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Decision No. 76010

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Investigation on the Commission's own motion into the operations and practices of Nikkola Express, Inc.

Case No. 8816

Murchison, Stebbins & Davis, by Donald Murchison, for respondent.
Janice E. Kerr, Counsel, and J. B. Hannigan, for the Commission staff.

O P I N I O N

By its order dated July 9, 1968, the Commission instituted an investigation into the operations and practices of Nikkola Express, Inc. (Nikkola) for the purpose of determining whether respondent has operated or is operating as a highway common carrier between fixed termini, or over regular routes between the City of Los Angeles, on the one hand, and the Cities of San Bernardino, Riverside, Palm Springs, Rancho Mirage, Bakersfield, Porterville, Visalia, Hanford, Fresno, Oceanside, Escondido, San Diego, El Cajon, National City, and La Mesa, on the other hand, without first having obtained a certificate of public convenience and necessity as required by Section 1063 of the Public Utilities Code.

A public hearing was held before Examiner William N. Foley, at Los Angeles, California, on November 7 and 8, 1968. The matter was submitted on the latter date, subject to the filing of concurrent briefs on February 24, 1969.

It was stipulated that Nikkola holds Radial Highway Common Carrier Permit No. 19-50939, and Highway Contract Carrier Permit No. 19-50938. By Decision No. 75685, dated May 20, 1969, in

Application No. 48186, the respondent was granted a certificate of public convenience and necessity to operate as a highway common carrier for the transportation of new, blanket-wrapped furniture between all points and places located in the Los Angeles Basin Territory as described in Item No. 270 of Minimum Rate Tariff No. 2. The transportation under investigation herein concerns operations beyond the Los Angeles Basin.

The Commission staff takes the position that Nikkola is operating as a highway common carrier of new, blanket-wrapped furniture. It conducted an investigation into Nikkola's operations for the period, October-December, 1967. The staff investigator testified that Nikkola is a family corporation; that it has 15 employees, including six drivers, four office personnel and five furniture handlers who work on the loading dock, and that its gross operating revenue for the period July, 1967 to July, 1968 was $296,434. Its equipment includes seven 40-foot furniture vans, seven tractors and two "bobtail" truck units.

The witness testified that Nikkola accepts new, uncrated furniture at its terminal in Los Angeles for shipment to various locations; that immediate delivery is not guaranteed because some shipments remain at the terminal for consolidation with other shipments destined for the same point. The staff study (Exhibit No. 1) shows that Nikkola made deliveries between Los Angeles and the various points named above (see p. 1, supra) two or three times each week during the three one-week periods of October 9-13; November 13-18; and December 4-8, 1967. Some of the points were served four or five times per week. The number of shipments and the number of parties engaging the carrier's services, as shown in the staff's exhibit, are summarized below:

Los Angeles to	Total Number of Shipments	Total Number of Different Parties Engaging Carrier's Services
San Bernardino	94	29
Riverside	28	16
Palm Springs	56	17
Rancho Mirage	21	6
Bakersfield	98	31
Porterville	24	11
Visalia	40	20
Hanford	21	9
Fresno	172	49
Oceanside	34	18
Escondido	24	13
San Diego	243	71
El Cajon	40	17
National City	26	13
La Mesa	36	12

The staff introduced a list of points served by Nikkola (Exhibit No. 2). The staff witness testified that Nikkola's president related that the list is provided to potential customers solicited by it, and that such solicitation is accomplished by personal calls or through recommendation from a current customer. The staff also introduced respondent's listing in the telephone directory which states that it carries blanket-wrapped and cartoned furniture (Exhibit No. 3). The staff also presented a study which shows that Nikkola serves a very high percentage of the furniture dealers listed in the telephone directory at each of the destinations under investigation herein (Exhibit No. 4).

The witness testified that upon inquiring of Nikkola's president about the relationship with its customers, he was told that respondent had oral contracts with 20 shippers. For shipments not involving these 20 consignors there were oral contracts with the consignees (Tr. 21). The witness further stated that these contracts provided that Nikkola was to have all the other parties' business "as long as the service was adequate and that there was a low loss and damage ratio" (Tr. 35). He was told that there were no other

conditions or terms to the contracts; and the contracts did not cover a specified period of time (Tr. 35; 101). In reply to the staff's inquiry whether Nikkola accepted all shipments offered to it, the president stated that he would reject shipments only when it had space limitations. In such circumstances Nikkola would tender the shipment to another carrier which shared its loading facilities.

