

ORIGINALDecision No. 59655

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Investigation on the Commission's)
 own motion into the operations)
 and practices of JAMES L. CHASE,) Case No. 6109
 doing business as KERN VALLEY)
 TRANSFER.)

Turcotte & Goldsmith, for James L. Chase, respondent.

F. S. Kohles, for Valley Express Co., Valley Motor Lines, Inc., Southern California Freight Lines, Southern California Freight Forwarders, California Motor Express Ltd., California Motor Transport Co., Ltd.; Leonard Colbert, for Sterling Transit Co.; Glanz & Russell by Arthur Glanz, for Desert Express and the Victorville-Barstow Truck Line, interested parties.

Elmer Sjostrom, for the Commission staff.

O P I N I O N

This is an investigation on the Commission's own motion into the operations of James L. Chase, doing business as Kern Valley Transfer, to determine whether he may have operated or may be operating as a highway common carrier between fixed termini or over regular routes, without first having obtained a certificate of public convenience and necessity as required by Section 1063 of the Public Utilities Code, between any or all of the following points: Los Angeles and Bakersfield, Los Angeles and Fresno, and Los Angeles and Lancaster.

A duly noticed public hearing was held in this matter before Examiner Donald B. Jarvis in Los Angeles on July 24, 1958, October 9, 10, 1958, and in Fresno on November 25, 1958. The matter was submitted subject to the filing of briefs. Extensive briefs were filed and the matter is now ready for decision.

At all times here involved respondent held the following permits issued by this Commission: Radial Highway Common Carrier Permit No. 15-5234, Highway Contract Carrier Permit No. 15-5235, City Carrier Permit No. 15-5237, and Household Goods Carrier Permit No. 15-5299. Respondent has never held and he does not now hold a certificate of public convenience and necessity issued by this Commission.

For the purposes of this proceeding the Commission staff utilized three test periods to which, initially, the production of evidence by the staff was primarily directed. These periods were November 18 through November 25, 1957; December 9 through December 13, 1957; and January 6 through January 10, 1958. The record clearly indicates that during each of these test periods respondent transported shipments daily between Los Angeles and Bakersfield, Los Angeles and Lancaster, and Los Angeles and Fresno. Respondent still transports shipments at least five days per week between these points. Respondent does not deny the fact of regular transportation between said points. He contends that these shipments were and are being lawfully carried by him under his highway contract carrier permit.

An assistant transportation representative of this Commission called upon respondent on February 7, 1958. At that time he examined respondent's freight bills for the period from October 1, 1957 to February 1, 1958. On the morning of February 7, 1958, respondent told the assistant transportation representative that he had approximately 50 contracts with shippers of freight and that three of these contracts were written and the rest were oral. Later that day, respondent gave to the assistant transportation representative a list of 52 firms with whom respondent alleged that he had contracts.

On March 11, 1958, the assistant transportation representative again called on respondent. At this time respondent gave the assistant transportation representative a supplemental list of firms with whom respondent alleged that he had contracts. In addition to these alleged contracts, freight bills examined by the assistant transportation representative for selected periods of time indicated eight other firms with which respondent alleged that he was hauling under contract. Thus on March 11, 1958, respondent claimed to be transporting freight as a contract carrier under 82 contracts.

The Order Instituting Investigation in this matter was filed on May 20, 1958. Respondent was served with a copy of the order. After service of the order was made, respondent, acting on the advice of counsel, attempted to secure as many written contracts as possible.

The number of alleged contracts held by respondent is not determinative of his status (Samuelson v. Public Utilities Commission, 36 Cal. 2d, 722). The nature of the alleged contracts, the circumstances under which they were entered into and the conduct of respondent in connection with them are important in determining whether there has been sufficient conduct to hold that respondent has been illegally operating as a highway common carrier.

At the hearing the Commission staff introduced in evidence a frequency exhibit compiled from an examination of respondent's freight bills between the points here involved, for the three test periods of November 18 through 22, 1957, December 9 through 13, 1957, and January 6 through 10, 1958. Portions of this exhibit have been challenged by respondent on the ground that certain shipments did not actually move between the points shown on the staff exhibit.

