

Decision No. 28261.

BEFORE THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA

ORIGINAL

In the Matter of Application of
PACIFIC MOTOR TRANSPORT COMPANY,
for certificate of public convenience and necessity for the
transportation by motor trucks
of railroad traffic between certain railroad stations in the
San Joaquin Valley under contract
with the railroad operating between
such stations.

) Application No. 18699.
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E. J. Foulds and A. A. Jones for applicant
and for Southern Pacific Company.
Sanborn & Roehl, by A.B. Roehl, for Valley Motor
Lines, Valley Express Company, George Earm Truck
Line, Frasher Truck Line, Western Truck Line,
Fresno-Stratford Freight Line, Fresno-Lanare
Truck Lines, Protestants.
G. L. Aynesworth, for Fortier Bros., protestants.
Strother P. Walton, for Triangle Transfer Company,
protestant.
Wallace K. Downey, for Motor Freight Terminal Company,
protestant.
Berne Levy, for The Atchison, Topeka & Santa Fe
Railway Company.
H.R. Brashear, for Los Angeles Chamber of Commerce.
R.S. Sawyer, for Associated Jobbers and Manufacturers
of Los Angeles.
W.G. Stone, for Sacramento Chamber of Commerce.
Harry See, for Brotherhood of Railroad Trainmen and
Brotherhood of Locomotive Firemen and Enginemen.

HARRIS, COMMISSIONER:

O P I N I O N

In this application the Pacific Motor Transport Company asks for a certificate of convenience and necessity to operate motor trucks upon public highways for the distribution of railroad traffic between the railroad stations located on the Stratford, Riverdale, Coalinga and Kerman Branches of the Southern Pacific Company and the main line between Fresno and Goshen Junction, such traffic to consist of freight and express shipments of the character now handled by rail between railroad stations on such routes, including the traffic moving to such railroad stations by rail from more distant points or vice

versa, via Fresno, which is to be established as a rail terminal point for the collection or distribution of such traffic.

The rates to be charged by applicant will be fixed by contract between applicant and Southern Pacific Company on a basis compensatory to applicant, copies of such contracts to be filed with the Railroad Commission.

Applicant proposes to transport property only for such railroad by contract and will not publish a tariff.

During the hearing the Pacific Motor Trucking Company was substituted as applicant. The original applicant and substituted applicant are both subsidiaries of the Southern Pacific Company and are both California corporations. The Southern Pacific Company is a foreign corporation.

Several protestants appeared, all being certificated highway transportation companies operating in the territory proposed to be served by applicant.

Protestants' main contentions are that this Commission has not jurisdiction to grant the application and that public convenience and necessity do not require the service proposed by applicant.

The contention that the Commission lacks jurisdiction is based upon two grounds:

- (1) That applicant does not propose to operate as a common carrier,
- (2) That the Commission cannot grant a certificate to a foreign corporation.

Does the applicant propose to operate as a common carrier?

The Civil Code, Section 2168, defines a common carrier as follows:

"Everyone who offers to the public to carry persons, property, or messages, excepting only telegraphic messages, is a common carrier of whatever he thus offers to carry."

The extent of the obligation of a common carrier to accept freight is defined in Section 2169 of the Civil Code as follows:

"A common carrier must, if able to do so, accept and carry whatever is offered to him, at a reasonable time and place, of a kind that he undertakes or is accustomed to carry."

It is apparent that the offer to the public and the extent of the obligation to the public are exactly equal. If the offer to the public by the carrier is to transport furniture or oil, he is not under obligation to accept anything else. The use of the word "public" in this connection, therefore, means only that portion of the public which offers oil or furniture for transportation.

A misconception in regard to the nature of the common carrier has arisen through the use of the misleading expression that he "undertakes generally and for all persons indifferently to carry goods and deliver them for hire." As a matter of fact in a multitude of instances his offer relates to a very limited portion of the public, but is, of course, made to anyone of the public who chooses to place himself in the class to which the offer is directly made, and in this sense only, is the undertaking general.

