Decision No. 31976

ORIGINAL

BEFORE THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of CARLEY & HAMILTON, INC., a corporation for leave to file its Tariff C.R.C. No. 3 as a "freight forwarder" as defined in Section 2 (ka) of the Public Utilities Act.

Application No. 22327

Douglas Brookman, for Applicant.
Harold B. Frasher, for Frasher Truck Co., Valley Motor Lines, Inc. and Valley Express Co.
J. F. Vizzard, for Draymens Association of San Francisco.
Guy V. Shoup, R. E. Wedekind, J. J. Geary and M. G. Smith, by M. G. Smith, for Southern Pacific Company, Northwestern Pacific Railroad Company and Pacific Motor Trucking Company.
W. G. Stone, for Sacramento Chamber of Commerce.
McCutchen, Olney, Mannon & Greene, by F. W. Mielke, for The River Lines.
George D. Hart, for United Transfer Company.

BY THE COMMISSION:

INTERIM ORDER
ON MOTION TO DENY OR DISMISS

Alleging continuous operation as a "freight forwarder" for over thirty years, and claiming a prescriptive right, applicant asks that it be permitted to file its proposed Tariff No. 3, or a tariff in such form as the Commission may require, to take the place of its Tariff No. 2, which was ordered canceled in Re Carley & Hamilton, Inc., 41 C.R.C. 327. When the matter was called for hearing on December 8, 1938, counsel for the Transportation Department of the Commission moved that the application be denied or dismissed

upon the ground that the issues presented had been determined adversely to applicant in the above decision. Counsel for The River Lines joined in this motion. Exhibits were introduced in support of the motion and in connection with applicant's offer of proof, and the motion was argued and submitted.

There have been several prior proceedings relating to applicant's tariff filings and a brief reference thereto is necessary in considering the present motion.

Prior to 1933 "express corporations," while subject to regulation, were not required to obtain certificates.(1) In that year two new sections were added to the statute. Section 2(ka) defined the term "freight forwarder,"(2) while section 50(f) required certification of all express corporations or freight forwarders commencing or extending operations after August 1, 1933. These sections became effective on August 21, 1933.

On March 16, 1934 applicant tendered a proposed tariff and requested an order permitting the filing thereof. Applicant alleged that it had not been aware of the statutory amendment until about March 1, 1934, when it consulted counsel and was advised that because of the amendment its freight forwarding operations came within the provisions of the regulatory statute, and that it was necessary

---

(1) An "express corporation" is one "engaged in or transacting the business of transporting any freight, merchandise or other property for compensation on the line of any common carrier * * *" (Public Utilities Act, sec. 2(k)), and is a common carrier. (Public Utilities Act, sec. 2(l).)

(2) A "freight forwarder" is one "who for compensation undertakes the collection and shipment of property of others, and as consignor or otherwise ships or arranges to ship the same via the line of any common carrier at the tariff rates of such carrier and/or acting as consignee of same receives such property, * * *" (Public Utilities Act, sec. 2(ka)), and is a common carrier. (Public Utilities Act, sec. 2(l).)

to file a tariff. Following a public hearing, at which applicant's right to file a tariff was not challenged, the Commission authorized and directed the filing of a tariff, subject to certain conditions as to the form and contents thereof.(3) After Tariff No. 1 became effective, a complaint was filed alleging that it did not conform to the conditions of the order authorizing and directing its filing.(4) A second tariff was filed prior to the hearing of that complaint. This filing was protested by The River Lines upon the ground that applicant had no prescriptive or certificated right between San Francisco and Sacramento and Stockton. The Commission suspended the second tariff(5) and the two matters were consolidated for hearing, at which applicant's then counsel offered a third tariff. He requested a finding that the third tariff complied with the conditions of the 1934 order, or if it did not so comply, that the 1934 order be modified.

In September 1935 the Commission found that applicant had received and forwarded shipments at charges less than those contemporaneously maintained by underlying carriers for the transportation of like kind and quantity of property, without specifically showing such charges in its tariff, as required by the 1934 order. It also found that the proposed tariffs did not comply with the

---

(3) Re Carley & Hamilton, Inc. (May 28, 1934), Decision No. 27102 in Application No. 19362.

(4) Valley Express Co. v. Carley & Hamilton, Inc., Case No. 3928.

