



James E. Lyons and A. L. Whittle for Southern Pacific Company, Pacific Motor Transport Company and Pacific Motor Trucking Company.

G. E. Duffy for The Atchison, Topeka & Santa Fe Railway Co.

Reginald L. Vaughan and Barnum Paul for Applicants and Respondents.

A. S. Williams for Southern Pacific Company, Pacific Motor Trucking Company and Pacific Motor Transport Company, protestants.

Edward Stern for Railway Express Agency, Inc., as its interests may appear.

F. M. Mott for Merchants Express Corporation, protestant.

J. L. Amos, Jr., for The Western Pacific Railroad Company, Protestant.

WHITSELL, Commissioner:

#### O P I N I O N

In Application No. 20847, Louis Erickson (West Berkeley Express and Draying Company), Kellogg Express & Draying Co., A. Pasteris (East Bay Drayage & Warehouse Co.), Peoples' Express Company and United Transfer Company sought a declaration by the Commission that each of them possessed a prescriptive right to operate as a highway common carrier to and from San Leandro. This application contained a request that Cases Nos. 3910, 3923 and 3924 be reopened for the purpose of admitting newly discovered oral and documentary evidence not available at the time of the original proceedings which it was alleged established the prescriptive right of Kellogg Express & Draying Co., (hereinafter referred to as the corporation) to operate as a common carrier to and from San Leandro. By Decision No. 27966 in Cases Nos. 3910, 3923 and 3924, which were

consolidated for convenience of hearing and disposition, the Commission decided upon the evidence then before it that neither the corporation nor its predecessor in interest (hereinafter designated as the company) was operating in good faith as a common carrier on or before May 1, 1917, between the points named by it in certain tariffs suspended by the Commission and hence did not possess a prescriptive right to continue such operations. Pursuant to the requests and allegations contained in said Application No. 20847 the Commission reopened the above mentioned cases which were consolidated with said application for the purposes of hearing. An agreement was entered into by counsel for applicants, counsel for certain respondents and the Commission that the present hearings would be confined solely to the issue of whether or not the corporation possesses a prescriptive right to serve San Leandro. The agreement provided that this issue would be finally determined before further hearing would be held in Application No. 20847.

Public hearings were held on March 30th and 31st at San Leandro, and on April 1st, 1937 at San Francisco, at which places and times evidence was introduced. The matter was thereafter submitted subject to the filing of concurrent briefs and the hearing of oral argument. The briefs were received and thereafter oral argument was presented on May 3rd, 1937 at San Francisco before the Commission sitting en banc. The matter is now ready for decision.

A prescriptive right to serve a particular locality as a common carrier by motor vehicle is predicated upon operation in good faith as a common carrier prior to May 1, 1917. The issue now before the Commission being whether or not the corporation possesses a prescriptive right to serve San Leandro, it is

necessary to determine from the evidence adduced at the hearings whether the company served San Leandro prior to May 1, 1917, and if it did, whether or not such service was that of a common carrier operating in good faith.

Documentary and oral evidence were introduced at the hearings which showed conclusively that the company transported property by motor vehicle to and from San Leandro prior to May 1, 1917. The evidence indicated that in 1916 the company served sixteen customers in San Leandro who had charge accounts with them and in addition performed transportation service for some twenty persons or firms in San Leandro who paid cash for such service. It is also shown that a great variety of commodities were transported by the company for their customers. Oral testimony was introduced to the effect that drivers of the company's trucks were instructed to solicit new business in San Leandro, which they did. The evidence presented relating to regularity of service was sufficiently clear to warrant the conclusion that the company served San Leandro twice daily on the average excluding Sundays and holidays. It is concluded from the above evidence that the company was operating prior to May 1, 1917 as a common carrier.

Having determined that the company was operating as a common carrier prior to May 1, 1917, it is now appropriate to consider whether such service was conducted in good faith thereby investing the company with a prescriptive right to continue it. This issue was raised at the hearings and discussed in oral argument and in the briefs. Evidence was convincing that the company was operating prior to the time that the Legislature contemplated the enactment of a statute to require all common

carriers by motor vehicle to obtain a certificate of public convenience and necessity authorizing such operation. Furthermore, it was evident that the company did not commence to operate trucks merely to acquire a prior right and thus to forestall pending legislation. It follows from the evidence that the company was operating to and from San Leandro in good faith as a common carrier prior to May 1, 1917 and therefore possessed a prescriptive right at that time to continue to do so.

It must now be ascertained whether or not the company or the corporation lost such prescriptive right for any reason.

