Decision No. 21185

BEFORE THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA

PACIFIC MOTOR TRANSPORT COMPANY, a corporation, PACIFIC MOTOR TRUCKING COMPANY, a corporation, and SOUTHERN PACIFIC COMPANY, a corporation, Complainants, vs. VALLEY EXPRESS COMPANY, a corporation, Defendant.	ORIGINAL Case No. 4184

A. S. WILLIAMS, for Complainants,

JAMES J. BROZ, for Defendant,

EDWARD STERN, for Railway Express Agency, Inc., intervenor on behalf of Complainants,

DOUGLAS BROOKMAN, for Valley and Coast Transit Company, intervenor on behalf of Complainants.

BY THE COMMISSION:

O P I N I O N

By complaint filed November 7, 1936, Pacific Motor Transport Company, a corporation, Pacific Motor Trucking Company, a corporation, and Southern Pacific Company, a corporation, herein called complainants, alleged that Valley Express Company, a California corporation, herein called defendant, was unlawfully conducting operations as an express corporation as defined in Section 2 (k), Public Utilities Act. The complaint alleged specifically that defendant was operating as an express corporation between Oakland and San Jose, between said

termini, respectively, and intermediate points, and between points intermediate to said termini, without first having obtained from the Commission a certificate of public convenience and necessity authorizing such operations. It was also alleged that defendant had not been conducting such operations on or before August 1, 1933. Complainants prayed that defendant be ordered to cease and desist from such operations until it had procured a certificate of public convenience and necessity authorizing them. By its answer, defendant denied these charges, and alleged affirmatively that it was conducting such operations lawfully, by virtue of the fact it had initiated the service prior to May 1, 1933, and had therefore acquired a "grandfather right" under Section 50(f), Public Utilities Act.

A public hearing was had at San Francisco before Examiner Austin, when evidence was received and the matter was submitted on briefs, subsequently filed.

Since it is conceded that defendant had secured no certificate authorizing it to engage in the operations complained of, there remains only for our consideration the question whether or not defendant's operations were of such a character as to vest it with a "grandfather" operative right. We shall first discuss the pertinent provisions of the applicable statutes.

Section 2(k) of the Public Utilities Act defines an express corporation as follows:

> "The term 'express corporation', when used in this act, includes every corporation or person, their lessees, trustees, receivers or trustees appointed by any court whatsoever, engaged in or transacting the business of transporting any freight, merchandise or other property for compensation on the line of any common carrier or stage or auto stage line within this State."

Section 50(f) provides:

> "No express corporation or freight forwarder shall after August 1, 1933, commence operating between points in this State or extend its operations to or from any point or points in this State not theretofore served by it, unless and until it shall first secure from the Railroad Commission, upon formal application therefor, a certificate that public convenience and necessity require such operation. Any express corporation or freight forwarder having between May 1, 1933, and the effective date of this act, commenced operations or extended its service as aforesaid, shall have ninety (90) days after the effective date of this act to file with the Railroad Commission a formal application for a certificate of public convenience and necessity for such service. The Railroad Commission shall have power, with or without hearing, to issue such certificate, or to refuse to issue the same, or to issue it for the partial exercise only of the privilege sought, and may attach to its order granting such certificate such terms and conditions as, in its judgment, the public convenience and necessity require. The Railroad Commission may at any time, for good cause shown and upon notice to the holder of any such certificate, revoke, alter, or amend any such certificate."

By its decision in Re Pacific Motor Transport Co., 39 C.R.C. 242, 245, the Commission applied to the section last quoted a construction designed to remove the ambiguities and inconsistencies appearing on its face. Holding that there should be substituted for the date May 1st, 1933, wherever it appeared, that of August 1st, 1933, the opinion declared:

> " ..... Thus while a 90-day period within which to file an application is allowed those carriers commencing operations between May 1, 1933, and August 21, 1933, there is nothing in the Act requiring that a certificate must be obtained for any operations prior to August 1, 1933. As it now stands the Act provides a time within which may be done that which is not required and which would not reasonably be done unless required. Clearly this was not the intention of the legislature. If however there is substituted August 1, 1933, for the date of May 1, 1933, the statutory provision becomes clear and definite. Carriers commencing operations after August 1, 1933, must then as now secure certificates of public convenience and necessity, while those operating prior thereto need not. The 90-day period allowed for the filing of applications will then extend to those carriers commencing operations after August 1, 1933, and before the effective date of the Act, all of which are definitely required to obtain certificates. We are satisfied that this was the

intention of the legislature and that May 1, 1933, should be construed to mean August 1, 1933."

