

Decision No. 33572

BEFORE THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of LEE B. HAWKINS, an individual, to sell, and READER TRUCK LINES, a corporation, to purchase, and automobile freight line operated between San Luis Obispo, Fresno, and El Centro, and points intermediate thereto, also points reached by tap lines, and Los Angeles, Moneta and Wilmington, California.

ORIGINAL

) Application
) No. 23593

ARTHUR H. GLANZ and PHIL JACOBSON, for Applicants.

WALLACE K. DOWNEY, for Pacific Freight Lines and Keystone Express System, Protestants.

BY THE COMMISSION:

O P I N I O N

In this matter authority is sought by Lee B. Hawkins to sell and transfer to Reader Truck Lines, a corporation, and by the latter to purchase and acquire from the former an operative right to engage in the transportation of certain commodities as a highway common carrier between Los Angeles, Wilmington and Moneta, on the one hand, and other points presently to be described. The agreement of sale specifies a purchase price of \$1,000. Pacific Freight Lines and its affiliate, Keystone Express System, (1) protested the granting of the application, contending that the service had been abandoned.

(1) By Decision No. 33569, dated October 1, 1940, on Application No. 23511, Pacific Freight Lines and Keystone Express System were authorized to merge, the surviving corporation being known as Pacific Freight Lines. The latter, therefore, has become the sole protestant in this proceeding, and it will be considered as such.

A public hearing was had before Examiner Austin at Los Angeles on September 26 and October 7, 1940 when evidence was offered, the matter submitted, and it is now ready for decision.

The operative right sought to be transferred was created by Decision No. 18150, dated March 31, 1927, on Application No. 10859. ⁽²⁾ Here the Commission granted to Lee B. Hawkins, one of the applicants herein, a certificate of public convenience and necessity authorizing the operation of an on-call service as a highway common carrier for the transportation of certain named commodities in minimum lots of three tons between Los Angeles, Wilmington and Moneta, on the one hand, and points designated on seven distinct routes (including intermediate points) and within

(2) By Decision No. 18150 Hawkins was authorized to engage in the operation "...of an automotive freight service, on demand, for the transportation of steel, tanks, lumber, cement, sand, rock, stucco, wallboard, doors, windows, roofing, builders hardware, hollow concrete blocks and tile, pipe, tubular goods, oil well supplies, seeds, vegetable and fish oils and commercial fertilizer between (a) Los Angeles, Wilmington and Moneta and route 1-7, inclusive, as follows, (1) San Pedro, Wilmington, Compton, Watts, Huntington Park, Sherman, Beverly Hills, Sawtelle, Santa Monica, Ocean Park, Venice, Playa Del Rey, El Segundo, Manhattan Beach, Hermosa Beach, Redondo Beach, Clifton, Harbor City, Torrance, Moneta, Gardena, Culver City, and Palms, (2) Clearwater, Downey, Santa Fe Springs, Los Nietos, Norwalk, Artesia, Buena Park, Fullerton, La Habra, Brea and Walnut, (3) Alhambra, Pasadena, Altadena, Arcadia, Sierra Madre, Monrovia, Duarte, Azusa, Glendora, and Claremont, (4) Montebello, Whittier, Bassett, Baldwin Park, Covina, San Dimas, El Monte, Puente, Pomona, Ontario, Riverside, Colton, Redlands, Yucaipa, Beaumont, and Banning, (5) Long Beach, Seal Beach, Sunset Beach, Westminster, Huntington Beach, Newport Beach and Laguna, (6) Anaheim, Olive, Santa Ana, Orange and Irvine, (7) Glendale, Hollywood, Burbank, San Fernando, Newhall, Saugus, Castaic, Palmdale and Lancaster; and fruit between points designated in (a) and points in routes 1, 2, and 7; and hay and grain between points designated in (a) and points in routes 1 and 2; and flowers between points designated in (a) and point in route 1; and the intermediate points in (a) and routes 1-7, inclusive, being included, and an area of 5 miles on each side of the route traversed, movements to be over the most direct and practical route; and all movements must have their origin or destination in points designated in (a), and minimum load will be 3 tons, except that weight restriction will not apply to the return of empty containers."

a lateral zone extending five miles on each side of the routes traversed. The points and routes are described in the margin. With the Commission's sanction, Hawkins transferred this operative right to Puckett Freight Lines, Ltd., and subsequently reacquired
(3)
it.

