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Decision No. 24289

BEFORE THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of GEORGE G. HARM and HAROLD B. FRASHER, doing business under the firm name and style of Valley Motor Lines, for a certificate of public convenience and necessity to operate an auto truck service, as a common carrier of property, for compensation, over the public highways between Oakland, Alameda, Berkeley and Emeryville, on the one hand, and Manteca, Fresno and intermediate points on the other; also from San Francisco to points north of Fresno, to and including Manteca, California.	Application No.16176

Sanborn, Roehl, Smith & Brookman, by A. B. Roehl for the applicant.
William F. Brooks, for The Atchison, Topeka & Santa Fe Railway Company, Protestant.
W. S. Johnson, for Southern Pacific Company, Protestant.
A. S. Hutchison and L. N. Bradshaw, for Western Pacific Railroad Company, Tidewater Southern Railway Company, and Western Pacific California Railroad Company, Protestants.
Edward Stern, for Railway Express Agency, Incorporated, Protestant.
Hal M. Remington, for San Francisco Chamber of Commerce, interested party.
W. G. Stone, for Sacramento Wholesalers and Manufacturers Association, interested party.
Edmund G. Wilcox, for Oakland Chamber of Commerce.

BY THE COMMISSION -

OPINION ON REHEARING

By Decision No.23949, issued on August 16, 1931, this Commission granted to Valley Motor Lines, Inc., a certificate of public convenience and necessity authorizing it to give, in connection with and as part of its through auto trucking service between San Francisco and Fresno, a service between San Francisco and certain East Bay points and all intermediate points between

Fresno and Manteca, including Manteca. Protestants Atchison, Topeka and Santa Fe Railway Company, Pacific Motor Transport Company, Railway Express Agency, Inc., and Southern Pacific Company applied for a rehearing and on October 26, 1931, after oral argument thereon, held by the Commission en banc, the Commission made its order granting said rehearing. Rehearing was sought principally on the ground that petitioners had been duly restricted in their proofs as to

(a) The existence on and prior to December 19, 1929, (the date of filing the application herein) of a comprehensive plan for the establishment of store-door, pick-up and delivery service in connection with rail transportation and which was in process of being consummated with reasonable diligence, and

(b) The qualifications and fitness of the applicants to perform the service sought,

and the order granting said rehearing limited it to the presentation of further evidence in respect to the two matters specifically set forth.

A public hearing was held, evidence heard and an order of submission made.

Such evidence as was offered regarding the fitness and qualifications of applicant to perform the service does not justify any other conclusion than that implied by the original order, namely, that applicant is fully qualified and fit to perform the service authorized therein.

The Commission will, therefore, concern itself with the proper application of the rule dealing with the conditions under which competition will be admitted or denied in a field already served by an existing utility - a rule announced some eighteen years ago in an opinion by the Commission in Pacific Gas and Electric Co. v. Great Western Power Co., 1 C.R.C. 203,

and which has since been uniformly adhered to by the Commission. (Re Oro Electric Co., 2 C.R.C. 748, 770; re United Parcel of Los Angeles, 32 C.R.C. 82, 99; re Truckee River Power Co., 32 C.R.C. 72; re Auto Ferry Co., 34 C.R.C. 201. Its soundness is not seriously questioned by the protestants.

Briefly, and so far as here material, it is that "only until the time of threatened competition shall the existing utility be allowed to put itself in such a position with reference to its patrons that this Commission may find that such patrons are adequately served at reasonable rates" and be protected against the admission of a new comer into its general field. The philosophy of this rule or principle cannot be better expressed than by quoting from the decision:

> "By announcing this principle, we hope we shall hold out to the existing utilities an incentive which will induce them voluntarily, without burdening this Commission, or other governmental authorities, to accord to the communities of this State those rates and that service to which they are in justice entitled, and to the new utilities we shall likewise hold out the incentive that on the discovery by them of territory which is not accorded reasonable service and just rates, they may have the privilege of entering therein if they are willing to accord fair treatment to such territory."