This construction of the statute has been challenged by defendant. The section, it is claimed, prescribes three separate periods during which operative rights may, by distinctive methods, be created. Among them, it is asserted, is included the carrier whose operations were inaugurated prior to May 1, 1933. The operative rights of a carrier of this class, so defendant contends, are to be measured by the tariffs it has filed rather than by its actual operations. This contention will be considered presently.

Defendant has been engaged in business as an express corporation between various points in California since 1931. The operations in question here are those conducted entirely between San Jose, Oakland, and intermediate points, - a territory within which, so the record shows, defendant has been operating locally since December, 1935. No issue is raised as to shipments which originate at or are destined to points outside that area.

Defendant's alleged operative rights between Oakland and San Jose are based on the contention that it was conducting the business of an express corporation between Oakland and San Jose prior to May 1, 1933. The evidence presented relative to such operations before that date is scanty and incomplete. The underlying carrier used by defendant was Oakland-San Jose Transportation Company, which at that time was the only certificated highway common carrier operating between Oakland and San Jose. A. C. Woodard, president of that company during the time involved here,

testified that to the best of his knowledge defendant did not actually transport any shipments locally between Oakland and San Jose prior to May 1, 1933. On May 4, 1932, defendant and Oakland-San Jose Transportation Company entered into a contract which, as subsequently amended, provided in substance that Oakland-San Jose Transportation Company would transport for the defendant over its lines between San Jose and Oakland all shipments moving via Oakland between Los Angeles and points in the Sacramento-San Joaquin Valley and points south of Oakland, on the one hand, and points in the Santa Clara Valley and points intermediate to San Jose and Oakland which Oakland-San Jose Transportation Company is authorized to serve, on the other hand.

In correspondence passing between defendant and complainant Pacific Motor Trucking Company, the following statement, indicative of defendant's interpretation of the contract, appears:

> "As the contract now stands, Oakland-San Jose Transportation Company and/or its successors in interest, Pacific Motor Trucking Company, handle the traffic of Valley Express Co. between all points on its lines with the exception of San Jose and Santa Clara, California, when said traffic is either originating at or destined to points in the San Joaquin Valley or south thereof. The contract calls for transportation services, however, between Oakland and San Jose in connection with Valley Express traffic originating at Oakland or points beyond destined to points beyond San Jose and vice versa."(1)

From the record it appears that the writer of this letter, Mr. Willard S. Johnson, then employed by the defendant, possessed authority to bind the defendant by his construction of the contract.

Among other provisions appearing in this agreement was the following:

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(1) Exhibit 2, Tr. pp. 23, 90.

"The service herein contemplated shall be construed as additional service not now being rendered by said Oakland-San Jose Transportation Company and under no circumstances will said Valley Express Company compete directly or indirectly with the service now being rendered by the said Oakland-San Jose Transportation Company."

Woodard testified that the purpose of this provision was to preclude defendant from accepting any shipments for transportation where the termini were between Oakland and San Jose, inclusive, and stated that this provision had been observed by the defendant. In fact, so he testified, had any shipments been tendered on Valley Express billing for local movement between these points, it would not have been accepted in that form; on the contrary, it would have moved under a bill of lading issued by Oakland-San Jose Transportation Co. This was true as to shipments originating in Oakland and destined to San Jose or any intermediate point.(2) It is important to note that defendant

(2)
Mr. Woodard testified:

"Q. [MR. BROOKMAN] Look at page 2 of that agreement where it states 'The service herein contemplated shall be construed as additional service not now being rendered by said Oakland-San Jose Transportation Company and under no circumstances will said Valley Express Company compete directly or indirectly with the service now being rendered by the said Oakland-San Jose Transportation Company.'

Why was that put in there? A. For protection of our own line.

