

Decision 99-10-067 October 21, 1999

**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA**

In the Matter of the Application of Antone Sylvester Tug Service, Inc. for a Certificate of Public Convenience and Necessity as a Common Carrier of Property by Vessel between Points in the Los Angeles, Long Beach, and Redondo Beach Harbor Areas, on the One Hand, and, on the Other, Points on Santa Catalina Island.

Application 99-01-018  
(Filed January 19, 1999)  
(Amended April 2, 1999)

John G. Lyons, Attorney at Law, for Antone Sylvester Tug Service, Inc., applicant.  
Patrick J. Richard, Attorney at Law, for Catalina Freight Line, protestant.

**O P I N I O N**

**Summary**

This decision authorizes Antone Sylvester Tug Service, Inc., (Sylvester) to transport property by vessel between all points in the Los Angeles, Long Beach, and Redondo Beach harbor areas, on the one hand, and all points on Santa Catalina Island excluding Avalon and the Isthmus, on the other.

**Background**

Sylvester performs unregulated tug and towboat operations in the Los Angeles, Long Beach, El Segundo, and Redondo Beach harbor areas, and operates as a common carrier by vessel (VCC-75) transporting passengers and their baggage and/or property between all points in the Los Angeles, Long Beach, and Redondo Beach harbors, ships inside and outside those harbor

areas, and points offshore of Los Angeles County. The Commission granted Sylvester its present authority in Decision (D.) 96-09-029 and D.98-11-053.

Sylvester filed the original application January 19, 1999 requesting authority to serve between the mainland harbor areas and all points on Santa Catalina Island. Catalina Freight Line (CFL) (VCC-58), which also offers cross-channel freight service, filed a timely protest opposing the application in its entirety. At the March 2<sup>nd</sup> prehearing conference, assigned Administrative Law Judge (ALJ) McVicar directed Sylvester to amend the application to include its complete showing. The April 2<sup>nd</sup> amended application included additional support in the form of a statement from Sylvester's vice president, letters from would-be shippers, and various other materials, and it narrowed the area Sylvester proposed to serve on Santa Catalina Island to exclude Avalon and the Isthmus. CFL once again protested. The assigned Commissioner issued his scoping ruling on June 11, the ALJ held an evidentiary hearing on July 20, and the proceeding was submitted upon the receipt of briefs and one late-filed exhibit on August 24, 1999.

### **Discussion**

Pub. Util. Code § 1007 requires, "No corporation or person shall begin to operate or cause to be operated any vessel for the transportation of persons or property, for compensation, between points in this state, without first having obtained from the commission a certificate declaring that public convenience and necessity require such operation...." In examining Sylvester's request, we first address the issue of public convenience and necessity for the service, then Sylvester's fitness to provide it. Note, however, that the public convenience and

necessity test can be considered as encompassing fitness as well.<sup>1</sup> At each step we will review the related concerns that CFL has raised in opposition.

### **Need for the Service**

To appreciate both Sylvester's showing in favor of and CFL's against certificating a new vessel freight service requires an understanding of the distinct characteristics of their offerings. CFL transports all types of freight between its terminal in Wilmington and freight ramps near Avalon and the Isthmus on Santa Catalina Island, in semi-trailers which are rolled onto and off of barges moved across the channel by tugs. CFL's tariff lists cross-channel service *only* to these two island destinations, but CFL arranges to have its affiliate, Seaway Company of Catalina, truck goods without additional charge from Avalon and the Isthmus to its shippers on many other parts of the island. In some cases, shippers make their own arrangements to move freight from CFL's island ramps to distant island locations. Cross-channel charges are based on weight. During the busy summer season, CFL runs five and sometimes six round trip barges weekly, tapering down to perhaps three round trips weekly during the winter. It characterizes this as "scheduled service," although there is no schedule published in the tariffs or elsewhere shippers may refer to, and the carrier varies the number of weekly trips and departure times depending on demand and tides. CFL has apparently from time to time also used its barges to provide non-tariffed service directly to island destinations other than Avalon and the Isthmus.

