

Decision No. 23410

BEFORE THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of  
MARIN EXPRESS SERVICE, a corporation,  
seller, and KELLOGG EXPRESS AND DRAYING  
COMPANY, a corporation, buyer, for an  
order authorizing the former to sell  
and convey and the latter to purchase  
and acquire the operative rights and  
property herein described.

ORIGINAL

Supplemental  
Application No. 23410

REGINALD L. VAUGHAN, for Applicant.

G. C. HOLTWICK, for Merchants Express Corpor-  
ation, Protestant.

A. J. GAUDIO, for Southern Pacific Company,  
Northwestern Pacific Railroad and Pacific  
Motor Trucking Company, Protestants.

DOUGLAS BROOKMAN, for R. G. Anderson, doing  
business as Petaluma and Santa Rosa  
Express, Interested Party.

BY THE COMMISSION:

O P I N I O N

By supplemental application in this proceeding, Kellogg Express and Draying Company, a corporation, (hereinafter referred to as Kellogg or applicant) seeks authority to consolidate two separate highway common carrier operative rights owned by it, one between San Francisco and certain Marin County points, on the one

hand, and the other between San Francisco and certain Alameda points, on the other hand.<sup>(1)</sup>

Public hearings were had before Examiner Eroz at Oakland and at San Rafael, at which time public witnesses testified and evidence was offered. At the conclusion of the hearings, the matter was submitted, and it is now ready for decision. The Merchants Express Corporation, Southern Pacific Company, Northwestern Pacific Railroad and Pacific Motor Trucking Company appeared at the hearing as protestants to the granting of the application.

The Marin County points served by applicant from San Francisco are as follows:

Alto	Kentfield	San Anselmo
Baltimore Park	Landsdale	San Clemente
Escalle	Larkspur	San Rafael
Corte Madera	Line Point	Sausalito
Fairfax	Manzanita	Waldo
Greenbrae	Mill Valley	Yolanda
Hamilton Field	Ross	

The Alameda County points served by applicant from San

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(1) The operative right between San Francisco and Marin County points was originally established by Decision No. 32677 of December 27, 1939, in Application No. 21422. Subsequently, said operative right was transferred to the Marin Express Service. By Decision No. 33008, of April 16, 1940 in this proceeding, Kellogg acquired said operative right from Marin Express Service. By supplemental application filed on September 4, 1940, Kellogg requested the Commission to issue a new certificate in the name of Kellogg, in lieu of the right acquired under Decision No. 33008. By Decision No. 33478 of September 10, 1940 in this proceeding, said in lieu certificate was granted to the applicant.

The Alameda County points here involved are served by applicant under an operative right acquired by purchase from William Bolts under Decision No. 25744 of March 20, 1933, in Application No. 18745.

Francisco are as follows.

Oakland  
Alameda  
Albany

Emeryville  
Berkeley

Piedmont  
San Leandro

Applicant's vice-president and general manager testified that his company operates two highway common carrier services daily between San Francisco and said East Bay points. It also operates two common carrier services daily between San Francisco and the designated points in Marin County. According to the witness, the company presently utilizes about 90 pieces of automotive equipment in these operations which are conducted as separate services with a common terminal at San Francisco. Applicant also maintains a terminal in Oakland and one in San Rafael.

In the East Bay cities, applicant performs two pickup services daily (except Sundays and holidays), one between 8:00 A.M. and 12:00 noon and the other between 2:00 P.M. and 5:30 P.M. Traffic so picked up and destined to San Francisco or to Marin County points is moved to San Francisco via the San Francisco - Oakland Bay Bridge.

The record shows that applicant provides two daily (except Sundays and holidays) schedules between San Francisco and Marin County points, one leaving San Francisco at 1:30 P.M. for delivery of shipments the same afternoon to various points in Marin County; and the second schedule leaving San Francisco at the close of the business day carries shipments directly to San Rafael from which point they are delivered to the Marin County points the following morning.

