

Decision No. 28591

BEFORE THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of
THEODORE PHILLIPS, doing business under
the name and style of CYCLE EXPRESS,
for a certificate of public convenience
and necessity to operate motor express
service as a highway common carrier
between East Bay Cities and Contra
Costa County.

Application No. 20838

COPY

William W. Hoffman, for Applicant.

A. S. Williams, for Pacific Motor Transport Co.,
Pacific Motor Trucking Co. and Southern
Pacific Railway, Protestants.

L. N. Bradshaw, for Sacramento Northern Railway,
Protestant.

R. S. Elliott, for Railway Express Agency, Inc.,
Protestant.

BY THE COMMISSION:

O P I N I O N

Applicant, Theodore Phillips, operating under the
fictitious name "Cycle Express," herein seeks a certificate of
public convenience and necessity authorizing him to establish
truck service as a highway common carrier for the transportation
of property between Oakland, Berkeley, Emeryville, Piedmont and
Albany and the Contra Costa County Cities of Orinda, Lafayette,
Walnut Creek, Concord, Pittsburg, Antioch, Nichols, Port Chicago
and Martinez.

Public hearing hereon was conducted by Examiner W. R.
Williams at Walnut Creek. The matter was duly submitted upon
memoranda, which, having been filed, places the matter under
submission and ready for decision.

Applicant's service as proposed is now in operation. In 1933 applicant began the transportation of miscellaneous packages between Oakland and other East Bay cities and the points named in Contra Costa County, using as a vehicle a motorcycle with side-car attachment. This service was begun at a time when the Commission had not formally asserted and assumed jurisdiction over the transportation of property by such vehicles. (1) By September, 1935, applicant's business had grown to such volume that he discarded the motorcycle and substituted a small truck which has been in operation ever since. In November, 1935, applicant obtained from this Commission a permit under Chapter 223, Statutes of 1935, as a radial highway common carrier. Applicant's permit restricts his regular or frequent operation to an area within fifty miles of Oakland because of restricted insurance. Applicant's operations were continued under this permit. On October 26, 1936, he filed the instant application for a certificate of public convenience and necessity as a highway common carrier.

The service which applicant now renders, and has been rendering since 1933, is the delivery of small parcels, without return movement, except occasionally returned dental articles.

At the hearing, applicant testified he was transporting approximately fifty packages daily and that no package exceeded 250 pounds in weight. The testimony of witnesses using the service, however, indicated that nothing in excess of 200 pounds had been transported for them. The shipments normally vary from 25 to 100 pounds. The actual average weight is not stated.

(1) See Decision No. 27688, Certified Highway Carriers v. Kemp, dated January 24, 1935, C.R.C. 39, p. 263.

Witnesses now using his service and who testified their desire for its continuance were, Robert S. Garrett, Secretary of the Businessmen's Association of Lafayette, which endorsed the application, M. H. Stanely, druggist at Lafayette, D. S. Potter, dentist, J. H. Brubaker, garage, C. T. Reichhold, automobile dealer of Walnut Creek. The service to Lafayette was deemed necessary, Mr. Garrett testified, because express packages are not delivered to stores and freight must be received at Orinda. Dr. Potter testified that applicant's service to Walnut Creek was especially valuable to him because he could telephone to Oakland not later than one o'clock each day and have necessary dental materials forwarded to him immediately. Some of these witnesses did not know of the services of other common carriers to these points. Some of them had used the service of Railway Express Agency, Inc., Sacramento Northern Railway and Pacific Motor Transport Company.

Applicant testified that his business had grown and become profitable because of efficient and rapid service with cargo insurance. He proposes to expand the business to some East Bay communities as points of origin, which has not contributed many shipments heretofore, and to limit his operations to the points proposed, with twice daily schedules. Applicant estimates that his operating cost is \$152.84 per month with receipts sufficient to pay all this cost and allow approximately \$200 per month to him as salary. In the operation of his service, applicant averages about 4,000 miles a month at a cost of 8.8 cents per mile.

The established operation of applicant and, in addition, the testimony of the witnesses he produced indicate that the service has a measure of value in the area sought. In some

respects, it is a special messenger service between the points. It is now, and has been, available to the public generally, particularly that portion which ships small packages requiring haste.

