

Decision No. 28424.

BEFORE THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of LARKIN TRANSPORTATION COMPANY, a corporation, and HIGGINS TRANSPORTATION COMPANY, a corporation, for an order of the Railroad Commission (a) authorizing the unified operation herein described; (b) approving proposed increases in freight rates and changes in rates, rules and regulations applicable to terminal services; and (c) authorizing the proposed changes in rates, rules and regulations to be made effective on less than statutory notice.

ORIGINAL

Application No. 18493.

Reginald L. Vaughan, for applicants.

Allan P. Matthew, F. W. Mielke, and McCutchen, Olney, Mannon & Greene, for The River Lines, intervener.

Allan P. Matthew, F. W. Mielke, and McCutchen, Olney, Mannon & Greene, and Arthur B. Wellington, for Bay Cities Transportation Company, intervener.

HARRIS, Commissioner:

O P I N I O N

This is an application for an order under Section 51(a) of the Public Utilities Act approving an agreement between applicants for the unified operation of the services which are now being conducted by each separately. Approval is also sought of proposed unified freight and terminal tariffs.

Each of the applicants is a common carrier of freight by

vessels on the inland waters of the state.

B. L. Larkin commenced operations in 1907. His business was later incorporated as Larkin Transportation Company, applicant herein. This company was a member carrier in Bay and River Boat Owners Association, being a party to certain of its tariffs and particularly to California Railroad Commission Tariff No. 2 and supplements of John S. P. Dean, Agent, issued January 20, 1923, effective February 28, 1923, which tariff was in effect on August 16, 1923, when Section 50(d) of the Public Utilities Act became effective. Subsequently Larkin Transportation Company published individual tariffs in its own name, to-wit: Local Freight Tariff No. 1, filed August 1, 1924, effective September 1, 1924 (C.R.C. No. 1), and Local Freight Tariff No. 2, cancelling Tariff No. 1 above, filed July 20, 1931, effective August 21, 1931 (C.R.C.No.2).

The father of L. L. Higgins, the manager of the present corporation, commenced operations in 1921. The business was incorporated in 1929 as Higgins Transportation Company, applicant herein. The first tariff was entitled, John W. Higgins Freight Line, effective August 5, 1921. This tariff was in effect on August 16, 1923. It was later superseded by tariffs filed in the name of Higgins Transportation Company.

The application states that it is proposed to conduct the transportation services of the two companies as a single unified service, for the purpose of eliminating duplications of service, of utilizing their equipment in the capacity to which it is best suited, to reduce operating and other expenses and to provide a superior service to the public.

The River Lines intervened, offering no objection to the proposed unified operations provided that they shall be confined

to the services actually conducted in good faith under lawful tariffs as of August 16, 1923.

The parties agree that the full extent of the Commission's power in approving the proposed unified operation may be stated as follows:

"That the services to be conducted by the applicants shall be in all respects substantially the same, in their essential and inherent features, as the services which the applicants were separately conducting on August 16, 1923, under tariffs of the applicants lawfully on file with the Railroad Commission, and only to the extent of the services then being separately conducted by the applicants."

This definition of the Commission's power is derived from the statute and from decisions which should be considered before it is accepted.

Section 50(d) of the Public Utilities Act, which has to do with certificating vessels on inland waters, provides as follows:

"No such certificate shall be required as to termini between which any such corporation or person is actually operating vessels in good faith at the time this act becomes effective under tariffs and schedules of such corporations or persons lawfully on file with the Railroad Commission."

This is the amendment of 1927, but it differs very little from the Act as it read on August 16, 1923, and as will later be seen, the original and the amendment are construed by the Supreme Court of this State as identical in meaning.

A similar provision is contained in Section 5 of the Auto Stage and Transportation Act which has to do with certificating transportation companies:

"But no such certificate shall be required of any transportation company as to the fixed termini between which or the route over which it is actually operating in good faith at the time this act becomes effective."

In Golden Gate Ferry Company vs. Railroad Commission,

204 Cal. 305, these three provisions were compared and the Court said:

"A careful consideration of these three enactments of the legislature convinces us that in principle they are the same. Indeed, we are unable to discover any difference whatever in meaning between the provision of Section 50 as enacted in 1923 and the paragraph as re-enacted in 1927. To our mind both said provisions should receive a construction analogous to that received by the automobile transportation section construed in Motor Transit Co. vs. Railroad Commission, supra, for it is evident from the context of the proviso that the exemption granted is not personal." (Emphasis supplied)

In the Motor Transit Company case referred to by the Court, the contention was made that a through passenger bus service between Los Angeles and San Diego gave the operator a vested right under the exception in Section 5 of the Auto Stage and Truck Transportation Act to a local service at intermediate points. In denying this contention the Court held as follows:

"The primary purpose of the legislature in enacting this statute was not to confer a franchise upon the operating companies but to give into the power of the commission for regulation and control in the interest of the public the operation of auto stages for transportation. It did this by requiring every auto transportation company to secure from the commission a certificate of public convenience and necessity. It relieved from the necessity of obtaining such certificate the companies actually operating in good faith at that time. The purpose in so exempting such companies was to refrain from interfering with the operations as then carried on - in other words, to confirm in these operators the rights they were at that time exercising. But such exemption was, obviously, only to the extent of the operations then conducted. To hold that by the operation of a through line on that date petitioners were given a franchise to operate to any extent that they, in their judgment might see fit, limited solely by the restriction that the operations must be between the same termini and over the same route, would be to materially decrease the power of the commission over these lines, and thus overlook the primary purpose of the enactment which was to give to the commission, in the interest of the public, the fullest power possible to regulate the operation of auto stage companies." Motor Transit Co. vs. Railroad Commission, 189 Cal. 573.

In the Golden Gate Ferry Case, supra, the Southern Pacific Company contended that its operation on August 16, 1923, of passenger boats between Alameda and San Francisco carried with it under the exemption in Section 50(d) a right to establish a vehicular ferry between the same points. In denying this contention the Court said:

"Nor can it be said that a certificate of public convenience and necessity was unnecessary to inaugurate this service because the Southern Pacific Company was 'actually operating vessels in good faith under tariffs and schedules lawfully on file with the Railroad Commission', within the meaning of the Public Utilities Act. The briefs on file herein present three possible interpretations of the language just quoted: one, a legislative purpose to exempt a corporation operating vessels in any type of service on the inland waters of this state from securing a certificate; two, a legislative purpose to exempt a corporation that is operating a similar service to the one sought to be inaugurated from securing such a certificate; and three, a legislative purpose to exempt a corporation that is operating, at the time the act becomes effective, a service which is later to be continued, from securing such certificate.

"We are of the opinion that the third alternative is the one which was intended by the legislature, i. e., that a corporation is exempted from obtaining the certificate if it was, at the effective date of the act, actually operating a service in all respects substantially the same as the service to be rendered after the act became effective.

"The safe, definite rule, and the one supported by the reason and purpose of the Public Utilities Act, would seem to us to be to construe the language, 'operating vessels in good faith', to mean operating them in good faith in the essential and inherent features of the service sought to be continued after the effective date of the act. It seems apparent from the admitted facts that the Southern Pacific Company was not operating such a service at the date mentioned. A different type of vessel is to be used by the Southern Pacific Company from that used at the date of the act; a different route is to be taken, and a different class of service rendered."

This Commission has also added to the interpretation applicable here the phrase "scope of its activities" as follows:

"The extent to which applicant is entitled to operate as a common carrier upon the inland waters of this state must be determined by the scope of its activities

on September 15, 1923, and prior thereto, when by the enactment of Chapter 387, Statutes 1923, Section 50(d) of the Public Utilities Act became effective." (In the Matter of the Application of Crowley Launch and Tugboat Company, etc., 27 C.R.C. 734)

It is clear that the definition of the Commission's powers agreed upon by the parties and above referred to should be accepted as sound.

It is true of all definitions and interpretations, however, that they themselves require defining and interpreting and we are now confronted with such expressions as "essential and inherent features", "extent of the operations then conducted", "scope of their activities", "operating vessels in good faith", which are to be found in the accepted definition or in ancestral definitions and interpretations.

Refraining as far as possible from additional definitions or interpretations, we will now undertake to apply the facts to the definitions above stated.

#### LARKIN TRANSPORTATION COMPANY

This company claims only an on-call service. The parties agree that the company has operative rights for such service as follows:

1. Produce from Delta or Island points to Sacramento.
2. Produce from Delta or Island points to Stockton.
3. Miscellaneous freight from Sacramento and Stockton to points in the Delta.
4. Produce and miscellaneous local traffic between points within the Delta.
5. Produce from Delta points to San Francisco Bay points and miscellaneous freight from San Francisco Bay points to Delta or Island points, not including either Sacramento or Stockton.
6. Miscellaneous local freight service between points on San Francisco and San Pablo Bays.

The company does not claim operative rights above Sacramento. It does claim, and protestant contests, operative rights between San Francisco Bay points, Sacramento and Stockton.

Applicant had no individual tariff of its own on file on the date when Section 50(d) of the Public Utilities Act became effective. It was one of the 36 operators who filed the Tariff No. 2 above referred to. Being a collective tariff it cannot be assumed that all tariff rates and all the points named in it applied to all or any one of the 36 participating carriers.

It therefore becomes necessary to consider applicant's operations under this tariff and also its own interpretation of the scope of these operations and rights thereunder as disclosed in Larkin Transportation Company Tariff C.R.C. No. 1, effective September 1, 1924, and published by it after its withdrawal from the Association and about a year after the effective date of Section 50(d).