(5) Re Suspension of Carley & Hamilton Tariff No. 2, Case No. 3946. Under section 63(b) a tariff schedule not resulting in a rate increase may be suspended for a limited period pending a hearing concerning the propriety of such schedule. After hearing the Commission shall establish the rates, etc., proposed, or others in lieu thereof, which it shall find to be just and reasonable. Rates, etc., not suspended within thirty days after filing thereupon become effective and are "the established and effective rates," etc., subject to the continuing power, after hearing, to alter or modify them.

1934 order, and modification thereof was denied. The 1935 order (6) directed applicant, first, to cancel Tariff No. 2; second, to file a tariff fully complying with the 1934 order or to cancel Tariff No. 1; and third, to desist from collecting rates lower than the contemporaneous rates of line haul carriers on like kind and quantity of property, unless it complied with the condition of the 1934 order requiring that its tariff specifically show such rates.

While the 1935 decision found that there was nothing in the record to show operation as a freight forwarder between San Francisco and Sacramento-Stockton on or prior to August 1, 1933, it did not admonish applicant to cease and desist any operation, nor did it purport to determine the existence, extent or scope of any prescriptive right.

In seeking rehearing, applicant's then counsel contended that to require publication of rates to destinations beyond San Francisco would compel applicant to engage in business as an "express corporation." It was argued that the reference in section 50(f) to operation "between points" referred to operations of express corporations and not to those of freight forwarders, and that to apply it to the latter would leave no distinction between a forwarder and an express corporation. In support of the claim that the statute had been misconstrued from the beginning, a somewhat involved argument was advanced to the effect that the Commission had failed to distinguish between an "express corporation," a "freight forwarder" and a "consolidator," and had erroneously classified applicant's

---

(6) Decision No. 28252 in Case No. 3928 (complaint of Valley Express Co.) and Case No. 3946 (suspension proceeding).

operations. It was urged that forwarding had no connection with transportation beyond San Francisco, and that applicant could not be compelled to publish charges beyond, because it assumed no responsibility after shipments had been turned over to underlying carriers. It was submitted that the 1934 and 1935 orders did not conform to the law, but that the tariff did, and should be accepted and filed.

Rehearing was granted in November 1935,(7) and on the same day the 1934 application was reopened for further hearing. The decision on rehearing (41 C.R.C. 327) was not issued until May 1938, and is the decision upon which the motion to dismiss is based.

According to that decision the distinction between an express corporation and a freight forwarder does not concern the relationship between the shipper and the express corporation or forwarder, but has to do with the relationship between the underlying carrier and the express corporation or forwarder. The opinion states that ordinarily underlying carriers deal with an express corporation as another carrier, rather than as a shipper, and agree to handle its traffic at special contract rates, while forwarders are those who, "having assumed a carrier's undertaking with shippers," accomplish the transportation by tendering goods as a shipper to the underlying carrier at the latter's tariff rates, and not as another carrier under special contract.(8) It was concluded that tariffs

---

(7) The suspension of Tariff No. 2 (Case No. 3946) expired October 13, 1935, on which date that tariff became effective. This was prior to the filing of the petition for rehearing, which petition, however, was filed in time to suspend the 1935 order. Decision on the rehearing was not issued until May 9, 1938.

(8) The opinion directs attention to the fact that prior to 1933 some express corporations, as shippers, tendered freight to underlying carriers at the latter's tariff rates, and were required to file tariffs as express corporations. (Re Frost Fast Freight, 31 C.R.C. 668.) According to the opinion, section 2(ka) gave recognition in the law to this distinction, designating such operators as freight forwarders.

of forwarders must specify rates for their transportation service between the points where they operate, and that the 1934 and 1935 orders should not be modified in this respect.

The 1938 opinion then refers to shipping documents used by applicant, and based largely upon an analysis thereof, the opinion concludes that prior to August 1, 1933 applicant acted as a shipper's agent to forward goods, assumed no responsibility after delivery to the line haul carrier, and was not then operating as a freight forwarder, but was merely a drayman and forwarding and receiving agent. However, it found that after that date certain changes were made in applicant's methods and practices, particularly in connection with the shipping documents used, which resulted in applicant becoming a freight forwarder. These changes were found to have occurred after line haul carriers had published reduced quantity rates and so-called "split delivery rules," thereby increasing opportunities for consolidation.

