

Decision No. 19837

ORIGINAL

BEFORE THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA.

In the Matter of the Application)
of Paul R. Kemp and Jack B. Kemp,)
co-partners doing business under)
the fictitious name and style of)
California Delivery Service, for a)
Certificate of Public Convenience)
and Necessity to operate a motor-)
cycle delivery service between)
Los Angeles and nearby cities)

Application No. 19837.

David R. Faries and McIntyre Faries, by McIntyre Faries, for applicant.
Douglas Brookman and F. G. Athearn, by Douglas Brookman, for United Parcel Service of Los Angeles, Inc., protestant.
Edward Stern, for Railway Express Agency, Inc., protestant.
Robert Brennan and Wm. F. Brooks, by Wm. F. Brooks, for The Atchison, Topeka & Santa Fe Railway, protestant.
Phil Jacobson, for G. F. D. Lines, Inc., protestant.
R. E. Wedekind, for Southern Pacific Company, Pacific Electric Railway Company and Pacific Motor Transport Company, protestants.
C. E. Smith, for Allison's Auto Express, protestant.
C. Storey, for Storey Auto Express, protestant.
Wesley Perry, for Perry Auto Parts Express, protestant.
Wallace K. Downey, for Pacific Freight Lines, protestant.
G. C. Foster, for Western Truck Lines, Ltd., and Glendale Interurban Express, protestants.
H. J. Bischoff, for Southern California Freight Lines, protestant.
D. G. Shearer, for Allison Auto Express, Storey Auto Express and Perry Auto Parts Express, protestants.
John V. Morris, for Automotive Parts Jobbers, protestants.

BY THE COMMISSION:

O P I N I O N

Applicants Paul R. Kemp and Jack B. Kemp are co-partners doing business under the fictitious name and style of California Delivery Service.

By application, as amended, they seek a certificate of public convenience and necessity authorizing the operation of a motorcycle delivery service as a common carrier for the transportation of parcels and messages between Los Angeles and North Hollywood, Van Nuys, Burbank, Glendale, Huntington Park, Compton, Long Beach, Hawthorne, Inglewood, Torrance, Culver City, Lynwood, Lennox, Lomita, Wilmington, San Pedro (Los Angeles Harbor), Gardena, Beverly Hills, Santa Monica, South Pasadena, Pasadena, Alhambra, San Gabriel, Arcadia, Monrovia, Montebello, Whittier, Pico and intermediate points, over seven distinct routes as hereinafter more fully set forth.

By Decision No. 27688 of January 21, 1935, in Case No. 3867 (39 C.R.C. 247-252), the Commission found "that Paul R. Kemp and Jack B. Kemp, co-partners operating under the fictitious name and style of California Delivery Service, are operating as a transportation company, as defined in Section 1, subdivision (c) of the Auto Transportation Act (Chapter 213, Statutes 1917, as amended), with common carrier status from Los Angeles to San Pedro, Long Beach, Huntington Park, Whittier, Pasadena, Monrovia, Glendale, Van Nuys, North Hollywood, Santa Monica, Beverly Hills, Inglewood, Alhambra, Burbank, San Fernando and Compton, and without a certificate of public convenience and necessity or prior right authorizing such operations."

This decision turned upon the question whether the regulatory power of the Commission extended to operations conducted by motorcycle. Overruling the contention of applicants (defendants therein) to the contrary, the Commission held a motorcycle to be an auto truck within the meaning of the Auto Truck Transportation Act, and that consequently applicants' service was subject to the requirement of certification. In view of the novelty of the question, and the absence of any element of bad faith, applicants having acted in reliance upon the advice of counsel, the Commission found the circumstances sufficiently extenuating to warrant a modification of the usual cease and desist order, and accordingly, permission was granted to file within a reasonable time, fixed at thirty days, an application for a certificate covering this service.

