

Decision No. 31145

BEFORE THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of
O. R. BENEDICT and E. T. BROWN, co-
partners, for a certificate of public
convenience and necessity to operate a
specialized automotive transportation
service for the transportation of new
furniture between Los Angeles and
Huntington Park on the one hand, and
San Diego on the other hand, serving
intermediate points including Anaheim,
Santa Ana and Oceanside.

ORIGINAL

Application No. 19880

Rex W. Boston, Esq., for Applicants;
Wallace K. Downey, for Pacific Freight Lines, Inc.,
Protestant;
Ellis Brown, for Triangle Transfer & Storage Company,
Protestant;
W. E. McMillan and E. T. Lucey for The Atchison,
Topeka & Santa Fe Railway Company, Protestant;
H. J. Bischoff, for Southern California Freight Lines
and Southern California Freight Forwarders,
Protestants;
Floyd Bekins, for Bekins Van Lines, Protestant;
C. P. Von Herzen, for Certificated Highway Carriers,
Protestant;
Phil Jacobson, for Ace Transportation Company, Inter-
ested Party.

BY THE COMMISSION:

OPINION ON REHEARING

Applicants filed their Petition for Rehearing and Modifi-
cation of Order with respect to Decision No. 29042 rendered
August 17, 1936, wherein their application for a certificate of
public convenience and necessity was denied. It was found that

granting of the application "will not be in the public interest", and would not meet a necessity not being met by a number of certificated highway common carriers as well as one railroad operating between Los Angeles and San Diego, between which points applicants desire to operate a specialized automotive trucking service as a highway common carrier for the transportation of new furniture, including household furnishings. It was also found that applicant "is now operating" as a common carrier and that service "as now conducted" should be discontinued.

Petitioners excepted to the finding: "This application was filed on the advice of counsel after it became apparent that the operation was such as required certification". They point out that the application alleges they have "for the past several months been engaged" in hauling furniture and that their operations "are conducted under particular agreements and with but a limited number of shippers". The application further alleges that service was performed "believing that said operations were then and now are that of a private carrier * * *. After recent discussion * * * with counsel, applicants are now of the opinion that operations of this character may now be, or in the future may become impressed with a public interest and therefore subject to the jurisdiction of this Commission". (Application, p. 4). Petitioners contend that they should not be penalized when, in their opinion, the record contains no facts indicating common carrier operation.

Exception is also taken to the finding that "applicant is now operating a highway common carrier service", and ask if "now" refers to the date of hearing (May 28, 1935) or the date of the decision (August 17, 1936). If the former, they claim that the

record does not support the statement, and if the latter, that there is no evidence as to the character of their operations on August 17, 1936. It is pointed out that 15 months elapsed between the hearing and the decision, and that during the interim the Examiner who heard the case died. Petitioner requested a rehearing, oral argument, and an opportunity to offer additional evidence.

Pursuant to this request, and on September 28, 1936, the Commission made an order granting a rehearing, which was had before Examiner Austin at Los Angeles on October 26, 1936. Counsel for applicants appeared and argued the case and submitted it on the evidence previously introduced. Ellis Brown, a partner of Triangle Transfer & Storage Company, a protestant, testified that his company was authorized to transport new and used furniture between Los Angeles and San Diego and intermediate points, and had been so operating for fifteen years. Due to rail competition, so he stated, his company's tonnage and revenue has decreased substantially during the past five years. No further evidence was introduced.

The record discloses ample proof that applicant, at the time of the rehearing herein, was operating a highway common carrier service between Los Angeles and San Diego without having been certificated by the Commission.

A careful review of the entire record impels us to conclude, and we hereby find as a fact, that the granting of the authority herein sought will not be in the public interest; it will serve no necessity not now being satisfactorily met by certificated common carriers operating between these points. We are, therefore, not disposed to disturb the finding of lack of public convenience and

necessity, contained in our former decision.

As to the second objection raised by applicants in their petition, it is sufficient to say that they offered no evidence concerning their operations at any time subsequent to the date of the original hearings (May 10 and 28, 1935), and were content to submit the case on the evidence previously introduced.

It is readily apparent that in view of a denial of such certificate, the service as now conducted should be immediately discontinued. This Commission has repeatedly and consistently held that the mere filing of an application may not be considered by the applicant as authority to operate, and it has many times held that the operation of a service in anticipation of certification is good and sufficient reason for denial of the application.

O R D E R

A public hearing having been had in the above entitled proceeding, the matter having been submitted, and being now ready for decision, and the Commission being fully advised;

IT IS HEREBY ORDERED that the petition of applicant herein requesting a modification, in certain particulars, of Decision No. 29042 rendered herein on August 17, 1936, be, and it is hereby denied.

IT IS HEREBY FURTHER ORDERED that the application herein be

and it is hereby denied.

The effective date of this order shall be twenty (20) days from the date hereof.

Dated at San Francisco, California, this 1st day of August, 1938.

Robert H. ...
Leon ...
Frank ...

Ray L. Liley
COMMISSIONERS.