

ORIGINAL

Decision No. 58408

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

C. O. Bliss, an individual, doing
business as BLISS FILM DELIVERY,

Complainant,

vs.

Ada Teresa Gilboy and John R. Maloney
as Executors of the Estate of Thomas
W. Gilboy, Patricia A. Shortall,
Edwin C. Hunter, and Thomas E. Gilboy
individually and as co-partners doing
business as GILBOY COMPANY OF
LOS ANGELES,

Defendants.

Case No. 6104

Glanz & Russell, by Theodore W. Russell, for
complainant.
Turcotte & Goldsmith, by F. W. Turcotte, for
defendants.

O P I N I O N

Public hearings were held in Los Angeles before Examiner Grant E. Syphers on October 6, November 10 and 13, 1958. On these dates evidence was adduced and on the last-named date the matter was submitted subject to the filing of briefs. Briefs now have been filed by both complainant and defendants and the matter is ready for decision.

The complainant is a highway common carrier engaged in the transportation of motion picture film and accessories conducted under the authority of certificates of public convenience and

necessity issued by this Commission.^{1/} Defendants are partners engaged in the transportation of motion picture film and accessories as a highway common carrier in certain territory under certificates granted by this Commission^{2/} and in other territory under the authority of permits issued by this Commission.^{3/}

In substance the complaint alleges that the defendants are conducting highway common carrier operations beyond the scope of the authority of their certificates. The complaint requests that defendants be ordered to cease and desist from such hauling, and that the permits of defendants be cancelled and revoked.

The defendants, in answer to the complaint, deny that they have at any time conducted operations as a highway common carrier in excess of their existing authority. They further allege that the service they are rendering outside of their certificated area is being rendered in the capacity of a contract carrier and does not exceed the authority of their permits.

According to this record, the defendants are the Los Angeles representative of the National Film Service, a New York corporation which distributes motion picture film. Defendants maintain a place of business at 1512 West 21st Street, Los Angeles,

^{1/} Decision No. 41796, dated June 29, 1948, in Application No. 29275; Decision No. 47904, dated November 3, 1952, in Application No. 33664.

^{2/} Decision No. 46971, dated April 8, 1952, in Application No. 33127; Decision No. 47635, dated August 26, 1952, in Application No. 33492.

^{3/} No. 19-41401, Radial Highway Common Carrier Permit, issued April 24, 1950; No. 19-39576, City Carrier Permit, issued May 9, 1950; No. 19-46309, Highway Contract Carrier Permit, issued December 11, 1952.

where they store, ship and inspect motion picture film. In the immediate area of this place of business there are nine film distributors and they comprise what is known as "film row."

In addition to their film servicing business, defendants conduct a trucking business, picking up and delivering all film offered by the distributors on "film row." Some of this film may be hauled to defendants' certificated area while other film may be hauled to areas outside the scope of the certificate, allegedly under the authority of the permits. The pickups for both the certificated and the permitted hauls are frequently made on the same trucks. All of the film so picked up is handled by the same employees, no distinction being made between the so-called highway common carrier freight and the permitted freight.

A total of ten trucks are used by defendants to make pickups on "film row" in the daytime and deliveries to the theaters at night. There are a total of five drivers picking up film in the daytime and one of these makes the night deliveries of the so-called permitted freight.

In making these deliveries, a regular route is usually followed. There are fourteen theaters involved and on Tuesdays and Saturdays stops are made at all of them, but on other nights not all of them are covered. These fourteen theaters are located as follows: four in Alhambra, two each in San Gabriel, Arcadia and Baldwin Park, and one each in Monterey Park, Temple City, Five Points and El Monte. It should be noted that these constitute all of the theaters in these respective cities and communities with the exception of the El Rey Theater in Alhambra. As to this theater, defendants do not deliver film there but do stop occasionally to make pickups.

The hauling to these fourteen theaters is performed under five contracts, copies of which were received in evidence. Exhibit No. 1 is a contract covering the hauling to the Edgewood Drive-In Theater at Baldwin Park. Exhibit No. 2 is a contract covering hauling to the Garfield Theater in Alhambra. Exhibit No. 3 is a contract covering hauling to the El Monte Theater in El Monte and the Baldwin Theater in Baldwin Park. Exhibit No. 4a is a contract covering hauling to nine theaters: the Alhambra, Garfield,^{4/} Coronet, San Gabriel, Temple City, Tumbleweed, Edwards Drive-In, Santa Anita, and Azusa Theaters. Exhibit No. 4b is a contract covering hauling to the San Gabriel Drive-In and Edwards Monterey Theaters.

