

**ORIGINAL**

Decision No. 23083

BEFORE THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA.

In the Matter of the Application )  
of JACK MILLSPAUGH for a license )  
as a Motor-Transportation Broker.)

M.T.B.  
Application No. 20464.

Harold W. Dill, for Applicant.

Fred N. Bigelow, for Pacific Southwest Railroad  
Association, Protestant.

E. T. Lucey, for The Atchison, Topeka & Santa Fe  
Railway Co., Protestant.

R. G. Dilworth, for San Diego & Arizona Eastern  
Railway Co., Protestant.

L. C. Maire, for State Board of Equalization,  
Interested Party.

BY THE COMMISSION:

O P I N I O N

In this matter the applicant Jack Millspaugh seeks a  
license as a Motor Transportation Broker under the Motor Transporta-  
tion Broker Act (Statutes 1935, Chapter 705). Protests were  
entered by Pacific Southwest Railroad Association, The Atchison,  
Topeka & Santa Fe Railway Company, and San Diego & Arizona Eastern  
Railway Company. A public hearing was had before Examiner Austin  
at San Diego on May 13th, 1936, when evidence was heard, the matter  
submitted and it is now ready for decision.

During the past two years applicant has been engaged in  
business in San Diego as a distributor for Kendal Oil Company,  
representing this company in the sale of its products. During

the preceding five years he followed the automobile and truck business in San Diego. Since the filing of this application in October, 1935, he has been operating trucks daily from San Diego to San Francisco, carrying produce principally.

At present applicant maintains an office at 753 Union Street, San Diego. He conducts no parking lot or other place where truck operators are accustomed to make their headquarters, it being his practice to communicate with them by telephone whenever a load is available.

Accompanying the application are letters of authority from three motor carriers; in addition, applicant has dealt with five other carriers whose letters of authority have not yet been filed. All of them hold permits from the Commission as Highway Contract Carriers.

The traffic secured by applicant and transported by these carriers consists almost entirely of produce originating in the vicinity of Oceanside and destined to San Francisco produce dealers. Some fish is hauled from San Diego shippers to San Francisco but this is negligible. Part of this produce is transported by the Southern California Freight Lines, a certificated highway common carrier, from points on its line to Oceanside where it is delivered to the carriers operating in connection with applicant. For this service the Southern California Freight Lines collects a charge, but it is not contended that any joint or combination rate has been or could be established between it and any of the carriers involved.

During the summer season, the volume of the traffic is such that trucks must be operated daily from Oceanside to San Francisco. The carriers attempt to secure a back-haul at San Francisco, but with this applicant has no concern.

The San Francisco produce dealers for whom this traffic is hauled, pay and bear the transportation charges. The contracts between them and applicant, all of which are verbal except one, provide for the transportation, establish the rates, and determine the liability for goods lost or damaged in transit. They do not obligate the dealer to furnish, nor the carrier to transport, any specific quantity of freight, nor do they endure for any definite term. It is applicant's practice, at the beginning of the season, to consummate these agreements. In this connection it will be observed that applicant himself, a broker, and not the carriers, has undertaken to enter into these contracts of carriage.

Unlike some of the other Motor Transportation Brokers who recently have applied for licenses, the applicant himself owns no equipment nor does he hold any permit to operate as a Highway Contract Carrier or a Radial Highway Common Carrier.

Upon all commodities transported by the carriers operating in conjunction with applicant, cargo insurance will be carried by him under a policy issued in his name, which does not mention any of them as co-assured parties. Applicant concedes that for all loss of or damage to any shipment occurring in transit, the shipper will hold him, and not the carrier, responsible, and it will be his practice to settle directly with the shipper rather than require him to recover from the carrier.

For his services as a broker, applicant will collect and retain from the carriers ten percent of the gross receipts, together with an additional three percent to reimburse him for the premium paid for cargo insurance. Upon delivery of the shipments, all freight charges will be collected from the San Francisco produce dealers by the carriers who, on returning to San Diego,

will pay over to applicant all sums so collected, and receive from him the net amount remaining after deducting commissions and insurance premiums.

In the future, applicant will enter into a written "transportation agreement" with each shipper under which applicant undertakes to furnish, through a competent and legally licensed carrier, transportation for certain commodities described therein, to be protected by cargo insurance, for which service the shipper will pay the rate determined therein, subject to modification at the instance of the commission. A "commission agreement" will be executed by the applicant and each carrier, under which the carrier obligates himself to pay a commission amounting to ten percent of the gross freight charges received upon the cargo secured by applicant, and three percent of such amounts to cover cargo insurance. The carrier further undertakes to pay all freight and handling charges accruing against the cargo, and, wherever the cargo consists of perishable commodities, he guarantees timely arrival at markets. Applicant on his part agrees to perform according to the best of his ability all of his duties as a broker for the carrier, and to discharge his duties honestly.