Under this application, Kellogg proposes to pick up shipments in the East Bay cities in the morning, carry them directly

to San Francisco where they will be consolidated with San Francisco shipments for Marin County and delivered to Marin County points the same afternoon. Shipments picked up in the East Bay cities in the afternoon will likewise go directly to San Francisco where they will be consolidated with San Francisco shipments and transported to San Rafael during the night for delivery out of San Rafael the following morning.

Applicant contends that the proposed consolidation of the two separate operations will increase, to a certain extent, its load factor between East Bay cities and San Francisco, with some attendant increase in bridge tolls, but that unit operating costs as a whole, would be reduced by virtue of the anticipated increase in load factor. It is alleged that no additional equipment will have to be operated under this proposal, since applicant's existing automotive equipment is adequate to handle the traffic offered. Sufficient terminal facilities are already available in Oakland, San Francisco and San Rafael, hence there would be no additional capital expense involved.

A rate witness for applicant compared the company's present rates with those of competitive carriers for the transportation of property between East Bay cities and Marin County points. He introduced an exhibit purporting to show that whereas the Sausalito, Mill Valley and San Francisco Express Company, the Southern Pacific Company and the Merchants Express Corporation maintain through rates between East Bay cities and Marin County points on a minimum basis prescribed by this Commission by Decision No. 31606, as amended, in Case No. 4246, the applicant, because of its separate operative rights, is required to apply and charge a combination rate over San Francisco composed of its rate from East

Bay points to San Francisco, plus its rate from San Francisco to Marin County. The witness asserted that such combination rates are from 50 to 60 per cent higher in volume than the through rates of competitive carriers. He pointed out that it is proposed to establish the same rates as now maintained by such other carriers. Furthermore, the witness testified with respect to the schedules of service proposed by the applicant and compared them with the existing schedules of protestant carriers between East Bay cities and Marin County points. The exhibit shows that protestants, with but one exception, now render an overnight service, while applicant proposes two services a day, one with delivery the same afternoon, and the other, an overnight service.<sup>(2)</sup>

Twenty-nine public witnesses appeared and testified on behalf of applicant (twenty-one at Oakland and eight at San Rafael). At San Rafael, the testimony of six additional public witnesses on behalf of applicant was stipulated by counsel for protestants. Three of applicant's witnesses appeared on behalf of the Oakland Chamber of Commerce, the San Rafael Chamber of Commerce and the Marin County Junior Chamber of Commerce, respectively.

The attorney for Oakland Chamber of Commerce testified that applicant's proposal was considered by the traffic committee of that organization. The committee recommended that the application be supported and authorized the witness to appear and testify in behalf of the applicant. The reasons underlying the committee's action, according to the witness, are (1) that East Bay jobbers compete with San Francisco jobbers for Marin County business;

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(2) One protestant, according to the witness, the Merchants Express Corporation, now maintains a schedule which leaves Oakland very early in the morning, and begins making deliveries at San Quentin and San Rafael about 9:00 A.M. This schedule is said to be too early for handling anything but overnight shipments from Oakland, i.e. shipments which have been picked up in Oakland during the previous day.

(2) that San Francisco now has the advantage of two delivery services a day into Marin County, while East Bay shippers have only an overnight service to the same points; and (3) that the higher combination rates now charged by applicant via San Francisco impair the use of its service from East Bay cities, even though it is a more frequent and expedited operation than that of competitive carriers.

The secretary of the San Rafael Chamber of Commerce stated that his organization held an executive meeting and passed a resolution endorsing the applicant's proposal. He said the reason for this action is the fact that Marin County merchants have long expressed a desire to do business with Oakland jobbers and manufacturers, and want more expeditious service from the East Bay cities. The witness testified also that higher rates via the applicant's line made on the combination basis over San Francisco were a handicap to Marin County businessmen. On cross-examination, the witness conceded that he knew of no complaints against the service of Merchants Express Corporation, nor had he ever asked that carrier for additional schedules of service. The president of the Marin County Junior Chamber of Commerce testified substantially in the same manner as the preceding witness.