During the course of the hearing the respondent called a shipper witness who testified with respect to his dealings with respondent. Cross-examination elicited the fact that none of the regular shipments tendered by this shipper to respondent moved between any of the points named in the Order Instituting Investigation. Staff counsel representing the Commission moved to strike the testimony of the witness. The Examiner granted the motion on the ground that he would not permit either the respondent or the Commission staff to introduce evidence showing activities pertaining to areas outside the scope of the Order of Investigation. Respondent, long after the testimony of certain witnesses had been admitted

in evidence and the witnesses excused, moved to strike the testimony on the ground that the transportation rendered by respondent to the firms represented by these witnesses was not between any of the points indicated in the Order Instituting Investigation. The Examiner ruled as follows: "Now, in fairness to your client and because of the nature of the proceeding, I will examine the record with regard to the witnesses that you suggest. If it affirmatively appears from their testimony that the point of origin of the shipments involved was outside of the city of Los Angeles and if there is no testimony in the record, as I understand it, showing a point of origin in Los Angeles — and by that I mean certain testimony by Mr. Wilson with relation to the freight bills with regard to those companies — if there is none of that testimony, then the testimony of these witnesses will be disregarded." The Commission has carefully considered the testimony of these witnesses — Johnson, DeLara, Glaser and Lazercheck — and has concluded that the testimony should not be stricken.

Later in the proceeding the respondent, himself, testified about the location of certain of the businesses listed as consignors or consignees of freight on the staff's frequency exhibit for the three test periods. Respondent testified that although his own freight bills involving these consignors or consignees showed shipments originating or terminating in Bakersfield or Los Angeles, the places of business of these concerns were outside the corporate limits of Los Angeles or Bakersfield. Based upon this testimony, respondent moved to strike portions of the staff frequency exhibit. The motion was properly denied. Respondent, in his brief, concedes that there is a conflict in the evidence concerning the origin and destination of certain of the shipments listed on the staff's

frequency exhibit. Respondent testified that he had made an investigation to determine the "precise location of the places of business of the consignors and consignees" listed on the staff's frequency exhibit. He testified that the places of business of a number of these concerns were located outside the corporate limits of Bakersfield and Los Angeles. He stated that these were the places where shipments were picked up or delivered. However, he testified that he did not pick up or deliver any of the specific shipments listed on the staff's frequency exhibit.

This Commission has issued, under the authority of Public Utilities Code, Sections 3662 et seq and 3703, Minimum Rate Tariff No. 2, which provides minimum rates, rules and regulations for Radial Highway Common Carriers, Highway Contract Carriers and Household Goods Carriers. At the time of the test periods encompassed in the staff's frequency exhibit, Item 255-C of Minimum Rate Tariff No. 2 provided as follows:

"1. Issuance of Shipping Document. A shipping document (either in individual or manifest form) shall be issued by the carrier to the shipper for each shipment received for transportation. The shipping document shall show the following information:

- (a) Name of carrier.
- (b) Date of shipment.
- (c) Name of shipper and name of consignee.
- (d) Point of origin and point of destination.
..." (Emphasis added)

Violation of this provision is a misdemeanor (Public Utilities Code, Section 3802).

The freight bills in connection with the disputed points of origin and destination were prepared by respondent himself and show Bakersfield and Los Angeles as the points involved. In addition, representatives of several firms whose places of business were

listed by respondent as being outside the corporate limits of Bakersfield or Los Angeles testified at the hearing. It is clear from the testimony of those witnesses who talked about points of origin and destination that, although their firm's place of business might be outside the corporate limits of the cities, the shipments involved originated and were delivered to points within these cities.

The supervisor of shipping for the State Department of Education, Surplus Properties Division, testified that certain shipments hauled by respondent for that agency were "frozen when they are picked up at the terminal refrigeration in Los Angeles. They are transported to the various schools in Kern County ..."

