Decision No. 30444

BEFORE THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of the JOE MANGINI DRAYAGE COMPANY for the Commission to find that it was actually operating as a common carrier of fresh fruits and vegetables, by motor vehicle, for compensation between San Francisco and Oakland and Alameda, and vice versa, on and before May 1st, 1917, and continuously thereafter or For a certificate of public convenience and necessity to operate as a highway common carrier for the transportation by truck of fresh fruits and vegetables between San Francisco, Oakland and Alameda and vice versa either via Southern Pacific Golden Gate Ferries or via the San Francisco-Oakland Bay Bridge.	Application No. 21252.

ORIGINAL

J. F. Vizzard, for Applicant.

H. A. Encell, for T. Landi Draying Co., Protestant.

Guy V. Shoup, H. W. Hobbs, M. G. Smith, for Southern Pacific Company and Pacific Motor Transport Company, Protestants.

E. H. Hart, for Pacific Motor Tariff Bureau and Member Carriers, Interested Party.

DEVLIN, Commissioner

O P I N I O N

The applicant in this proceeding seeks recognition of an asserted right to operate as a highway common carrier between

San Francisco, on the one hand, and Oakland and Alameda, on the other hand, allegedly acquired pursuant to Section 5 of the Auto Truck Transportation Act, Chapter 213, Statutes of 1917, now Section 50-3/4 (c) of the Public Utilities Act, by virtue of operations conducted on and prior to July 16, 1917, the effective date of the act. In the alternative, the applicant requests the granting of a certificate of public convenience and necessity to conduct such an operation.

At the hearing the application was amended by stipulation between the applicant and protestants and interested parties to limit the right involved to the transportation of fresh fruits and vegetables. Thereupon objection to the application was withdrawn by all except protestant T. Landi Draying Co.

Applicant is a corporation which, since 1913, has been engaged in the drayage business in San Francisco and the vicinity thereof. It is clear from the record that at the present time the applicant is engaged in the transportation of fresh fruits and vegetables for compensation by motor vehicle as a common carrier usually and ordinarily between San Francisco and Oakland, operating several trucks across the bay daily. To maintain its claim of a so-called prescriptive right, applicant must prove that similar operations have been conducted as a common carrier in good faith since prior to July 16, 1917. The record does not support such a finding, although it is clear that motor vehicle operations were conducted between the points involved well prior to that date.

Applicant attempts to justify its position in asking for recognition of a prescriptive right at this late date, twenty years

after enactment of the law, by certain proceedings taken before the Commission in 1925 and 1926. It is undisputed that the applicant took no recognition of any of the requirements of the Auto Truck Transportation Act during the period from its effective date, July 16, 1917, to July 24, 1925. On the latter date the applicant filed with the Commission its application entitled "In the Matter of the Application of the Joe Mangini Draying Co., a corporation, for a certificate of public convenience and necessity to operate a freight service between San Francisco and the East Bay cities and between San Francisco and Colma and Colma and San Francisco", designated as Application No. 11487. This application was dismissed without prejudice on August 5, 1926, at applicant's request. It is claimed that this request was made at the suggestion of the Commission or members of its staff, in the belief that the operation was not subject to the act, either because not between fixed termini or over a regular route, or because not of common carrier status, or for both reasons. However, the full circumstances surrounding the dismissal of this application show applicant to be undeserving of any special consideration because of anything arising out of that proceeding.

During the early days of the Auto Truck Transportation Act some uncertainty existed concerning the meaning of the term "between fixed termini or over a regular route," as used in the act. Some clarification resulted from the decision in Application of Ben Moore, 27, C. R. C. 388, and further clarification has been subsequently accomplished. (Regulated Carriers vs. Triola, 38 C. R. C. 724.) As the Auto Truck Transportation Act stood after amendment in 1919, moreover, it was not expressly limited to common carriers but

purported to apply to all carriers by auto truck operating between fixed termini or over a regular route. The unconstitutionality of the act as applied to private or contract carriers by auto truck was established by the decision of the United States Supreme Court in Frost & Frost vs. Railroad Commission (271 U. S. 583; 70 L. Ed. 1101).

Probably because the Auto Truck Transportation Act, as just mentioned, then was not expressly limited to common carriers, but apparently embraced all carriers by auto truck operating between fixed termini or over a regular route, Application No. 11487 did not state that the applicant proposed to conduct the operation, for which a certificate was sought, as a common carrier. While the application was pending, however, the decision in the Frost case was rendered, and the Commission accordingly wrote to the applicant, under date of July 16, 1926, calling attention to this holding of the Supreme Court and its bearing upon the pending application, stating,

> "In view of the Frost & Frost decision, the Commission requests advice as to whether you intend to operate as a common carrier or as a so-called contract carrier. In the event that you propose to serve only as a carrier of property under contract, upon receipt of such advice, an order of dismissal of your application will be issued."

The applicant, under date of July 21, 1926, replied, saying,

> "Referring to your letter of the 16th, inst., regarding App No. 11487, will say we wish to withdraw our application for a certificate of public convenience and necessity to operate a freight service between San Francisco and the East Bay Cities and between San Francisco and Colma and Colma and San Francisco, without prejudice."

