

Decision No. 31868

BEFORE THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA

ORIGINAL

In the Matter of the Application of)
WM. M. SMITH and MAKIN H. SMITH, JR.,)
copartners doing business under the name)
and style of TRANSBAY MOTOR EXPRESS CO.,)
for an amendment of certificate in) Application No. 22497
Decision No. 27975, to include the city)
of Piedmont, and for an amendment)
authorizing the use of motor trucks.)

GWYN E. BAKER, for Applicant.

F. G. ATHEARN and DOUGLAS BROOKMAN, by Douglas
Brookman, for United Parcel Service Bay
District, Protestant.

E. H. BART and REGINALD L. VAUGHAN, for Pacific
Motor Tariff Bureau, Protestant.

F. X. VIEIRA, for Southern Pacific Company and
Pacific Motor Trucking Company, as their
interests may appear.

BY THE COMMISSION:

O P I N I O N

This is an application by Wm. M. Smith and Makin H. Smith Jr., operating under the fictitious name and style of Transbay Motor Express, seeking authority to serve the city of Piedmont as an extension and enlargement of their existing rights as a highway common carrier of property by motorcycle trucks ⁽¹⁾ between the city and county of San Francisco and the East Bay Cities of Oakland, Berkeley, Alameda and Emeryville. Additionally applicants request an order of the Commission authorizing them to substitute light panel four-wheel delivery trucks for motorcycles as now authorized under their certificate, subject to the provision that the use of motorcycles be continued where they may be deemed more convenient.

(1) By Decision No. 27975, three-wheel vehicles are referred to as motorcycle trucks. For convenience hereinafter this type of vehicle will sometimes be referred to as a motorcycle.

A public hearing in this matter was had before Examiner McGettigan in Oakland, on February 24, 1939, where testimony was taken, exhibits received, and the matter being submitted it is now ready for decision.

The granting of this application was protested by the Pacific Motor Tariff Bureau and United Parcel Service Bay District. Southern Pacific Company and Pacific Motor Trucking Company appeared as interested parties in this proceeding.

United Parcel Service Bay District, by stipulation of counsel, withdrew its protest in so far as the establishment of service to Piedmont was concerned but reaffirmed its objection to the granting of authority to use four-wheel trucks in addition to the use of motorcycles. Counsel for Southern Pacific Company and Pacific Motor Trucking Company joined counsel for United Parcel Service Bay District in this position.

Makin H. Smith, Jr., applicant copartner and general manager of the company, testified in support of the application but no public witness testimony was presented. Witness Smith testified chiefly in support of the contentions of his company that the light panel delivery trucks should be substituted for the motorcycles now in use, in the interest of efficiency, facility, economy, and safety of operation. His testimony with respect to service to and from Piedmont was limited to a statement that he had had inquiries and requests for the establishment of the same service to that city as is now being rendered to other East Bay Cities. Rates to be assessed for the proposed service are those appearing in applicants' Local Tariff No. 2, C.R.C. No. 2, applying between Zones 1 and 3 in San Francisco and Zone 4 in Oakland, as set forth in Exhibit "A" attached to the application. A scheduled service

(2) Time schedule No. 1 of applicants currently in effect shows three trips daily except Sunday from San Francisco with an additional trip operated daily except Saturday and Sunday. From Oakland two trips are operated daily except Sunday with two additional trips operated daily except Saturday and Sunday.

Piedmont identical with that now being maintained between San Francisco and Zone 4 in Oakland is proposed.

In connection with the additional safety of operation factor attributed to the four-wheel trucks as compared to motorcycle operation, Mr. Smith testified that the operator of the motorcycle is more exposed in the event of an accident than would be the case if light four-wheel trucks were employed. While germane to a certain degree, the statements of Mr. Smith appear to lose considerable weight when viewed in connection with applicants' desire to retain and use the motorcycle truck when and if it appears convenient. Also this witness disclosed that, in the event that authority to change the type of equipment was not forthcoming, his company was in a position to, and in fact intended to, purchase new motorcycles which would permit of increasing the present carrying capacity of 750 to 1500 pounds, the latter being the carrying capacity of the panel four-wheel trucks proposed to be used.