The secretary-treasurer of the Mitchell Sales Company testified that the company was located in Alhambra. He further testified as follows (Tr. Vol. 2, pp. 190,191):

Q. "Have you ever entered into a contract, oral or written, with Kern Valley Transfer?"

A. "No."

Q. "Have you given shipments to Kern Valley Transfer?"

A. "Never - on one occasion only. The rest of the time it was indirectly through a carrier that calls on us and picked up for them."

Q. "On these indirect shipments, do you pay the transportation charges?"

A. "We are billed by Kern Valley, but these shipments are not picked up by the Kern Valley truck. They are picked up by another Kern Valley driver from their warehouse in Los Angeles. Our policy in the company is that everything over 200 pounds is shipped prepaid, yes."

It should be noted that even if the shipments disputed by respondent with respect to point of origin or point of destination were eliminated from consideration herein, the record shows that

respondent transported shipments daily during the three test periods covered in the staff's exhibit.

Having ascertained that respondent transported shipments daily between the points here involved during the three test periods, we look to the circumstances surrounding this transportation.

The evidence shows that during the three test periods and at the time of hearing, respondent had an agreement with the Orowheat Baking Company in Los Angeles. Respondent, under the terms of these agreements, has been picking up bakery goods at the Orowheat bakery in Los Angeles at 2:30 a.m. every day, including Saturdays, Sundays and holidays, and ~~delivering these goods to the~~ Orowheat distribution facilities in Bakersfield by 6:00 a.m. Respondent has been providing special equipment for this hauling. This special equipment consists of a truck with special racks installed at angles so that bread and other bakery goods can be loaded on the trucks in trays without special packaging. Also, respondent has installed heaters in these trucks to prevent freezing of the bakery goods during periods of cold weather.

At the time of the hearing in this matter, respondent was transporting bakery goods between Los Angeles and Bakersfield for the Weber and Van De Kamp's bakeries under agreements and operations similar to the Orowheat arrangements.

Prior to the three test periods, respondent had been approached by several Bakersfield bakery route drivers who had heard of the service that respondent was rendering to Orowheat. These drivers arranged to have respondent pick up in Los Angeles in the early morning hours various specialty bakery items which were delivered to them in Bakersfield at approximately 6:00 a.m. in the same equipment used for the Orowheat transportation. At the hearing, respondent introduced evidence to show current agreements with some of the bakery drivers.

Specialized hauling in and of itself does not delineate the difference between highway common carriage and contract carriage. This Commission has issued certificates of public convenience and necessity to operate as a highway common carrier for specialized types of transportation (See e.g., W. A. Fraser Trucking Co. (A-37073) 56 Cal. P.U.C. 474; Oilfields Trucking Co. (A-44262, etc.) 49 Cal. P.U.C. 713; Harry Steward, 48 Cal. P.U.C. 735; Re Western Parcel Service, 38 C.R.C. 755).

The Commission has carefully examined the record with respect to the bakery goods transportation by respondent during the three test periods and at the time of hearing. The Commission notes that this type of hauling, involving the special equipment heretofore enumerated, is not usually done by highway common carriers. The agreements for such transportation are designed to meet the specific needs of the consignors and consignees involved on a regular basis. The Commission finds that the transportation by respondent of bakery goods during the three test periods and at the time of the hearing in this matter was highway contract carriage. Shipments involving the transportation of bakery goods listed on the staff's frequency exhibit for the three test periods will not be considered in determining whether respondent was during these periods illegally operating as a highway common carrier between the points here involved. The bakery goods carriage will also be excluded in determining whether respondent is presently illegally operating as a highway common carrier between the points here involved.

Respondent contends that the shipments not involving bakery goods listed on the staff's frequency exhibit for the test periods were hauled "under contract" and that this transportation was not highway common carriage.

The Commission staff called as witnesses people representing some of the firms with which respondent alleged that he had contracts in his conversations on February 7, 1958 and March 11, 1958 with the assistant transportation representative, which firms also appear on the staff's frequency exhibit for the three test periods. These witnesses testified that at the time of the three test periods their companies did not have any transportation contracts with respondent.