The Commission ordered "that California Delivery Service shall cease and desist, directly or indirectly, or by any subterfuge or device, from continuing such operations; provided, that should defendants herein file, within thirty (30) days from the date hereof, (1) their proper application for a certificate

(1) Decision No. 27668 is dated January 21, 1935, and Original Application No. 19837 was filed February 18, 1935, pursuant to this proviso.

of public convenience and necessity covering such service, the foregoing order, in all respects, shall stand suspended until the Commission shall have finally disposed of said application."

The instant proceeding is upon application made pursuant to and in accordance with the foregoing proviso, in the course of the hearings of which amendments have been made as hereinafter shown.

Since the entry of Decision No. 27688, supra, the Auto Truck Transportation Act has been repealed and Sections 2-3/4 and 50-3/4, relating to highway common carriers, have been added to the Public Utilities Act through the enactment of Chapter 664, Statutes 1935. (2)

As the handling of messages is not subject to certification under the provisions of the statute, consideration of the application herein will be limited to parcels.

At the outset it was stipulated by applicants that they would not transport motion picture films, accessories and supplies over the routes as proposed in this application.

Following public hearings before Examiners Gorman on April 19, 1935, and Geary on June 20, August 22 and 23, 1935, in Los Angeles, the matter was submitted on briefs, since filed. Thereafter protest was filed by certain auto parts jobbers who had originally supported the application.

Several of them had supported applicants, so it was alleged, upon their representations, relied upon by protestants, that

(2) Statutes 1935, Chapter 664, in repealing the Auto Truck Transportation Act (Statutes 1917, Chapter 213, as amended), provides as follows:

"* * * provided, however, that any certificate of public convenience and necessity heretofore issued by the Railroad Commission shall not be terminated by this repeal, but shall be deemed to have been issued under this act; and such repeal shall not affect any pending application for such certificates, or any proceedings pending under said act so repealed, it being the intention of this act to continue in effect the provisions of the act so repealed by incorporating the same herein, except as the same may be amended hereby."

applicants would afford exclusive auto parts service for southern California jobbers - a service they asserted was very essential. They claimed applicants have so changed the nature of their service, (rendered under contract, pursuant to the cease and desist order, supra), that it was no longer reliable. Hence, the withdrawal of protestants' support.

The case was reopened for further hearing before Examiner Austin on January 7 and 20, 1936, in Los Angeles, and submitted upon the consolidated record. In determining the issues we shall consider the original showing, along with evidence produced at the hearings had upon the protest.

The record shows the California Delivery Service to have been in existence continuously since January, 1932, operating over seven routes between Los Angeles and Van Nuys, Long Beach, San Pedro, Santa Monica, Pasadena, Monrovia and Whittier, designated as Routes Numbers 1 to 7, respectively. Certain points embraced within one or more of these routes as, for example, North Hollywood and Van Nuys, in Route No. 1, while situated within the city limits of the City of Los Angeles, are served via circuitous routing rendering them inter-city in character and therefore included within the provisions of the Public Utilities Act.

Applicants own and operate some nine to twelve motorcycles equipped with side-cars consisting of boxes attached to chassis, the dimensions of which are one to two feet deep by four to five feet long, and approximately three feet wide.

The business consists of delivering merchandise (principally automobile accessories, parts, and supplies), from concerns in Los Angeles to points situated upon the aforesaid routes. With the exception of the San Pedro and Monrovia routes, service is rendered

daily except Sunday, leaving Los Angeles at 9:30 A.M., 1:30 P.M., and 4:30 P.M. (3)

Applicants testified that automotive parts in packages ranging from two to ten pounds average weight constituted ninety per cent of the transportation here involved, the remaining ten per cent consisting of general merchandise, principally electrical supplies, paint, and paper, including newspapers. In the performance of this pick-up and delivery service it is customary to receive the orders of patrons, either by pick-up or by telephone, and transmit them to the auto parts houses in Los Angeles where applicants collect the shipments, thereafter classifying and routing them from their own terminal at 1116 South Main Street, Los Angeles. Some twenty-five per cent of the orders are by telephone, in connection with the more emergent of which an "on call" special delivery service is maintained.

