

August 12, 1948

Judge

The Hon. Wilson T. Wright
The Hon. Wm. T. Brooks
The Hon. Yale McFate
Corporation Commission
Capitol Annex
Phoenix, Arizona

LAW LIBRARY
ARIZONA ATTORNEY GENERAL

Gentlemen:

RE: Docket MV-12224: Application
of Fred L. Clark for a Contract
Carrier's Permit

RECOMMENDATION:

In accordance with your request for the recommendations of this office on the matter of Fred L. Clark's application for a contract carrier's permit, it is our belief that all motions to dismiss the application should be denied and the permit should be granted as per his amended application Dated July 15, 1948, authorizing his operation as a contract carrier for the transportation of lumber, mine timber, explosives, fuel oil and mining machinery materials and supplies in a radius of twenty-five (25) miles of the site of San Manuel Copper Corporation operations near Tiger, Pinal County, Arizona.

However, it is our belief that Mr. Clark's application to transport cement between Rillito, Arizona and the site of the San Manuel Copper Corporation near Tiger, Pinal County, Arizona, be denied without prejudice to his being able to file application with proper notice for this extension of the subject contract carrier's permit. In addition, the subject contract carrier's permit should definitely limit him to hauling for no more than the two mines covered by this and his previous permit. The reasons for our conclusions are as follows:

1. THE MINES ARE THE CONSIGNORS

It is our belief that the San Manuel and St. Anthony mines, by taking title at their railheads in Winkelman and Hayden, to the goods shipped to them from all over the country become at those railheads both the consignees (as to the companies which ship them the supplies) and the consignors (as to their own mine sites to which these supplies are sent by them from their railheads).

2. SECTION 66-501, A.C.A., 1939, PUTS THE BURDEN OF PROOF ON A
CARRIER FOR MORE THAN ONE CONSIGNOR TO SHOW THAT HE IS NOT A
COMMON CARRIER

Section 66-501 states in part as follows:

"The transportation for more than one (1) consignor, by any motor carrier, shall be prima facie evidence that such motor carrier is acting as a common carrier."

It is well settled by the United States Supreme Court that the legislature may not, by statute, convert a contract carrier into a common carrier.

Mich. Pub. U. Comm. v. Duke, 266 U.S.
570, 69 L. Ed. 445, 36 A.L.R. 1105;

Stephenson v. Binford, 287 U.S. 251,
77 L. Ed. 288, 87 A.L.R. 721

Therefore, all the above statute can do is to put the burden of proof on the applicant to show that if he does desire to haul for more than one consignor he is still not holding himself out to the public generally as a common carrier.

The transcript shows that the certified common carrier in this area had hauled for the people of the area before San Manuel Mine became a substantial customer and that Mr. Clark's hauling for the mine does not in effect constitute a holding out to the public generally in that area.

3. THE EFFECT OF SECTION 66-507, A.C.A., 1939

This section states that a contract carrier's permit "may be granted on such limitations, terms and conditions as the commission may prescribe", if, among other things the commission finds that the privilege sought will not "impair the condition or maintenance of such highways, directly or indirectly, by impairing the efficient public service of any authorized common motor carrier then adequately serving the same territory".

At best this is a most ambiguous statute and, as yet, has not been interpreted by our Supreme Court. The two most possible interpretations are:

- (1) That a contract carrier will not be certified if, by so doing, it is

found that he will injure the condition of the highways to the injury of the common carriers using those highways.

- (2) A contract carrier will not be certified if such will injure the profitableness of the business of the then certified common carrier to the extent that the common carrier can no longer give efficient service to the public concerned.

The first interpretation seems to be the more literal one, but has the disadvantage of making very little sense as a practical matter.

The second interpretation has the disadvantage of requiring broad liberties to be taken with the actual language of the statute, but it has the advantage of making sense and coinciding with our principle of regulated monopoly in this field. Some states have statutes which more clearly state an intention coincident with the second interpretation. These statutes have been sustained on the theory that it is to the interest of the public generally to see that a common carrier is protected (at least to the extent that he will not be forced out of business by the certification of too many contract carriers in his area) in order that, in that area, the general public, aside from those contracting with contract carriers, can always be assured of the availability of service.

Pond, Public Utilities (3d Ed.), Sec. 775;

Elliott, Roads and Streets (4th Ed.) Sec. 1171.25;

Maine Motor Coaches v. Public Utilities
Comm., 125 Me. 63, 130 Atl. 866;

Re James, 99 Vt. 265, PUR 1926C, 132
Atl. 40;

Re Maynard Barney, PUR 1932A p. 241;

Public Service Com. v. Grimshaw, 49 Wyo.
158, 53 P. 2d 1, 109 A.L.R. 534, and
see ann. beginning p. 550.

The transcript shows that the San Manuel operations constitute,

in effect, new business and so much new business that both the contract and common carriers will be benefited thereby. There apparently was enough business to justify the certification of a common carrier before the advent of the San Manuel operations. His lot now will, if anything, be improved. These circumstances make it difficult to justify a claim of hardship on the part of the common carrier showing him to be squeezed out of business by the certification of this contract carrier assuming the second interpretation of the statute to be correct.

If the first interpretation of the statute is correct, certainly there is no evidence presented that Mr. Clark's trucking would in anyway tear up, overcrowd or injure the roads to the detriment of the common carrier.

4. NOTICE

Objections have been made by the attorneys representing certified common carriers to the fact that no notice was given for the application for the permit as amended to a radius of twenty-five miles.

Good and sufficient notice was given for this application before it was amended and when it included a radius of fifty miles from the base of operations. And the Commission's records show that the hearing on the amended application was not a new hearing but merely a continuation of the original hearing. We believe that notice to be sufficient, for all of the interested parties having information of the first hearing constituted a larger group and included all and many more than would be interested in the amended petition for a lesser area.

An exception, however, must be made for the Rillito haul for the reason that the transcript suggests Rillito to be even beyond the fifty mile radius limit and no notice was given at any time for this part of the application. It is for this reason that we believe the permit should be issued excluding the Rillito haul but without prejudice to the applicant's applying for this extension to this certificate upon proper notice and hearing.

Other technical objections were to the effect that no contract was filed with the application as per the Commission's General Order #147-A and in fact the contract was not filed until the 29th of July. Also, no application for a rehearing or reopening was filed as per article 16 of the Corporation Commission's General Rules. These objections seem to be technically valid, however, nothing in the transcript indicates that the contesting parties were or could in anyway be

Corporation Commission
Phoenix, Arizona

Page Five
August 12, 1948

prejudiced by these slight technical slips in procedure, and all statutory requirements seem to have been complied with.

If there are any questions as to the results we have reached or supporting reasoning therefor, we would be happy to amplify this.

Very truly yours,

EVO De CONCINI
Attorney General

EDWARD JACOBSON
Assistant Attorney General

EJ:lh

cc: Richard Minne, c/o Minne & Sorenson
Title & Trust Bldg., Phoenix
Burr Sutter, c/o Jennings, Strouss, Salmon & Trask
Title & Trust Bldg., Phoenix
Thos Chandler, c/o Darnell, Robertson, Holesapple,
Valley Nat'l Bldg., Tucson, Arizona
C. Leo Guynn, c/o Guynn & Twitty
Title & Trust Bldg., Phoenix