

ORIGINALDecision No. 58794

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Investigation on the Commission's
own motion into the operations and
practices of WILLIAM R. JOHNSON
and FLOYD JOHNSON, doing business
as J & J TRUCK LINE.

Case No. 6108

Marquam C. George, for the respondent.Martin J. Porter, for the Commission staff.O P I N I O N

On May 20, 1958, the Commission issued an order instituting an investigation on its own motion into the operations and practices of William R. Johnson and Floyd Johnson, doing business as J & J Truck Line. The investigation was instituted for the purpose of determining whether the respondents have operated or are operating as a highway common carrier between fixed termini or over regular routes between certain designated points in the State of California without first having obtained a certificate of public convenience and necessity to so operate as required by Section 1063 of the Public Utilities Code. The designated points in question are:

Between San Francisco and:

San Jose
Los Gatos
Santa Cruz
Watsonville
Monterey
Salinas

Between Oakland and:

Morgan Hill
Hollister
Fort Ord
Pacific Grove
Los Gatos
San Francisco

Between San Jose and:

Santa Cruz
Watsonville
Monterey
Hollister
Salinas
Gilroy
Morgan Hill
Pacific Grove

Between Santa Clara and:

Monterey

Public hearings were held before Examiner William L. Cole in San Jose on September 3 and 4, 1958, and in San Francisco on September 22, 1958, at which time the matter was submitted.

MOTION

At the time of the hearings, the Commission staff made a motion to delete Floyd Johnson's name from the order of investigation. This motion was taken under submission at that time. Inasmuch as the evidence indicates that Floyd Johnson had no interest in the J & J Truck Line, this motion is hereby granted.

FINDINGS AND CONCLUSIONS

Based upon all of the evidence in the record, the Commission hereby makes the following findings and conclusions:

1. William R. Johnson, the respondent herein, on September 17, 1957, received by means of a transfer by the Commission, unrestricted permits to operate as a radial highway common carrier and highway contract carrier. These permits were originally issued on May 21, 1948, to the respondent and his brother, Roy Johnson. Roy Johnson died in 1956. Since Roy Johnson's death, the respondent has been conducting the operations of the J & J Truck Line.

2. During the period of time the shipments hereinbelow referred to took place, there was also in force a certificate of public convenience and necessity issued to the respondent and Roy Johnson to operate as a highway common carrier between various points other than the points in question in this investigation. The Commission takes official notice that subsequent to the hearings in this matter, this certificate was transferred into the respondent's name alone. Briefly, this certificate authorizes highway common carrier operations between San Leandro, Berkeley, Oakland and Mulford, on the one hand, and points on U. S. Highways 101 and 101-Bypass between South San Francisco and San Jose, both inclusive, Freedom, Santa Cruz, Watsonville, Gilroy, Salinas, Monterey, Seaside and Castroville, all on the other hand.

3. The respondent's terminal is located in San Jose. During the period of time the shipments hereinbelow referred to took place, the respondent engaged in both a scheduled and on-call operation. Trucks were dispatched daily from San Jose to Salinas and return; from San Jose to Monterey and return; from San Jose to Gilroy, Watsonville, and Santa Cruz and return; from San Jose to San Francisco via Peninsula points and return; from San Jose to Oakland and East Bay points and return; and in some instances from San Jose to Oakland and East Bay points and then to San Francisco and San Jose. At the time of the hearings in this matter, the respondent owned nine tractors, ten trailers, one truck, one converter dolly, and two pickup trucks.

4. The Commission's staff investigated the respondent's operation between the various points in question for the four five-day periods October 21 through 25, 1957; November 18 through 22, 1957; December 2 through 6, 1957; and January 13 through 17, 1958. During

each of these four five-day periods, the respondent transported property for compensation between San Francisco, on the one hand, and San Jose, Los Gatos, Santa Cruz, Watsonville, Monterey, and Salinas on the other hand; between Oakland, on the one hand, and Morgan Hill, Hollister, Fort Ord, Pacific Grove, Los Gatos, and San Francisco, on the other hand; between San Jose, on the one hand, and Santa Cruz, Watsonville, Monterey, Hollister, Salinas, Gilroy, Morgan Hill, and Pacific Grove, on the other hand; and between Santa Clara and Monterey. These shipments covered a variety of commodities and ranged in weight from under 5 pounds to in excess of 40,000 pounds.