Q. By that you mean to protect the local business between the East Bay and San Jose? A. And Livermore.

Q. East Bay points and San Jose? A. That our franchise covered.

Q. It was also agreed at that time by Mr. Frasher that he would not compete with you at all? A. Correct.

Q. And he didn't, did he? A. Not to my actual knowledge.

Q. He didn't go into the business of transporting locally between the East Bay and San Jose? A. Right.

Q. As long as you owned the line? A. Correct."

(Tr. p. 48).

used only highway common carriers for the underlying haul between the points involved here, and that Oakland-San Jose Transportation Company was the only certificated highway common carrier operating between Oakland and San Jose prior to May 1, 1933. It is not

(2) -(Continued):

"MR. WILLIAMS: Q. Referring to the last paragraph, page 2, of Exhibit 1 -- the next to the last paragraph, is that provision construed by you to mean that all Valley Express shipments to and from the territory between Oakland and San Jose were to be handled by you? A. That is, you mean all freight picked up in Oakland?

Q. No, I mean all Valley Express shipments originating in the territory or destined to the territory were to be handled by you and by no one else? A. That is right.

Q. Do you know of any occasion when there were any handled by any one else contrary to the provisions of the contract? A. I don't recall any at present.

Q. Had you known of anybody else you would have taken the matter up with the Valley Express Company, would you not?

A. Yes, sir." (Tr. pp. 49, 50).

"MR. BROZ: Q. Mr. Woodard, is it not a fact that at the time you operated the Oakland-San Jose Transportation Company the Valley Express Company did tender to you shipments for movement between Oakland and points intermediate to San Jose?

A. Freight originating in Oakland?

Q. In Oakland proper. A. They might have presented it, but it would not have been accepted on that bill of lading; it would have been rebilled on Oakland-San Jose Transportation bill of lading.

Q. On Oakland-San Jose Transportation? A. Yes."

(Tr. p. 54).

"Q. [MR. BROZ] But when that document [Exhibit No. 4] was prepared can you state whether or not it was your belief that the Valley Express Company had service between Oakland and San Jose and points intermediate? A. How do you mean that they had service between Oakland and intermediate points?

Q. Between Oakland and San Jose and points intermediate?

A. No, they didn't have any service on that territory. I didn't allow them to file any rates on it."

(Tr. p. 56).

contended by defendant that any other underlying carrier was used.

Harold Frasher, vice-president and manager of defendant, was unable to state definitely whether or not his company had handled shipments locally between Oakland and San Jose and intermediate points. He testified that the shipping documents covering any such shipments had been issued by Oakland-San Jose Transportation Company and remained in its possession, defendant retaining no copies. The records of Oakland-San Jose Transportation Co. were lost or destroyed in 1934, when the business of that company was taken over by Pacific Motor Trucking Company, one of the complainants herein. The following excerpt from his testimony, however, substantiates Woodard's statement there had been no actual shipments:

> "The territory was adequately served by a truck carrier at that time, and we had no reason, never tried to take the business away from them when the entire business was handled by the Oakland-San Jose anyhow" (Tr. p. 102).

Defendant's claim of a grandfather right is not based on actual operations as an express corporation between Oakland and San Jose prior to August 1, 1933; rather, it rests upon the contention that the mere publication, prior to May 1, 1933, of tariffs applicable between Oakland and San Jose, coupled with a willingness to accept shipments at those rates, is sufficient to confer a grandfather right.

We quote as follows from defendant's brief:

> "The sole issue before the Commission in this proceeding is whether an express corporation which was doing business before May 1, 1933, and which had its published tariff lawfully on file with the Commission naming rates for the transportation of property between Oakland and San Jose, California, prior to May 1, 1933, is entitled to a grandfather operative right as an express corporation between those points, irrespective of the fact that it did or did not actually transport any shipments between those points prior to May 1, 1933."

In none of the tariffs published by defendant and filed with the Commission prior to May 1, 1933, were specific rates provided

between San Jose and Oakland. San Jose first appeared in the tariff on June 15, 1932, being referred to therein as a new station. Previously, on March 5, 1932, there had been inserted in the tariff an intermediate application rule, as follows:

> "Except as otherwise specifically provided herein, rates named in this tariff will apply as maximum from or to intermediate points named herein."

Defendant contends that by this rule a rate was established between Oakland and San Jose. This is so, it is claimed, because the tariff specified a rate between San Jose and Manteca, a point beyond Oakland. On April 29, 1933, defendant published rates between Oakland and San Francisco via San Jose which were lower than the San Jose-Manteca rates, and it is contended that thereafter the Oakland-San Jose rate was the same as the Oakland-San Francisco rate, since the latter was lower than the San Jose-Manteca rate. Likewise, on April 29, 1933, defendant published rates between Oakland and Coyote, a point beyond San Jose, and it contends that by the intermediate application rule the establishment of this rate also fixed rates between Oakland and San Jose.

