Decision No. 27366.

ORIGINAL

BEFORE THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Investigation by the Commission on its own Motion into the rates, rules, regulations, classifications, charges, operations, schedules and practices, or any of them, of KELLOGG EXPRESS AND DRAYING COMPANY.	Case No. 3910.
In the Matter of the Suspension by the Commission on its own Motion of Warehouse Tariff No. 1, C.R.C. No. 3, and Supplement No. 1 thereto, of KELLOGG EXPRESS & DRAYING CO.	Case No. 3923.
In the Matter of the Suspension by the Commission on its own motion of Local Freight Tariffs Nos. 1 and 2, C.R.C. Nos. 1 and 2 of KELLOGG EXPRESS & DRAYING CO. naming class and commodity rates between various points in California.	Case No. 3924.

A. B. Roehl, Harry Young, H. H. Sanborn and Clair W. MacLeod, for Kellogg Express & Draying Co.
McCutchen, Olney, Mannon & Greene, by Allen P. Matthew, for -
Bay Cities Transportation Company,
Haslett Warehouse Company,
Interurban Express Corporation,
Merchants Express and Draying Company,
Peoples' Express Company, and
United Transfer Company, interested parties.
Gwyn H. Baker, for Oakland-San Jose Transportation Company, interested party.
Hettman & Scampini, by A. J. Scampini, for Merchants Express Corporation.
James E. Lyons and A. L. Whittle, for Southern Pacific Company, Pacific Motor Transport Company and Pacific Motor Trucking Company.
G. E. Duffy, for The Atchison, Topeka and Santa Fe Railway Company.

BY THE COMMISSION:

O P I N I O N

On October 2, 1934, the Commission on its own motion instituted an investigation into the rates, rules, regulations, classifications, charges, operations, schedules and practices, or any of them, of Kellogg Express and Draying Company, transporting property by auto truck between San Francisco and Oakland and other East Bay points, particularly to determine whether or not said Kellogg Express and Draying Company had in any manner, directly or indirectly, deviated from its lawfully filed tariff.

Kellogg Express and Draying Company subsequently filed with the Commission Warehouse Tariff No. 1, C.R.C. No. 3, effective December 1, 1934, and Supplement No. 1 thereto effective December 3, 1934, naming rates, rules and regulations for storage and incidental handling of merchandise at a warehouse in Oakland; also Local Freight Tariff No. 1, C.R.C. No. 1, and Local Freight Tariff No. 2, C.R.C. No. 2, both effective December 1, 1934, naming class and commodity rates for the transportation of property by auto truck between Alameda, Berkeley, Emeryville, Oakland and San Francisco on the one hand, and El Cerrito, Stege, Pullman, Richmond, Point Richmond, San Leandro, San Lorenzo and Hayward on the other. It appearing from the records of the Commission that the respondent had never obtained a certificate of public convenience and necessity to operate as a public utility warehouseman, as required by Section 50½ of the Public Utilities Act, or as a transportation company between the points named in the proposed tariffs as required by Section 5 of the Auto Truck Transportation Act (Chapter 213, Statutes 1917, and effective amendments), orders were issued October 27, 1934, suspending the tariffs.

Public hearings were had at San Francisco before Examiner Brown on October 31, 1934, and before Examiner Geary on December 12,

13 and 14, 1934. The matters were orally argued before the Commission en banc on April 12, 1935. They were consolidated for hearing and will be disposed of in one decision.

The investigation in Case 3910 was instituted by the Commission on its own motion following the disclosure of unlawful practices through a check of respondent's records made by a member of the Commission's staff. This check revealed numerous tariff violations, specific instances of which were set forth in Exhibits Nos. 1 and 2 submitted at the hearing. Exhibit No. 1 lists 13 shipments which respondent's records indicated were accorded rates lower than those named in respondent's tariff on file with the Commission. On two of these shipments respondent states that local drayage charges were assessed in addition to the terminal to terminal charges shown by the exhibit, resulting in overcharges rather than undercharges. The tariff violations are admitted by respondent. It asks that they be excused on the ground that the violations occurred during an emergency created by the waterfront strike, were forced by competitive conditions as between the various transbay carriers and through restrictions imposed by conference rules relating to the publication of tariff changes, or by the failure of E. H. Hert, Publishing Agent for the Pacific Motor Tariff Bureau to file tariff changes with the Commission agreed upon by member lines. These circumstances offer no justification for violating the published tariff. The law specifically prohibits the charging of rates different from those specified in the tariffs on file with the Commission. Respondent was one of the parties to a stipulation filed in Case No. 3609 in which the various transbay carriers urged dismissal of the investigation instituted in that case to determine if they were adhering to this tariff,