5. The evidence shows that the respondent told a member of the Commission staff, during the course of the latter's investigation, that the respondent had no enforceable legal contracts with the shippers of the shipments in question, that he had agreements to do their hauling, but that the shippers could stop using respondent's services at any time. The evidence shows that the respondent did have some type of arrangements with the majority, but not all, of the shippers of the shipments in question concerning the transportation of their property between various of the points in question. The arrangements were all oral and varied with the different shippers. Normally the arrangements were such that the shipper guarantees to tender a certain minimum monthly quantity of traffic to the respondent. These amounts vary from 100 to 5,000 pounds. Under these arrangements the respondent was to transport at the Commission's minimum rates the property offered by the shipper and, with respect to most of the shippers, agreed to maintain various schedules such as same-day deliveries, overnight service, or Saturday morning deliveries. In some instances, the respondent was to have special equipment available for particular shippers. With respect to the

arrangements with certain shippers, there was no minimum guarantee, but rather the shipper agreed to route all shipments over which it had control via the respondent; or in some instances, the shipper agrees to request the firm with whom it deals, to use the service of the respondent. One shipper guaranteed the freight charges on collect shipments and required the respondent to maintain cargo insurance. In another instance, the respondent and a shipper reduced the amount of the minimum tonnage that the shipper agreed to ship via the respondent. There was no definite period of time during which these arrangements were to remain in effect, rather, they were to be in effect indefinitely, or at least as long as the respondent performs the transportation service. These arrangements were such that there is no specified procedure whereby they can be terminated. The respondent and the various shippers have abided by the terms of their various arrangements.

6. Under one type of arrangement entered into between the respondent and certain of the shippers involved, there was no requirement for a definite amount of property to be transported, nor did it appear from the evidence that the shippers were under any obligations whatsoever with respect to this type of arrangement. These arrangements likewise had no definite period of time during which they were to remain in effect.

7. There were also certain shippers of the shipments in question with which the respondent had no arrangements at all except the normal common carrier-shipper relationship. Shipments were transported for this group of shippers between the following sets of points among others: San Francisco and San Jose, San Francisco and

Los Gatos, San Francisco and Santa Cruz, San Francisco and Watsonville, San Francisco and Monterey, San Francisco and Salinas, Oakland and Hollister, San Jose and Santa Cruz, San Jose and Watsonville, San Jose and Hollister, and San Jose and Gilroy.

8. The majority of the shippers with whom respondent has arrangements approached the respondent relative to the transportation of their property rather than the respondent soliciting them. During the period of time the shipments in question took place, the respondent did not employ solicitors for the purpose of obtaining business.

9. The respondent had not transported property between the various points in question for the shippers with whom he had arrangements, prior to the time the arrangements were made.

10. Relative to the shipments described in paragraph 4, the following table sets forth:

- (A) The number of consignors and consignees served who engaged the respondent.
- (B) The number of consignors and consignees who engaged the respondent and with whom the respondent had an arrangement of the type described in paragraph 5.
- (C) The number of consignors and consignees who engaged the respondent and with whom the respondent had no arrangement other than the usual common carrier-shipper contract or with whom the respondent had an arrangement of the type described in paragraph 6.

<u>Between San Francisco and:</u>	(A)	(B)	(C)
San Jose	28	13	15
Los Gatos	8	2	6
Santa Cruz	13	5	8
Watsonville	10	7	3
Monterey	13	8	5
Salinas	14	9	5

<u>Between Oakland and:</u>	(A)	(B)	(C)
Morgan Hill	4	4	0
Hollister	11	8	3
Fort Ord	2	0	2
Pacific Grove	2	2	0
Los Gatos	7	6	1
San Francisco	7	5	2

<u>Between San Jose and:</u>	(A)	(B)	(C)
Santa Cruz	11	7	4
Watsonville	12	9	3
Monterey	5	3	2
Hollister	7	4	3
Salinas	5	4	1
Gilroy	10	6	4
Morgan Hill	3	2	1
Pacific Grove	6	5	1

<u>Between Santa Clara and:</u>	(A)	(B)	(C)
Monterey	4	2	2

The evidence shows that there were 98 different consignors and consignees who engaged the respondent's services for the shipments in question.