The staff witness further testified that he had observed the operations of two highway common carriers who transport new, uncrated furniture, among other goods. He concluded that their operations were substantially similar to Nikkola's.

Nikkola disputes the staff's contention that it is operating as a highway common carrier. It maintains that all the shipments under investigation were made pursuant to valid oral contracts in conformity with its operating authority as a highway contract carrier. It contends that its operations are specialized to one type of goods; it claims that its advertising is minimal and insufficient to constitute a holding out to the public that it is a carrier of new, uncrated furniture for anyone shipping that particular commodity.

Respondent presented its president to rebut the testimony of the staff witness. This witness denied making several of the statements attributed to him by the staff witness. He then explained the differences between his operations and those of the two highway common carriers observed by the staff as follows: that since an earlier staff investigation in 1965, Nikkola has not handled any merchandise other than new, uncrated furniture; that it does not guarantee overnight deliveries, but rather on occasion holds furniture for as long as two days until a full truckload is ready; that it neither accepts truckload shipments nor does it provide pick-up service; that it does not utilize the same type of vehicles, hand-trucks or

dollies as the common carriers do, while it does employ only specialized low-bed, high-roof van equipment designed specifically to carry light and bulky commodities such as new furniture; that Nikkola's employees are specially trained to handle blanket-wrapped furniture and such a commodity requires careful and specially trained expert handling, and that often these personnel perform nontransportation service such as carrying furniture beyond 25 feet from the point of delivery into the premises of the furniture store consignees and helping them arrange it for display; that Nikkola does not employ solicitors and only solicits shippers twice a year by personal calls of the president and his father; that the list of points served is not distributed promiscuously but instead is made available only upon request.

The witness further testified that he requires a contract from each of his customers. The witness drew a distinction between consignee and consignor, on the one hand, and the person who selects the carrier, on the other hand. According to the witness, Nikkola has oral contracts with the parties selecting it as the carrier. Some contracts are with the 20 major shippers described to the staff witness at the time of his investigation and other contracts are with consignees who have selected Nikkola as the carrier. The contracting party, or selector, is not necessarily the manufacturer of the furniture or the party who pays the freight bill.

It was stated that the terms of these oral contracts provide that the shipper or selector is required to give Nikkola all its merchandise. The time period of the contracts is indefinite (Tr. 138). Insurance is provided by Nikkola. The applicable minimum rates are charged and Nikkola pays for damaged merchandise. The witness also related that upon learning of any breach of one of these oral contracts,

he could sue the defaulting party, but that this remedy is impractical since any future business would probably be lost. As a result the witness said that he would call the particular furniture factory and attempt to settle the matter amicably (Tr. 241). Finally, the witness testified that the number of parties, either consignors or consignees, shown in Exhibit No. 1 as contracting parties with Nikkola, is erroneous because of joint-ownership relationships between entities operating under separate names.

Based upon the above described testimony, respondent contends that its operations are those of a highway contract carrier and that it has not held itself out to the general shipping public or a substantial portion thereof as a common carrier. It points to the minimum solicitation of business and the unique, distinctive and specialized characteristics of its operation in support of its position. We find otherwise and conclude that Nikkola has been operating as a highway common carrier.

Nikkola argues that the staff witness' testimony is entitled to little or no weight on the ground of lack of expertise. It points to the fact that before commencing employment with the Commission in 1962, the witness was employed by two railroads and that this proceeding involved his first investigation of furniture haulers. The Commission rejects this argument. The witness has been in the employ of the Commission for six years and has conducted investigations of general commodity common carriers. This experience qualifies him to review the shipping documents of a furniture hauler, inquire into the nature of its operations, and present testimony involving such carriers.

In California, a carrier's status is determined by resolving the question whether the carrier unequivocally intended to dedicate his property to public use (Samuelson v. Public Utilities Commission, 36 Cal. 2d 722 (1951); Souza v. Public Utilities Commission, 37 Cal.

2d 539 (1951); Alves v. Public Utilities Commission, 41 Cal. 2d 344 (1953); Nolan v. Public Utilities Commission, 41 Cal. 2d 392 (1953); Talsky v. Public Utilities Commission, 56 Cal. 2d 151 (1961)). This issue is determined by considering all the facts relating to the carrier's conduct of its operations. If this conduct demonstrates an intent to serve the public, and if the carrier is operating between fixed termini or over a regular route its status is that of a common carrier (Nolan v. Public Utilities Commission, supra, p. 397).

