

Decision No. 34005

BEFORE THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of  
H. FRASHER TRUCK LINE, an individual  
and VALLEY EXPRESS CO., a corporation,  
to extend motor truck transportation  
service of H. Frasher Truck Line, and  
to perform emergency transportation  
service for shipments of Valley Express  
Co., and to interchange said shipments  
at San Jose, California.

ORIGINAL

Application No. 20504

JAMES J. BROZ, for Applicants.

R. S. MYERS, for Southern Pacific Company, Pacific  
Motor Transport Company, Pacific Motor Truck-  
ing Company and Crowe Brothers, doing business  
as Santa Cruz Motor Freight Company, Protest-  
ants.

EDWARD STERN, for Railway Express Agency, Inc.,  
Protestant.

J. F. VIZZARD, for Highway Transport, Inc., Protest-  
ant.

IRVIN S. BEST, for J. W. Silva, Protestant.

J. H. WYTHE, for Valley Truck Line, Interested  
Party.

DOUGLAS BROCKMAN, for Valley & Coast Transit Company  
and Coast Line Express, Protestants.

REGINALD L. VAUGHAN, for Clark Bros., Interested  
Party.

E. G. WILCOX and T. G. DIFFERDING, for Oakland  
Chamber of Commerce, Interested Party.

BY THE COMMISSION:

O P I N I O N

In this proceeding, applicant H. Frasher Truck Line  
seeks a certificate of public convenience and necessity author-  
izing operation as a highway common carrier, as defined by

section 2-3/4, Public Utilities Act, for the transportation of property as an underlying carrier for its co-applicant Valley Express Company, (an express corporation, as defined by section 2(k), Public Utilities Act), and also for the public directly. In the original application H. Frasher Truck Line (referred to hereafter, for brevity, as Frasher) requested a certificate limited to the transportation of express matter for Valley Express Company (referred to hereafter as Valley Express), but by amendments to the application it proposes, in addition, to serve the public directly.

Prior to the initiation of this proceeding, Frasher operated as an underlying carrier for Valley Express between East Bay points and San Jose and certain intermediate points. (1) At San Jose this express traffic was interchanged between Frasher and Highway Transport Company, which then served Valley Express as an underlying carrier, pursuant to a written agreement between the two latter carriers. (2)

Frasher now seeks to extend its lines from San Jose, northward to Alviso, and southward to Hollister, Salinas, Pacific Grove, and Santa Cruz, and certain intermediate

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- (1) Frasher, so the original application alleged, was operating as an underlying carrier for Valley Express between Oakland, Emeryville, Berkeley, Alameda, and San Leandro, on the one hand, and Hayward, Decoto, Niles, Mission San Jose, San Lorenzo, Mt. Eden, Alvarado, Midway, Newark, Centerville, Irvington, Warm Springs, Milpitas, Wayne, Sunol, Pleasanton, Livermore, Santa Rita, Dublin, Castro Valley, San Jose, and Santa Clara, on the other hand.
- (2) Under this arrangement Highway Transport Company handled express over its line between San Jose and other points which it served, viz: Alviso, Sunnyvale, Santa Clara, Coyote, Madrone, Morgan Hill, San Martin, Gilroy, Sargent, Hollister, Salinas, Spreckels, Del Monte, Monterey, Pacific Grove, Alma, Holy City, Glenwood, Santa Cruz, Seabright, Del Mar, Capitola, Sequel, and Sea Cliff. This agreement, executed December 28, 1932, provided it should continue in force for a period of three years and thereafter until terminated by ninety days' notice, in writing, by either party.

(3)  
points--a territory which had been served by Highway Transport Company, and was then served by its successor, Highway Transport, Inc. (referred to hereafter as Highway). In effect, Frasher proposes to serve the public directly, and also as an underlying carrier, between East Bay points and points south of San Jose now reached by Highway.

Applicants Frasher and Valley Express are closely affiliated. Harold Frasher owned and controlled Frasher and was also president and general manager of and owned a proprietary interest in Valley Express.

Protests to the granting of this application were raised by Highway Transport, Inc., Southern Pacific Company, Pacific Motor Transport Company, <sup>(4)</sup> Pacific Motor Trucking Company, Crowe Brothers, doing business as Santa Cruz Motor Freight Company, Railway Express Agency, Inc., Valley and Coast Transit Co., Coast Line Express and J. W. Silva. Valley Truck Line, Clark Bros., and Oakland Chamber of Commerce appeared as interested parties.

