

Decision No. 28360

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. 18498.

McCutchen, Olney, Mannon & Greene, by Allan P. Matthew, for The River Lines.

Reginald L. Vaughan and Scott Elder, for The L-E Lines.

Thomas F. Louttit and J. Richard Townsend, by J. Richard Townsend, for the Stockton Port District and Port of Stockton Traffic Association, interveners.

Robert Brennan and Wm. F. Brooks, for The Atchison, Topeka and Santa Fe Railway Company, interested party.

HARRIS, Commissioner:

O P I N I O N

By order in Decision No. 26424 of October 16, 1933, in the above entitled proceeding, the Commission approved an agreement between applicants, Larkin Transportation Company and Higgins Transportation Company, for the unified operation of the services then

being conducted by each applicant separately, and authorized the publication of unified freight and terminal tariffs. The operating rights claimed by these applicants were challenged however and it was found necessary to determine just what rights each possessed.¹ It was found (1) "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"; and (2) "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". In both instances it was held that neither the testimony nor the tariffs showed that applicants ever rendered or held themselves out to render a regular scheduled service for shipments of merchandise, and that they could not under their prescriptive rights inaugurate such a service.²

¹ Applicants hold no certificate of public convenience and necessity. Whatever rights they possess they have by virtue of their status on August 16, 1923, at which time Section 50(d) of the Public Utilities Act providing for the certificating of vessels on inland waters, became effective. The pertinent provision of this section reads:

"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." (1927 amendment)

² Applicants thereupon filed two tariffs to cover their unified operations. Neither of them, however, conformed to the order in Decision No. 26424. One was rejected and the other suspended.

A petition for reconsideration of said Decision No. 26424 was filed by protestant The River Lines.³ Oral argument thereon was had at San Francisco February 9, 1934, and was participated in by the Stockton Port District and the Port of Stockton Traffic Association. This argument was devoted solely to the question of the extent of applicants' operating rights, particularly between the termini of Stockton and Sacramento on the one hand and San Francisco Bay points on the other. No exception has been taken to the approval of the agreement in so far as it embraces rights the possession of which is undisputed.

Protestant contends that to entitle applicants to a finding that they possess prescriptive rights it is incumbent upon them to show affirmatively (1) that on August 16, 1923, and continuously thereafter they had on file with the Commission rates on the commodities and between the points on and between which they claim operating rights, and (2) that during the same period they actually operated vessels in the transportation of these specific commodities between the particular points. It is conceded that the first of these requirements has been satisfied in the decision here in review, but it is urged that the record is wholly devoid of proof that the second of these so-called dual tests has been met. Not only is testimony that applicants held themselves out at all times to serve between the termini of Stockton, Sacramento and San Francisco challenged but it is contended that this is not sufficient to prove good faith operation. The words "actually operating in

³ The petition alleges (1) that applicants' operating rights have not been specifically determined, (2) that certain questions of tariff interpretation essential to an ascertainment of the operating rights possessed by applicants have not been decided; and (3) that the tariff has been made a controlling test of applicants' operating rights without material weight being given to the actual operations.

good faith"⁴ protestant argues connote action and can only refer to the physical operation of vessels. Furthermore, such operations as are shown by the record in so far as service between Stockton, Sacramento and San Francisco Bay points is concerned, are said to be too remote, vague and uncertain to be used as a measure of service rights today.

Applicants urge that they at all times held themselves out to serve the entire territory here embraced, that they thereby obligated themselves to perform such service, and that although they did not actually transport all the various commodities between each and every point, their offer to serve the public was commensurate with their duty to serve. Neither volume of traffic, regularity of trips nor variety of commodities handled but the good faith operation of vessels under tariffs lawfully on file, they contend, is the test of operating rights. They urge that they are entitled to the utmost latitude in the substitution and addition of commodities, limited only by such changes as will alter the essential character of the service. The operations to which they now claim a right, they maintain, are not essentially different from those carried on in 1923.

Intervenors contend that applicants are entitled to a general "on call" service for the transportation of all freight, both carload or less, between Stockton and all the points here involved. They urge that maintenance of rates and proof of actual operation on and between particular commodities and points are not necessary to entitle a carrier to prescriptive rights, but that on the contrary it is sufficient if the carrier at the time Section

⁴ Section 50(d) of the Public Utilities Act.