---

<sup>1</sup> "Public convenience and necessity is a test which encompasses a broad view of the needs of the particular class of public concerned, as well as the requirement that the applicant for a certificate establish reasonable fitness and financial responsibility to conduct the proposed service." (*Pacific Towboat and Salvage* (1982) 9 CPUC2d 475, 482.)

Sylvester, by contrast, proposes to provide year-round, "on-call" service at hourly or daily rates upon six hours' notice by the shipper, between mainland harbor points and all points on the island *except* Avalon and the Isthmus.

Sylvester would use a variety of tugs, barges, crew boats and other listed vessels, several of which are able to deliver goods directly ashore to the island's many isolated beach, camp and cove locations. Sylvester, too, has provided non-tariffed, non-certificated service to island points over the past several years.

Sylvester maintains that it will offer service with equipment better adapted to the needs of shippers than that operated by CFL. In support, it introduced letters from seven shippers who have used Sylvester's services over the past several years and desire to continue doing so. Representatives of three of those shippers testified on Sylvester's behalf in the evidentiary hearing, and a number of common themes ran through the letters and testimony: many locations on the island are not accessible by road, so all deliveries to them have to be made directly to the beaches; to offload CFL's barges they have to build out from the beaches temporary earthen ramps that are intrusive, muddy the water and cause undesirable siltation; direct delivery onshore by CFL's large barges can be useful for some purposes, but Sylvester's vessels are more cost-effective for smaller loads to meet ongoing needs for provisions such as perishable foodstuffs, building supplies and equipment, and solid waste, recycling and septic container removals; and Sylvester's smaller vessels, particularly its LCM which has a front ramp that can be lowered to deliver directly to the beach, permit convenient deliveries in restricted areas where moorings, swim lines, floats and the like would otherwise have to be moved at great inconvenience to accommodate barges. Several shippers indicated they would also continue to use CFL for some deliveries such as major annual reprovisioning where bringing in a large barge can be justified, or where there is road access from CFL's terminus in Avalon.

Shippers were explicit, however, in their desire to be able to choose from more than one provider offering varied services depending on their needs.

CFL counters that there is no public need for Sylvester's offering because CFL has met shippers' requirements with its barges and overland freight forwarding capabilities as the sole Commission-certificated cross-channel bulk freight carrier for some 30 years. CFL's general manager and chief operating officer testified that he knows through personal discussions with many of Sylvester's would-be shippers that the vast majority, if not all, would prefer CFL's services to Sylvester's. The record does indicate that several Sylvester supporters would continue to use CFL for some services, even as they use Sylvester for others. It does not demonstrate a preference for one carrier over the other under all circumstances, or that there is no need for Sylvester's service.

CFL argues as well that certifying an additional freight carrier would threaten CFL's financial viability and jeopardize the company's daily, year-round service to Santa Catalina Island. CFL's witness testified that cross-channel demand has remained relatively flat through the 1990's, and with two tugs and two barges, CFL could make up to two cross-channel round trips daily and thus is easily capable of handling cross-channel shipping growth well into the future. The accompanying data he presented, however, show that shipping weight rose to 37,000,000 pounds<sup>2</sup> in 1998 from about 31,000,000 in 1991 and revenues rose to about \$1.9 million from about \$1.55 million during the same period. To certificate Sylvester does not require that we find that its entry will

---

<sup>2</sup> Although the witness testified these figures are in tons, they are almost certainly not. In any case, the unit matters little here since their point is to gauge market growth over time.

have no detrimental effects on CFL. It is well-established that the Commission will not limit carrier entry into the water vessel market simply to protect the interests of existing carriers, but will allow competition whenever to do so is not adverse to the public interest.<sup>3</sup> There seems little doubt that allowing Sylvester into the cross-channel market will apply competitive pressure to CFL. CFL's attempt to extend that argument to show harm to the public is much less convincing.

CFL points out that Sylvester has not identified in the application its access rights to piers or docks anywhere on the island. Indeed, in its protest CFL claims to have secured an exclusive lease for what it claims are the only two ramps and docks on the island suitable for transferring bulk freight, one near Avalon and the other near the Isthmus. Sylvester and each of its shippers who have written or testified make clear, however, that the ability to deliver directly ashore without need of dock or pier is perhaps Sylvester's greatest strength.