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(3) By the amended application, Frasher proposes to operate between San Jose and Alviso, Coyote, Madrone, Morgan Hill, San Martin, Gilroy, Sargent, Hollister, Salinas, Spreckels, Del Monte, Pacific Grove, Monterey, Alma, Holy City, Glenwood, Santa Cruz, Del Mar, Capitola, Soquel, and Sea Cliff.

(4) By Decision No. 30723, on Application No. 21599, dated March 21, 1938, we authorized Pacific Motor Transport Company, a wholly owned subsidiary of Southern Pacific Company, to abandon service as an express corporation and to cancel its rates. Since August 1, 1938, the store-door pick-up and delivery service it had provided has been conducted directly by Southern Pacific Company and other transportation companies over whose lines the traffic moves (including Pacific Motor Trucking Company, also a wholly owned subsidiary of Southern Pacific Company) under appropriate local and joint tariffs on file with the Commission. (Re Southern Pacific Company, et al, 41 C.R.C. 166.)

Public hearings were had before Examiner Austin at Francisco, Oakland, San Jose, and Salinas, when evidence was received, oral argument had, the matter submitted on briefs since filed, and it is now ready for decision.

At the outset, we shall dispose of certain objections raised by protestants to the form of the pleadings.

### The Pleadings

During the course of the hearing, the application was twice amended. The purport of the amendments has already been stated. They effected substantial changes concerning the parties to the proceeding, the character of the service sought to be established, and the territory to be served. Applicants asserted that the allegations appearing in the amended pleadings should be deemed to relate back to the time of the filing of the original application, a contention vigorously opposed by protestants.

This objection rested upon a claim of priority asserted by Valley & Coast Transit Company, one of the protestants herein, which had applied for a certificate to operate as a highway common carrier over routes that would conflict in part with those which Frasher now seeks to serve. In point of time, the filing of that application occurred after receipt of the first amendment to the instant application, but before the amended application was filed. (5)

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(5) The original application in this proceeding was filed April 24, 1936, and the first amendment, on May 12, 1936. Because of objections raised by protestants to the form of this amendment, a pleading termed "Clarification of Amendment to the Application" was filed October 8, 1936. Valley Express joined in neither of these amendments. By the "clarification," applicant Frasher undertook to amplify and explain the matters set up in the amendment; though it was in substance an amended and supplemental application, it will be designated, for convenience, as the amended application. Protestants' motion to strike the amendment and the amended application was argued orally before the Examiner, and denied by our order of December 15, 1936. The application of Valley & Coast Transit Company (App.No. 20706) was filed August 8, 1936.

In view of the conclusion we have reached in this matter, we deem it unnecessary to rule upon this contention.

Operations Conducted by Applicants and Protestants

For a better understanding of the questions involved, it will be helpful to review the operations performed by applicants and the principal protestants.

As previously stated, Frasher operated between Oakland and other East Bay points, and San Jose, as an underlying carrier for Valley Express. <sup>(6)</sup> The service replaced that maintained since 1932, by Oakland-San Jose Transportation Company prior to its acquisition by Pacific Motor Trucking Company. <sup>(7)</sup> Subsequently, Frasher transferred this operative right to Frasher Truck Co., a corporation, <sup>(8)</sup> which by order dated May 31, 1938 was substituted as an applicant herein.

Through the facilities of various highway common carriers which provide the underlying service, Valley Express is engaged in business as an express corporation over an extensive network within this State under tariffs filed with the Commission. Among other places, it operates between San Joaquin Valley points and Oakland, via Altamont Pass and also via Pacheco Pass.

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(6) Authority for this service was granted by Decision No. 28199, dated September 3, 1935, on Application No. 19976. Frasher was certificated to operate between Oakland, Livermore, San Jose and Santa Clara, and certain intermediate points, in ". . . the transportation of property consigned to the Valley Express Company. . . for transportation to such points as said express company or companies are authorized validly to serve, and for no other service."

(7) The operative right was transferred pursuant to Decision No. 27549, dated November 26, 1934, on Application No. 19708.

(8) This transfer was authorized by Decision No. 29585, dated March 8, 1937, on Application No. 21022.

(9)  
Gilroy and San Jose. Its operations extend to the points now reached by the lines of Highway, south of San Jose.

For many years, Highway Transport Company operated as a highway common carrier between San Francisco, on the one hand, and Soledad, Pacific Grove, Hollister, and intermediate points, on the other hand, via San Jose. (10) Shortly before the commencement of this proceeding, that carrier transferred its operative rights and other properties to a new corporation known as Highway Transport, Inc., (11) protestant herein. It now serves the territory which applicant Frasher seeks to enter.