The application herein is by a truck operator duly certificated to perform a general trucking service between San Francisco and Fresno to extend this service to points intermediate between Manteca and Fresno, thus giving to these points what is generally termed a store-door, pick-up and delivery service. Applicant also sought authority to serve between Oakland and other East Bay points and the Manteca-Fresno territory. It was admitted by the protestants that from the date the application was filed public convenience and necessity for such a service existed. Indeed, such a service actually was inaugurated by the principal protestant, Southern Pacific

Company, through its subsidiary, Pacific Motor Transport Company, on April 1, 1930, which service was considerably extended and perfected before the close of that year. Times of delivery and rates as between the service thus established and that proposed are substantially the same.

The Southern Pacific Company and its subsidiary, the Pacific Motor Transport Company, with whom the other protestants join, urge that as early as September 3, 1929, or more than three months prior to the date the application was filed, they had definitely determined upon a general policy or plan of extending store-door, pick-up and delivery service throughout the territory served by the Southern Pacific lines, including the territory here involved, and that they were proceeding with due diligence to consummate the plan or project and that it is unfair and unjust to judge them as of the date the application was filed. In support of this contention particular reliance is had on Re Oro Electric Co., supra, where the Commission, while specifically reaffirming the rule expressed in Pacific Gas & Electric Co. v. Great Western Power Co., supra, refused to "judge" the Western States Company in its Stockton operations as of the date of filing of the application by the Oro Company, because it was felt that the existing utility was " 'caught' at a peculiarly disadvantageous time" when it was engaged in reconstructing some older systems in Stockton which it had purchased, and when its service and rates were not such as the Commission thought they should be. Accordingly, days of

grace were given during which the Western States Company sought to complete its program before being "judged."

To determine the not only interesting but important question thus raised calls for a consideration of the following chronological statement respecting the formation and execution of the rail lines' plan of extending a pick-up and delivery service which was brought out in the rehearing, as well as of certain transportation conditions existing even anterior to the first date referred to and which will be subsequently outlined:

Middle of 1928:	L. B. Young, (now manager of Pacific Motor Transport Co.) then employed by Pacific Electric Company, after a study of decreasing L.C.L. business reported to Pacific Electric and Southern Pacific Companies recommending establishment of store-door, pick-up and delivery service.
September, 1928:	Authority secured to experiment with plan recommended.
October 13,1928:	Pacific Electric Motor Transport Co. organized.
March 11, 1929:	Experimental store-door, pick-up and delivery service inaugurated on Pacific Electric lines by Pacific Electric Motor Transport Co.
September 5,1929:	General contract between Southern Pacific Company and Pacific Electric Motor Transport Co. contemplating pick-up and delivery service on all lines of Southern Pacific Company.
October 1, 1929:	Pick-up and delivery service inaugurated by Pacific Electric Motor Transport Co. between Los Angeles and Santa Barbara over Southern Pacific lines.
December 19,1929:	Application of Valley Motor Lines, Inc. filed.
December, 1929:	Santa Fe advised of purpose of Pacific Electric Motor Transport Co. to extend service to San Joaquin Valley.
February, 1930:	Name of Pacific Electric Motor Transport Co. changed to Pacific Motor Transport Co.
April 1, 1930:	Pick-up and delivery service inaugurated by Pacific Motor Transport Co. between San Francisco and Salinas and San Francisco and Fresno.

May 1, 1930: Pacific Motor Transport Co. service inaugurated Los Angeles to Owens Valley.

July 23, 1930: Pacific Motor Transport service extended from Santa Barbara to San Luis Obispo.

August, 1930: Pacific Motor Transport Co. service inaugurated in Sacramento Valley.

August 13,1930: Pacific Motor Transport Co. service inaugurated Los Angeles to Imperial Valley.

December 1,1930: Pacific Motor Transport Co. service from San Francisco to Fresno extended to embrace additional intermediate points.

December 8,1930: Pacific Motor Transport Co. service inaugurated between San Francisco and Sacramento Valley points.

June 24, 1931: Pacific Motor Transport Co. service inaugurated between Los Angeles and San Francisco.

October 31,1931: Being printed re-issue of Pacific Motor Transport Co. tariff extending service to 75 additional stations on Southern Pacific lines, including stations south of Fresno.

Mr. Young, testifying on the last above mentioned date, stated "it is the definite plan of the Pacific Motor Transport Co., sometime within the next 30 to 45 days, to extend its service to every remaining station on the lines of the Southern Pacific Company in California, Oregon and Arizona, at which an agent is maintained by that company." On December 7th the Santa Fe proposes to establish a pick-up and delivery service upon its lines in California.