With respect to applicants' contention that the use of light panel trucks would result in certain economies of operation, witness Smith testified in regard to the cost of operating such trucks as compared with the operation of motorcycles and introduced Exhibit 1 which is a statement of the maintenance costs of applicants motorcycle operations for the year 1938. However, his testimony on the subject of cost of operating four-wheel trucks was based only on verbal statements made to him by another carrier and a dealer in the East Bay Area using the same type of trucks as applicant proposes to employ and a Ford dealer who handled such equipment. Although applicants' showing on cost of truck operation was based, to a considerable extent at least, on cost studies presented by the Commission's Engineers at various rate proceedings, this witness was unable to identify the exhibits to which he referred. In fact it may be fairly stated that applicants' showing on cost of

truck operation was very meager. The witness also testified that one truck, of the type proposed to be used, would handle the work now being performed by two motorcycles and could also handle larger packages. The result being that for the same volume of merchandise delivered, the proposed truck operation would require only one-half the number of drivers as would be necessary if motorcycles were employed.

For protestants the testimony of two witnesses from United Transfer Company and Interurban Express Corporation was presented. They testified generally as to the service their companies were rendering between East Bay Points and San Francisco. In their testimony it was developed that no complaints had been received in regard to the Piedmont service, currently operated equipment was not being used to capacity, extra standby equipment was always available, and two round trips daily were made with additional special trips available at extra cost when requested. Additionally, it was stipulated by counsel that witnesses from Kellogg Express and Drayage Company, Merchants Express Corporation, Haslett Warehouse Company, Peoples Express Company and other transbay operators, if called, would testify in the same manner and to a like degree as the two witnesses actually called.

In addition to the testimony previously discussed, protestants introduced into the record, by reference, the Commission's Decision No. 27975, which granted a certificate of public convenience and necessity to the Transbay Motor Express Co. Also made a part of the record by reference was the Commission's Decision No. 29517 whereby Wm. A. Fairfield, operating under the name and style of Metropolitan Shuttle Service, was denied a certificate of public convenience and necessity as a highway common carrier between San Francisco and Oakland.

In calling the Commission's attention to Decision No. 27975 protestants contend that applicants herein have violated a provision of the certificate granted thereunder and base their contention upon condition number 1 which reads as follows:

- "1. Applicants shall file their written acceptance of the certificate herein granted within a period of not to exceed fifteen (15) days from date hereof, stipulating in said acceptance that said certificate is accepted for the exclusive use of motorcycle trucks and that the certificated right herein shall never be claimed as permitting the use of other vehicles than three-wheel motorcycles in contradistinction from four-wheel auto trucks of the conventional commercial type and/or automobile chassis."

Protestants construe this condition as precluding applicants from seeking authority to change the type of equipment used when the basis of such a request rests upon a deficiency in operating facilities resulting from the use of motorcycles. In other words, protestants contend that applicants' request for the change in type of equipment is predicated on the fact that motorcycles have proven inadequate to handle the operations of the company and have failed from both safety and load-carrying standpoints. By so doing applicants, in the eyes of protestants, have attempted to use an exclusive three-wheel motorcycle truck operation as a means of obtaining authority to use four-wheel trucks in contravention of the aforescribed condition. Protestants further alleged that applicants should have applied for a certificate de novo as a highway common carrier by four-wheel truck and made a distinct and separate showing of public convenience and necessity based upon the use of such four-wheel trucks and not depend in any way upon equipment failings attributable to motorcycles.

Protestants further pointed out that the Commission, in granting the original certificate to applicants, recognized the specialized service to be rendered by applicants and its rather non-competitive character as indicated by the following language appearing on page 3 of Decision No. 27975:

"It does not appear that this special small package service is in active competition with protestants' truck operations."

Protestants construe this statement as indicating a possibility that were it not for the restricted type of operation offered by Transbay Motor Express no certificate of public convenience and necessity would have been forthcoming to serve the highly competitive territory involved.

Decision No. 29517, in which the Commission denied William A. Fairfield a certificate of public convenience and necessity between San Francisco and Oakland, was referred to by protestants for the purpose of showing that the present applicants appeared as protestants in the proceeding involved indicating their stand thereby that transbay automotive service was adequate and sufficient and no additional service needed.