Protestant J. W. Silva operates as a highway common carrier between San Francisco and Salinas and intermediate points within Monterey County, and also between Salinas and Moss Landing, subject to certain restrictions affecting the Moss Landing operations and traffic moving northbound from Salinas.

Southern Pacific Company, in conjunction with Pacific Motor Trucking Company, provides a rail, or rail and truck, service between East Bay points and Salinas, Hollister, Monterey, Pacific Grove, Santa Cruz and other points involved in this

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- (9) Though it would appear from the applications in the present proceeding, both original and amended, and from applicants' assertions, that applicant Valley Express could operate locally between Oakland and San Jose and intermediate points, the Commission has held, in another proceeding, that it lacked authority to do so and, accordingly, it was required to discontinue that service. (Pacific Motor Transport Company, et al, vs. Valley Express Company, Decision No. 31185, dated August 8, 1938, in Case No. 4184). Subsequently, Valley Express sought a certificate authorizing service as an express corporation between these points; this proceeding (Application No. 22264) has been heard and submitted and now awaits decision.
- (10) The operative rights of this carrier are described in Re Highway Transport Company (Decision No. 15328, dated August 24, 1925) 26 C.R.C. 942.
- (11) Authority for this transfer was granted by Decision No. 28316, dated November 4, 1935, on Application No. 20181.

proceeding. Railway Express Agency, Incorporated, serves this territory as an express corporation.

Negotiations between Valley Express and Highway Transport, Inc., for Establishment of Service as an Underlying Carrier

This application is the outgrowth of a controversy between Valley Express and Highway regarding the terms under which the latter would agree to transport express traffic as an underlying carrier for the former, as the successor of Highway Transport Company. Having reached an impasse, the parties initiated this proceeding.

Following the acquisition of the assets and operative rights of Highway Transport Company by Highway, Valley Express, in November, 1935, approached Highway with a view to consummating an agreement under which the underlying carrier service previously furnished by Highway's predecessor could be continued. These negotiations were conducted through correspondence and by personal interviews between the representatives of each company and, particularly, between Harold Frasher and Joseph Robertson who controlled the policies of the carriers for which they severally spoke.

The differences between Valley Express and Highway may be resolved into three major contentions. They relate to: (a) the replacement of Highway by Frasher in the handling of local San Jose and Santa Clara traffic; (b) the form of the proposed contract submitted by Valley Express; and (c) the profits which Highway would receive as an underlying carrier under the contract offered by Valley Express.

We shall deal first with the San Jose and Santa Clara situation. Formerly Valley Express traffic originating at, or destined to, San Jose or Santa Clara, locally, had been picked up

and delivered by Highway Transport Company and subsequently by Highway, as its successor. As compensation, Highway and its predecessor received 60 cents a ton. During the course of the negotiations, Valley Express advised Highway that thenceforth Frasher would assume the performance of this service. Highway replied that because of the withdrawal of this privilege, (from which a substantial revenue had been derived) the express traffic no longer was attractive and that, thereafter, Highway would handle Valley Express business only at its published tariff rates. Under this arrangement, the expense incurred by Valley Express in handling the traffic would exceed that experienced under the contract previously existing between Valley Express and Highway Transport Company. Though admittedly Valley Express was not obligated to employ Highway or its predecessor to conduct the San Jose--Santa Clara local service, nevertheless, Highway regarded the operation as a substantial source of revenue; from its standpoint, this was closely linked with the underlying carrier service.

The form of the proposed contract submitted by Valley Express to Highway under which the express service would be conducted, was an important factor in this controversy. During the course of the hearing in this matter, Valley Express offered a draft said to be substantially similar in its terms to the contract under which Highway Transport Company previously had provided this service. This, Highway denied, pointing to certain provisions of the draft assertedly imposing upon it burdens and obligations more onerous than those contained in the contract with its predecessor. Particularly, it objected to paragraphs 13, 16 and 17. Mr. Robertson testified, however, that if the objectionable provisions were deleted, he would



sign the agreement. At a subsequent hearing, Valley Express withdrew its offer to execute the contract it had tendered Highway. However, throughout the period covered by the hearing, Highway continued to act as an underlying carrier for Valley Express under an oral agreement to the effect that temporarily these carriers would observe the terms of the contract of December 28, 1932, between Valley Express and Highway Transport Company. This arrangement appears to have been carried out by both parties.

No extensive consideration of the proffered contract appears necessary; it is sufficient to refer briefly to the controversial provisions. Paragraph 13 relates to the establishment of rates by the express company. The requirement that rate changes desired by Highway must first be approved by other underlying carriers participating in the movement of the traffic, would, so Highway contends, be cumbersome to carry out, would cause delay in the publication of new rates, and would materially curtail its freedom to determine for itself the rates to be established. Valley Express asserts, on the other hand, that such a provision is necessary to safeguard the interests of the other underlying carriers. The record is not clear as to the number or the identity of the carriers engaging in this business.

