

**ORIGINAL**

In the Matter of the Application of  
E. P. LAURITZEN, G. B. LAURITZEN and  
N. P. BUSH, a copartnership doing  
business under the name and style of  
RICHMOND NAVIGATION AND IMPROVEMENT  
COMPANY, for an order confirming and  
defining operative rights, or in the  
alternative for authority to operate  
motor trucks as a common carrier of  
property, for hire, between San Pablo,  
Richmond, El Cerrito, Albany,  
Berkeley, Oakland and Alameda.

In the Matter of the Suspension by  
the Commission, on its own motion, of  
certain portions of RICHMOND NAVIGATION  
AND IMPROVEMENT COMPANY Local Freight  
Tariff No.5-B, C.R.C. No.8.

Case No. 3801

A. J. Scampini and Reginald L. Vaughan, for Merchants Express Corporation, and West Berkeley Express and Draying Company, Protestants.

Robert Brennan and Leo E. Sievert, for The Atchison,  
Topeka & Santa Fe Railway Company, Protestants.

## O P I N I O N

Subsequently, Richmond Navigation and Improvement Company filed its application (No.19627), seeking confirmation of

alleged prescriptive right to operate co-ordinated boat and truck service to the points involved and also between these points and Albany, Berkeley, Oakland and Alameda.

Public hearings were conducted by Examiner Williams on both matters, (consolidated by stipulation), at Richmond and Oakland, the matters were duly submitted on briefs, which have been filed, and they are now ready for decision.

Applicant's operations as a water carrier are not involved in this proceeding, nor is its right to file rates between San Francisco and Richmond with pickup and delivery at each city presented. The extensions of truck pickup and delivery zones to San Pablo, El Cerrito and Albany, points in Contra Costa county, exterior to the limits of Richmond,<sup>1</sup> without first procuring a certificate of public convenience and necessity are disputed by protestants. Applicant's contention is based wholly on alleged prescriptive right.

The record, including the testimony of H. P. Lauritzen, founder and president of applicant corporation, supports the allegation that applicant has served San Pablo (an unincorporated area just north of Richmond) and El Cerrito in movements between those points and Richmond since prior to 1917 - in fact, practically since applicant acquired its first truck in 1912. The movements included cargo to and from the boat service at Richmond docks, operated by applicant or others. But there appears not to have been, before 1917, through service to or from San Francisco to points exterior to Richmond. Claim of such service meets negative answer by the application filed by applicant for a truck certificate between San Francisco and Richmond. This application (No. 10780) filed January 26, 1925, originally proposed truck service between Richmond, San Pablo and El Cerrito (and Stege) but

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<sup>1</sup> Stege, a point included in the tariff extension, has been eliminated by stipulation, as it is wholly within the municipal boundaries of Richmond.

was amended to include San Francisco and the through operation of motor trucks via San Francisco-Richmond ferry. After hearing, this application was granted (Decision No.15004, dated June 4, 1925), and in the same decision the application of E. C. Woodworth for similar certificate (Application No.10831), was denied, although it was Woodworth's application that caused applicant's amended offer. On April 21, 1927, applicant partnership made application to discontinue this certificated service (because of operation losses), and the application was granted by Decision No.18383, dated May 18, 1927. No claim of prescriptive right was made in any proceeding, and by the averments of the application, verified by Captain Lauritzen, it elected to adopt a service, not over its own boats but over those of the ferry, to perform trucking service. Tariff filings are consistent with this fact and confirm it. We cannot find that applicant has prescriptive right to give through service to San Francisco by coordinated boat-truck service.

As to the prior right to transport property by truck between Richmond, Albany, San Pablo and El Cerrito, on one hand, and Oakland, a number of witnesses were called to ascertain the operations prior to 1917. Captain Lauritzen testified that infrequent trips (twice a month, or less), were made between Oakland and Richmond, mostly on demand of Oakland shippers. Occasionally, trips were made between Richmond and Albany, Berkeley, Emeryville and Alameda. Captain Lauritzen's testimony is satisfying that some operations were conducted before 1917, but there is no certainty that any service performed was other than that of a casual drayman of the type later described in the Ben Moore case (27 C.R.C. 388). According all weight justified to Captain Lauritzen's testimony, the fact of operation as a common carrier between fixed termini or over a regular route is not established by it.

In support of applicant eleven witnesses were called. Of these, five testified to transportation service performed by applicant's predecessor before May 1, 1917. Witnesses Penning, Black, Burdick, Milnes and Mrs. Grimsley were sure of transportation by the applicant before 1917. Milnes, a newspaper publisher, testified to twenty years continuous use of applicant's service. Mrs. Grimsley was the only witness who recalled shipments from Berkeley, prior to 1917. In addition, the testimony of eleven additional witnesses was stipulated, relating to both prior operations and present public convenience. According similar division of witnesses to the stipulated number, and according equal weight to their testimony, we have only additional proof that applicant performed some service for them in transporting property.