Under this certificate all shipments were required to originate at or be destined to Los Angeles, Wilmington or Moneta. Between these points and points on the seven routes, Hawkins could engage in the transportation of steel, tanks, lumber, cement, sand, rock, stucco, wallboard, doors, windows, roofing, builders' hardware, hollow concrete blocks and tile, pipe, tubular goods, oil well supplies, seeds, vegetable and fish oils and commercial fertilizer. Fruit, hay and grain, and flowers could be transported only between Los Angeles, Wilmington and Moneta and points on certain of these routes.

Protestant contends that Hawkins has abandoned service over this operative right as to all authorized commodities except lumber, and that since the certificate was, therefore, subject to forfeiture he should not be permitted to transfer it. Applicants assert, on the other hand, that Hawkins has provided facilities and equipment adequate for the maintenance of this service; that he was financially able to conduct it; that he has held himself out through the publication of tariffs, the distribution of advertisements, and the solicitation of business, as ready and willing to furnish this service; that he actually has transported

(3) Pursuant to Decision No. 23323, dated February 27, 1931, on Application No. 17109, this operative right was transferred by Hawkins to Puckett Freight Lines, Ltd. The latter transferred it back to Hawkins under authority of Decision No. 24744, dated May 2, 1932, on Application No. 18104.

all shipments offered within the scope of his operative right; that he has never refused to handle any such shipments; and that the Commission has recognized and dealt with him as a highway common carrier in good standing.

The purchaser and proposed grantee of this certificate, Reader Truck Lines, a California corporation, has long operated as a highway common carrier. It is qualified by experience and has the financial ability to provide an adequate service were it permitted to acquire the operative right.

For twenty-eight years, Hawkins has been engaged in the lumber business at Moneta where he has maintained headquarters for both his lumber and his transportation activities. He has operated five trucks, ⁽⁴⁾ which were ample to meet the demands upon him. His financial resources, it appears, were adequate to permit him to continue this service.

Hawkins contends that by various means he has endeavored to attract public attention to his transportation business. He has published and filed with the Commission tariffs prescribing rates between the points and upon the commodities named in his certificate. A telephone has been maintained at his office where those desiring to use his service could communicate with him. Signs have been posted upon the outside of his headquarters announcing that he was engaged in for-hire trucking. During 1939 and 1940 he distributed calendars advertising both the trucking and the lumber business.

(4) Hawkins' annual reports for 1938 and 1939, respectively (received in evidence by reference) disclose that in 1938 he operated in this service 5 trucks, 1 tractor, and 3 trailers; in 1939, he used 5 trucks.

Certain obligations resting upon him as a carrier, Hawkins testified, had been observed. He has filed and published tariffs naming rates; he has filed with the Commission annual reports; he has deposited with the Commission evidence of adequate insurance protection as required by our General Order No. 91; and he has paid all taxes and license fees levied or imposed upon the transportation business or upon the property devoted to that purpose.

Applicants assert that the Commission has definitely recognized Hawkins' status as a highway common carrier. Recently, it appears, a judgment was recovered against him by the Commission for a penalty in the sum of \$75. This action grew out of Hawkins' failure to observe the provisions of a rate order requiring the amendment of his tariff.⁽⁵⁾

The service, Hawkins testified, always had been available to his patrons upon demand. He stated he had never refused to accept or transport any authorized commodity. Admittedly, he has hauled practically nothing but lumber, though, he stated, he had solicited some other commodities. He testified generally he had hauled other traffic but was unable to describe it with particularity or point to any specific instances.