On the other hand, a highway contract carrier can also operate between fixed termini or over a regular route without attaining common carrier status if its operations show no intent to serve the public (Samuelson v. Public Utilities Commission, supra). Nikkola does not argue that it is not operating between fixed termini or over a regular route, but it insists that its operations constitute only highway contract carriage because every shipment is performed under a contract with the selector (either the consignor or consignee of the furniture) and because the restricted nature of its operations shows a lack of intent to serve the public or a substantial portion of it.

Respondent asserts that the limited or restricted nature of its operations demonstrates an absence of intent to serve the public or a substantial portion thereof. It points to the transportation of only one commodity, except for a few shipments of cartonized mattresses; its special equipment and trained personnel, and its lack of advertising and of pick-up service in support of this position. Apparently, this argument is based upon the "substantial restrictiveness" test applied by the Commission in the Samuelson case, supra, in order to distinguish between common and contract carriage. In Samuelson this test was rejected by the Supreme Court.

The record shows that except for space limitations Nikkola will serve that portion of the public made up of furniture manufacturers and dealers who ship new furniture. The mere fact that Nikkola transports only one commodity, that it is in effect a specialized carrier, does not prove absence of common carriage. It shows only an absence of intent to carry other commodities than new, uncrated furniture. As the Court noted in the Samuelson decision, common carriage results if the carrier's conduct amounts "to a public offer to carry for all who tender such goods as he is accustomed to carry" (Samuelson v Public Utilities Commission, supra, p. 730; emphasis added).

The question remains, therefore, whether Nikkola's operations demonstrate an intent to serve that portion of the public which ships new, uncrated furniture. We agree with the staff that several factors about respondent's conduct of its operations support the presence of such an intent. The staff witness testified that Nikkola's president informed him that it refuses shipments at its dock only if there is inadequate space available in its trucks (Tr. 36).[1/] In addition, the unrebutted testimony of the staff witness indicates an intent on the part of Nikkola to solicit new business and to accept it (Tr. 36). On cross-examination the staff witness refused to agree with counsel for Nikkola that the witness was told this solicitation was limited to calling upon current contract customers (Tr. 104). The availability of the list of points served containing the names of more than 100 communities and the testimony that the list was given to potential customers as well as current ones further supports the conclusion that Nikkola held itself out to serve the shippers of new furniture (Tr. 108).

1/ Nikkola's witness did not recall this conversation with the staff witness and stated that it carries furniture only for parties contracting with it (Tr. 134-5). We accept the testimony of the staff witness in this regard.

Respondent's testimony that the list is not distributed promiscuously by mail or otherwise is entitled to little weight. The important fact is that the list is available. It is not unreasonable to conclude from this fact that Nikkola is interested in serving these particular fixed termini for any shipper of new furniture. Such an interest indicates a considerable degree of holding out or intent to serve that portion of the shipping public which ships this commodity (Inv. of Fleetlines, Inc., 52 Cal. P.U.C. 298, 305 (1952)).

More significant than the above factors is the large number of shippers served by respondent. Nikkola carried furniture to the points involved herein for 132 furniture manufacturers during the three-week check period. Assuming that Nikkola's testimony concerning joint ownership is correct, this number is reduced only by ten, or to 122 manufacturers. The number of consignees totals 296 and the number of shipments 957. Leaving aside the 20 major consignors mentioned by respondent's witness, as well as whether the contracting party is the consignor or the consignee, Nikkola serves a very large number of shippers. This number is far larger than was present in the three cases in which the Court reversed the Commission's finding of common carriage: Samuelson (47 shippers); Souza (26 shippers); Alves (27 to 43 shippers); it is also greater than the number involved in the two cases in which the Court upheld such a finding: Nolan (20 to 25 shippers); Talsky (90 to 100 shippers). Nikkola's service to such a large number of shippers is strong evidence of an intent to serve the shipping public in the transportation of the commodity concerned.

Respondent submits alternative tests to ascertain whether common or private carriage is involved here (respondent's brief, p.31).