Respondent produced witnesses representing other firms listed on the staff's frequency exhibit. These witnesses testified that their firms had oral contracts with respondent at the time the shipments listed in the frequency exhibit took place. However, cross-examination of these witnesses disclosed that these so-called oral contracts were nothing more than informal understandings, terminable at will, that if respondent gave good service the shipper would use him as desired. Two of the three written contracts respondent referred to in his February 7, 1958 conversation with the assistant transportation representative were with firms listed on the staff's frequency exhibit. These contracts were received in evidence and read as follows:

" TEMPORARY CONTRACT

This is a contract between Brasley-Cole Shoe Co., Ltd.
and Kern Valley Transfer of Bkfld. D.B.A as Jim's
Delivery Service.

Serving Bkfld. Shafter, Wasco, Delano, Taft, and Mohave.

Shipper agrees to pay rates set up by the Public
Utilities Commission.

(Sgd)
Brasley Cole Shoe Co.
per R S Long

J. L. Chase K.V.T. "

" JIM'S DELIVERY SERVICE

1025 Twenty-Sixth Street
Bakersfield, California
Phone 2-5787

It is agreed that this is a (temporary permanent) contract between Kern Valley Transfer, D.B.A Jim's Delivery Service, for transporting freight or new uncrated furniture from Los Angeles area to Bkfld, Shafter, Wasco, Arvin, Taft and way points.

Shipper to give all freight to Kern Valley Transfer to points served by them whenever possible.

Kern Valley Transfer agrees to making pickups daily with delivery the following day. It is clearly understood that Kern Valley Transfer operates as a Contract Carrier and does not hold their services open to the public.

Kern Valley Transfer to keep loads fully insured with Cargo Insurance.

Contract shall be void with dissatisfaction on either the Carrier or Shipper.

(Sgd)
The Du Bois Co. Inc.

by K H Karpowitz "

The alleged oral and written contracts between respondent and various shippers which were in effect at the time the shipments transported in the staff's frequency exhibit occurred created no different relationship than that which exists between a highway common carrier and its customers.

Respondent, anticipating the fact that the aforesaid alleged oral and written contracts do not in any way distinguish his operations from those of a highway common carrier, takes the alternate position that "contracts are not essential to constitute a contract carrier." Assuming, for the moment, that this contention is correct and that a special agreement is not necessary to a contract or private carrier status (but see People v. Duntley, 217 Cal. 150, 163), we examine the facts of record to determine whether respondent has acted as a highway common carrier.

The record clearly indicates that respondent, within the limits of his equipment, solicited and hauled, between the points here under consideration, all the profitable business he could obtain during the three test periods.

During the test periods respondent daily transported, between Los Angeles and Bakersfield, shipments including the following commodities:

Appliances, pump parts, caskets, meat, wire, varnish, household utensils, motors, drugs, machine parts, glue, electric equipment, crackers, mops, food, rubber, piles, lamps, cans, pipe, valves, soap, tractor parts, sliced apples, poultry, mattresses, plumbing supplies, cartons, reels, jacks, lard.

During the test periods he daily transported, between Los Angeles and Lancaster, shipments involving the following commodities:

Electric appliances, tractor parts, meat, tires, shoes, pipe, pipe fittings, caskets, drugs, wire blankets, pump parts, crackers, carpet lining, switches, varnish, advertising matter.

During the test periods respondent daily transported shipments between Los Angeles and Fresno, including the following commodities:

Rods, paper, wire, motors, pump parts, caskets, bars, tires, soap, meat, lamps, switches, drugs, crackers, hoist, carpet lining.

Respondent contends that the transportation heretofore enumerated differs from highway common carriage in two respects: (1) Respondent gives Saturday pickup and delivery. (2) Respondent arranges times of pickups and deliveries to the requirements of consignors and consignees.

Highway common carriers have the authority to render Saturday pickup and delivery service and in some areas of the state this is the practice (See e.g., William C. White, Decision 58297 in Application No. 40164; Henry Stovall, Decision 59029 in Application No. 40731). There is testimony in this record that

at least one highway common carrier gives a Saturday pickup and delivery service in the area here involved.