The position of the complainant is that it is a common carrier with authority to serve all of these theaters. In the past it has served most of them and now is willing and able to serve all of them. The position of the defendants is that this service is conducted as a contract carrier and accordingly no authority is necessary.

A consideration of all of the evidence adduced in this matter now discloses that the single issue before the Commission is whether or not the activities of the defendants in transporting film on a daily basis to all of the theaters, except one, in eight cities and communities constitutes common carriage. In considering the types of freight carriers which are subject to regulation under the California statutes, there are four basic

^{4/} This theater is also covered by the contract designated Exhibit No. 2.

elements involved: (1) transportation by motor vehicle; (2) over the public highways; (3) for compensation or hire as a business; and (4) the transportation of property. There is no question on this record but that the activities of defendants in hauling to these fourteen theaters consist of all of these four elements. Neither party challenges this conclusion since both concede that these activities are public carriage. However, the complainant contends that defendants' activities require a certificate of public convenience and necessity as a highway common carrier, whereas the defendants contend that these activities may be conducted under permit.

While the defendants specifically contend that these activities are those of a highway contract carrier, the record discloses that they possess permits authorizing operations as a city carrier, a radial highway common carrier, and a highway contract carrier. Clearly the operations in question are not those of a city carrier since they are not conducted "within the exterior boundaries of a city" (Section 3911, Public Utilities Code). That they are not those of a radial highway common carrier likewise seems clear since that type of carrier is one "which does not operate between fixed termini or over a regular route ..." (Alves v. Public Utilities Commission, 41 Cal. 2d 344, 350). The fact that the hauls in question are conducted regularly on a daily basis between certain fixed termini would remove them from this classification.

Therefore, the legal problem is whether or not these activities are being lawfully conducted under the contract carrier permit of the defendants. The principal difference between a contract carrier and a common carrier is whether or not the carrier

is holding out to serve the public or has dedicated property to a public use (Samuelson v. Public Utilities Commission, 36 Cal. 2d, 722, 733; Souza v. Public Utilities Commission, 37 Cal. 2d, 539, 543). In addition to this, the law in California provides the statutory test of providing service for the "public or any portion thereof" (Section 216 (a), Public Utilities Code).

In the instant matter the defendants have entered into five written contracts covering hauling to fourteen theaters. However, it is clear in the law that the existence of contracts in and of themselves does not provide the only test as to whether or not the hauling is that of a contract carrier. The California statute makes no mention of contracts, but rather defines a contract carrier "by exclusion as every highway carrier which is not a common carrier ..."
(Alves v. Public Utilities Commission, 41 Cal. 2d 344, 350). The statute is as follows:

"3517. 'Highway contract carrier' means every highway carrier other than (a) a highway common carrier, (b) a radial highway common carrier, (c) a petroleum contract carrier, or (d) a petroleum irregular route carrier."

The basic test must be, as previously stated, whether or not there is a holding out to serve the public or any portion thereof.

We can only conclude from this record that the activities of the defendants are those of a highway common carrier. They are holding out to serve, and actually do serve, all of the fifteen theaters in eight cities and communities. This constitutes common carriage. In providing this service for fourteen of these theaters they operate on a daily basis between fixed termini and over regular routes on the public highways for compensation. This constitutes highway common carriage.

The ensuing order will direct the defendants to cease and desist from these operations unless and until appropriate authority is obtained therefor. Inasmuch as it can fairly be concluded from this record that the activities of the defendants were conducted in good faith under the belief that their permits authorized the operations, the request of complainant that defendants' permits be cancelled will be denied.

O R D E R

Complaint as above entitled having been filed, a public hearing having been held thereon, the Commission being fully advised in the premises and having made the foregoing findings,

IT IS ORDERED that Ada Teresa Gilboy and John R. Maloney as Executors of the Estate of Thomas W. Gilboy, Patricia A. Shortall, Edwin C. Hunter, and Thomas E. Gilboy individually and as copartners doing business as Gilboy Company of Los Angeles, be and they hereby are directed and required, unless and until they 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 between Los Angeles and theaters in the following cities

and communities: Alhambra, San Gabriel, Arcadia, Baldwin Park, Monterey Park, Temple City, Five Points, and El Monte.

The Secretary is directed to cause a certified copy of this decision to be served personally upon said defendants, and the effective date of this order shall be twenty days after such service.

Dated at San Francisco, California, this 12th day of May, 1959.

S. Lynn Fox
 President

J. E. [unclear]

William [unclear]

Theodore [unclear]

Commissioners

Commissioner Everett C. McKeage, being necessarily absent, did not participate in the disposition of this proceeding.