

Decision No. 28922

BEFORE THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of
 H. 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.

Application No. 19627.

Gwyn H. Baker for Applicant.

Fitzgerald, Abbott & Beardsley, by Crellin Fitzgerald,
for Merchants Express Corporation, Protestant;Burton Mason and H. W. Hobbs for Southern Pacific Company
and Pacific Motor Transport Company, Protestants;Robert Brennan and W. F. Brooks for The Atchison, Topeka
and Santa Fe Railway, Protestant.

BY THE COMMISSION:

OPINION ON REHEARING

By our Decision No. 27970, dated May 20, 1935, in the
 above entitled matter, claim of applicant of a prescriptive right
 to transport property by truck as a highway common carrier between
 Richmond and other points north of the Alameda County line, on one
 hand, and Oakland and other points south of the Alameda County line,
 on the other hand, was denied. Applicant on June 17, 1935 filed
 its petition for rehearing on the following grounds;

- (1) That the record, "when properly construed in its entirety," establishes proof of such right.
- (2) That newly discovered evidence, corroborating that already produced, will conclusively establish the fact of such prior operation, constituting the right claimed.

Public rehearings were conducted by Examiner^{W.R.}/Williams at San Francisco and the matter was duly submitted without briefs.

As to the first point urged applicant made no showing other than reference to the record in the original hearing. Counsel for applicant alleges that Captain H. P. Lauritzen "became confused" in fixing the frequency of trips prior to May 1, 1917, between Richmond and Oakland. Examination of his testimony in the original proceeding fails to sustain this allegation. For example applicant in reply to questioning as to whether he had, prior to May 1, 1917, hauled freight"....from those points to Oakland, or from Oakland to those points, ...". Captain Lauritzen replied, in substance, that he had not hauled to Oakland, that prior to that date nothing was moving in that direction, that Oakland was a residential town and is yet. And further in reply to further questioning, Captain Lauritzen stated that he was not operating any trucks on schedule as of May 1, 1917, that his operation into Oakland was for the sporadic movement once or twice or three times a month of any freight which might be offered. (Transcript Pages 15 and 46). Under cross-examination during the original hearing the witness, Captain H. P. Lauritzen, when asked if he operated between Richmond and Oakland before May 1, 1917, answered "Yes." (Transcript Page 64). This answer refers to previous replies of the witness that the only service given from

Oakland to Richmond was in response to telephone requests from Oakland. The foregoing statements were part of the basis of the negative decision in Decision No. 27970. Other bases were the absence of documentary evidence, such as records, etc., and the fact that applicant had never filed tariffs or sought to comply with the law.

Captain Lauritzen was not recalled on rehearing and his testimony in the original proceeding must be regarded as fixed.

Applicant, however, did produce George B. Lauritzen, copartner of his father Captain Lauritzen, and Mrs. Marguerite Bush, daughter of Captain Lauritzen, both of whom were employed in the business before May 1, 1917, as witnesses. Mr. Lauritzen testified that his father, himself, and N. P. Bush, formed a partnership in 1911 and have conducted business since that time under the fictitious name "Richmond Navigation and Improvement Company." Before May 1, 1917 the partnership had acquired two trucks, one a dump truck. In 1917 a third was acquired. Witness testified he drove the trucks alternately with Bush and John Segesman and that property was transported between Oakland and Richmond four days each week. He named nineteen shippers and receivers of freight at Richmond and Oakland and commodities transported; such service was afforded "just as often as shippers wanted us." No terminal was maintained in Oakland and orders were taken by the truck driver. The period of such operations was fixed "before May 1, 1917 and thereafter." No document supporting this testimony was presented, witness explaining that records prior to 1927 had been destroyed; no records of shippers, many of whom are still in business, were produced. The testimony did not fix dates for any movement recited by witness.

Mrs. Bush testified that she was an office employee and the bookkeeper from 1916 to 1920 and that she gave directions to the truck drivers who, she said, were her brother, Bush and Segesman. She also made out the bills for transportation. She remembered the customers named by her brother and several additional.

She further testified that she had a list of rates to be charged and from this she made out the bills. She could not recall the rates or commodities listed. She was sure that four trips between Richmond and Oakland were made each week.

With such conflict in the testimony affirmative finding as sought, free from uncertainty, cannot be made. That some service was performed between the main points and to some intermediate points seems unquestionable but its character appears to have been casual and infrequent. The applicant is not in the position of one ignorant of the law as was shown in Decision No. 27970 by the filing of Application No. 10780 wherein a certificated route was sought, obtained and later relinquished.

An order denying the petition for rehearing will be entered.

O R D E R

The above entitled matter having been submitted after hearing upon petition for rehearing as to the finding in Decision No. 27970 as to alleged prescriptive right claimed between Richmond and Oakland, and the Commission being fully advised in the premises,

IT IS HEREBY ORDERED that said petition be and the same

hereby is denied and that said Decision No. 27970 herein be,
and the same hereby is, affirmed.

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 29th
day of June, 1936.

M. B. Davis

W. H. F. Davis

W. H. F. Davis

Frank R. Allen
Commissioners.