The providing of a Saturday pickup and delivery service to a consignor or consignee in an area where it is not otherwise available could in certain situations constitute that type of service embraced by the concept of contract carriage. However, except for the bakery goods situation, respondent does not give a regular Saturday pickup and delivery service to any particular consignor or consignee. Respondent runs regular Saturday schedules and operates on a will-call basis. Thus, respondent's Saturday service amounts to no more than a holding out that he will serve generally on Saturdays.

The fact that respondent arranges his schedules in an attempt to give consignors and consignees pickups or deliveries at requested times is not a distinguishing feature between contract and common carriage. All carriers try to accommodate their customers within the limits of their personnel and equipment. This is good business. The adoption of a competitive business practice is not a criterion upon which status should be determined.

Based upon the foregoing facts and other evidence of record, the Commission finds that during the periods of November 18 through November 22, 1957, December 9 through December 13, 1957, and January 6 through January 10, 1958, respondent operated daily as a highway common carrier without having obtained a certificate of public convenience and necessity between the following fixed termini: Los Angeles and Bakersfield, Los Angeles and Fresno, and Los Angeles and Lancaster.

At the time of the hearing in this matter, respondent still claimed to be operating to the points here involved under some of the oral contracts claimed during the three test periods. The evidence

dealing with these alleged oral contracts has previously been discussed and need not be repeated.

As indicated, after the Order Instituting Investigation was filed, respondent, acting upon the advice of counsel, attempted to procure as many written contracts as possible. At the hearing, respondent introduced in evidence those written contracts relating to the points here involved. The record discloses that, except for these written contracts, respondent was transporting shipments between the points here involved and conducting his business in the same manner as during the three test periods. We now consider the question of whether these written contracts have in any way changed the character of the transportation which respondent currently furnishes.

These written contracts are contained in a mimeographed blank form which reads as follows:

" MOTOR VEHICLE TRANSPORTATION CONTRACT

Date _____, 1958

TO: _____

Gentlemen:

This will reduce to writing our oral agreement made by KERN VALLEY TRANSFER, hereinafter designated as Carrier, and your company as Shipper/Consignee.

Pursuant to said agreement you hire Carrier to perform certain of your motor truck transportation requirements relative to shipment/receiving of goods, consisting principally of the following:

_____ between the
following points:

Carrier accepts such employment in the capacity of a Contract Carrier, and the parties hereto agree that such transportation shall be performed on the terms and conditions herein set forth:

1. Shipper/Consignee agrees to ship/accept, and Carrier agrees to transport, all (or _____ lbs. per _____) of the said goods which Shipper/Consignee shall have to be transported by truck during the life of this agreement, from and to the said points.
2. Shipper/Consignee agrees to pay Carrier, and Carrier agrees to accept from Shipper/Consignee, as compensation for said transportation, charges based on P.U.C. Minimum Rate Tariff No. 2.
3. This agreement shall continue for a period of one month after the date hereof and shall be renewed automatically for successive one-month periods thereafter, provided, however, that this contract is subject to cancellation by either party on thirty (30) days' notice in writing to the other.
4. Carrier shall transport and deliver said goods in good order and condition, and will be responsible for all loss or damage occurring during shipment except such as may be caused by an act of God, acts of the shipper or forces beyond Carrier's control. Carrier shall carry and maintain in full force during the term of this contract good and sufficient insurance covering the goods being transported.
5. Carrier agrees to furnish adequate equipment and capable drivers to perform said transportation and other incidental services herein contemplated in a prompt and efficient manner. Carrier agrees that it will at all times hold itself ready and able to perform said services within the limits of its equipment, upon call by Shipper/Consignee.
6. Termination of this agreement as provided herein shall in no way affect or void the rights accrued to either of the parties prior to said termination.

Please indicate your confirmation of the foregoing by signing below:

KERN VALLEY TRANSFER

By _____

A C C E P T A N C E

APPROVED and ACCEPTED this date.