The cases cited by protestants when considered from this point of view confirm it, as for instance the following citation taken from Munn vs. Illinois, 94 U.S. 113, 24 L.Ed.77:

"When, therefore, one devotes his property to a use in which the public have an interest, he in effect grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created."

and from Thayer v. California Dev.Co., 164 Cal.117, the following citation is taken:

'This public use need not be a use general or common to all the people of the state alike. It may be a use in which a small portion of the public will be directly benefited, as a street in a town, a bridge or a railroad, necessarily local in its benefits and advantages, but it must be of such a character as that the general public may, if they choose, avail themselves of it.'

The applicant offers to transport over the public highways between the points named in the application all freight that the public chooses to ship by the Southern Pacific Company and its subsidiaries.

There is no analogy between this case and Forsythe vs. San Joaquin Light, etc., Corp., 206 Cal.397, in which the operator of the stage confined his activities to carrying his own employees and their families. In that case no one could choose to become an employee of a stage operator and thereby be entitled to transportation. The choice was entirely with the stage operator. In fact, there was no more of an offer to the public in that case than there is in the case of the owner of the family automobile or the merchant who delivers by auto to his customers.

The applicant here proposes to devote his property to a use in which the public has an interest and of which the public may avail itself. It is, therefore, in the common carrier class.

There are a number of cases by this Commission supporting this conclusion, to-wit:

Application of Walkup Drayage Company, 32 C.R.C. 246; in re Morehart, 32 C.R.C. 65; and Application of Coast Truck Line, 36 C.R.C. 856; Application of Howard, 38 C.R.C. 240.

The courts also hold that one contracting with a common carrier to perform a transportation service for such carrier is himself indirectly serving the public and is himself a common carrier. U.S. v. Brooklyn Eastern Terminal, 249 U.S. 296; Chicago & Eastern Ill. Ry. v. Chicago Heights Terminal Co., 317 Ill. 65, 247 N.E. 666. See also - Terminal Taxicab Co. v. Kutz, 241 U.S. 252.

Protestants contend that applicant should be considered as a foreign corporation and therefore not qualified to receive a certificate of public convenience and necessity. This contention is based upon the ground that applicant, though a California corporation, is controlled through stock ownership by the Southern Pacific Company, a Kentucky corporation.

The same point was made and over-ruled in the application of Southern Pacific Transport Company, 32 C.R.C. 331, affirmed by the Supreme Court in Pickwick Stages System vs. Railroad Commission, L.A. Dec.No.11,194, Jan.-14, 1929.

It does not appear that the rights of third persons will be unjustly affected or that fraud will in any way result because of taking the applicant at face value as a California corporation.

Do convenience and necessity require the proposed operation? There is now a tri-weekly train service covering the points involved. There is proposed in lieu thereof, a daily truck service for less than carload freight, usually with first morning deliveries. Rail service will not be abandoned, but will be limited to carload freight. Applicant's compensation will be fixed by contract at cost plus ten (10) per cent. Profitable operating by it is therefor assured. Nor is this accomplished by casting a burden on other traffic. On the contrary the operating cost of the Southern Pacific Company will be reduced \$2,339.00 per month, while the cost of the proposed truck service will be \$969.00 per month, or a net saving of \$1,379.00 per month.

This is not a case of a new carrier entering an already over-crowded field. It is a question of improving and cheapening an existing service. There was ample evidence that that portion of the public now patronizing the rails desires the improvement. Convenience will unquestionably be greatly advanced. In this period of depression when it is difficult to pay for necessity, it could be well contended that convenience at additional cost is without economic justification. But this is a case where com-

venience brings with it reduced cost.

However, there can be no doubt that there is a real public need for more rapid and frequent transportation than the patrons of the Southern Pacific Company now enjoy at the points covered by this application.

Testimony to this effect was given by Mr. Brashear, Traffic Manager of the Los Angeles Chamber of Commerce, Mr. Sawyer, Traffic Manager of the Associated Jobbers and Manufacturers of Los Angeles, Mr. Stone, Manager of the Transportation Department of the Sacramento Chamber of Commerce, Mr. Buckner, Secretary of the Hanford Chamber of Commerce and shipper witnesses from several of the points affected. There are over 1000 patrons of the Southern Pacific Company at the various points affected who will be benefited by this improved service.