Pursuant to the stipulation of the parties, there was submitted, following the close of the hearing, a statement based upon Hawkins' records showing in detail all the shipments he had

(5) This action (People v Hawkins, No. 289,805) was commenced August 9, 1939, in the Superior Court, at San Francisco. The Commission sought to recover a penalty, under section 76, Public Utilities Act, because of Hawkins' failure to publish and make effective certain tariff amendments, as required by Decision No. 31606, as amended, in Case 4246, rendered December 27, 1938. (41 C.R.C. 671, 728, 731)

transported under this certificate between January 1938 and September 1940, inclusive. Much of the tonnage originating at Wilmington apparently moved in interstate commerce; in fact, applicants were unable to distinguish the interstate from the intrastate business. Making due allowance for traffic moving wholly within a municipality (which could have been handled by Hawkins only as a city carrier) ⁽⁶⁾ and assuming that all this traffic was intrastate, it appears that during a period of thirty-three months Hawkins handled a total of 586 shipments. Of the total 606 shipments described in Exhibit No. 4, 596 consisted of lumber; ⁽⁷⁾ the remaining 10 comprised various commodities.

Do the facts established of record, warrant the conclusion that Hawkins has partially abandoned the service he was authorized to conduct? The evidence clearly shows that during the past three years he was engaged in the transportation of lumber exclusively. This appears from the statement submitted, which discloses that during this period the quantity of other traffic

(6) Exhibit No. 4 indicates that between January 1938 and September 1940 Hawkins handled a total of 606 shipments. This included shipments moving wholly within municipalities as follows, viz: Long Beach 19, and Hawthorne 1, aggregating 20. Assuming that remaining shipments were made between points of origin and destination authorized by the certificate, it appears that during this period Hawkins handled 586 shipments under his certificate. The Commission's records disclose that applicant Lee B. Hawkins and Jessie G. Hawkins hold radial highway common carrier permit No. 19-7196 which was issued to them as copartners doing business as Hawkins Co. Ltd. This was received in evidence by reference.

(7) The ten shipments referred to consisted of the following commodities: hay 2, bentonite 1, cement (concrete) blocks 2, cement 1, cauliflower in barrels 2, cauliflower 1, oil well supplies 1. (Under his certificate, Hawkins was not authorized to transport cauliflower. It may be assumed that this was handled under his radial highway common carrier permit.)

handled was infinitesimal. It is true that Hawkins' testimony, standing alone, might indicate that a larger proportion of other commodities were transported, but this is outweighed by the statement, which rests upon the freight bills he produced and which consequently must be accepted as accurately measuring the scope of his operations.

We are not convinced that Hawkins has conducted this business as a common carrier of property other than lumber. Any genuine attempt to provide a general transportation service, as contended by Hawkins, undoubtedly would have generated a substantial volume of traffic. The circumstance that he was engaged in business as a lumber distributor appears to have led him to confine his common carrier activities to the transportation of that commodity.

It is true that Hawkins was obligated to operate only when there was a demand for the service, and to transport only the freight actually tendered. But a mere passive willingness on his part to accept commodities other than lumber is not sufficient to establish a public offer to engage in the transportation of these goods. This is true notwithstanding the fact that Hawkins maintained a terminal, provided equipment, and had adequate financial resources to handle these commodities had they been offered.

Though the tariffs filed by Hawkins prescribed rates on all these commodities, this circumstance, though it may have indicated a willingness to handle them, does not of itself establish a holding out to perform the service. Coupled with the tariff filing must be active and continuous efforts to secure the traffic. As we have seen, this was not proved to our satisfaction.

The penalty suit did not affect Hawkins' status as a carrier. Though it may well be doubted whether the Commission by such a step

could estop itself from questioning the legality of a carrier's operations, we are satisfied that it has not done so here. The action was brought because of Hawkins' failure to amend his tariff in obedience to the order rendered in a proceeding establishing certain rates. There the issue involved the disobedience of a rate order; it was wholly unrelated to the scope of the carrier's operations.