Complainants have challenged defendant's claim that through the intermediate application rule, defendant has established rates between San Jose and Oakland. Such a method, it is clear, would not normally be observed in initiating rates between points so important as these. Had it been defendant's intention to publish such rates, it seems obvious that it would not have resorted to so circuitous and devious a method; rather, it would have specifically named in its tariffs the very points between which it sought to establish rates. It must be remembered that we are here dealing, not with the legal effect of the intermediate application rule in so far as it may pertain to the existence or non-existence of a rate,

but rather with the bona fides of the operations alleged to have been conducted in this territory and relied upon as the source of an operative right. In weighing this evidence, consideration must also be given to the fact that by the operation of the intermediate application rule, rates would have been fixed between Oakland and San Jose substantially higher than those of other common carriers serving this territory, including Oakland-San Jose Transportation Co., a circumstance which would no doubt have resulted in diverting from defendant any traffic that otherwise would have moved over its facilities between those points. Rates which can only be arrived at in this manner are entitled to but little weight in determining the existence of a prior right.

It is well settled by the decisions of this Commission that a grandfather right must be based upon actual operations conducted in good faith.

In re Pacific Motor Transport Company, et al, supra;
In re Kellogg Express & Draying Company, 39 C.R.C. 314;
In re W. R. Ballinger & Son, 39 C.R.C. 389;
In re Channel Lighterage Company, et al., 40 C.R.C. 493.

In the Pacific Motor Transport Company case, supra, the Commission, after holding that certificates of public convenience and necessity were not required, under Section 50(f) of the Public Utilities Act, for express corporations which had commenced operations prior to August 1, 1933, declared (pp. 245, 246):

> "It should be clearly understood however that by this action the Commission is not finding that the mere filing of a tariff effective on or before August 1, 1933, constitutes 'operating' to the extent indicated by the tariffs as of that date. While the tariffs of certain of these applicants cover extensive territory the record shows that they never handled a shipment to or from many of the points,

maintained no representatives there and offered no proof of good faith operation other than such as is said to follow from the mere filing of tariffs. Applicants will be expected forthwith to take such steps as may be necessary to bring their tariffs into conformity with their good faith operations on August 1, 1933."

In the Lighterage case, supra, the Commission dealt with the alleged grandfather rights of numerous inland water carriers, under Section 50(d) of the Public Utilities Act, which is similar in purpose and context to Section 50(f). A contention was made in that case similar to the one made by defendant in this, which was discussed (pp. 495, 496) as follows:

"The position of some of the respondents has been summarized on brief as follows:

"'Where there is no evidence of an express intention by a carrier to restrict the scope of its operations it has a prescriptive operative right to transport all freight with respect to which it had rates in its tariff lawfully on file with the Railroad Commission on August 17, 1923, and to transport in the same general area all other freight which can be transported in the same type of boats and handled in substantially the same manner as any of the freight for which it had a rate in such tariffs..'

"This proposition . . . assumes that the mere filing of a tariff is sufficient to confer operative rights. Under Section 50(d) of the Act it is also incumbent upon respondents to show actual good faith operations on August 17, 1923. .....the fact that for such period a carrier's operations have been confined to performing transportation service between a limited group of points is strongly indicative of an intention to restrict its service to transportation between such termini."

Though defendant, as we have pointed out, has urged that we recede from the construction of Section 50(f) announced in the case first referred to, under which any carrier seeking to establish a prior right must show, in addition to the filing of a tariff naming rates between points sought to be served, actual operations within the territory as well, we are satisfied with

the conclusions there announced and are disposed to adhere to them.