By applicants' Exhibit No. 1, a total of 251 customers was listed on routes 1 to 7, inclusive, 56 of which were styled "regular" customers and 195 as "occasional" customers or consignees. The record shows that most of these so-called regular customers have entered into contracts with applicants, either written or oral, providing for an average charge of approximately seventeen cents per package of 17 pounds or less, plus one cent for each additional pound, subject to agreed monthly minima of from \$15.00 to \$125.00, according to the quantities handled. A somewhat higher rate obtains in the absence of such contract or agreement basis.

Financial statements tendered as of April 30, 1935, reflected a capital of \$4,123.11, total assets of \$6,016.16, total liabilities of \$1,297.03, and a profit of \$1,230.46⁽⁴⁾ for the first quarter of

(3) The 4:30 P.M. trip is omitted on San Pedro and Monrovia Routes Nos. 3 and 6.

(4) Corrections to Exhibits 1 and 2, pp. 110 and 111 of transcript.

the calendar year 1935. Taxes, interest, and depreciation were accounted for in the foregoing statement as were the items of public liability, property damage, and compensation insurance. Certain cost data relative to the daily operation of the motorcycles were furnished by applicants, in response to requests of particular protestants or competitors, and reflected an average cost of \$7.276 per motorcycle per day. The corresponding average income was shown to be \$8.04 per motorcycle per day, although no segregation was attempted as between intra and inter-city operations, nor was there any allocation of such expenses and revenues to particular routes of service herein proposed. Applicants estimated that 85 per cent of the total revenues were derived from inter-city operations.

Applicants called, in support of their application, numerous auto parts dealers and jobbers located at various points on the seven established routes, who, as patrons of applicants, expressed their need for the retention of the service. It was explained that the demands for expedited service in the automobile repair and maintenance industry have increased to such an extent as to practically require a specialized pick-up and delivery service by those familiar with the numerous mechanical parts used by the industry. In fact, so they testified, a specialized service of this kind served the dual purposes of providing a delivery for the normal replacement of stock carried in the auto parts business, and also the obtaining of parts which though not stocked are purchased because of special demands by the garage industry. To dispense with such specialized service would, according to various witnesses, necessitate the heavy investments incidental to a complete stocking of practically all auto parts, entailing greatly increased, if not prohibitive, expenditures by such dealers. Furthermore, the failure of the auto parts dealers and jobbers to respond to this quickened emergency demand of the auto-

motive repair and maintenance industry meant both loss of the auto parts business and the increased expense that would go with said concerns attempting to establish their own or exclusive pick-up and delivery service.

Applicants contended, and the testimony generally confirmed the statement, that in so far as the auto parts industry is concerned a satisfactory pick-up and delivery service requires someone who knows the auto repair business as well as the auto parts business, and that one must have experience of that kind. Summarizing the testimony of one of applicants' witnesses, a dependable service by a reliable operator who is familiar with the automobile business, is what is needed by the automotive jobbers in the way of delivery.⁽⁵⁾ These witnesses stated they have to compete with car wreckers and second-hand dealers of various sorts in providing new parts, and can only compete by having rapid delivery service to garagemen or to automobile dealers who need repair parts, and although the more frequent such service the better, to date applicants' service seems to more nearly meet the requirements of the particular industry than did the service of other carriers, particularly those without motorcycle equipment. As testified: "We want a service that can give us the experience which is back of our business"⁽⁶⁾ of which two essentials "had to be a quoted price and special knowledge, sufficient to handle automotive parts."⁽⁷⁾

Opposition to the application came principally from the
(8)
common carriers operating within the territory involved, several of

(5) See Transcript, pp. 519-520

(6) See Transcript, p. 208

(7) See Transcript, p. 219

(8) The major carriers operating within applicants' territory are the Southern Pacific Company, The Atchison, Topeka & Santa Fe Railway, Union Pacific Railroad, Pacific Electric Railway Company, Railway Express Agency, Inc., United Parcel Service Company, Inc., Southern California Freight Lines, Allison Auto Express, Storey Auto Express, Perry Auto Parts Express, Motor Freight Terminal, Western Truck Lines, Ltd., and Glendale Interurban Express.

