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Decision No. 47112

ORIGINAL

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Commission investigation into the operations and practices of GLEN D. NOLAN, doing business as COLMA DRAYAGE.	)	Case No. 5193

Marquam C. George, for respondent.
John K. Power, for Field Division,
Public Utilities Commission.

OPINION AND ORDER ON REHEARING

By Decision No. 45211, dated January 3, 1951, respondent was ordered to cease and desist from certain highway common carrier operations conducted principally in the San Francisco Bay area, until he should obtain a certificate of public convenience and necessity. His permits to operate as a radial highway common carrier and highway contract carrier were ordered suspended until, for good cause shown, the Commission directed otherwise.

A petition for rehearing, which challenged the finding of highway common carriage and the order suspending permits, was filed by respondent in time to stay the effective date of the decision. A rehearing, for the purpose of oral argument only, was granted by the Commission on April 3, 1951, and was had before Examiner Gillard in San Francisco on October 29, 1951.

In arguing the matter, the attorney for the Field Division pointed out that respondent commenced operations as a common carrier under the authority of a radial highway common carrier permit. It was argued that, when respondent secured a contract permit in 1948 and then in 1949 obtained "contracts" with his regular customers, there was no change in his manner of operation or in his legal status.

It was contended that the contracts were not binding, because not all were signed by authorized personnel and because respondent apparently could cancel at least some of them in a manner contrary to their terms without incurring legal liability. The final contention was that the regularity and frequency of the operation, particularly to Oakland, Newark and San Jose, made the operation highway common carriage rather than radial highway common carriage because the termini became "fixed."

The attorney for respondent replied that the Commission's restricted definition of a radial carrier was contrary to the legislative declaration of policy contained in the preamble to the Highway Carriers' Act (now Section 3592 of the Public Utilities Code) and, further, that such definition was unrealistic because under the Souza decision (1) a carrier operating between San Francisco and San Jose, for example, and serving 200 customers, would be a lawful contract carrier, even though his contracts with such customers only required a tender of 100 pounds per month, whereas a radial carrier serving the same number of people between those points is considered an unlawful highway common carrier. He also contended that the Commission's decisions do not allow a radial carrier to operate at all, even though he dedicates his service to an area and does nothing to establish terminals or termini. He stated in conclusion that respondent had always tried to obey the law and follow the suggestions of the Commission's representatives and, therefore, a suspension of permits is unwarranted.

The facts are not essentially in dispute and we adopt the recital thereof in our first opinion. However, it will be appropriate to review them in the light of the contentions made here upon rehearing and to recite or stress those which have particular significance in determining the carrier's status.

(1) Souza v. P.U.C., 37 A.C. 539.

Respondent commenced his trucking operations in 1946 under the authority of a radial highway common carrier permit and a city carrier permit. He testified that he did not know anything about a contract carrier permit at that time. He started with one truck and his first substantial business came from the National Starch Company when one of its salesmen asked him if he would deliver some merchandise down the Peninsula. Later on, this company wanted him to make deliveries in the East Bay and, as a consequence, he added another truck and undertook this business. From that point his activities grew and he gradually acquired more accounts and more trucks to serve them. He employed no solicitors but there is no indication that he ever refused new accounts that were offered to him until after this investigation was commenced. When asked his reason for such subsequent refusals, he testified: "Well, I have been in the trucking business to go ahead, but they don't seem to want to let us, seem to run into trouble if you take too much freight, that is what they tell me."

It was in January of 1948 that Nolan obtained a contract permit but not until June of 1949 that he entered into any transportation contracts having tenure beyond the immediate shipment. As pointed out in our first opinion, Nolan claimed to have entered into some nineteen contracts about June of 1949, all of them with shippers whom he had previously claimed to serve as a radial carrier. Through cancellations and substitutions, the number had become nine by the time of hearing.

The evidence was clear that whatever the motivation for entering into contracts, they were not undertaken to alter the manner of doing business or to modify the nature of Nolan's holding out. The contracts, which were entered into with a number of his more

regular customers, in no wise altered the physical operation or reduced the carrier's activity. There was evidence which indicated that at least some of the oral contracts were not contracts in the sense of being legally binding obligations and there was further evidence that at least some of the written contracts were not executed by authorized personnel.