Shipper witnesses for applicant testified with respect to the following points, which will be summarized for the sake of brevity, and will be stated in the order of their emphasis. They testified uniformly

- (1) that they are familiar with the applicant's proposed rates and service, and that if the consolidation of operative rights is authorized by the Commission, they would use the service;

- (2) that Oakland shippers require applicant's service in order to compete with San Francisco jobbers doing business in Marin County;
- (3) that San Francisco has numerous for-hire carriers who render twice-a-day service to points in Marin County, whereas East Bay shippers have only a once-a-day "overnight" service to the same points;
- (4) that retail customers in Marin County often phone their orders to an East Bay wholesaler or jobber and demand more prompt transportation service than can be rendered at the present time;
- (5) that the present transportation service of the Southern Pacific-Northwestern Pacific and Pacific Motor Trucking Company, in so far as their needs are concerned, is unsatisfactory and inadequate, because in some instances it is too slow and because it does not provide for same day delivery to Marin County points;
- (6) that service of Merchants Express between East Bay points and San Quentin is satisfactory; with respect to San Rafael, however, the witness urged the granting of the application on the ground that it would afford them a superior service to that offered by Merchants Express, in that it would afford a daily delivery as contrasted with the present overnight delivery.
- (7) that a large part, at least 50 per cent, of their traffic would move via applicant's line on the morning pickup in East Bay cities for same afternoon delivery in Marin County;
- (8) that Kellogg's proposed service will tend to develop more business for East Bay jobbers and manufacturers in Marin County due to the establishment of service competitive with San Francisco service, and to equalizing Kellogg's rates with those of other carriers;
- (9) that Kellogg's present service from San Francisco to Marin County points is satisfactory;
- (10) that in some cases it is necessary for shippers to use the services of the Triangle Express Company, a highway contract carrier, to secure more efficient and expeditious truck service from Alameda County to Marin County; and
- (11) that despite the handicap of higher combination rates over San Francisco, some shippers now use Kellogg's service because of the same day delivery on East Bay shipments.

The foregoing testimony of applicant's witnesses was not substantially controverted upon cross-examination by counsel for protestants.

Protestants offered no public witnesses in their own behalf. They introduced operating testimony, however, through representatives of their executive and operating departments. The general manager of Merchants Express Corporation stated that his company maintains a regular service between the principal East Bay cities and San Quentin and San Rafael; that the traffic presently handled by his company between those points is very small, with no back-haul traffic of any consequence from Marin County points to Oakland; that he maintains an agent at San Rafael for the solicitation of traffic; that there appears to be no sufficient volume of traffic at present to justify twice-a-day service from Alameda County nor any indication that the volume of Marin County business can be increased over that which is presently transported.

On cross-examination, the witness conceded that when the Merchants Express Corporation first began to serve San Rafael and San Quentin, its rates from the East Bay cities were generally lower than the rates of the Southern Pacific-Northwestern Pacific, but that after the Commission issued its Decision No. 30370, in Case No. 4088 Part "U" the rates of all carriers were equalized and thereafter the volume of Merchants Express Corporation's traffic fell off appreciably.