which hold certificates from this Commission. While the testimony varied as to the actual amount of strictly competitive traffic, it was the contention of these protestants that the services offered by their several lines in their respective territories here involved were adequate⁽⁹⁾ and sufficient without the necessity for further splitting the business with increased competition and that in certain instances, at least, their loss of the larger amount of their business from the garages was due to unauthorized carriers from the auto parts houses, or to alleged rate cutting. However, amongst these protestants, there was only one instance of an attempt to operate a motorcycle service between any of the points herein proposed, an experiment which was discontinued following the seven months' operations, ended December, 1934, because of non-support. The principal concern of these protestants apparently centered over the possibility applicants would seek to expand their service to embrace general merchandise, should the application be granted.

In fact, the two supplemental hearings held in this proceeding were occasioned by certain protesting shippers who, in the course of withdrawal of their former support of the instant application, alleged the deterioration of the service formerly rendered by applicants owing to the latter's handling of merchandise, other than auto parts, whereby the auto parts deliveries were slowed down to the point of no longer being satisfactory to that industry. As a consequence, several of these dealers, it was revealed, had engaged in the promotion of a proposed exclusive auto parts delivery service of their own, to be conducted through the medium of a cooperative corporation. To these charges applicants responded with numerous

(9) In the course of such showing time schedules between points here involved were indicated or filed as corroborative of the service of certain of these carriers, including the Railway Express Agency, Inc. (Protestants' Exhibits Nos. 4 and 5).

witnesses to the effect that their service had not so deteriorated during the period pending this application, even though (responsive to the Commission's order) they had not solicited additional customers pending final disposition of this proceeding. Stipulations were entered as to additional cumulative testimony of this character on the part of applicants' patrons on the several routes herein.

Great stress was laid upon the claim that applicants had originally secured the support of these shippers, all of whom were engaged in business as auto parts jobbers, by the representation that they would be accorded an exclusive service. Though such a service would undoubtedly benefit them and confer an advantage over their competitors, the garage operators and automobile wreckers, they are not entitled to receive preferential treatment of this character at the hands of any common carrier. Such a carrier must serve all alike without discrimination. Though he may limit the class to whom his facilities will be dedicated, he may not select within that class those who will be particularly favored.

Most of the testimony throughout the record on behalf of the applicants, including that embraced within the stipulation, came from those engaged in the auto parts industry, including automobile accessories and supplies incidental to repair and maintenance of automotive vehicles, and tended to prove that there has existed and now exists a public need for a delivery service of this type between the points proposed in the application.

Some 44 of applicants' patrons testified in support of the application, favoring the continuation of the service which they previously rendered, and a stipulation as to similar supporting testimony of some 17 additional patrons is also of record. Protestants presented some 20 witnesses, 9 of whom were or had been patrons. From the entire record it is clearly apparent that the

public convenience and necessity require a speedy and efficient specialized pick-up and delivery service of the kind and between the points herein proposed, with the flexibility of an "on call" service to care for emergency orders occasioned by the auto parts industry. It is equally apparent that any discontinuance of the existing motorcycle service would automatically force the industry to seek a substitute of the same vehicular type, owing to its flexibility, speed, and economy. The record shows that, through their past operations and those of their affiliated motorcycle business, applicants have the required experience, financial organization, operating equipment, and facilities for the rendering of the specialized auto parts pick-up and delivery service by motorcycles herein proposed.

In our opinion, the instant application, in so far as it pertains to motorcycle⁽¹⁰⁾ pick-up transportation and delivery of automobile accessories, parts, and supplies, has been justified.⁽¹¹⁾

Similar justification appears as to machinery and machines, and parts, as named in Item 10, Section 4, to Amended Exhibit "A" of the Application (as amended), subject to such necessary restrictive description as will properly confine said commodities to the automobile repair and maintenance industry and not be understood to embrace machinery and machines in general.

As regards Item 20, Section 5, of applicants' Amended Exhibit "A" of the Application (as amended), relating to "merchandise", the record is less convincing. Of all the witnesses testifying on

(10) The California Vehicle Code (Section 35) defines a motorcycle as follows: "A 'motorcycle' is a motor vehicle, other than a tractor, designed to travel on not more than three wheels in contact with the ground."