But the record herein also presents other aspects of the case which must be considered. The points sought to be served are now served from the points of origin by Southern Pacific Railway, Railway Express Agency, Inc., Pacific Motor Transport Company over the lines of its subsidiary, Pacific Motor Trucking Company, and Sacramento Northern Railway. Each of these carriers is equipped with several schedules by which property in any quantity may be moved between the points involved.

In addition, prior applications by Sacramento Northern Railway and Pacific Greyhound Lines to establish additional bus service to the same points with express rights limited to shipments of 100 pounds or less are now pending. ⁽²⁾

The applications now pending provide for the use of the low level tunnel road, which is not constructed and there is nothing in the record to indicate when this road will be available. At this time, applicant proposes to use the old tunnel road between Alameda and Contra Costa County.

Applicant asserts that the very fact that he has been successful in establishing this operation is of itself evidence of its need as a utility. However applicant, for more than three years, has conducted this service without first procuring from the Commission a proper certificate so to do. Applicant did not seek

(2) Application No. 19967 of Sacramento Northern Railway, filed May 22, 1935, and Application No. 20513 of Pacific Greyhound Lines, Inc., filed April 27, 1936. The instant application was filed October 26, 1936.

a certificate for his motorcycle operation, and, up until January, 1935, when the Commission held that it possessed jurisdiction over this class of operation on the highway, might have validly been excused from so doing. However, from and after January, 1935, this condition no longer existed and applicant's subsequent change to the use of a motor truck early in 1935 clearly indicates operation as a highway common carrier thereafter.

Applicant was aware of the Highway Carriers Act (Chapter 223, Statutes 1935) becoming effective in September, 1935, and thereafter sought, and obtained, a radial highway common carrier's permit. However, at the time, applicant knew his operation was between fixed termini and over regular routes; that his offer to the public was to serve such points twice daily; that he solicited and accepted business on the basis of quick delivery. These are some of the fundamental characteristics of highway common carriers. That there were diversions from the route at times is immaterial.

Applicant must have known of the existence of the other carriers in the field, particularly the rail carriers, and yet, not until more than a year after the application of Sacramento Northern Railway and six months after application by Pacific Greyhound Lines, for similar operation in connection with passenger stages, had been filed, did he seek compliance with law.

Section 50-3/4 (c) provides that "no highway common carrier shall hereafter begin to operate any auto truck, or other self-propelled vehicle, for the transportation of property for compensation, on any public highway in this state, without first having obtained from the Railroad Commission a certificate declaring that public convenience and necessity require such operation." This section was adopted in 1935 and became effective in September,

1935. It is substantially the same as a similar provision in Chapter 213, Acts of 1917, which Section 50-3/4 of the Public Utilities Act superseded.

At no time since 1933 was applicant authorized to begin any service for the transportation of property over the public highways by automotive power. Under the record before us, applicant plainly has been operating for more than three years without having sought at any time to bring himself within the law. During that period, he has built up a business which has become profitable. In doing this, he has invaded the territories served by other carriers and has diverted traffic that otherwise would have gone to them. This diversion of traffic from other carriers was based upon an illegal operation.

There is nothing in the record to show that he performed any service which would bring him within the scope of a radial highway common carrier. What he did under his radial permit was to continue a highway common carrier service between fixed termini and over regular routes at a regular tariff of rates and upon regular schedules twice daily, for which he has now sought a certificate. There are here no extenuating circumstances which justify condoning the violations of law. The application will be denied. Public interest will not be adversely affected by this denial as the record before us falls far short of showing that the present services of other carriers in this territory are inadequate.

Unless applicant immediately discontinues performing transportation service as a highway common carrier, it will be necessary for the Commission to institute a proceeding for the issuance of a cease and desist order against applicant.

O R D E R

Theodore Phillips, operating under the fictitious name of "Cycle Express," having made application as hereinabove entitled, the matter having been duly heard and now being ready for decision,

IT IS HEREBY ORDERED that the application be, and the same hereby is, denied.

Dated at San Francisco, California, this 8th day of March, 1937.

William H. Hall
Leon C. Hall
Harry R. Hall
Richard Hall
Ray & C. Hall
COMMISSIONERS.