11. The following table sets forth the number of separate days the respondent transported the shipments in question during each of the four five-day periods referred to above:

<u>Between San Francisco and:</u>	<u>10/21-25/57</u>	<u>11/18-22/57</u>	<u>12/2-6/57</u>	<u>1/13-17/58</u>
San Jose	5	5	5	5
Los Gatos	4	4	5	4
Santa Cruz	4	5	5	4
Watsonville	4	5	5	5
Monterey	5	4	4	4
Salinas	5	5	5	5

<u>Between Oakland and:</u>	(A)	(B)	(C)
Morgan Hill	0	1	4
Hollister	4	4	5
Fort Ord	4	2	3
Pacific Grove	1	1	4
Los Gatos	1	3	3
San Francisco	3	3	2

Between San Jose and	<u>10/21-25/57</u>	<u>11/18-22/57</u>	<u>12/2-6/57</u>	<u>1/13-17/58</u>
Santa Cruz	4	4	4	5
Watsonville	4	2	5	2
Monterey	4	2	3	4
Hollister	5	4	4	3
Salinas	2	4	3	1
Gilroy	3	4	4	5
Morgan Hill	4	4	3	3
Pacific Grove	3	2	4	3

12. Shipments handled by the respondent as a highway common carrier and shipments handled by him under his permitted operating authority are not segregated, in so far as the same trucks and personnel are used at the same time to transport shipments handled under both permitted and certificated authority.

COMMON CARRIER STATUS

Any determination of whether a carrier is operating unlawfully as a highway common carrier must, of necessity, first require a determination of the carrier's status as a common carrier. The Supreme Court has held in various decisions that the common law test of common carriage is applicable in California, and that the determination of a carrier's status involves the question of whether the carrier intended to dedicate his property to the public use.^{1/} The Court has held in these decisions that this intent is a primary factor in determining the character of carriage. These decisions have become the Commission's guides in ascertaining whether a particular carrier is operating as a common carrier or not. However, these guides are useful primarily in those cases where the carrier's operations are such that he is operating either entirely as a common carrier or entirely as a private or contract carrier.

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Samuelson v. Public Utilities Commission, 36 C 2d 722
 Souza v. Public Utilities Commission, 37 C 2d 539
 Alves v. Public Utilities Commission, 41 C 2d 344
 Nolan v. Public Utilities Commission, 41 C 2d 392

Dual Operation

Aside from the basic test of intent to dedicate property to the public use, the decisions referred to lose much of their usefulness as guides in those instances in which the carrier is operating both as a common carrier and as a private or contract carrier at the same time. That a carrier may lawfully perform such a dual operation has been established by Supreme Court decision.^{2/}

In the instances where the possibility of such a dual operation exists, the mere determination that the carrier is operating as a common carrier, is not sufficient in cases where illegal highway common carrier operations between two points are alleged. The Supreme Court has held that it must also be found that the carrier was operating as a common carrier between the points in question.^{3/} It would appear that even this determination is not sufficient, for the reason that it is apparent from Section 3542 of the Public Utilities Code that dual operation between the same points is lawful as long as the carrier does not transport the same commodities between those points as both a common carrier and as a contract carrier. Consequently the further determination must be made as to whether the carrier is also operating as a contract carrier between the two points in question, and if so, which shipments were transported by him as a contract carrier and which as a common carrier.