(11) This group embraces the following commodities, to-wit: Automobile accessories, parts and supplies; tires, rubber, pneumatic, with or without inner tubes, flaps or reliners; tires, rubber, solid; tire tubes, rubber; and automobile mechanics' tools.

behalf of the application only five represented dealers in commodities other than those embraced in the auto parts industry. The term "merchandise" as employed in Item 20 must necessarily be construed to embrace every commodity of whatsoever character, weight, or dimensions not specifically enumerated in Item 10 of Amended Exhibit "A". By the testimony of witnesses Kemp, co-partners and applicants herein, it was clearly shown that the restricted dimensions and limited capacity of the motorcycle side cars⁽¹²⁾ rendered them unsuitable and impractical for the handling of large or heavy shipments. Various witnesses testifying in behalf of applicants, stated that where large or heavy shipments were involved they relied upon other carriers operating auto truck equipment. There was no showing that a service of such a character was required. Accordingly, the application in so far as it pertains to merchandise or commodities other than automobile accessories, parts and supplies, and machinery and machines commonly used in the repair and maintenance of automotive equipment, will be denied.

In view of applicants' proposal to limit the equipment used in conducting this service to motorcycles, and the absence of any showing in support of the need for facilities of any other type, the certificate herein granted will confine applicants to the use of motorcycles only.

A certificate will therefore be granted, limited, as has been indicated, to the commodities which may be transported and the equipment that may be used.

(12) The dimensions of said side cars average approximately 1 to 2 ft. deep by 4 to 5 ft. long, and approximately 3 ft. wide, with an estimated load limit of approximately 500 pounds. See Transcript pages 7, 22, 27, 79, 86, 96, 130, 140, 141, 296, 628 and Exhibit No. 8.

Upon full consideration of the evidence offered in this proceeding, the Railroad Commission of the State of California hereby finds as a fact that public convenience and necessity require the operation by applicants Paul R. Komp and Jack B. Komp, co-partners, doing business under the fictitious name and style of California Delivery Service, of an automotive service to be conducted by motorcycles only, as a highway common carrier, as defined in Section 2-3/4, Public Utilities Act, for the transportation only of automobile accessories, parts and supplies; automobile mechanics' tools; and machinery and machines, and parts, commonly used in the repair and maintenance of motor vehicles and automotive equipment, between the points and over the routes more specifically set forth in the following order.

Applicants 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 holders 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

Public hearings having been had in the above entitled proceeding, evidence having been received, the matter having been duly submitted, and the Commission now being fully advised:

The Railroad Commission of the State of California does hereby declare that public convenience and necessity require the

operation by Paul R. Kemp and Jack E. Kemp, co-partners, doing business under the fictitious name and style of California Delivery Service, of an automotive service to be conducted by motorcycles only, as defined in the Vehicle Code of the State of California, as a highway common carrier, as defined in Section 2-3/4, Public Utilities Act, for the transportation of automobile accessories, parts and supplies; automobile mechanics' tools; and machinery and machines, and parts, commonly used in the repair and maintenance of motor vehicles and automotive equipment, from Los Angeles to the points named on the several routes, and to all intermediate points thereon, said routes being described as follows, to-wit:

Route No. 1. - Van Nuys Route: To North Hollywood, Van Nuys, Burbank and Glendale over the following route, viz., North on Cahuenga Blvd. to Lankershim Blvd., thence to Chandler Blvd., to Van Nuys Blvd., and Victory Blvd. to Burbank; thence San Fernando Road to Glendale; returning Glendale to Los Angeles via the same route or Glendale Blvd.

Route No. 2 - Long Beach Route: To Huntington Park, Lynwood, Compton and Long Beach, via Long Beach Avenue to Slauson Avenue, via Slauson Avenue and Pacific Boulevard to Huntington Park; thence via Santa Fe Avenue to Short Street, and Short Street to Alameda Street through Compton to Wardlow Road; thence via Wardlow Road and American Avenue to State Street and Long Beach; returning to Los Angeles via the same route or Long Beach Boulevard.