So far as written records are concerned, there is practically nothing to show operations between the disputed points. The oral evidence, as is natural, after so many years is meager and vague. There is no doubt that applicant operated at intervals between the disputed points. There is some evidence that between San Francisco and Sacramento it carried beans, flour, canned goods, merchandise, sugar and perhaps some other commodities, but these shipments except as to beans, seem to have been negligible in volume and very infrequent.

There is some evidence that between San Francisco and Stockton it carried potatoes, onions and oil; between Stockton and Sacramento, potatoes and onions; between Stockton and Alameda, lumber.

Standing alone this evidence might have had some weight,

but it loses all significance when viewed in the light of applicant's tariff of 1924. This was applicant's individual tariff and must be presumed to state its view as to the commodities and the points covered by its operations, that is as to the services which it deemed "essential and inherent features" of its operations.

Rates contained in the tariff in effect on August 16, 1923, which applicant shared with 35 other operators, and not carried in the tariffs of applicant's own issue, must be presumed to be for services applicant did not hold itself out to perform. On the other hand those published for the first time in tariffs made effective subsequent to August 16, 1923, must be deemed to have been unlawfully established. I find that applicant Larkin Transportation Company possesses operating rights for the transportation in "on call" service of the commodities and between the points on and between which it provided rates in tariffs lawfully on file and in effect on August 16, 1923, which were subsequently published in its tariffs filed September 1, 1924, and July 20, 1931. Neither the testimony nor the tariff shows that applicant ever rendered or held itself out to render a regular scheduled service for ~~transportation~~ ~~transportation~~ shipments of merchandise, and this applicant cannot under its prescriptive right inaugurate such a service.

#### HIGGINS TRANSPORTATION COMPANY

This applicant also claims an operating right for an "on call" service substantially similar to that claimed by the Larkin Transportation Company. This claim is likewise contested by protestant in so far as it embraces an operating right for other than the following transportation:

1. Potatoes, onions, celery and lettuce from Delta or Island territory to Stockton and Antioch.



2. Scattering movement of potatoes between Stockton and Sacramento.
3. Miscellaneous freight in small quantities (nails, box shoo, empty crates, posts, onion seed, hay, two wagons, two horses, farm implements and tools, a potato digger and one shipment of rolled barley) from Stockton, Antioch and Sacramento into the Delta or Island territory.

I likewise find that applicant Higgins Transportation Company possesses operating rights for the transportation in "on call" service of the commodities and between the points on and between which it provided rates in the tariff lawfully on file and in effect on August 16, 1923, in the name of John W. Higgins, and in the tariffs subsequently filed in the name of Higgins Transportation Company. This applicant likewise did not render or hold itself out to render a regular scheduled service for the transportation of ~~in fact~~ merchandise and cannot under its prescriptive right inaugurate such a service.

The record does not show that applicants actually transported property under each of the rates carried in their respective tariffs. They testified however that they were at all times ready and willing to perform such transportation and that no shipments were ever refused. Under these circumstances it cannot be said that applicants were not holding themselves out in good faith to perform the service provided for in their tariffs.

In so far as the agreement, the approval of which is here sought, contemplates the merging of operating rights applicants are herein found to possess, the application should be granted.

I recommend the following form of order:

O R D E R

This application having been duly heard and submitted,  
IT IS HEREBY ORDERED that the application of Larkin  
Transportation Company and Higgins Transportation Company in so  
far as it relates to transportation services these applicants are  
herein found to possess, be and it is hereby granted subject to  
the following conditions:

1. The authority herein granted is subject to the ex-  
press condition that applicants in this proceeding will never urge  
before this Commission in any proceeding under Section 71 of the  
Public Utilities Act or in any other proceeding that the opinion  
and order herein constitutes a finding of fact of reasonableness  
of any particular rate and the filing of rates pursuant to the  
authority herein granted will be construed as consent by the re-  
spective applicants to this condition.

2. The authority herein granted will become effective  
when the Larkin Transportation Company and Higgins Transportation  
Company have filed with the Commission in form satisfactory to the  
Commission stipulations duly authorized by their respective Boards  
of Directors and/or Boards of Control in which stipulations Lar-  
kin Transportation Company and Higgins Transportation Company  
agree to file with the Commission annual and other reports as may  
be required by the Commission and that their accounts and records  
will be kept in the form prescribed in Decision No. 11260 dated  
November 23, 1923.

3. The rates herein authorized shall be filed with  
the Commission within ninety (90) days from the date of this or-  
der and made effective on not less than ten (10) days' notice to

the Commission and the public.

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 16<sup>th</sup> day of October, 1933.

Ch. Leary  
Leon Ashwell  
W. G. Lee  
M. B. Harney  
M. H. ...  
Commissioners.