upon the grounds that they had formed a conference for the purpose of policing themselves and would undertake to prosecute any not complying with their tariffs. Case 3609 was subsequently dismissed. It is clear from the record that respondent knowingly deviated from its tariff. Respondent will be required to adjust the charges on all shipments transported during the statutory period to the basis provided by the tariff.[1]

It is alleged by respondent that other transbay carriers are likewise guilty of violating their tariffs. These carriers are not before us in this proceeding. However the law applies with equal force to such carriers and to determine if they have violated their tariffs the Commission has this date instituted an investigation of their practices to enable respondent to substantiate its allegations.

In addition to the tariff violations the check made by a member of the Commission's staff also disclosed operations for which no rates had been filed with the Commission. Following the Commission's order in Case No. 3910 tariffs purporting to cover these operations were filed but were suspended by orders in Cases Nos. 3923 and 3924. These tariffs enlarge respondent's operations in two respects: first, by publishing for the first time rates between Alameda, Berkeley, Emeryville, Oakland and San Francisco on the one hand and El Cerrito, Stege, Pullman, Richmond, Point Richmond, San Leandro, San Lorenzo and Hayward on the other; and second, by publishing for the first time a warehouse tariff for the storage and

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[1] If respondent were operating under the provisions of the Public Utilities Act, the Commission under the circumstances here of record would authorize its attorney to bring a penalty action. However, the Auto Truck Transportation Act does not authorize such an action. A cease and desist order will be issued against respondent and should future violations of its tariff occur it will be subject to contempt proceedings.

incidental handling of property at Oakland. By the filing of these tariffs two issues are raised:

1. Was respondent or its predecessors operating as a transportation company in good faith at the time the Auto Truck Transportation Act became effective (May 1, 1917), and does respondent possess a prescriptive right lawfully to continue such operations?

2. Was respondent or its predecessor operating as a public warehouseman in good faith at the time Section 50½ of the Public Utilities Act became effective (August 2, 1927) under tariffs and schedules lawfully on file with the Commission, and does respondent possess a prescriptive right lawfully to continue such operations?

Prescriptive Rights under the Auto Truck Transportation Act

There was no documentary evidence offered to support respondent's claim of operation in good faith prior to the effective date of the Auto Truck Transportation Act, from or to El Cerrito, Stege, Pullman, Richmond, Point Richmond, San Leandro, San Lorenzo and Hayward. The oral testimony presented was in sharp conflict.

On June 15, 1918, the Kellogg Express Company[2] filed with the Commission an application for permission to increase rates. The application was personally signed by William Bolt.[3] In disposing of this application the Commission said: "With the exception of the Williams Motor Express Company the activities of these applicants are between San Francisco, Oakland, Berkeley and Alameda." (Kellogg Express Company, Decision No. 5587, dated July 17, 1918, in Application No. 3845, unreported.)

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2. The fictitious name under which William Bolt operated.

3 The predecessor in interest to respondent.

By application filed May 2, 1924, the Kellogg Express Company and other companies joined with the Oakland-San Jose Transportation Company in seeking a certificate of public convenience and necessity for the purpose of establishing through routes and joint rates between San Francisco on the one hand and San Leandro and Wayne and intermediate points on the other; also between San Francisco on the one hand and Sunol and Livermore on the other. In behalf of Kellogg Express Company the application was signed and verified by William Bolt as the owner. It was alleged in paragraph VII of the application that William Bolt, an individual doing business under the fictitious name of Kellogg's Express Company and others were "common carriers, engaged in the transportation of freight by automobile truck between various points, but more particularly between San Francisco and Oakland; that they were so engaged prior to May 1, 1917, and have been continuously so engaged up to the present time; that such transportation is performed, and has at all times since May 1, 1917, been performed under tariffs on file with the Railroad Commission of the State of California and in accordance with the rules and regulations of said Commission, and all other provisions of law".