In modifying its request to exclude service to Avalon and the Isthmus, Sylvester set itself up to contend that it would not be competing with CFL because CFL's tariffs hold out service *only* to those two island locations. And, Sylvester notes, CFL's claim that certifying an on-call carrier would jeopardize the island's only scheduled cross-channel service cannot be so since CFL is not tariffed to provide scheduled service. These are ingenious but unnecessary contentions. CFL may not provide scheduled service in the classic sense, but from a shipper's viewpoint its service offering is regular and clearly distinguishable from the on-call service Sylvester would offer. And CFL may

---

<sup>3</sup> *Pacific Towboat and Salvage* (1982) 9 CPUC2d 475, 486, D.82-07-110; and *Harbor Bay Maritime* (1992) 43 CPUC2d 465, 471, D.92-03-040.

show only Avalon and the Isthmus in its tariffs, but it is equally clearly offering to see that cross-channel freight is conveyed to many other island destinations. In certificating Sylvester, we would be enabling most shippers to chose between two cross-channel freight carriers with overlapping capabilities but different strengths depending on shippers' needs.

We conclude that the public convenience and necessity require the service Sylvester would provide.

### **Sylvester's Fitness**

Sylvester is already certificated as a vessel common carrier in the mainland harbor areas. The application as amended provides specifications for nine vessels it would make available for cross-channel service. According to the application, its president has over 42 years' experience operating vessels for Sylvester, its vice president over 18 years, and a third employee over 16. All of its captains are United States Coast Guard certified and its crews are experienced. Contrary to CFL's contentions, Sylvester's unaudited financial statements attached to the application give no indication that Sylvester is other than fully capable of supporting the service and facilities it proposes to offer.

Sylvester acknowledges having provided cross-channel freight service to a number of Santa Catalina Island destinations since 1997. CFL views these as illegal operations that have siphoned off revenues it would have received as the only Commission-certificated cross-channel bulk freight carrier. CFL protests that this fact alone demonstrates Sylvester to be unfit and is sufficient grounds for the Commission to deny it a certificate. On cross-examination, however, Sylvester's vice president clouded the issue by responding that he initially thought no certificate was needed because four of its vessels are under 5 tons net register, one of the criteria set forth in Pub. Util. Code § 238 for exemption from

Commission jurisdiction. The Christopher G, Sylvester's LCM which was mentioned as the vessel most often used for delivering freight directly onto shippers' island beaches, is among them. And, according to Sylvester's witness, corroborated by shipper witnesses' testimony, CFL likewise may have from time to time exceeded its tariff authority by providing chartered barge service directly to island destinations other than Avalon and the Isthmus. Considering the uncertainties, we are not inclined to give significant weight to the charges of either against the other here.

Sylvester is indeed fit to provide cross-channel service as it proposes.

The Commission has previously favored greater competition in certificating vessel services, and we will continue to apply that policy in this proceeding. "We have concluded that, in the transportation field, public convenience and necessity should be liberally construed, and that competition should be encouraged. We are also inclined to ensure that the fullest range of common carrier service is made available to the public."<sup>4</sup> Having found that the public convenience and necessity require Sylvester to provide the cross-channel service it proposes, and having found Sylvester fit to provide that service, we will grant Sylvester the authority it seeks.

### **Comments on Proposed Decision**

The principal hearing officer's proposed decision in this matter was filed with the Commission and served on all parties in accordance with Pub. Util. Code § 311(d) and Rule 77.1 of the Rules of Practice and Procedure. CFL filed comments in large part rearguing its position and advancing new arguments in

---

<sup>4</sup> *Pacific Towboat and Salvage* (1982) 9 CPUC2d 475, 483, D.82-07-110.



opposition to the application. CFL did point out an error in Appendix VCC-75 and that error has been corrected.

### **Findings of Fact**

1. Sylvester proposes to offer year-round, on-call vessel common carrier freight service at hourly rates between the mainland and points on Santa Catalina Island excluding Avalon and the Isthmus.