It cannot be said that the company or its successor lost the right to serve San Leandro by abandonment. The evidence shows that the corporation and its predecessor operated trucks continuously to and from San Leandro for a period commencing before 1916 until December 1936. During the hearing it was stipulated by counsel for protestants that the company and its successor continuously performed transportation service between San Francisco and East Bay points on the one hand and San Leandro on the other from July, 1916 until December, 1936. Service to San Leandro was discontinued in December of 1936 because of a penalty action which was instituted by the Commission against the corporation for operating as a common carrier without tariffs lawfully on file with the Commission. The rejection of tariffs filed by the corporation naming San Leandro and other points, was an issue in the original proceedings in the cases reopened.

There being no abandonment by either the company or the corporation of the right to serve San Leandro, there remains to be considered only the question of whether by the failure of either of them to file a tariff including San Leandro they automatically forfeited such right or justified the Commission in now

refusing to acknowledge the existence of such a right.

There is a conflict in the evidence bearing upon the innocence of the corporation and its predecessor in interest in failing to file a tariff including San Leandro as a point of service. Testimony was presented to the effect that Mr. William Bolt, owner of the company, did not think it was necessary to specifically mention San Leandro in his tariffs because San Leandro was treated as a part of East Oakland and the company had the right to serve Oakland. The testimony further indicated that Mr. Bolt thought it was unnecessary to file tariffs at all and only filed the tariff covering Oakland in conjunction with other East Bay carriers. It was asserted that Mr. Bolt was not then aware that he was following the mandate of the law in so filing. At the time of the transfer by the company to the corporation the evidence indicates that Mr. Bolt advised the corporation that the company had the right to serve San Leandro. It is in evidence also that after the transfer the corporation, upon advice of counsel, filed a tariff naming certain specific points including Oakland and then added the words "adjacent points" which Mr. Friedman, Manager of the corporation, said he believed covered San Leandro. Mr. Friedman also said that he thought it was unnecessary to file tariffs including points served prior to May 1, 1917.

Protestants introduced some evidence tending to show that the company and its successor knew or should have known that the filing of tariffs was necessary. It was pointed out that failure to file a tariff including San Leandro was at least some evidence that neither the company nor the corporation thought they possessed the right to serve that point or they

would have publicly asserted such right. No attempt will be made to summarize all of the evidence introduced for the purpose of proving or disproving innocence of the company and its successor in failing to file a tariff including San Leandro. It is enough to say that such evidence was in conflict. In view of the controversial nature of this evidence the Commission does not feel justified in declaring that the corporation or its predecessor so defied regulation as to cause it to lose its prescriptive right to serve San Leandro. The corporation has already suffered substantially from the fact that it failed to file such a tariff by reason of the loss of revenue from San Leandro since December, 1936 and also because of the sum recovered from it for operating to San Leandro without a tariff legally on file covering that point.

This proceeding is equitable in its nature and depends for solution upon the particular circumstances involved. It cannot serve as a precedent in other matters as it is necessarily predicated upon its own unusual facts.

Based upon the evidence offered in the original and reopened proceedings the Railroad Commission of the State of California finds that the predecessor in interest of the Kellogg Express & Draying Co., possessed a prescriptive right to operate as a common carrier by motor vehicle to and from San Leandro as a result of operation in good faith prior to May 1, 1917. That such prescriptive right was transferred to Kellogg Express & Draying Co. by its predecessor. That neither Kellogg Express & Draying Co. nor its predecessor in interest acted or failed to act in such a manner as to automatically forfeit such right or cause the same to be lost. It is concluded, therefore, that Kellogg Express & Draying Co. now possesses a prescriptive

right to operate as a highway common carrier to and from San Leandro.

It is recommended that Decision No. 27966 in Cases, Nos. 3910, 3923 and 3924 be rescinded.

O R D E R

Public hearings having been held in the above entitled proceedings, evidence having been received and the matter duly submitted; the Commission now being fully advised, and good cause appearing, based upon the findings and conclusions indicated in the above opinion:

IT IS HEREBY ORDERED that Decision No. 27966 in Cases Nos. 3910, 3923 and 3924 be and the same is hereby rescinded.

IT IS HEREBY FURTHER ORDERED that Kellogg Express & Draying Co. file with this Commission its rates, rules and regulations covering its highway common carrier service to and from San Leandro within thirty days from the date of this order, and in all other respects comply with the provisions of the Public Utilities Act.

And it further appearing that Application No. 20847 having been submitted only so far as it relates to applicant, Kellogg Express and Draying Co.,

IT IS HEREBY FURTHER ORDERED that said Application No. 20847 shall remain open for such further proceedings and orders relating to applicants other than said Kellogg Express and Draying Co., as may be appropriate and proper.

The foregoing Opinion and Order are hereby approved and ordered filed as the Opinion and Order of the Railroad Commission of the State of California.

Dated at San Francisco, California this 7<sup>th</sup> day of

July, 1937.

William L. Sullivan

Frank P. Sullivan

Raymond A. Riley  
Commissioners