^{2/} Alves v. Public Utilities Commission (Supra)

^{3/} Alves v. Public Utilities Commission (Supra)

With respect to making the determination as to whether the carrier is operating as a common carrier, the basic test of express or implied intent to dedicate property to the public use must, of course, be met. In this regard it would appear that where a carrier applies for and obtains an unrestricted radial highway common carrier permit, and operates under that permit between any two points, in law, he has manifested his intent to operate as a common carrier between those two points. This action on the part of the carrier is sufficient evidence of dedication and makes of secondary importance other factors such as solicitation, size of operations, number of shippers, and other factors that are normally considered in ascertaining the carrier's intent.

Respondent's Situation

With respect to the respondent's situation, it must first be determined whether the evidence shows that he has dedicated property to the public use as a common carrier. The facts indicate that during the period the shipments in question were transported, the respondent was the holder of an unrestricted radial highway common carrier permit. The facts also show that at least between certain points, the respondent transported property for shippers with whom he had no arrangements whatsoever except the usual shipper-common carrier arrangement. These sets

of points include San Francisco and San Jose, San Francisco and Los Gatos, San Francisco and Santa Cruz, San Francisco and Watsonville, San Francisco and Monterey, San Francisco and Salinas, Oakland and Hollister, San Jose and Santa Cruz, San Jose and Watsonville, San Jose and Hollister, and San Jose and Gilroy. Based upon these facts, the Commission finds and concludes that the respondent operated under his unrestricted radial highway common carrier permit between these points and, therefore, that he intended to and did dedicate his property to the public use as a common carrier between these points.

In view of this conclusion, then, it must be determined whether the respondent transported, as a common carrier, shipments between these sets of points with such frequency as to support a finding that respondent was operating between fixed termini or over regular routes. For this an analysis of the arrangements between the respondent and the various shippers in question must be made. Four principal points must be borne in mind with respect to most of these arrangements. First, a minimum monthly amount of tonnage was apparently guaranteed by the shipper. Second, there was no express procedure whereby these arrangements could be terminated. Third, the arrangements were to continue for an indefinite period of time, or at least for as long as the respondent maintained his service. Fourth, it is apparent from the respondent's statements to the Commission staff which are set forth in the record that he did not

think the arrangements were valid enforceable contracts; rather, he thought they could be terminated at any time by the shippers.

The first point, relating to the minimum amount of tonnage, would seem to indicate an intent on the part of the two parties to ship property pursuant to a binding enforceable contract under which each intended to be bound by real obligations. On the other hand, the second, third, and fourth points would seem to indicate that the two parties intended that the alleged agreements could be terminated at any time, and for that reason, they did not intend to be bound by real obligations of any type. This is particularly true with respect to the respondent, as indicated by his remarks that the alleged agreements could be terminated at any time and that they were not valid enforceable contracts. It is reasonable to infer from these remarks that in transporting the shipments in question, the respondent did not intend to transport them pursuant to a valid enforceable bilateral contract containing real obligations. Based upon the evidence in the record, therefore ~~the Commission~~ finds and concludes that the respondent intended to transport all of the various shipments carried between the sets of points enumerated above, as a common carrier.

FREQUENCY OF OPERATION

The factor which distinguishes highway common carriage from other common carriage is that the highway common carrier operates between fixed termini or over a regular route. It is well settled that whether or not a carrier is operating between fixed termini depends upon the frequency of his operations between sets of termini. In view of this, it is apparent that there may be periods of time when a carrier is operating between fixed termini and other periods of time when he is not so operating. It is also

apparent that it is only when the carrier is so operating that he may possibly be operating as a highway common carrier.

Because of this, it must be ascertained what period of time is to be used as the proper measure in determining the frequency with which a carrier operates. In other words, how long a period of time must the carrier operate at the required frequency before he is operating between fixed termini. The Commission, in the administration of its policy-decision program, adopted the weekly period as the correct period for ascertaining the frequency of a carrier's operation. It is still the Commission's conclusion that this period is the natural and logical one to be used in determining this frequency. It would seem to follow that if a carrier was operating between any two points as a common carrier with the required frequency during any one-week period, he was operating as a highway common carrier during that week. With respect to this required frequency, the Supreme Court has held that service between two points on a daily basis constitutes operations between fixed termini.