2. CFL provides vessel common carrier freight service at per-pound rates on a regular basis between the mainland on one hand, and Avalon and the Isthmus on Santa Catalina Island on the other. It is not tariffed to provide on-call vessel common carrier service, or vessel common carrier service to other points on Santa Catalina Island.

3. No vessel common carrier currently offers Commission-regulated on-call freight service between the mainland and any point on Santa Catalina Island.

4. Sylvester and CFL would compete for much of the same cross-channel shipping business, and each would offer to shippers advantages not available from the other.

5. There is a public need for the service Sylvester would provide.

6. Sylvester is operationally and financially fit to provide the service it proposes.

### **Conclusions of Law**

1. The public convenience and necessity require Sylvester to provide the cross-channel service it proposes in Application 99-01-018 as amended. Sylvester should be authorized to provide the service.

2. Catalina Freight Line's protest of Sylvester's amended application should be denied.

3. The order that follows should be made effective immediately so that Sylvester may begin offering service without delay.

## O R D E R

### IT IS ORDERED that:

1. Antone Sylvester Tug Service, Inc., (Sylvester) is authorized to transport property by vessel between all points in the Los Angeles, Long Beach, and Redondo Beach harbor areas, on the one hand, and all points on Santa Catalina Island excluding Avalon and the Isthmus, on the other. Sylvester's certificate of public convenience and necessity is amended by replacing Original Pages 1 and 2 with the corresponding revised pages included as Appendix VCC-75 to this decision.

2. To implement the authority granted in this decision, Sylvester shall:

- a. File with the Commission's Rail Safety and Carriers Division, within 30 days after the effective date of this order, written acceptance of this authority and the corresponding revised certificate of public convenience and necessity pages set forth in Appendix VCC-75 to this decision.
- b. File revised tariffs and begin offering the authorized service within 120 days after the effective date of this order. Revised tariffs shall become effective 10 days after filing and shall state the date service will begin.

3. Catalina Freight Line's protest of Sylvester's amended application is denied.

A.99-01-018 ALJ/JCM/mrj

4. Application 99-01-018 is closed.

This order is effective today.

Dated October 21, 1999, at San Francisco, California.

RICHARD A. BILAS

President

HENRY M. DUQUE

JOSIAH L. NEEPER

JOEL Z. HYATT

CARL W. WOOD

Commissioners

SECTION I. GENERAL AUTHORIZATIONS, RESTRICTIONS, LIMITATIONS,  
AND SPECIFICATIONS.

Antone Sylvester Tug Service, Inc., a corporation, by the certificate of public convenience and necessity granted by the decision noted in the foot of the margin, is authorized to conduct nonscheduled\* common carrier services by vessel\* for the transportation of passengers and their baggage, and/or property, between the points described in Section II subject to the following provisions:

- a. No vessel shall be operated unless it has met all applicable safety requirements, including those of the United States Coast Guard.
- b. Nonscheduled service under Section II.A.\* shall be operated on an on-call basis. The term "on-call" refers to service which is authorized to be rendered dependent on the demands of the passengers and/or its customers. The tariffs and timetables shall show the conditions under which each authorized on-call service will be rendered.
- \*c. Transportation of passengers and their baggage shall not be performed between points in Section II.B.
- \*d. The Isthmus includes Isthmus Cove, defined as landward of a line drawn between 33°26'45" N latitude, 118°29'54" W Longitude and 33°26'37" N latitude, 118°29'27" W longitude, and Catalina Harbor, defined as landward of a line drawn between 33°25'20" N latitude, 118°30'45" W Longitude and 33°25'35" N latitude, 118°30'22" W longitude.

SECTION II. ROUTE DESCRIPTION.

A. **Los Angeles Harbors**

Between all points in the Los Angeles, Long Beach, and Redondo Beach Harbors, ships inside and outside these harbor areas, and points offshore of Los Angeles County.

B. **\*Los Angeles Harbors/Santa Catalina Island**

Between all points in the Los Angeles, Long Beach and Redondo Beach harbor areas, on the one hand, and all points and places on Santa Catalina Island except Avalon and the Isthmus, on the other hand.