A summation of the record in this proceeding leads to the conclusion that, mindful of the geographical location of Piedmont as entirely surrounded by the city of Oakland, the attendant difficulty, as set forth in the application, of determining where one community ends and the other begins and mindful also that shipments allegedly often carry no city identification but only a street and number designation, plus the further allegation by applicants that the original omission of the city of Piedmont as a service point was an oversight, the Commission is of the opinion and so finds that, in the public interest and as a clarifying factor in this matter, applicants should be granted the right to serve the city of Piedmont as herein prayed for.

Turning to that portion of the record dealing with applicants request to operate four-wheel panel trucks in addition to

their motorcycle operations, this record does not support the granting of this portion of the application on the ground of the convenience and necessity of the shipping and receiving public in the district affected. Rather it is more readily apparent that private advantages to the carrier are involved to a much greater degree. Statements of the witness Smith that his company purposed to achieve the same results, allegedly to accrue through the use of four-wheel trucks, by purchasing three-wheel motorcycle trucks of equal carrying capacity would appear to offset that portion of applicant's showing that they should be permitted to operate four-wheel panel trucks in lieu of motorcycles on the ground of less hazard to the operators. As set forth above, applicant's certificate was granted by said Decision No. 27975 solely upon the use of motorcycles and this record does not justify a modification of that order with respect to the type of vehicle to be operated.

Wm. M. Smith and Makin H. Smith Jr. are hereby placed upon notice that "operative rights" do not constitute a class of property which should be capitalized or used as an element of value in determining reasonable rates. Aside from their purely permissive aspect, they extend to the holder a full or partial monopoly of a class of business over a particular route. This monopoly feature may be changed or destroyed at any time by the state which is not in any respect limited to the number of rights which may be given.

O R D E R

Public hearings having been held in the above entitled proceeding, testimony taken, and an order of submission entered,

THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA HEREBY DECLARES that public convenience and necessity require the establishment and operation by Wm. M. Smith and Makin H. Smith, Jr. of an automotive service as a highway common carrier between the city and county of San Francisco and the city of Piedmont as an extension and enlargement of their existing rights as heretofore granted by Decision No. 27975, dated May 20, 1935, as amended by Decision No. 29291, dated November 23, 1936, subject to all restrictions and limitations heretofore imposed thereunder.

IT IS HEREBY ORDERED that a certificate of public convenience and necessity therefor be, and the same hereby is, granted to Wm. M. Smith and Makin H. Smith, Jr., subject to the following conditions:

1. Applicants shall file a written acceptance of the certificate herein granted within a period of not to exceed fifteen (15) days from date hereof.
2. Applicants shall commence the service herein authorized within a period of not to exceed thirty (30) days from the effective date hereof, and shall file in triplicate, and concurrently make effective on not less than ten days' notice to the Railroad Commission and the public, a tariff or tariffs constructed in accordance with the requirements of the Commission's General Orders and containing rates and rules which in volume and effect shall be identical with the rates and rules shown in the exhibit attached to the application in so far as they conform to the certificate herein granted, or rates and rules satisfactory to the Railroad Commission.
3. Applicants shall file in duplicate, and make effective within a period of not to exceed thirty (30) days after the effective date of this order, on not less than five days' notice to the Railroad Commission and the public, a time schedule or time schedules covering the service herein authorized in a form satisfactory to the Railroad Commission.
4. The rights and privileges herein authorized may not be discontinued, sold, leased, transferred nor assigned unless the written consent of the Railroad Commission to such discontinuance, sale, lease, transfer or assignment has first been obtained.
5. No vehicle may be operated by applicants herein unless such vehicle is owned by said applicants or is leased by applicants under a contract or agreement on a basis satisfactory to the Railroad Commission.

6. Applicant shall, prior to the commencement of service authorized herein and continuously thereafter, comply with all of the provisions of this Commission's General Order No. 91.

IT IS HEREBY FURTHER ORDERED that in all other respects Application No. 22497 be and it is hereby denied.

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

Dated at Los Angeles, California, this 27th day of March, 1939.

Ray W. Whipple
Henry R. DeWitt
Ray H. Cline
W. Baker
Justus J. Coomer
COMMISSIONERS