

Decision No. 25936

BEFORE THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of }
GAROFALO and ELWELL for certificate }
of public convenience and necessity }
to operate refrigerated express } Application No. 18187
service as a common carrier between }
the City of San Francisco and City }
of Los Angeles, State of California. }

E. S. Best, H. M. Anthony and J. R. Klawans,
for applicants.

Edward Stern, for Railway Express Agency, Inc.,
protestant.

W. F. Brooks, for The Atchison, Topeka & Santa
Fe Railway, protestant.

Douglas Brookman, for California Motor Express, Inc.,
protestant.

H. W. Hobbs, for Southern Pacific Railway and
Pacific Motor Transport Company, protestants.

HARRIS and WARE, Commissioners -

ORDER DENYING REHEARING

By our Decision No. 25936, dated May 15, 1933, in this proceeding, the above entitled application was denied. On June 15, 1933, applicants filed their petition for rehearing and on June 26, 1933, said petition was ordered set for argument, which was held at San Francisco on July 25, 1933, the matter was duly submitted and now is ready for decision.

The matter was presented on rehearing only by oral argument upon the record as produced by the hearings. Applicants' principal contention was that the Commission erred in not treating applicants' and protestants' relations as they existed June 1, 1932, the date on which the application was filed, and in considering such relations as they existed upon the submission of the matter (February 21, 1933). That the situation became altered between June 1, 1932, and February, 1933, was clearly shown by our Decision No. 25936 herein, except perhaps that changes made by applicants were not explicitly stated.

Originally (June 1), applicants sought rights between termini and certain intermediate points, some of which they were already serving. By amended application filed September 2, 1932, the offer was enlarged to include all intermediates and nineteen principal points were named. On October 31, 1932, the application was further amended to restrict the offer to termini only, the only intermediate service retained being southbound transportation of flowers from Burlingame and Palo Alto to Los Angeles. Between the filing of the original application and the second amended application protestants Railway Express Agency and Pacific Motor Transport Company altered their services by reduction of rates and the establishment of passenger train carriage. When the final amended application was filed, both applicants and protestants had changed their actual and proposed operations and the issue presented by each finally was upon such changed conditions. If the Commission is to be bound by the status of all parties as of June 1, 1932, the amended applications must be disregarded and, inferentially, protestants must be rebuked for changing their status even though great public benefit resulted therefrom. Such facts do not bring the question of certification before us in any way that aligns it with the principles established in Oro Electric Corporation (34 C.R.C.201-3) and other cases cited.

Condonation is also urged by applicants in disputing our decision as promulgated on the basis of some decisions where prior operation was condoned principally because of ignorance of the law or confusion as to it. In the case at bar, however, applicants were aware of the illegal character of their operations, yet they continued them many months after their application until forced by order of this Commission to cease and desist. They were neither ignorant nor confused; their stated excuse in public hearing was the purpose "to convince the Commission that the service was necessary." Such facts do not justify the Commission to use its

wholesome discretion to condone a course, knowingly counter to the word and spirit of the Auto Truck Transportation Act.

We recommend the following form of Order.

ORDER

IT IS HEREBY ORDERED that the petition of applicants herein for a rehearing of the above entitled application be and the same hereby is denied.

The foregoing Order is hereby approved and ordered filed as the Order of the Railroad Commission of the State of California.

Dated at San Francisco, California, this 14th day of

August, 1933.

C. J. Seamy
Leon C. White

M. B. Davis
W. H. Brown
COMMISSIONERS.