

Decision No. 24741.

BEFORE THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA.

In the Matter of the Application of
FRANK McMANN, Jr., an individual for a
certificate of public convenience and
necessity authorizing the operation by
him of an auto truck line as a common
carrier of property over the public
highways of the State of California
between San Francisco, Oakland, Alameda,
and Emeryville and Berkeley, on the one
hand, and Concord, Clayton, Byron,
Antioch, Pittsburg and Clyde, on the
other hand and the intermediate points.

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(Application No. 18,395.
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T. C. McGettigan, for the Applicant.

L. N. Bradshaw, for the Sacramento Northern Railroad
and Bay Point & Clayton Railroad Company.

Roy G. Eildebrand, for the Southern Pacific Company
and Pacific Motor Transport Company.

Edward Stern, for the Railway Express Agency, Inc.

William F. Brooks and Robert Brennan, by William F.
Brooks, for The Atchison, Topeka & Santa Fe
Railway Co.

J. E. Anderson, for the River Lines.

Wallace K. Downey, for Merchants Express & Draying Co.

E. H. Hart, for Pacific Motor Tariff Bureau.

HARRIS, Commissioner:

O P I N I O N

In this proceeding applicant asks for a certificate of
convenience and necessity authorizing the establishment of an
auto truck line for the transportation of property as a common
carrier between San Francisco, Oakland, Alameda, Emeryville
and Berkeley, on the one hand, and twenty-six points in Contra
Costa County including Walnut Creek, Concord, Pittsburg, Antioch,
Brentwood, Byron, Oakley, Knightsen, Danville and San Ramon.

Protestants are three rail carriers, one water carrier, one express company and one express and forwarding company, the latter operating over two of the rail lines and furnishing at a number of the points involved in addition to the terminal service, a pick-up and store-door delivery service by truck. These protestants were at the time of the filing of the application, serving all of the thirty-one points involved with the exception of Orinda, Clayton, Pacheco and Diablo.

This applicant has been before this Commission for some time. On September 13, 1932, he filed this application. On October 18, 1932, complaint was filed charging him with illegally operating trucks between the points involved in the application. On April 24, 1933, (Decision No.25863), the complaint was dismissed. Rehearing was granted and on August 7, 1933, a cease and desist order which is still in force was issued. On October 9, 1933, an order was issued under this application declaring that public convenience and necessity required the operation by applicant of trucks between certain, but not all, of the points here involved. Later, rehearing was granted and this opinion is the result of that rehearing.

Applicant proposes to install a service six (6) days per week with daily pick-up and store-door delivery.

To prove public necessity and convenience, he called twenty-two witnesses. Four of these represented wholesale firms in San Francisco and Oakland. The others were, four from Walnut Creek, six from Concord, three from or near Pittsburg, one from Antioch, one from Clayton, two from Lafayette.

Protestants called twenty (20) witnesses and the testimony of seven others was stipulated to. These witnesses were, three from Walnut Creek, four from Concord, two from Port Chicago, fourteen from Pittsburg, two from Antioch, one from Brentwood, one from Danville. Consideration of the testimony of these public

witnesses is convincing that there is no need for a new service in this already over crowded field. The service of the protesting carriers is adequate to the needs of the various communities.

Nor can it be said that taking the territory as a whole the proposed service is superior in any respect to the existing service.

The time schedule proposed provides for morning delivery at many of the points such as Walnut Creek, Concord, Port Chicago, Pittsburg and Antioch later than that which they now enjoy from existing carriers. At certain other points such as Knightsen, Brentwood, Oakley and Byron the proposed morning delivery is about an hour earlier than the schedule of existing carriers. At all points, however, the present morning delivery hours of the existing carriers are early enough for all reasonable purposes. Most of the points involved now enjoy at the hands of existing carriers a daily over-night service including in most instances store-door, pick-up and delivery. The only important exceptions at the time the application was filed were Walnut Creek and Concord which had this service tri-weekly and in addition a daily over-night depot freight service.

At many points there would appear to be too much service now for the amount of business involved. For instance, Concord is served by two railways, Port Chicago by three, Pittsburg by three railroads and one carrier by water, Antioch by two railroads and one carrier by water. It is apparent that there are carriers enough now operating to more than meet the transportation needs of the communities involved. To permit a new carrier to enter this crowded field would lessen the ability of the existing carriers to maintain their present service. More-

over, the rates proposed by applicant are practically the same as those of the existing carriers.

It has not been shown that the public will benefit either in rates or service by granting the applicant a certificate. The burden rests upon applicant to make such showing.

"Public convenience and necessity must be shown by direct testimony. It can not be assumed to exist because of the statement of one or several persons that if certain facilities are offered they will utilize them. In all cases the burden is on the applicant to show public necessity, and if there is a substantial conflict in the evidence it must be resolved against him. This is required in order that the Commission may ascertain clearly from the record that public necessity does actually exist."
(Washington et al. v. Fairchild, 224 U.S.510)

An excellent statement of the rule applicable in this case is in "Principles of Motor Transportation" by Ford K. Edwards at page 317:

"According to the theory of public-utility regulation, the public is best served by granting a monopoly to a limited number of companies in each field, usually one, and then regulating the rates and services offered in order that the benefits of large-scale operation and freedom from competition may be saved for the public. With this in mind, the commissions usually protect the existing carrier on the routes covered by his certificate, providing, of course that the service rendered is satisfactory to the consumers. Exceptions arise in the case of densely populated areas where there is obviously sufficient traffic and sufficient demand to support several carriers. The existing operator may be a motor carrier, electric line or steam line, but if a territory is adequately served by any one or more of these agencies, most commissions will refuse the new applicant a permit. This is under the belief that he will merely split the existing traffic and financially jeopardize the existing carrier. Few average-size communities can afford to support more than one carrier over a given route."

Protestants argue that applicant has attempted to prove his case by evidence of illegal operations. This is true, but the rule laid down by the Commission in such case has not been applied owing to the fact that in the cease and desist case above referred to, the Commission first found the defendant not guilty, and later, on rehearing, reversed itself and found him guilty.

The following order is recommended:

O R D E R

Decision No. 26416 is vacated.

The application is denied.

Dated at San Francisco, California, this 2nd day
January, 1934.

CC Weaver
Leon Whitwell
W. A. Carr
M. B. Lang
Walter M. ...
Commissioners.