That such service was then a bona fide service, such as the statute (Chapter 213, as amended), exempted from procuring a certificate, appears so doubtful that this Commission cannot find that there is affirmative proof justifying a declaration of prior right. Applicant relies on the Commission's decision in the Lawrence Warehouse Company case (37 C.R.C. 199), as precedent for its claim of prior right. We believe the cases are easily distinguishable. In the instant case no witness does more than say applicant's predecessor performed truck service before 1917. Even Captain Lauritzen knows of no details of operation such as schedules, who drove the vehicles, what routes were used, the quantities transported, etc., details which should, at this period eighteen years removed, be an essential part of proof. No documentary evidence is presented. In the Lawrence case the foreman and drivers of the trucks operating before 1917 were produced and gave convincing testimony of the continuous and almost

daily service held out to the public. No such showing is made in the instant application. We believe the other cases cited by applicant are equally distinguishable, for similar reasons.

Applicant, shifting from the basis of prescriptive right, also seeks a certificate based on present day public convenience and necessity. Each of the eleven oral witnesses testified that they desired to continue applicant's service between Richmond and other East Bay points. It may be assumed that each of the eleven stipulated witnesses desires the same. But a majority of those testifying also use the services of protesting carriers and find such service satisfactory, though some express preference for a carrier with headquarters in Richmond, alleging easier contact. There is no proof that any authorized service, either rail or truck, is now inadequate or inefficient. There is no disparity of rates. The schedules of operation are abundant and the facilities employed ample. No need has been shown for any movements between points in Alameda county. At best the record is an expression of desire on the part of Richmond shippers and consignees that applicant be permitted to continue the business conducted for many years.

We have discussed what appear to be the determinative issues presented. Collateral issues raised by applicant have been determined by a long line of decisions by the Commission in similar matters and need no discussion. We can discern, however, in the record certain equitable rights due applicant and supported by testimony as to public convenience and necessity. It seeks to serve San Pablo, El Cerrito and Albany as it has served them for probably twenty years, from Richmond. Its boat service is limited to San Francisco and Richmond. In connection therewith it asks a through rate including San Pablo and El Cerrito. Applicant stipulated it claimed no prescriptive right between San Francisco

and Alameda county points. The Richmond rate is blanketed for pickup and delivery at San Pablo and El Cerrito. Albany is included in the application with the qualification the rate sought should be the same as El Cerrito. This, in effect, blankets the Albany rate with that to Richmond. We believe the record justifies the granting of a certificate, coordinated with the boat service, and including San Pablo, El Cerrito and Albany as points of pickup and delivery. In all other respects the application will be denied.

Based upon the foregoing findings, the suspension proceeding (Case 3801) will be dismissed.

H. P. Lauritzen, G. B. Lauritzen and N. P. Bush are 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

The above entitled application of H. P. Lauritzen, G. B. Lauritzen and N. P. Bush, a copartnership operating under the fictitious name of Richmond Navigation and Improvement Company, has been submitted after hearings held thereon and the filing of briefs,

THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA HEREBY DECLARES that public convenience and necessity require the establishment of auto truck service for the transportation of property between Richmond El Cerrito, Albany and San Pablo, and all points intermediate thereto, which service may be coordinated with the boat service of applicant between Richmond and San

Francisco by the filing of through rates to and/or from all the points named over and along the public highways connecting said points; and

IT IS HEREBY ORDERED that a certificate of public convenience and necessity therefor be and the same hereby is granted to E. P. Lauritzen, G. B. Lauritzen and N. P. Bush, a copartnership, subject to the following conditions:

1. Applicant shall file its written acceptance of the certificate herein granted within a period of not to exceed fifteen (15) days from date hereof.
2. Applicant shall file, in triplicate, and make effective within a period of not to exceed thirty (30) days after the effective date of this order, on not less than ten days' notice to the Commission and the public a tariff or tariffs constructed in accordance with the requirements of the Commission's General Orders and containing rates and rules which, in volume and effect, shall be identical with the rates and rules shown in the exhibit attached to the application insofar as they conform to the certificate herein granted, or rates satisfactory to the Railroad Commission.
3. Applicant shall file, in duplicate, and make effective within a period of not to exceed thirty (30) days after the effective date of this order, on not less than five days' notice to the Commission and the public, time schedules covering the service herein authorized in a form satisfactory to the Railroad Commission.
4. 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.
5. 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.

IT IS HEREBY FURTHER ORDERED that in all other respects said application be and the same hereby is denied.

IT IS HEREBY FURTHER ORDERED that Case No. 3801 be and the same hereby is dismissed.

For all other purposes the effective date of this order shall be twenty (20) days from the date hereof.

Dated at San Francisco, California, this 20th day of May, 1935.

John A. Sullivan  
W. A. Lewis  
W. B. Davis  
W. B. Davis  
W. B. Davis  
COMMISSIONERS.