According to W. A. Worthington, a vice-president of the Southern Pacific Company, that company for a number of years had viewed with great concern the losses of its traffic by competition from motor trucks operating over the highways. This competition, it was felt, had become very substantial five or six years ago; and it was found that the Company could not adequately cope with the situation through any changes in existing tariffs "lacking pick-up and delivery service which could be furnished by the motor trucks."

What Mr. Worthington thus recognized has been obvious to the Commission for a much longer time than the five or six years he refers to. When the State first launched upon the policy of regulating common carrier transportation by truck (Auto Stage and Truck Transportation Act, Stats. 1917, p. 330) there were filed with this Commission by truck operators, whose rights were recognized by the initial act, tariffs specifying the rates and service which they offered to the shipping public. Almost all of these tariffs showed that the service extended embraced store-door, pick-up and delivery. The books reporting the decisions of this Commission from that time on are replete with instances where truck operators were certificated to perform a service, one of the essential features of which was the store-door, pick-up and delivery. In most cases where certification was thus granted the records show that the principal rail carriers of the State appeared as protestants. It is inconceivable that these carriers were unfamiliar with the rapidly changing transportation conditions of the State and the ever growing and ever more insistent demand of shippers for the convenience of the store-door, pick-up and delivery. What at first may have seemed a mere convenience gradually, in the evolution of business practices, became a necessity, and it became this long before the Southern Pacific Company, as it appears from this record, seriously approached the problem of adapting its service to meet these changed conditions and increased necessities of its patrons.

It appears that inasmuch as chronology plays such an important part in the plans of the protestants, that it should be given full consideration in connection with the development of applicant's service. Through a predecessor

in interest, applicant, whose previous operations had been confined to San Joaquin Valley, on March 3, 1928, (Application No.14747), sought a certificate to operate between San Francisco and Fresno. (The report of Young to the railroad executives recommending the pick-up and delivery service was filed in the "middle of 1928.") The certificate was issued on February 18, 1929, practically a month prior to the inauguration by Pacific Motor Transport Company of its first "experimental" service. Six months later (October 1, 1929), Pacific Motor Transport Company established its first service over Southern Pacific between Los Angeles and Santa Barbara. On December 19, 1929, applicant sought the certificate to enlarge its operating right so as to permit of service to points intermediate between Manteca and Fresno and San Francisco and other bay points. During the pendency of the application Pacific Motor Transport Company, on April 1, 1930, installed partial service to San Joaquin Valley points, later installing the service in other parts of the state, and increasing the number of points served in San Joaquin Valley.

Considering this record it must be borne in mind that Pacific Motor Transport Company, an express corporation, is not required to obtain a certificate of public convenience and necessity before installing pick-up and delivery service. On the other hand applicant, a common carrier operating between fixed points or over a regular route for compensation, is compelled under the law to seek certification to enlarge its field of operations. Despite the delay naturally resulting from the legal process involved, such as public hearings, etc., it would appear that there has not been on the part of applicant any lack of diligence in meeting the traffic demands of its chosen field of endeavor.

As much cannot be said for protestants.

Allowing due credit for its long deferred planned efforts to meet the situation created by the very obvious development of highway transportation, it must be concluded from the record herein that the Southern Pacific Company, as well as the other rail carriers, have been almost incredibly dilatory in meeting changed transportation conditions.

The long delay of the Southern Pacific Company and its subsidiary in even considering the meeting of changed transportation conditions, as well as its slowness in getting the plan of pick-up and delivery service into execution after its recommendation by Mr. Young, indicates that it almost reluctantly met a demand which it now admits was a public need. The rail carriers were not aroused to action until tonnage losses to trucks "became alarming." The record clearly shows the Southern Pacific Company did not take any action to meet a traffic demand that from 1917 to 1928, a period of eleven years, was obvious to all but railroad executives. Competition threatened for eleven years before protestant determined to "accord to the communities of this state those rates and that service to which they are in justice entitled."

Equally as important as the principle laid down in the Oro Electric case is the language contained in the Commission's decision in the Coronado Ferry case (34 C.R.C. 201-208). The Commission says in that decision:

> "It is incumbent upon every public utility in this state to be abreast with public needs, regardless of whether there is competition facing it or not."

The decision should be affirmed.