It is worth while at this point to refer to the report made February 13, 1933, of the National Transportation Committee, sometimes called the Coolidge Committee. Under the head "Un-profitable railroad services should be replaced by cheaper alternative transport methods" it has this to say:

"In view of the rapid development of automotive and other transport, there is no justification for maintenance by railroads of losing services and lines, and there devolves upon regulatory bodies and controlling interests something more than a negative duty to hasten their replacement by alternative methods, such as motor transport, which can render adequate service on a profitable basis in cases where rail transportation can operate only at a loss."

In his concurring opinion Honorable Alfred E. Smith makes these supplementary remarks:

"They must use trucks and buses, eventually air transportation and, if necessary, waterways and pipe lines as a supplement or substitute for rails wherever these new forms of transportation are more economical."

The application will be granted.

Applicant should file in full with the Commission the schedules of operation and the rates to be charged as set forth in the exhibits filed with this application.

Pacific Motor Trucking Company, is hereby placed upon notice that "operative rights" do not constitute a class of property which should be capitalized or used as an element of value in determining reasonable rates. Aside from their purely permissive aspect, they extend to the holder a full or partial monopoly of a class of business over a particular route. This monopoly feature may be changed or destroyed at any time by the state, which is not in any respect limited to the number of rights which may be given.

O R D E R

A public hearing having been held upon the above entitled application, the matter submitted and now being ready for decision:

The Railroad Commission of the State of California hereby finds public convenience and necessity require the operation by Pacific Motor Trucking Company of an automobile truck service between the railroad stations located on the Stratford, Riverdale, Coalinga and Kerman Branches of the Southern Pacific Company and the main line between Fresno and Goshen Junction and over the routes as set forth in "Exhibit B" attached to the application herein for the transportation of freight, such service to be limited to the transportation of such freight as may have been previously consigned for transportation over the line of the Southern Pacific Company and which may be delivered to the applicant by the Southern Pacific Company or the Pacific Motor Transport Company, or the Railway Express Agency, Inc., at the railroad freight stations designated below and to be redelivered

by the applicant at another of said freight stations, to-wit, at the freight stations of the Southern Pacific Company located at Fresno, Fowler, Selma, Kingsburg, Traver, Goshen Junction, Remroy, Shell, Hanford, Armona, Orion, Lemoore, Rossi, Heinlen, Lethent, Cuneo, Stratford, Westhaven, Huron, Turk, Coalinga, Ora, Crump, LeRoy, Helm, Nares, Caldwell, San Joaquin, Tranquillity, Kerman, McMullin, Raisin City, Caruthers, Cando, Hardwick, Lynn, Hassett, Hub, Robinson, Riverdale, Kimble, Caru and Burrell.

IT IS HEREBY ORDERED that a certificate of public convenience and necessity for such a service be and the same hereby is granted to Pacific Motor Trucking Company subject to the following conditions:

1. Applicant shall file its written acceptance of the certificate herein granted within a period of not to exceed ten (10) days from date hereof.
2. Applicant shall file in duplicate within a period of not to exceed twenty (20) days from date hereof copies of the contract between applicant and Southern Pacific Company relating to the operation herein directed to be certificated, and, in triplicate, the rates to be charged, and time schedules, said rates and time schedules to be satisfactory to the Railroad Commission. Applicant shall commence operation of said service within a period of not to exceed sixty (60) days from date hereof.
3. The rights and privileges herein authorized may not be discontinued, sold, leased, transferred nor assigned unless the written consent of the Railroad Commission to such discontinuance, sale, lease, transfer or assignment has first been secured.
4. No vehicle may be operated by applicant herein unless such vehicle is owned by said applicant or is leased by it under a contract or agreement on a basis satisfactory to the Railroad Commission.

For all other purposes the effective date of this order shall be twenty days from the date hereof.

The foregoing opinion and order are hereby approved and ordered filed as the opinion and order of the Railroad Commission of the State of California.

Dated at San Francisco, California, this 21st day of August, 1933.

Clarence
Leon
W. A. C.
W. B. H.
Commissioners.