A freight bill will be executed in triplicate upon a form bearing applicant's name as a Motor Transportation Broker. Each of the counterparts which are identical excepting only the designation appearing at the top of each, viz: "original freight bill", "shipper's receipt", and "delivery receipt", will show upon its face the date of shipment, the truck number, the name of the operator or carrier, the trip number, the name and address of the consignee and consignor, respectively, a description of the

commodity showing the number of units, the kind of commodity, the weight, rate, and amount of charges, a receipt to be signed by the carrier or operator upon receiving the goods from the consignor, and a receipt to be signed by the consignee upon final delivery. In addition, the applicant will prepare in duplicate a manifest, the original of which he will retain, while the other will be delivered to the carrier. This will contain a detailed description of the shipments carried on each trip.

In practice, orders for shipments will be transmitted by the local agents of the San Francisco dealers verbally to applicant, who thereupon will prepare the form of freight bill, the original of which will be retained by the carrier, and copies will be delivered to the consignor and consignee, respectively.

Although in the past applicant has handled shipments for some eight or nine large San Francisco produce dealers only, and for a few San Diego fish dealers, who, as we have pointed out, pay and bear all of the transportation charges, nevertheless it is quite clear that he contemplates a considerable expansion of his activities should he be granted a license. This appears from his testimony, elicited upon redirect examination by his counsel, to the effect that if granted a license he will be willing to enter into arrangements with any substantial shipper for the handling of any commodities, including those moving between San Diego and San Francisco. On cross examination he stated that he would solicit contracts from shippers for such transportation.

Although the question of public convenience and necessity justifying the continuance of these operations is not directly in issue here, the applicant testified, without objection, that this service was convenient, being, in fact, more expeditious, in so far

as it related to the transportation of produce, than any other service now available. In view of the perishable nature of these commodities, this was asserted to be quite advantageous to the shippers.

It was stipulated by the parties that the testimony of two witnesses, one a shipper and the other a licensed truck operator, would, if called, corroborate the evidence given by the applicant.

The record discloses that applicant alone will deal with the shippers, negotiating and consummating in his own name all contracts for transportation; he alone will solicit freight, agree upon rates, provide in his own name all cargo insurance, and assume personally all responsibility for loss and damage to shipments. And he will issue all freight bills and manifests, collect and pay over the freight charges to the carriers, and control the distribution of traffic among them. Such have been his operations in the past, and it is clear from his testimony that not only will they be conducted similarly in the future but he intends to so expand them that he will serve all substantial shippers having produce or other commodities to be hauled between Oceanside, other San Diego County points, and San Francisco. Unquestionably, this service will be conducted over regular routes or between fixed termini. He has not undertaken merely to sell, furnish or provide transportation over the public highways, when such transportation is furnished or offered or proposed to be furnished by a motor carrier, as provided in Section 2, Motor Transportation Broker Act. On the contrary, the scope of his activities is such that he himself must be deemed the carrier. His operations differ in no substantial respect from those of the so-called "freight forwarders" against whom many cease and desist orders have been issued in the past. Typical of these cases may be mentioned the following:

M.F.T. Co. v. Moyer Forwarding Co., 37 C.R.C. 857  
(Certiorari denied, S.F. 14801).

Regulated Carriers, Inc. v. May, Decision No. 26949.

Regulated Carriers, Inc. v. Ramsey, Decision No.  
27087.

Regulated Carriers, Inc. v. Corlett, Decision No.  
27443.

The Motor Transportation Broker Act was not intended to legalize operations of the character condemned by these decisions. It was designed solely to govern the business of one acting merely as a broker or an intermediary between the shipper and a motor carrier of property. But here, applicant is far more than an intermediary. Because of the control which he exercises over the conduct of the transportation in its entirety, he is no longer a broker, but has become a carrier. One who is himself a carrier cannot act as a broker in respect to the sale of or negotiation for transportation over his own lines. The Commission, therefore, will not undertake in this instance to grant a license permitting operations such as those herein proposed. Furthermore, the bond accompanying the application, which was filed by applicant pursuant to Section 8, Motor Transportation Broker Act, is no longer in effect, having been cancelled by the surety company. For the reasons mentioned the application will stand denied.

#### O R D E R

A public hearing having been had in the above entitled matter, evidence having been offered, the matter having been submitted, and the Commission being now fully advised in the premises,

IT IS HEREBY ORDERED that the application of Jack  
Millsbaugh for a license as a Motor Transportation Broker be and  
the same is hereby denied.

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

Dated at San Francisco, California, this 31<sup>st</sup> day of August,  
1936.

M B Lewis  
Leon A. Brown

Arthur H. Brown  
Frank R. Brown  
Commissioners.