Route No. 3 - San Pedro Route: To Inglewood, Lennox, Hawthorne, Torrance, Lomita, San Pedro, Wilmington, and Gardena,

via South Broadway and Slauson Avenue to West Boulevard to Inglewood; thence via Hawthorne Boulevard, Torrance Boulevard, Sepulveda Boulevard, Normandic Avenue, and Gaffey Street to San Pedro and Wilmington; returning via the same route or Harbor Boulevard (Main Street) to South Broadway, to 165th Street, to Gardena; thence 165th Street to South Broadway to Los Angeles.

Route No. 4 - Santa Monica Route: To Beverly Hills, Santa Monica and Culver City, over the following route, viz., West on Pico to San Vicente, thence San Vicente and Wilshire Boulevard to Beverly Hills, thence via Santa Monica Boulevard to Sawtelle Boulevard, and Wilshire Boulevard to Santa Monica; returning to Los Angeles via the same route or Lincoln Blvd., Washington Street through Culver City.

Route No. 5 - Pasadena Route: To Pasadena and South Pasadena, via Pasadena Avenue, Avenue 64 and Colorado Street to Pasadena; returning through South Pasadena, via the same route or Fair Oaks Avenue and Huntington Drive to Los Angeles.

Route No. 6 - Monrovia Route: To Alhambra, San Gabriel, Arcadia and Monrovia, via Huntington Drive to Main Street, Alhambra, through Alhambra via Main Street to San Gabriel, via San Gabriel Boulevard to Huntington Drive, thence to Arcadia and Monrovia; returning via the same route or Huntington Drive to Los Angeles.

Route No. 7 - Whittier Route: To Montebello, Pico, and Whittier, via Ninth Street to Indiana Street, Indiana Street to Whittier Boulevard; Whittier Boulevard through Montebello to Whittier; returning via Whittier Boulevard to Montebello; thence via the same route or Ninth Street to Los Angeles.

And for the return transportation of said commodities by motorcycle only, to Los Angeles from said points and any of them, over and along said several routes, only where such shipments have been transported by said carrier from Los Angeles, and they have been rejected by the consignee thereof, or said carrier has been unable to effect delivery thereof.

IT IS HEREBY ORDERED that a certificate of public convenience and necessity therefor be, and the same is, hereby granted to Paul R. Kemp and Jack B. Kemp, co-partners, doing business under the fictitious name and style of California Delivery Service, subject to the following conditions:

(1) Applicants shall file a written acceptance of the certificate herein granted within a period of not to exceed fifteen (15) days from date hereof.

(2) Applicants shall commence and/or continue the service herein authorized within a period not to exceed thirty (30) days from the effective date hereof, and shall file in triplicate and concurrently make effective on not less than ten (10) days' notice to the Railroad Commission and the public a tariff or tariffs constructed in accordance with the requirements of the Commission's General Orders and/or Tariff Circulars and containing rates, rules and regulations which in volume and effect, shall be identical with the rates, rules and regulations shown in the exhibits attached to the application (as amended) in so far as they conform to the certificate herein granted, or rates, rules and regulations satisfactory to the Railroad Commission and in conformity with the orders of the Commission entered subsequently to the filing of this application.

(3) Applicants shall file, in duplicate, and make effective within a period not to exceed thirty (30) days after the effective date of this order, on not less than five (5) days' notice to the Railroad 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 obtained.

(5) No vehicle may be operated by applicants herein unless such vehicle is owned by said applicants or is leased by applicants under a contract or agreement on a basis satisfactory to the Railroad Commission.

(6) Applicant shall, prior to the commencement of service authorized herein and continuously thereafter, comply with all of the provisions of this Commission's General Order No. 91 and/or as amended.

IT IS HEREBY FURTHER ORDERED that in all other respects Application No. 19837 be and it is hereby denied.

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 1st day of July, 1937.

Walter Ware

Leon O. Whitwell

Randolph

Commissioners.