As we have shown, it was established by the record that no shipments were actually made by defendant locally between Oakland and San Jose or intermediate points. In this connection, there must be considered the agreement between defendant and Oakland-San Jose Transportation Company, by which defendant expressly undertook not to engage in operations to and from points intermediate to Oakland and San Jose. As construed by the parties, this inhibition extended to operations between Oakland and San Jose and intermediate points. Defendant urges that that provision of the contract should be ignored as illegal, on the ground that by publishing rates applicable between Oakland and San Jose and intermediate points, defendant was bound to accept shipments between those points and could not divest itself of such a duty by any contract. While that argument might be sound were it addressed to the provisions of a contract shown to be inconsistent with a carrier's established tariffs pertaining to operations in which it was already engaged, it is clear that we are here dealing with an entirely different subject. This contract must be viewed, not from the standpoint of its impact upon any tariff which defendant may previously have established in relation to service in this territory, for there were no such tariffs. On the contrary, this contract marked the initial step of defendant when it entered this territory; its chief significance lies in its delineation of the field which defendant proposed to serve. As we have shown, the contract provided that Oakland-San Jose Transportation Co., as the underlying carrier, would transport for defendant traffic moving between Oakland and San Jose and intermediate points, on the one hand, and points in the San Joaquin Valley, south of Oakland, extending to and including Los Angeles, on the other hand. That it did not authorize the performance by defendant of transportation locally between Oakland and San Jose and intermediate points, is indicated by the provision, quoted above,

to the effect that the service contemplated should be deemed an additional one not then being rendered by Oakland-San Jose Transportation Co., and that, under no circumstances would Valley Express Co. compete directly or indirectly with the service performed by the former company. And there is evidence in the record that such was the interpretation placed upon the contract by defendant itself.

Thus, not only has there been no showing on the part of defendant that it was engaged, in good faith, in the business of an express corporation between the points involved herein prior to August 1, 1933, nor prior to May 1, 1933, but also there appear an intent on the part of defendant not to engage in such operations, and evidence that no such operations were actually performed.

The records of Pacific Motor Trucking Company, which performed the underlying haul for defendant between Oakland and San Jose after December 1, 1934, and until December 7, 1935, show only one shipment between those points by defendant during that period of time. After December 7, 1935, the underlying haul was performed by H. Frasher Truck Line, and by its successor, both affiliated with defendant. Frasher testified that since that date defendant had operated locally between San Jose and Oakland as an express corporation, using the H. Frasher Truck Line as underlying carrier. But that date is too late to be of any significance in determining the existence of a prior right.

Since the record shows that defendant has been engaged in t he business of an express corporation between the points named in the complaint subsequent to August 1, 1933, and since defendant possesses neither a certificate nor a grandfather right authorizing such operations, a cease and desist order will be issued.

FINDINGS OF FACT

Upon full consideration of the evidence, THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA HEREBY FINDS:

(1) That Valley Express Company, a corporation, as an express corporation as defined in Section 2(k) of the Public Utilities Act, has since August 1, 1933, engaged in the business of transporting freight, merchandise, or other property for compensation on the line of a common carrier within this State between Oakland and San Jose, between said termini, respectively, and intermediate points, and between points intermediate to said termini, without first having obtained from the Commission a certificate of public convenience and necessity authorizing such operations.

(2) That Valley Express Company, a corporation, was not, prior to August 1, 1933, engaged in good faith, as an express corporation as defined in Section 2(k) of the Public Utilities Act, in the business of transporting any freight, merchandise, or other property for compensation on the line of a common carrier or stage or auto stage line between Oakland and San Jose, between said termini, respectively, and intermediate points, and between points intermediate to said termini.

O R D E R

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

IT IS HEREBY ORDERED that defendant Valley Express Company, a corporation, be and it is hereby directed, within twenty (20) days after the effective date of this order, to cease and desist and thereafter abstain from engaging in or transacting the business of transporting any freight, merchandise, or other property for compensation on the line of any common carrier or stage or auto stage line locally, as an express corporation as defined in Section 2(k), Public Utilities Act, between Oakland and San Jose, between said termini, respectively, and intermediate points, and between points intermediate to said termini, without first having secured from the Railroad Commission of the State of California a certificate of public convenience and necessity authorizing such operations.

IT IS HEREBY FURTHER ORDERED that defendant Valley Express Company, a corporation, be and it is hereby directed, within twenty (20) days after the effective date of this order, to cancel any rate or rates in its tariffs filed with the Commission for the transportation of any freight, merchandise, or other property locally between Oakland and San Jose, between said termini, respectively, and intermediate points, and between points intermediate to said termini.

IT IS HEREBY FURTHER ORDERED that the Secretary of this Commission shall cause a certified copy of this decision to be served upon defendant Valley Express Company, a corporation.

IT IS HEREBY FURTHER ORDERED that this order shall become effective twenty (20) days from the date of service hereof

upon said respondent.

Dated at San Francisco, California, this 8th day of August, 1938.

Commissioners.