While it is true that Nolan had only twenty or twenty-five regular customers and that he singled them out in attempting to obtain contracts, he accepted prepaid and collect shipments indiscriminately and looked to many consignees for payment, thereby performing transportation service for them and drawing them within the orbit of his holding out. In addition, he accepted prepaid shipments from consignors who were not regular customers as were those with whom contracts, purported or otherwise, had at some time been entered into. Exhibits 1 and 2 showed that during representative periods of two weeks Nolan performed service for something in the neighborhood of one hundred parties, if those who requested service and those who were billed for charges be aggregated.

While the operation was shown not to be conducted on regular schedules, but rather "on call," and while the carrier was shown to have no terminal facilities other than his own home and a public garage, service had become frequent enough by August of 1949 to be daily from San Francisco to Oakland, Newark and San Jose, respectively.

Respondent claimed to be operating as a contract carrier as to any shipment where the consignor was one with whom respondent had entered into a contract, purported or otherwise, and as a radial carrier as to all other shipments.

In our first opinion, we did not agree and concluded that the whole of respondent's operation fell within the definition of a highway common carrier. Upon full consideration of the oral argument upon rehearing, we do not perceive any proper basis for departing from that conclusion. We can detect no distinction between the holding out to the so-called contract shippers (a) before contracts were entered into with such shippers, (b) while contracts or claimed contracts were in effect with such shippers, and (c) after contracts with such shippers were abrogated by the carrier. Nor can we detect any distinction between the holding out to those shippers singled out for contract arrangements and those not so singled out. In our opinion, the whole of respondent's operation manifests an unequivocal dedication to serve the public or a portion thereof between fixed termini or over regular routes. We view the contracts, whether legally binding or not, merely as a device, albeit an honestly conceived one, to avoid the obvious pitfall of broaching into highway common carriage when the radial operation became too frequent and could no longer be described as between unfixed termini or over irregular routes.

Notwithstanding the foregoing, we deem it appropriate, in the light of the dicta in the last paragraph of the Souza decision (37 A. C. at 543, 544), to limit our findings in this decision upon rehearing to a determination of the carrier's status only as to those pairs of termini served with such frequency that their "fixed" nature is beyond dispute. In short, we find that at least as to service from San Francisco to Oakland, Newark and San Jose, respectively, where the operation is daily, Nolan has unequivocally dedicated himself to serve the public or a portion thereof generally between fixed termini and is, therefore, a highway common carrier to that extent. We cannot ignore the history of the operation. Until at least June of 1949 Nolan did not claim to be other than a radial

highway common carrier. By definition a radial highway common carrier is one who holds himself out to serve the public or a portion thereof generally, but not between fixed termini or over a regular route. Such holding out was not altered by the entering, or purported entering, into contracts. The evidence establishes that such entering into contracts was undertaken not with a view to altering the nature of the holding out and that the carrier did not in fact intend to change the nature of his holding out. It follows that, when the business became extensive enough that the termini became "fixed" within the meaning of the statute (Public Utilities Code, Sec. 215, formerly Public Utilities Act, Sec. 2-3/4(b)), a radial permit no longer covered the operation and a certificate of public convenience and necessity became a prerequisite to its continuance.

Respondent would contend that such conclusion makes a radial permit of little value when a carrier desires to increase his patronage. That, no doubt, is true, but the plain language of the statute cannot be ignored to the effect that a dedication to serve "between fixed termini or over a regular route" requires a certificate of public convenience and necessity.

In the light of the foregoing, respondent Nolan will be ordered to cease and desist from operating as a highway common carrier from San Francisco to Oakland, Newark and San Jose, respectively.

O R D E R

IT IS ORDERED:

(1) That Glen D. Nolan, doing business as Colma Drayage, be and he is hereby directed and required, unless and until said Glen D. Nolan shall have obtained from this Commission a certificate of public convenience and necessity therefor, 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 in Section 213 of the Public Utilities Code) for compensation, over the public highways of the State of California, from San Francisco to Oakland, Newark and San Jose, respectively;

(2) That Decision No. 45211 is hereby modified to the extent that it is inconsistent with the foregoing.

The Secretary is directed to cause a certified copy of this decision to be served personally upon respondent Glen D. Nolan.

The effective date of this order shall be twenty (20) days after the date of such service.

Dated at San Francisco, California, this 5th day of May, 1952.

R. T. [illegible]
President

Justus F. Craemer

Harold P. Huls

Kenneth Potter

Peter E. Mitchell
Commissioners