50(d) of the Act became effective and since has held itself ready, willing and able to perform the service. Under such circumstances the carrier is said to be obligated to serve.⁵ They also contend that public convenience and necessity require a service such as the one applicants propose. However, public convenience and necessity for an enlargement of applicants' operative rights is not an issue in this proceeding and cannot here be determined. If the public interest demands a broadening of the rights hereafter found to exist, an application therefor should be filed.

It is not necessary here to review in detail the extensive evidence and testimony offered in this proceeding. The record fairly shows that prior to and since August 16, 1923, these applicants were engaged in the transportation between the Delta points⁶ and between the Delta points on the one hand and Stockton, Sacramento and San Francisco Bay points on the other, of substantially all articles of commerce that were ordinarily offered; that they transported these commodities under tariffs lawfully on file with the Commission; that they at no time declined to perform such transportation but that on the contrary they continuously held themselves out to do so for the public generally. As to this territory the Commission should find that they possess an unrestricted operating right. The right here granted is somewhat broader than the tariffs of applicants would indicate. However, applicants have shown that they were

⁵ Numerous decisions are cited, none of which holds however that a carrier which by lawfully filed tariffs has voluntarily limited its holding out to the carriage of certain specific commodities, is obligated to perform service in excess of such holding out.

⁶ The term "Delta points" is used to denote the points named in applicants' tariffs on the San Joaquin River below Streckers, Mokelumne River below New Hope, Old River, Middle River, Sacramento River below Sacramento, and on tributaries of the Sacramento River below Sacramento.

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servng this territory in good faith in the transportation of such commodities as were then offered, and it would be extremely harsh to say that because there was no asparagus grown, for example, or no radios shipped in 1920, applicants could not now haul such articles.

Neither the tariff filings nor the records of physical transportation support applicants' contention of "good faith" operations between any of the other points here involved, excepting in isolated instances. Specific rates have been maintained on but a comparatively few commodities, although applicants contend that tariff provisions reading "When used in this tariff, river points shall mean the San Joaquin river below Streckers, Mokelumne river below New Hope, Old river, Middle river, Sacramento river and tributaries below Sacramento," or words to like effect, provided class or commodity rates between all bay and river points on practically all articles of commerce. The most that can be said for this item is that it is ambiguous. If so, it is subject to construction and to construe this item fairly it is necessary to consider the evidence with respect to the actual movement of freight, together with the volume and character of the rates maintained and published in connection with the tariff provisions quoted above. The most liberal construction that can be placed upon this item would be to hold that it was designed to provide rates from, to or between the Delta points, and between the Delta points on the one hand and San Francisco bay points, Stockton and Sacramento on the other hand. The rates published in connection therewith were not designed to apply from, to or between points outside of the Delta area and it is logical to assume that no traffic moved between such points under these rates. Apparently the traffic which was moving from, to or between the points outside of the Delta area on or before August 16, 1923, or sub -

sequent thereto, was moving under rates specifically published to apply between such points. As to this territory, the Commission should find that applicants' rights are coextensive with the rates specifically published between the points shown in their tariffs and continuously maintained thereafter.

The Commission should find:

1. That between the Delta points and between San Francisco Bay points, Sacramento and Stockton on the one hand, and Delta points on the other hand, applicants, collectively, have an unlimited operative right.

2. That between all other points applicants' operative rights are coextensive with the rates published between specifically named points shown in the tariffs on file with the Commission on August 16, 1923, and continuously maintained thereafter, except that no operative right is here conferred on applicants to render service from, to and between points north of Sacramento.⁷

3. That the operative rights here found to exist are the collective rights of applicants and should not be construed as in any manner broadening the individual prescriptive rights of applicants.

The following form of order is recommended:

O R D E R

Upon further consideration of the record in the above entitled proceeding, and in the light of the oral argument,

IT IS HEREBY ORDERED that in so far as it relates to the

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Applicants specifically eliminated from the proposed unification of their lines any service north of Sacramento.

operating rights applicants are found to possess in the opinion which precedes this order, this application be and it is hereby granted, subject to the following conditions:

1. The authority herein granted is subject to the express 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 respective 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 Larkin 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 effective date of this order 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 12th day of March, 1934.

C. Leary
Leon Whitwell
W. J. Lee
M. B. Harris
Commissioners.