ORDER ON REHEARING

A rehearing having been held in the above entitled proceeding,

IT IS HEREBY ORDERED that Decision No.23949 be and the same is hereby affirmed.

Dated at San Francisco, California, this 7th day of December 1931.

C. L. Seavey

Fred E. Stewart

Commissioners.

CARR, Commissioner, Concurring.

I concur in the order and in what is said in the opinion. This is one of those close cases where a decision either way may be justified without departing from the salutary rule long adhered to by this Commission and recognized in both majority and dissenting opinions.

One thing which stands out in my mind from the record is that these contending agencies are not on the same basis. The truck line, in order to secure authority to satisfy the public need, admitted to exist, had to apply for certification. Pacific Motor Transport Company, operating as an express company, did not but could establish the service without certification. My conclusion from the evidence is quite at variance from that reached by Commissioner Harris. It is that if the Transport Company had been required to apply for a certificate the application would not have been filed until the early part of 1930, in which case under the usual precedents, both parties being responsible, the first applicant would have been granted the certificate.

W. M. Carr
Commissioner.

We dissent.

The order for a rehearing in this matter specifically stated that the rehearing was granted in order that "the petitioners be given a further opportunity to supplement, if they can, the record herein given" as to "the existence on and prior to December 19, 1929 (the date of filing the application herein) of a comprehensive plan for the establishment of store-door, pick-up and delivery service in connection with rail transportation and which was in process of being consummated with reasonable diligence."

The majority opinion states in substance the material evidence introduced by petitioners for that purpose and it is not necessary to restate it here. The chronological statements in that opinion show, among other things, that the application in this matter was filed on December 19, 1929; that in September, 1928, the Southern Pacific Company and its subsidiary, the Pacific Motor Transport Company, hereinafter referred to as protestants, were experimenting with a plan that had been recommended and that, on September 5, 1929, a contract was entered into by protestants for a pick-up and delivery service on all lines of the Southern Pacific Company and that steady, if slow, progress in the installation of that service has continued since then. The record is clear that the "slow" installation of the service was not due to lack of diligence but to inability of protestants to meet more rapidly the obstacles naturally developed because of the extent and scope of the proposed plan.

It is true that, at the date of the filing of the application, such service had not actually been installed in the area covered by the application but, as stated, it was being installed at various points on the lines of which the area here

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involved is a part. On April 1, 1930, service was inaugurated by protestants between San Francisco and Fresno and on December 1, 1930, it was extended to embrace additional intermediate points.

Proof, clear and uncontradicted, was made of "the existence on and prior to December 19, 1929 (the date of filing the application herein) of a comprehensive plan for the establishment of store-door, pick-up and delivery service in connection with rail transportation and which was in process of being consummated with reasonable diligence."

It is likewise clear and uncontradicted that before the "time of threatened competition" protestants had a plan and had contracted for installing on all of Southern Pacific Company's lines in California the identical service thereafter proposed by applicant paralleling a small part of said lines.

Under the law protestants were not required to procure a certificate of convenience and necessity. If such certificate had been required, what reasonable doubt is there that an application would have been filed for it on the date of the contract, September 5, 1929, or more than two months prior to the filing made by applicant?

We are convinced that the rule announced in Re Oro Electric Co. 2 C.R.C. 748 and later cases cannot be justly invoked in this manner against protestants.

These are not the times when regulatory bodies should lightly permit new competition in a field already served with reasonable adequacy by existing carriers. This country is undergoing one of the severest depressions in history and the end apparently is not yet. The transportation companies are struggling under crushing burdens. It is of primary importance to the public

that at this juncture these burdens be not unnecessarily increased.

As already stated, where service by existing carriers is reasonably adequate, new competition should not in these times be permitted, and this is true even where the new service proposed is of a somewhat different character from the existing service or perhaps is somewhat more convenient. Convenience does not imply necessity and what is convenient in normal or prosperous times may be a luxury in times of depression.

There was abundant evidence in the main case that the service of these protestants was reasonably adequate. All the needs of the communities served by them had been met or were being met. The main contention for applicant was that his service might, in some respects, be more convenient.

Public convenience and necessity do not require the issuance of a certificate in this case. On the contrary, it is against public policy and public interest that one be issued.

The application should be denied.

Dated at San Francisco, California, this 7th day of December, 1931.

M. B. Harris

Commissioners.