Highway objects to paragraph 16 because it undertakes to fasten upon future purchasers of the operative right responsibility for the performance of the contract. This provision, Valley Express insists, is reasonably necessary to insure the continuation of the service.

Paragraph 17 purports to invest Valley Express with an option to purchase the properties of Highway, at the price which

may be offered in good faith by a prospective purchaser. A similar provision, so Mr. Frasher testified, had been incorporated in all contracts entered into by Valley Express with its underlying carriers. In view of Mr. Robertson's objections, Mr. Frasher consented to the elimination of the paragraph.

Throughout the course of the negotiations between the parties, the prospective revenue to be realized from the contemplated operation was a major subject of discussion; it was referred to in the correspondence and considered at the conferences between their executive officers. Statements introduced in evidence disclosed in detail the expected tonnage and revenues. Wide divergence of opinion upon this subject existed; both Valley Express and Highway were unable to reconcile their views.

#### Contentions of the Parties

As we have indicated, the application presents two phases: Frasher seeks not only the privilege of transporting express as an underlying carrier for Valley Express but, in addition, it asks authority to serve the public directly. Frasher contends that it should be permitted to transport express as an underlying carrier because, assertedly, Valley Express is entitled to continue the service it had developed at substantial cost to itself; that Valley Express has offered to conduct the service through the instrumentality of Highway, as underlying

carrier, under a proposed contract, fair and reasonable on its face; that Highway has capriciously and arbitrarily rejected this proposal; that because of this refusal, Valley Express has suffered delays in the transportation of its express traffic with consequent loss of business; that Valley Express, because of its inability to maintain agents at points reached by Highway's lines, has lost contact with its shippers and has been deprived of the benefits and advantages flowing from through billing; that since the existing highway common carriers serving this territory are competitors of Valley Express, they would not be desirable as underlying carriers; and that such an underlying service can best be provided by applicant Frasher, an efficient carrier which now serves part of the territory and is well able to provide the service proposed.

The offer to serve the public directly, so applicants assert, finds support in the evidence produced through applicants' officials and representatives as well as in the testimony of public witnesses. Applicants concede, however, that the public would be adequately served were Frasher authorized to operate only as an underlying carrier for Valley Express. Although they prefer the broader grant of authority, a certificate subject to these limitations, they admit, would be sufficient.

Protestants contend, on the other hand, that the disadvantages claimed by applicants to have arisen from the present situation were suffered by the carrier itself, and not by the public; that should the arrangement for the division of revenue between Valley Express and its underlying carrier prove unprofitable, this is but an exigency of business which an express corporation must face; that a highway common carrier seeking

authority to operate as an underlying carrier for an express corporation must establish public convenience and necessity in the usual manner; that such proof must go beyond a showing sufficient to warrant the certification of an express corporation, which, it is said, need only establish the advantages incident to the through billing of shipments; that applicants' remedy here is to invoke the aid of the Commission which, under its regulatory powers, they assert, may modify the charges provided by the contract between an express corporation and its underlying carrier where they have been shown to be unreasonable; and that the proposal submitted by Valley Express to Highway to serve as an underlying carrier was unreasonable in that terms of the contract offered were unduly burdensome and that the compensation suggested was inadequate to permit profitable operations.

Protestants also urge that applicants had failed to show the existence of public convenience and necessity justifying the establishment of a direct service as a highway common carrier.

#### Conclusions

As we have pointed out, the application must be considered from two viewpoints. It proposes a service for the public directly without the intervention of an overlying carrier and, in addition, it seeks approval of an operation to be conducted by Frasher solely as an underlying carrier for Valley Express.

Concerning the offer to serve the public directly, the record discloses that the service proposed by Frasher would not be superior to that of the protesting carriers now occupying the field, and that Highway, J. W. Silva, Southern Pacific Company and its affiliate Pacific Motor Trucking Company, and Railway

Express Agency, Incorporated, severally provide, within their respective spheres, adequate and satisfactory service between the points where Frasher seeks to operate. This was established by the testimony of protestants' representatives, by that of the public witnesses whom they called, and even by some of the witnesses called by applicants. The latter witnesses failed to establish a need for the proposed service to the public directly, nor did they show that the service furnished through existing facilities was inadequate. It cannot be said, therefore, that Frasher has sustained the burden of proof as to this phase of the application.