With respect to the respondent's operation, the facts show that during the four five-day study periods used by the staff, the respondent transported shipments on each of the five days of one or more of these periods between the points of San Francisco and San Jose, San Francisco and Los Gatos, San Francisco and Santa Cruz, San Francisco and Watsonville, San Francisco and Monterey, San Francisco and Salinas, Oakland and Hollister, San Jose and Santa Cruz, San Jose and Watsonville, San Jose and Hollister, and San Jose and Gilroy. It is the Commission's finding and conclusion that the respondent was operating between fixed termini with respect to the aforementioned points during those periods when the respondent was

transporting shipments between the respective points on each of the five days of that period.^{4/}

The evidence also showed that the respondent was operating between other points at a frequency of three or four times during one or more of the five-day periods, rather than on every one of the five days. It must be determined then whether the respondent was operating between fixed termini with respect to those points. The Supreme Court of this state has indicated that daily frequency is sufficient to establish operations between fixed termini. There has been no indication from the Court whether operations comprising less than daily frequency would also constitute operations between fixed termini. In a recent decision,^{5/} the Commission has held that where a carrier was serving certain points with the same frequency with which certificated carriers serve those points and with the frequency which the particular type of transportation demanded, notwithstanding that it was less than daily frequency, the carrier was operating between fixed termini. The present record does not show the frequency with which certificated carriers served the points in question which were served by the

^{4/} It is to be noted that the staff, in its frequency study, used five-day periods, Monday through Friday, rather than a seven-day week. The evidence showed that the respondent operated six days a week but that his Saturday operations consisted principally of making deliveries of shipments picked up on Friday. In the study introduced by the staff, the date shown as being the date of the shipment, was the date upon which the shipment was picked up. With respect to the four periods under consideration, no shipments were picked up on Saturdays between the various points in question. These facts in no way detract from the Commission's conclusion that the respondent was operating between fixed termini between the points hereinabove mentioned.

^{5/} Investigation of John Worley, Decision No. 56043, Case No. 5955, January 7, 1958, 56 CPUC 125.

respondent on less than a daily basis. Consequently, the Commission will not apply this test. We cannot conclude, with respect to such points, that the respondent was operating between fixed termini.

CONCLUSIONS

Based upon the foregoing findings and conclusions and all of the evidence in the record, the Commission hereby finds and concludes that the respondent was operating as a common carrier when transporting the shipments in question between San Francisco and San Jose, San Francisco and Los Gatos, San Francisco and Santa Cruz, San Francisco and Watsonville, San Francisco and Monterey, San Francisco and Salinas, Oakland and Hollister, San Jose and Santa Cruz, San Jose and Watsonville, San Jose and Hollister, and San Jose and Gilroy. The Commission further finds and concludes that the respondent was operating between fixed termini with respect to each of the foregoing sets of points. The Commission further finds and concludes that the respondent operated as a highway common carrier between each of these sets of points during one or more of the periods of time in question. Inasmuch as the respondent has not been issued a certificate of public convenience and necessity to operate as a highway common carrier between these sets of points, the Commission further finds and concludes that the respondent violated Section 1063 of the Public Utilities Code.

It is the Commission's conclusion that the respondent's existing certificate of public convenience and necessity and his permits to operate as a radial highway common carrier and highway contract carrier be suspended for a period of five days.

O R D E R

A public hearing having been held in the above-entitled matter and the Commission being fully informed therein,

IT IS ORDERED:

1. That William R. Johnson is hereby ordered to cease and desist from operating as a highway common carrier between any points or over any route within this state unless he has first obtained a certificate of public convenience and necessity from this Commission to so operate.

2. That the certificate of public convenience and necessity to operate as a highway common carrier, the radial highway common carrier permit, and the highway contract carrier permit issued to William R. Johnson are hereby suspended for five days starting at 12:01 a.m. on the second Monday following the effective date of this order.

3. That William R. Johnson shall post at his terminal and station facilities used for receiving property from the public for transportation, not less than five days prior to the beginning of the suspension period, a notice to the public stating that his certificate of public convenience and necessity, radial highway common carrier permit, and highway contract carrier permit have been suspended by the Commission for a period of five days.

