necessity authorizing such operation, in violation of Section 50-3/4 of said Act.

(23) Re M. L. Morris, supra; Re Doss, supra.

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O R D E R

The above entitled proceeding being at issue, a public hearing having been held therein, evidence having been received, the matter having been duly submitted, and the Commission being fully advised:

IT IS ORDERED that defendant, J. P. Nielsen, doing business as Nielsen Freight Lines, be, and he is hereby, directed and required to cease and desist from operating, directly or indirectly, or by any subterfuge or device, any auto truck as a highway common carrier (as defined by 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 San Francisco, California, on the one hand, and Novato, Petaluma, Santa Rosa and points intermediate between Novato and Santa Rosa, California, along U. S. Highway No. 101, on the other hand, unless and until said J. P. Nielsen shall have obtained from the Public Utilities Commission a certificate of public convenience and necessity therefor.

The Secretary is directed to cause a certified copy of this order to be personally served upon said defendant, J. P. Nielsen.

This order shall become effective on the twentieth day after the date of such service upon said defendant.

Dated at San Francisco, California, this 24th, day of February, 1949.

COMMISSIONERS