It was further alleged in paragraph XV:

> "That by decision of the Railroad Commission of the State of California No. 13321 dated March 25, 1924, in application No. 7987, a certificate of public convenience and necessity was issued, authorizing the operation of a through route at joint rates between San Francisco on the one hand, and San Leandro, Irvington and points between on the other hand, by applicants Merchants Express and Draying Company and Oakland-San Jose Transportation Company; that shipments are being daily offered in San Francisco to applicants (other than the Merchants Express and Draying Company and Oakland-San Jose Transportation Company) for transportation to the territory beyond San Leandro, and that the only alternative of said applicants is to refuse to accept such shipments or to accept for interchange with applicant Oakland-San Jose Transportation Company at the combination of the local rate from San Francisco to Oakland, plus the local rate from

Oakland to destination; * * * that so long as all of these operators participate in the transbay business, which is necessary to properly take care of it, it is to the public interest that all of them be permitted to participate in business to and from points beyond Oakland on a basis not preferential to any one operator; that this is necessary in order to provide adequate and convenient service to the public generally at reasonable joint rates, rather than the full combination of locals; that a single line, namely that operated by applicant Oakland-San Jose Transportation Company, is sufficient to care for all of the business beyond Oakland, to and from the points served by said line."

Authority for the establishment of through routes and joint rates between the points named in the application was granted. (Motor Service Corporation et al., Decision No. 14467 dated January 17, 1925, in Application No. 10036, unreported.)

By application filed December 18, 1929, various transbay carriers including Kellogg Express Company applied for an order of the Commission declaring that applicants possess and may exercise an operative right for the transportation of property by automobile truck between San Francisco and Albany. The declaration was made in the application that the operative right of Kellogg Express Company arises out of the fact that it was operating prior to May 1, 1917, and filed tariffs in accordance with General Order No. 47. It was claimed that the failure to show Albany as a point served in the tariffs was due to a lack of knowledge as to tariff construction in the early days of common carrier trucking regulations. Applicants were authorized to publish tariffs showing the community of Albany as a service and rate point. (Consolidated Motor Transport Company et al., Decision No. 21981 dated January 3, 1930, in Application No. 16175, unreported.)

The various formal applications filed with the Commission by Kellogg Express Company are singularly lacking in any reference to service as a common carrier between the points named

in the suspended tariffs. That Kellogg Express Company was aware of the provisions of the law and the requirements of the Commission relating to the filing of tariffs is clearly apparent, first, by the filing of transbay tariffs effective February 1, 1918, and second, by the filing of the application to add Albany to the tariff. Had Kellogg Express Company been operating in good faith between the points named in the suspended tariffs at the time the Act became effective, why were the points not included in the tariffs filed with the Commission? If they had been omitted in error, why then was not an application filed to add these points such as was done in the case of Albany? Instead these points were served "when a paying load was offered" and "at rates named in other carriers' tariffs" or "at rates applying between the outer zone in San Francisco and the outer zone in Oakland". Unless the revenue to be obtained by transporting the freight was attractive it would ordinarily be turned over to other carriers at Oakland to complete the transportation. Thus respondent escaped the losses which would be occasioned in handling small loads while at the same time not sacrificing the lucrative business. It likewise avoided adherence to published tariff rates and was in a position to quote whatever rates were necessary to secure desirable business.

It is clear from the record that Kellogg Express Company was not operating "in good faith" as a common carrier transportation company between the points named in the suspended tariffs on or prior to May 1, 1917.

Prescriptive Rights as a Warehouseman under Section 50¾ of the Public Utilities Act

Respondent claims that its predecessor Kellogg Express Company operated as a warehouseman in good faith at the time Section 50¾

of the Act became effective (August 2, 1927), and was thus relieved from the necessity of obtaining a certificate of public convenience and necessity, and that it acquired these rights by transfer authorized by Decision No. 25744 of March 20, 1933, in Application No. 18745.