A representative of the Southern Pacific Company's

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- (3) The witness stated that his company operates a truck from Oakland via Richmond, thence via Richmond-San Rafael Ferry Company to Point San Quentin, thence to San Rafael, leaving East Bay cities about 7:30 A.M. and performing certain pickup service at intermediate points between Oakland and Richmond before boarding the ferry at the latter point, about 8:20 A.M. Delivery at San Quentin begins about 8:30 A.M. and at San Rafael between 8:45 A.M. and 9:15 A.M. The return trip from San Rafael to Oakland is made about noon each day.



bureau of transportation research testified with respect to the method of operation of present rail and truck services of that carrier and its connections on traffic between Alameda County and Marin County. From his testimony, it appears that freight picked up in the East Bay cities during the day, is assembled at the Southern Pacific freight station, 5th and Kirkham Streets, Oakland, where it is loaded into a rail box car. The box car is moved out of the freight depot at 8:00 P.M. each night and is barged from Oakland to Tiburon where the Northwestern Pacific Railroad receives it, and hauls it to San Rafael. The car arrives at San Rafael about 3-30 A.M. the following morning where the traffic is sorted for distribution by Pacific Motor Trucking Company to points in Marin County commencing at 8:00 A.M. Roughly, about three tons of traffic per day moves between East Bay cities and Marin County points via the Southern Pacific Company and its connections. The witness contended that this traffic is needed for the continued operation of freight service from and to points north of San Rafael, and that any diversion of less-carload traffic may jeopardize the maintenance of certain railroad agency stations by the Northwestern Pacific Railroad in the affected area.

Before proceeding to a discussion of the evidence, it may be well to review briefly, the status of the applicant here before the Commission. Unlike an applicant for a new certificate, Kellogg has two separate operative rights which are sought to be consolidated. These operative rights are currently exercised under separate certificates heretofore granted by this Commission, authorizing the operation of a truck service between San Francisco and Alameda County, on the one hand, and between San Francisco and Marin County, on the other hand. The instant application was filed under the provisions of Section 50-3/4 (c) of the Public Utilities Act, which reads in part as follows:

"...Without the express approval of the commission, no certificate of public convenience and necessity issued to any highway common carrier under the provisions of this section, or heretofore issued by the commission for the transportation of property by auto truck or self-propelled vehicle, nor any operative right founded upon operations actually conducted in good faith on July 26, 1917, shall be combined, united or consolidated with another such certificate or operative right so as to permit through service between any point or points served under any such separate certificate or operative right, on the one hand, and any point or points served under another such certificate or operative right, on the other hand; nor, without the express approval of the commission, shall any through route or joint, through, combination, or proportional rate be established by any highway common carrier between any point or points which it serves under any such certificate or operative right, and any point or points which it serves under any other such certificate or operative right."

In construing the foregoing provisions of the Public Utilities Act, the Commission has heretofore enunciated the doctrine that an applicant seeking (1) authority to consolidate separate operative rights, or (2) permission to establish joint through rates in lieu of combination rates involving separate operative rights, is required to prove public convenience and necessity.<sup>(4)</sup>

Counsel for applicant contended in his opening statement in this proceeding that the Commission is in error in holding to this doctrine, because Section 22 of the Public Utilities Act makes it the duty of a carrier to establish joint through rates and render

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(4) By Decision No. 32029, in Application Nos. 20826, 20892, and 20893, issued on May 23, 1939, In re Anderson et al (42 CRC 15) the Commission said:

"No certificate may be granted except after a showing of public convenience and necessity. In the past we have held that consolidation may not be accomplished except upon a similar showing of public convenience and necessity. The establishment of joint rates is one of the clearest manifestations of a consolidation of certificates or operative rights, within the meaning attributed by our decisions to that term. It would seem, therefore, that the obligation resting upon an applicant to establish public convenience and necessity conditions and permeates the entire subdivision."

(5)  
through transportation service. He asserted that in view of Section 22, the "duty" there enjoined upon a carrier creates a correlative "right," permissive in nature, which the carrier may exercise without being required to assume the burden of proving public convenience and necessity. However, he said, in view of the Commission's opinion in Decision No. 32029 (42 C.R.C. 15) in which it expressed the view that an obligation rests upon an applicant to establish public convenience and necessity, he would offer the testimony of public witnesses and other probative evidence to support the instant application. We will now undertake to review the evidence offered.