Date: _____

(Name of Company)

By _____

(Address)

It should be noted that most of the obligations of the carrier enumerated in the blank form contract are obligations already imposed upon the carrier by law. The only additional obligations assumed by the carrier are to carry cargo insurance, charge the rates prescribed in Minimum Rate Tariff No. 2 and to furnish service as requested until the contract is cancelled on 30 days' notice given by either party thereto. As a practical matter most California truck carriers carry some amount of cargo insurance. Also, the minimum rates set forth in Minimum Rate Tariff No. 2 are the prevailing rates generally charged by truck carriers in California because of the extremely competitive conditions existing in the transportation industry in this state. A few of the executed form contracts have added provisions which, except for certain of the bakery goods contracts heretofore discussed, amount to the setting forth of accommodation pickup or delivery times with respect to the firms involved.

The obligations assumed by the firms which have entered into these contracts with respondent are nebulous. None of these firms has agreed to ship a minimum amount of freight in a given period of time. In many of the form contracts, paragraph 1 has been amended to read that the shipper agrees to ship by respondent all of previously enumerated commodities "that can be specified". The determination of what can be specified is left to the shipper. In other of the form contracts, paragraph 1 has been amended to read that the shipper agrees to ship by respondent whenever requested by a consignee. In these contracts there is no assurance that a consignee will ever request the shipper to ship to him by using respondent.

Many of the form contracts, as executed, are illusory. In addition, a witness who had signed one of these form contracts on behalf of his firm testified that the representative of Kern Valley, who requested him to sign the contract, told him that "it didn't mean very much." Two witnesses whose firms had signed form contracts with respondent testified that their firms did not consider these contracts to be binding.

Based upon the foregoing evidence and other evidence of record, the Commission finds that, except for certain bakery goods contracts heretofore discussed, the form contracts prepared by respondent and signed by various firms doing business with him are a sham and subterfuge to mask highway common carrier operations.

Based upon the evidence of record, the Commission finds that respondent is regularly transporting property as a highway common carrier without having obtained a certificate of public convenience and necessity between the following fixed termini: Los Angeles and Bakersfield, Los Angeles and Fresno, and Los Angeles and Lancaster.

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 that:


1. James L. Chase is hereby ordered to cease and desist from operating as a highway common carrier, unless he has first obtained a certificate of public convenience and necessity from this Commission to so operate, between the following points: Los Angeles and Bakersfield, Los Angeles and Fresno, and Los Angeles and Lancaster.

2. The radial highway common carrier permit, the highway contract carrier permit and the city carrier permit issued to James L. Chase are hereby suspended for a period of five consecutive days starting at 12:01 a.m. on the second Monday following the effective date of this order.

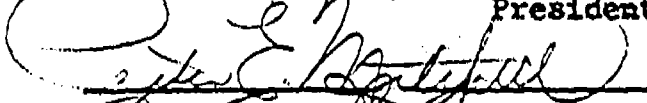
3. James L. Chase shall post at his terminal and station facilities used for receiving property from the public, not less than five days prior to the beginning of the suspension period, a notice to the public stating that his radial highway common carrier permit, highway contract carrier permit and city carrier permit have been suspended by the Commission for a period of five consecutive days; that within five days after such posting James L. Chase shall file with the Commission a copy of such notice, together with an affidavit setting forth the date and place of posting thereof.


The Secretary of the Commission is directed to cause personal service of this order to be made on James L. Chase and this order shall become effective twenty days after the date upon which said service is made.

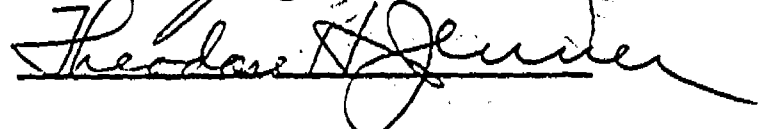
Dated at San Francisco, California, this 9th day of FEBRUARY, 1960.



 President







 Commissioners

-18- Commissioner G. Lyn Fox, being necessarily absent, did not participate in the disposition of this proceeding.