It is fairly established through the testimony of respondent's witnesses that freight in transit was occasionally held in storage prior to August 2, 1927, at the successive terminals of the Kellogg Express Company and that charges in addition to the transportation charges were assessed for such service. However it is clear that this company did no solicitation for merchandise storage except in a very incidental and sporadic fashion and that what little storage was done was incidental to its transbay express operations. There were never any negotiable or non-negotiable warehouse receipts such as are customarily issued by public utility warehousemen. The only record the storer had was the regular drayage delivery receipt. No rates or tariffs of any kind were ever filed by defendant with the Commission pursuant to either General Order No. 15 or General Order No. 61 of this Commission. Annual reports filed with the Commission both prior and subsequent to August 2, 1927, reported no revenue for storage although a space for that purpose is specifically provided in the report form.

The record fails to support respondent's claim to a prescriptive right under Section 50½ of the Act. Neither the test of "good faith" nor the statutory requirement that operations be under tariffs lawfully on file with the Commission has been met. Nor did the Commission authorize the transfer of any such right from Kellogg Express Company to respondent. Decision No. 25744, to which respondent refers, related solely to an operative right for the trans-

portation of property by motor trucks as a common carrier between certain points as specified in the application. The suspended warehouse tariffs should be ordered cancelled.

From the record herein we are of the opinion and so find:

1. That respondent has assessed and collected for the transportation of property rates greater or less or different than those contained in the effective tariffs on file with the Commission.

2. That respondent should be ordered to cease and desist immediately and thereafter abstain from applying, demanding or collecting rates greater or less or different than the rates contained in its tariff on file with the Commission.

3. That respondent be required forthwith to proceed in good faith to collect all outstanding undercharges and refund all outstanding overcharges, and not later than June 15, 1935, report under oath to this Commission the amount of undercharges he has collected and the overcharges he has refunded and if any undercharges have not been collected and overcharges refunded, then report in detail the proceedings taken looking to their collection and refund.

4. That respondent has failed to show that William Bolt, doing business under the firm name and style of Kellogg Express Company, operated in good faith as a common carrier of property by auto truck between Alameda, Berkeley, Emeryville, Oakland and San Francisco on the one hand, and El Cerrito, Stege, Pullman, Richmond, Point Richmond, San Leandro, San Lorenzo and Hayward on the other, at the time the Auto Truck Transportation Act became effective (May 1, 1917).

5. That respondent Kellogg Express and Draying Company does not, nor did its predecessor in interest, possess a prescriptive

right to operate a public utility warehouse in the City of Oakland.

O R D E R

These matters having been duly heard and submitted, and basing this order upon the findings of fact contained in the opinion which precedes the order,

IT IS HEREBY ORDERED that respondent Kellogg Express and Draying Company shall immediately cease and desist and thereafter abstain from charging, demanding, collecting or receiving any charges for the transportation of property greater or less or different than those shown in its effective tariffs lawfully on file with the Commission.

IT IS HEREBY FURTHER ORDERED that respondent Kellogg Express and Draying Company forthwith diligently and in good faith proceed to collect and collect the amount of all outstanding undercharges, and refund all outstanding overcharges, and not later than June 15, 1935, report to the Commission under oath the amount of undercharges it has collected and all overcharges it has refunded, and if all undercharges have not been collected and overcharges refunded, to report in detail the proceedings taken looking to their collection and refund.

IT IS HEREBY FURTHER ORDERED that respondent Kellogg Express and Draying Company be and it is hereby ordered and directed to cancel on or before June 3, 1935, its Warehouse Tariff No. 1, C.R.C. No. 1, and Supplement No. 1 thereto, filed with the Commission on October 26, 1934; also Local Freight Tariff No. 1, C.R.C. No. 1, and Local Freight Tariff No. 2, C.R.C. No. 2, filed with the Commission on the same date.

IT IS HEREBY FURTHER ORDERED that upon cancellation of the tariffs as provided by the preceding paragraph, Cases Nos. 3923 and 3924 be and they are hereby discontinued and our suspension orders of October 27, 1934, be vacated and set aside.

IT IS HEREBY FURTHER ORDERED that the Commission retain jurisdiction in these proceedings to take such further steps and make such further orders as shall be necessary to insure full compliance with the law by respondent, Kellogg Express and Draying Company.

Except as otherwise provided herein this decision shall become effective twenty (20) days from the date hereof.

Dated at San Francisco, California, this 14th day of May, 1935.

Leon O. Whitsell

M. B. Harris

Wm. Stadtmueller

Frank R. Havenner

Commissioners.