The testimony preponderantly shows that shippers in Alameda County and Marin County desire applicant to render a through service under through rates competitive with those of other carriers. It shows, moreover, that applicant's same-day delivery service is much desired and is an improvement over the existing overnight service of other carriers. The application is supported by Chambers of Commerce of Alameda and Marin Counties who seek to bring about a closer trade relationship with one another and to establish transportation service comparable with service from and to San Francisco.

The financial ability of the applicant to undertake and operate the consolidated through service is not questioned inasmuch as applicant has been and is now operating the two services separately although under one management and control and that it will utilize existing trucking equipment and terminal facilities to carry on the proposed operation.

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(5) Section 22 of the Public Utilities Act reads in part as follows:

"Every common carrier shall afford all reasonable, proper and equal facilities for the prompt and efficient interchange and transfer of passengers, tonnage and cars, loaded or empty, between the lines owned, operated, controlled or leased by it and the lines of every other common carrier, and shall make such interchange and transfer promptly without discrimination between shippers, passengers or carriers either as to compensation charged, service rendered or facilities afforded.....Nothing in this section shall be construed as in anywise limiting or modifying the duty of a common carrier to establish joint rates, fares and charges for the transportation of passengers and property over the lines owned, operated, controlled or leased by it and the lines of other common carriers, nor as in any manner limiting or modifying the power of the commission to require the establishment of such joint rates, fares and charges."

The inadequacy of the existing service of competitive carriers is demonstrated by the testimony of applicant's witnesses which stands unchallenged in this record. The protestants merely offered evidence designed to show the nature of the existing service. This testimony shows that Merchants Express Corporation serves San Rafael and San Quentin only, giving 9:00 A.M. delivery on traffic picked up in Oakland the previous day. It is not, therefore, a same-day service, such as that proposed by the applicant. Moreover, this protestant does not offer service to the other points in Marin County proposed to be served by applicant, nor does applicant propose to serve San Quentin.

The other protestant, Southern Pacific Company, renders an overnight service from Alameda County to Marin County points by means of a rail service, a barge service, another rail service and finally a truck service to complete the operation. At least a portion of the less-carload traffic here involved is entitled to a more expeditious service, and one which does not entail so many handlings and transfers in transit.

The evidence further shows that some shippers are now using a highway contract carrier to secure the type of service which they need and which they are unable to secure from the existing common carriers serving the points involved.

It appears conclusive, therefore, that applicant has demonstrated by evidence and testimony that public convenience and necessity justify the consolidation of the separate operative rights here involved; that the proposed through service and through rates with two schedules per day between Alameda County and Marin County will be in the public interest and will not enlarge the number of carriers operating in the affected area, since applicant is presently engaged in rendering the same service today on combination rates over San Francisco. The net result of the authority

here sought will be to continue an existing improvement in transportation service at rates competitive with those of other common carriers. The application will be granted.

O R D E R

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

THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA HEREBY DECLARES that public convenience and necessity require the consolidation of separate operative rights now owned by Kellogg Express and Draying Company,

1. Between San Francisco and certain Marin County points, authorized by Decision No. 33478, dated September 10, 1940, in this proceeding, on the one hand, and
2. Between San Francisco and certain Alameda County points, authorized by Decision No. 25744, dated March 20, 1933, in Application No. 18745, on the other hand.

IT IS HEREBY ORDERED that said operative rights be and they are hereby merged and consolidated, and that Kellogg Express and Draying Company be and it is hereby authorized to establish and publish through rates between all points served by the consolidated operation, and to establish and maintain through routes for service between all of said points.

IT IS HEREBY FURTHER ORDERED that appropriate tariffs and time schedules be filed to provide for the establishment of said rates and service on five (5) days' notice to the Commission and to the public.

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

Dated at San Francisco, California, this 17<sup>th</sup> day of December, 1940.

Ray L. Riley  
Frank P. Allen  
[Signature]  
Justice J. Cooney  
COMMISSIONERS