In the light of the showing that Hawkins has partially abandoned his operations--and such is the conclusion we have reached upon this record--should we approve the transfer sought? Should the operative right be transferred, subject to limitations under which it would be confined hereafter to the transportation of lumber?

We have hitherto declined to sanction the transfer of an operative right shown to have been abandoned. ⁽⁸⁾ The Interstate Commerce Commission also has expressed similar views. Where a motor carrier had wholly abandoned its operations, that Commission withheld approval of a transfer following the sale of an operative right purporting to have been made by the carrier's trustee in bankruptcy. Within the meaning of section 213, Motor Carriers' Act (49 U.S.C.A. Sec. 313), an operative right tainted with this infirmity may not be considered as "property" susceptible of conveyance. The opinion declares that:

(8) In the following decisions we disapproved the transfer of an operative right, where it was shown that the carrier, without authority, had abandoned service, viz: Re California National Bank of Modesto, 19 C.R.C. 702; Re California Transit Co., 21 C.R.C. 211, 215; Re J. R. Martin, 28 C.R.C. 210, 213; Re Western Motor Transport Co., 31 C.R.C. 690, 707.

"...A motor carrier is one which engages in the physical performance of transportation for compensation in interstate or foreign commerce and discharges its duties in that regard to the shipping public by moving traffic offered; and when such a carrier abandons such performance without present intention of resuming same, it thereupon ceases to have the status of a motor carrier.

"We conclude that the actual performance of transportation in interstate or foreign commerce is a prerequisite to the existence of a motor carrier within the meaning of the definition in section 203 (a) (16); and that the possession of such a going-business status by a prospective vendor or company of which control is sought must be established as a prerequisite to our jurisdiction under section 213."

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In short, actual operation is not a mere appurtenance to an operative right; it is an essential ingredient of the right itself. And where such operation ceases, without authority, the operative right has become impaired to such a degree that it may no longer be the subject of transfer.⁽⁹⁾

(9) In a recent decision we thus expressed our views:

"As indicated at the outset of this opinion, a further purpose of the investigation is to determine whether or not operating rights should be revoked in instances where the respondents discontinued or suspended service without authority from the Commission. In treating this phase of the investigation consideration must be given to the fact that in acquiring operating rights, whether by prescription or certification, each carrier acquiring rights undertook to serve the public in a particular field. It follows that after assuming an obligation to render service in order to secure operating rights carriers should not be permitted to withdraw entirely or partially from the field of service undertaken without forfeiting their rights to render the withdrawn service, unless public interest is best served by temporary suspension of service, and then only after securing appropriate authority from the Commission. Suspension of service with no intention of re-establishing it constitutes abandonment of operating rights, and, clearly, rights so relinquished should be revoked. * * *"

Re Operations of Vessels (Decision No. 33548) 43 C.R.C. 50, 53. See also: Re Vessel Carriers (Decision No. 28283) 39 C.R.C. 429, 432, 433, 434; Re Vessel Operative Rights. (Decision No. 29778) 40 C.R.C. 493, 496.

If total abandonment of service results in the loss of an operative right, then for the same reason, partial abandonment accomplishes an extinguishment of the right to the extent it has not been exercised. In this respect, the holder's privileges as a highway common carrier must be regarded as having been limited and curtailed.

From the record, it appears that public convenience and necessity require the continuance of the lumber hauling. This is so because of the long continued use of this service. It seems to meet a definite need.

We are disposed to permit the transfer of the operative right if it be limited hereafter to the transportation of lumber. However, we shall require, as a condition to the granting of such authority, that the applicants consent to the transfer on this basis, and that Hawkins, the seller, cancel all tariff rates and provisions relating to the movement of commodities other than lumber. Since our order is permissive only, such action on the part of the applicants would be wholly voluntary. But should their approval be withheld, the application will stand denied in its entirety. An order will be entered accordingly.