The 1938 decision found that applicant possessed no prescriptive right and ordered, first, the annulment of the 1934 and 1935 decisions, second, the denial of the original 1934 application, third, the dismissal of the 1934 complaint of Valley Express Co., and fourth, the cancelation of Tariff No. 2. Here again, as in the 1935 order, there was no admonition that applicant should cease and desist any operation.

Petition for a writ of review was denied.(9) The answer to that petition represented to the Court that the crucial question

---

(9) Carley & Hamilton, Inc. v. Railroad Commission. S.F. No. 16091.

argued before the Commission since the first hearing in May 1934 was whether a freight forwarder is under the same duty as other common carriers to publish a tariff complying with statute and Commission rules, and that that was the only question presented in the court proceeding.(10)

The present application alleges that the existence of a prescriptive right can be established by evidence never presented in any prior proceeding. Attached to the application is a proposed tariff which is alleged to be in conformity with the Commission's minimum rate orders, and which contains class rates on a mileage basis, as well as rules and regulations governing their application.

As heretofore stated, dismissal of the application is sought upon the ground that the issues presented thereby have already been considered and determined. In reply applicant's present counsel urges that the main controversy involved in the earlier proceedings related to the form of tariff which should be filed; that prior counsel misconstrued the law with reference to freight forwarders and the proper form of tariff to be filed by them; that the 1938 decision contains the first clear definition of a freight forwarder; and that the complete facts of applicant's method of operation have never been presented to the Commission.

---

(10) In referring to the 1938 decision, the answer stated in part as follows:

"Let it be noted merely that the Commission did not compel petitioner to do anything other than to cancel its unlawful tariffs. It did not compel petitioner, as alleged, to become an express company rather than a freight forwarder. It did make a finding that petitioner was not actually a forwarder on August 1, 1933, but that finding was upon an issue collateral to the dominant issue argued throughout the proceedings."

Certain bills of lading and a freight bill, all relating to actual shipments which moved prior to August 1, 1933, were introduced as exhibits in connection with applicant's offer to prove, by testimony and actual records, that applicant acted as shipper and consignor before as well as after August 1, 1933 (11); that from its inception applicant's business has been largely that of a freight forwarder (interstate, intrastate and foreign), and not merely that of a city drayman; that those using the service were billed by and paid applicant on freight bills presented by applicant covering the entire movement through to destination, and did not know anyone else in the transaction except applicant; that the underlying carriers recognized applicant as the shipper and consignor; that as consignor applicant was paid "C.O.D's" by underlying carriers; that underlying carriers required applicant, rather than the individual merchant, to file claims for loss or damage; that applicant made claims for loss or damage and itself settled with the individuals or merchants using its service; and that from the beginning applicant's president desired to file a tariff naming rates between separate points and to comply with the 1934 order, and later desired to file rates in accordance with the Commission's minimum rate orders, but was prevented from so doing solely upon the advice of prior counsel.

Of course the fact that one may have acted upon the advice of counsel does not present sufficient reason of itself for relitigation of issues once determined. However, the primary issue in the past proceedings concerned the form of tariff which should be filed.

---

(11) Three of the bills of lading introduced indicate applicant as the shipper, while one indicates applicant as consignee. The freight bill is one rendered to applicant by Southern Pacific Company and indicates applicant as the shipper.

No Commission decision prior to the one upon which the motion is based attempted to define with certainty the distinction between express corporations and freight forwarders. Inconsistencies in the position taken by applicant now and in the past may be due to the earlier uncertainty as to statutory construction. If applicant is able to present substantial evidence in support of a prescriptive right, an injustice will result if it is not permitted to do so in a proceeding where the existence of such a right is not only directly involved, but is recognized by all parties as being the dominant issue. Under the peculiar circumstances disclosed by the record, and in view of the offer of proof, we believe that opportunity should be afforded for the presentation of evidence in support of the allegations of the present application. The burden of proving the existence of a prescriptive right rests, of course, upon the applicant, as well as the burden of showing that its proposed tariff is not only consistent with any prescriptive right that may be established, but is also the proper form of tariff to be filed by a freight forwarder.

Good cause appearing, IT IS ORDERED that the motion to deny or dismiss be and it is hereby denied and that the application be set for hearing on the merits.

Dated, San Francisco, California, January 23, 1939.

Commissioners.