One is whether the carrier assigns specific vehicles for a continuous period to a particular shipper or selector; the other is whether the carrier furnishes services designed to meet the distinct needs of each customer. Under either test Nikkola fails to show private carriage. There was no testimony by its witness that it assigns vehicles to particular selectors or shippers. Its witness also conceded that insofar as new furniture is concerned its equipment is no different than that utilized by common carriers who transport such goods. The fact that some of Nikkola's deliveries are made beyond 25 feet of its trucks' tailgates is not distinctive enough to permit the conclusion that the result is a lack of common carriage.

The respondent's primary argument is that all its shipments are made pursuant to oral contracts, and therefore its operations remain within the limits of a highway contract carrier (respondent's brief, p. 27). The testimony is in conflict and no shipper or selector of Nikkola's service testified to confirm or deny the existence of any of these contracts. Upon weighing the evidence we accept the position of the staff that these oral contracts are only vague, nebulous understandings.

While we agree with respondent that there is no requirement that a contract carrier's agreements be reduced to writing, the record shows that the circumstances surrounding Nikkola's contracts, as well as their terms, are not clear or convincing. The staff witness testified that he was told Nikkola had contracts with twenty consignors who controlled the freight. Respondent's witness did not recall this conversation and testified that the contracts are with the selectors, who may be either consignors or consignees, and that the twenty consignors were only his major shippers. The number of such contracts

is great, at least 200 (staff brief, p. 11). While the staff witness testified that he was informed of only two terms (exclusive carriage by Nikkola and a low damage ratio), the respondent's witness testified to various other understood terms. Both witnesses testified that the contracts are not for any specified period of time (Tr. 101; 138). When asked about the origin of one of these contracts, Nikkola's witness could only say that it was with a man named "Joe" and that it had been agreed to four or five years earlier (Tr. 217). He could not recall where or when another was agreed to (Tr. 202). He readily admitted that legal enforcement of any of the agreements had never been attempted, and that his remedy for any breach was moral persuasion (Tr. 240-1).

After reading the record as a whole, and upon weighing the testimony of each witness, we conclude that these alleged oral contracts are too vague and nebulous to permit a finding of contract carriage (Inv. A. C. Woodard (Circle Transportation Co.), 44 CRC 711, 714 (1943); Inv. Edward L. Stratton (Stratton Truck Lines), 56 Cal. P.U.C. 129, 130-1 (1958)). We believe that the evidence is insufficient to find that respondent is operating by contract. We conclude that Nikkola holds itself out to transport any shipment of new furniture to the points involved herein, subject to the availability of space; and that it is operating as a common carrier of such furniture. We also conclude that suspension of respondent's present operating authority is not justified.

Findings of Fact

1. Respondent has conducted transportation operations between its terminal in Los Angeles and the fifteen points set forth at page 1 of this opinion at least two or three times each week.

2. Based upon the facts and reasons set forth in the opinion above, respondent has held itself out to serve that portion of the shipping public which ships new, uncrated furniture, and respondent has been conducting an unrestricted transportation service of this commodity.

3. The facts surrounding the formation of the oral contracts, and the terms of these contracts, under which respondent purports to operate, are so vague and uncertain that we cannot reasonably conclude that respondent operates exclusively pursuant to contract.

Conclusion of Law

Nikkola Express, Inc. has operated as a highway common carrier, as defined in Section 213 of the Public Utilities Code, without first having obtained a certificate of public convenience and necessity from this Commission as required by Section 1063 of said code.

O R D E R

IT IS ORDERED that Nikkola Express, Inc. cease and desist from operating any auto truck as a highway common carrier, as defined in Section 213 of the Public Utilities Code, between the following termini: Los Angeles, on the one hand, and San Bernardino, Riverside, Palm Springs, Rancho Mirage, Bakersfield, Porterville, Visalia, Hanford, Fresno, Oceanside, Escondido, San Diego, El Cajon, National City, and La Mesa, on the other hand, unless or until it shall first

have obtained from this Commission a certificate of public convenience and necessity authorizing such operation as required by Section 1063 of said code.

The Secretary of the Commission is directed to cause personal service of this decision and order to be made upon the respondent. The effective date of this order shall be twenty days after completion of such service.

Dated at San Francisco, California, this 12th day of AUGUST, 1969.

William Symons, Jr.
President

Commissioners

Commissioner J. P. Vukasin, Jr., being necessarily absent, did not participate in the disposition of this proceeding.