Reader Truck Lines is 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

Application having been made as above-entitled, a public hearing having been had, evidence having been offered, the matter having been duly submitted, and the Commission being now fully advised:

IT IS HEREBY ORDERED that Lee B. Hawkins be and he hereby is authorized to sell and transfer to Reader Truck Lines, a corporation, and the latter hereby is authorized to purchase and acquire from the former, the operative right created by the certificate of public convenience and necessity granted to said Hawkins by Decision No. 18150, dated March 31, 1927, on Application No. 10859, in accordance with the terms of the agreement, a copy of which is attached to the application herein and referred to therein as Exhibit "A"; provided that said operative right shall be and it hereby is modified and amended so that it shall be limited hereafter to the transportation of lumber only between the points specified in said Decision No. 18150. Such authority is granted subject to the following conditions:

- (a) That within thirty (30) days from the effective date of this order, the applicants Lee B. Hawkins and Reader Truck Lines shall severally file with the Commission a consent, in writing, to the modification of said certificate limiting it to the transportation of lumber only; and said Reader Truck Lines shall within said period, file with the Commission a written acceptance of said certificate as so modified and amended.
- (b) That within thirty (30) days from the effective date of this order, applicant Lee B. Hawkins shall file with the Commission, upon not less than five (5) days' notice to the Commission and the public, a supplement to the tariffs on file with the Commission covering the service given under the operative right herein involved, cancelling all rates and provisions relating to the transportation of commodities other than lumber.

IT IS HEREBY FURTHER ORDERED that in the event said applicants Lee B. Hawkins and Reader Truck Lines, a corporation,

or either of them, should severally fail to file, within the time herein designated, the consent to said modification of said certificate, the acceptance of said certificate as modified, and said tariff supplement, as hereinabove provided, the application herein shall thereupon be and it hereby is denied.

IT IS HEREBY FURTHER ORDERED that in the event said applicants Lee B. Hawkins and Reader Truck Lines should severally file said consent to such modification of said certificate, said acceptance of said certificate as modified, and said tariff supplement, within the time herein designated, as hereinabove provided, the said application shall be and it hereby is granted, subject, however, to the following additional conditions:

1. The authority herein granted shall lapse and be void if applicants shall not have complied with all the conditions within the periods of time fixed herein unless, for good cause shown, the time shall be extended by further order of the Commission.

2. The consideration to be paid for the property herein authorized to be transferred shall never be urged before this Commission, or any other rate fixing body, as a measure of value of said property for rate fixing, or for any purpose other than the transfer herein authorized.

3. Applicant Lee B. Hawkins shall within thirty (30) days after the effective date of the order herein, and upon not less than five (5) days' notice to the Commission and the public, unite with applicant Reader Truck Lines in common supplement to the tariffs on file with the Commission covering the service given under the operative rights herein authorized to be transferred, applicant Lee B. Hawkins withdrawing, and applicant Reader Truck Lines accepting and establishing such tariffs and all effective supplements thereto, subject to the conditions hereinabove set forth.

4. Applicant Lee B. Hawkins shall within thirty (30) days after the effective date of the order herein, and upon not less than five (5) days' notice to the Commission and the public, withdraw all time schedules filed in his name with the Railroad Commission and applicant Reader Truck Lines shall within thirty (30) days after the effective date of the order herein, and upon not less than five (5) days' notice to the Commission and the public, file in triplicate, in its own name, time schedules covering service heretofore given by applicant Lee B. Hawkins which time schedules shall be satisfactory to the Railroad Commission.

5. The rights and privileges herein authorized may not be sold, leased, transferred, nor assigned, nor service thereunder discontinued, unless the written consent of the Railroad Commission to such sale, lease, transfer, assignment or discontinuance has first been obtained.

6. No vehicle may be operated by applicant Reader Truck Lines unless such vehicle is owned by said applicant or is leased by it under a contract or agreement on a basis satisfactory to the Railroad Commission.

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

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

Dated at San Francisco, California, this 4th day of February, 1941.

[Signature]
[Signature]
Ray L. Kelly
Justus J. Gorman
Frank R. Havenner
COMMISSIONERS