Thereafter, on August 5, 1926, Application No. 11487 was dismissed.

Numerous inferences may be drawn from these circumstances, all inconsistent with applicant's possession of a prescriptive right. In the first place, Application No. 11487 sought an original certificate, not recognition of a prescriptive right. If such a right had existed, it would seem that applicant would normally have claimed it instead of asking for a certificate. Even then, the claim of a prescriptive right would have been eight years late, and the lapse of a period that long further negatives the probability of such a right existing. Lastly, while applicant's request for dismissal states no reason therefor, it expressly refers and manifestly is the reply to the Commission's letter which proposed that dismissal be requested only if the operation was that of a contract carrier, and not for any other reason. If applicant had any other reason for dismissing the application, the request would most certainly have so stated. The correspondence thus may be deemed to constitute a deliberate declaration that applicant did not intend to operate as a common carrier. Applicant cannot now be heard to claim that it was then and ever since has been so operating.

Applicant's secretary, while testifying in the instant application, disclosed a rather confused concept of the distinction between a common and a private contract carrier; but no plea for leniency can be rested thereon, on the theory that a similar confusion existed in his mind in 1926, because it appears that applicant was advised by its attorney concerning the correspondence with the Commission and the dismissal of the application and did not rely on the unadvised judgment of its officers.

It is claimed, however, that other reasons did exist for the dismissal of Application No. 11487, and that unnamed representatives of the Commission's staff advised applicant to dismiss the application on the authority of Application of Ben Moore (supra), but no weight can be given to such vague and uncertain conversations in the face of the exchange of letters above referred to. As just said, if applicant dismissed its application for reasons other than that suggested in the Commission's letter, it should properly have stated them. Moreover, no similarity is apparent in applicant's operation and that involved in Application of Ben Moore (supra). If any doubt existed in applicant's mind as to the applicability of the act to its operation, it was not a reasonable doubt, because at that very time and for years prior thereto, in competition with the operation applicant claims to have been conducting, were numerous other operations, all being conducted under regulation by the Commission.

It seems impossible to hold that applicant was engaged in the transportation of property as a common carrier by motor vehicle usually and ordinarily between San Francisco and Oakland in good faith on and prior to July 16, 1917, and has been so operating continuously thereafter.

As above mentioned, applicant's present operations between Oakland and San Francisco are admittedly common carrier and, as an alternative to the recognition of the prescriptive right, applicant requests the granting of a certificate de novo. In support thereof several witnesses were produced who testified that they have used the applicant's service for the transportation of fruits and vegetables between San Francisco and Oakland and found it superior to

that of protestant, T. Landi Draying Co. The latter's service, it was claimed, was satisfactory for afternoon deliveries but inadequate for early morning deliveries which are claimed to be necessary to the shippers. The protestant, however, introduced contrary evidence tending to show that its service is adequate for both the morning and afternoon deliveries; and there is reason to believe that much of the criticism of the protestant's competitors in the produce commission business in which protestant is also engaged. There is nothing to show that protestant has been derelict in his duty to the public, but rather does it appear that he has made every reasonable effort to supply adequate service. Any deficiencies therein appear to be largely due to losses occasioned by inroads on his traffic made by applicant.

In any event, it has long been the rule of this Commission that certificates of public convenience and necessity will not be granted where the applicant is shown to have been previously willfully operating in an illegal manner over the desired route, and that where an applicant for a certificate is shown to have begun and built up to large proportions a common carrier transportation system, he is not entitled to receive the certificate which he seeks. (Application of Richardson, 23 C. R. C. 284; Application of Ritzman, 31 C. R. C. 772; Application of Brooks, 37 C. R. C. 672; Application of Hempstead, 21 C. R. C. 370.) These authorities aptly apply to the instant case and preclude the granting of a certificate to the applicant.

Applicant's plea that its unlawful operations were conducted innocently and in ignorance of the requirements of the law

is not persuasive. The evidence was that Gustave M. Carroll, the secretary, and Joe Mangini, the president of the applicant corporation, have together managed the applicant's business since 1913 and that applicant has been engaged in no other business than transportation by motor vehicle in San Francisco and vicinity during the entire period. It would appear that applicant's officers should, by the exercise of proper judgment and precaution, have known long before this that its operations were unauthorized and illegal. The Commission should not condone or ignore continued illegal operation resulting from failure of the persons in charge to inform themselves as to requirements of the law. Such failure reflects unfavorably upon the fitness of the applicant to receive and hold a certificate of public convenience and necessity and to perform the service for which it seeks authority. To ignore such illegal operations and grant a certificate to the violator would not only be unfair to other carriers, such as protestant, who have long ago complied with the requirements of the law, but would also encourage general disrespect for and lack of observance of the law and the Commission's rules and regulations promulgated thereunder.

I recommend the following form of order:

O R D E R

Public hearing having been held in the above entitled application, the matter having been submitted and the Commission now being fully advised,

IT IS HEREBY ORDERED that said application be and it is hereby denied.

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 22nd day of December, 1937.

Wallace Ware,
Leon O. Whitsell
Frank R. Havenner

Paul L. Peek
COMMISSIONERS