Considered from a broader viewpoint, the application, it is apparent, was designed to perpetuate the service conducted by Valley Express. This clearly was applicants' primary objective; they sought essentially to protect the rights and continue the operations of Valley Express.

The right of Valley Express to operate between the points involved has not been challenged; no question has been, nor could any well be, raised here as to the validity of the operative right of that carrier. It rests upon the "grandfather" clause of section 50 (f), Public Utilities Act, which became effective August 21, 1933.<sup>(12)</sup> Since 1932, Valley Express has held itself out to serve the public generally, through the

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(12) As construed by the Commission in Re Pacific Motor Transport Company (Decision No. 27593) 39 C.R.C. 242, section 50 (f) did not require any express corporation or freight forwarder which had commenced operations before August 1, 1933, to secure a certificate of public convenience and necessity; the right of carriers who had commenced operation prior to that date to continue their service thereafter, was recognized by the provisions of that section. They thus became vested with a "prior" or "prescriptive" operative right.

instrumentality of its underlying carriers, in the territory which Frasher now proposes to enter. Although this operative right was created by reason of operations conducted on or before the date provided by section 50 (f), rather than by a certificate of public convenience and necessity, it must be presumed, nevertheless, that the establishment and continued performance of the service was, and is, justified and required in the public interest. Though rebuttable, this presumption can be overthrown only by cogent and convincing evidence. The long continuance of the service--a service shown by the testimony of witnesses in this proceeding to be essential and necessary--impels the conclusion that it should not lightly be destroyed.

The record indicates two methods are available to preserve the operations conducted by Valley Express. It may continue to operate under a contractual arrangement with Highway or it may avail itself of Frasher's facilities, should a certificate be granted that carrier. No other carrier now operating within the territory appears to be available or suitable for this purpose. The Commission, we believe, should be slow to grant a certificate of public convenience and necessity which would authorize the entrance of a new carrier into the field, unless it has been clearly shown that the existing carriers who otherwise would be available as underlying carriers for the express corporation either cannot or will not provide a satisfactory service. We are equally convinced that no underlying carrier should be permitted to act in so arbitrary a manner as to render impossible the performance by an overlying carrier of a satisfactory service to the public. Under these conditions it would become our duty to take such steps as would insure the continuance and preservation of the existing express service.

This brings us to a consideration of the controversy which has been permitted to develop between Highway and Valley Express concerning the terms under which the express service could be continued. In view of the facts shown of record, it may fairly be said that both Valley Express and Highway have acted arbitrarily in this matter; upon each of them rests a substantial share of the responsibility for the impasse confronting them. While the record before us does not contain sufficient facts upon which to base a determination of the equities in the situation, it by no means justifies the conclusion that it would be impossible for Valley Express and Highway to reconcile their differences and reach a satisfactory agreement as to the terms and conditions under which the traffic of Valley Express could be transported.

In the absence, therefore, of any convincing showing that Highway is more culpable than Valley Express for the situation that has come about, we are not disposed to sanction, at the present time, the issuance of a certificate authorizing Frasher, a newcomer in this field, to undertake the performance of the underlying service. The application of Frasher, therefore, will be denied without prejudice, with the admonition to both Valley Express and Highway immediately to enter upon negotiations for the settlement of their differences. Should they fail within a reasonable time to reach an equitable agreement, this proceeding will be reopened for further hearing and for such action as we may deem necessary to preserve the continuance of the express service, which now appears necessary in the public interest. In our judgment, a period of thirty days should be sufficient for that purpose. Within this time both Highway and Valley Express will be expected to advise us whether or not they have arrived at an understanding.

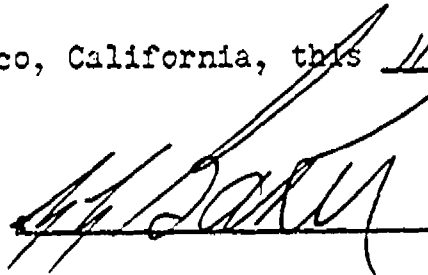
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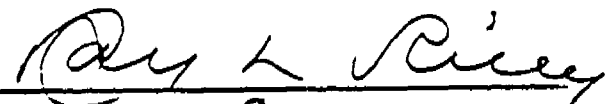
Application having been made as above entitled for a certificate of public convenience and necessity, public hearings having been had, evidence having been received, the matter having been duly submitted, and the Commission now being fully advised:


IT IS ORDERED that the above-entitled application be and it hereby is denied without prejudice to its renewal as provided in the foregoing opinion.


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

Dated at San Francisco, California, this 11<sup>th</sup> day of March, 1941.

  
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COMMISSIONERS