

Decision No. 26413165

BEFORE THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA

ORIGINAL

In the Matter of the Application of)
VALLEY EXPRESS CO., a corporation,)
for a certificate of public conven-)
ience and necessity to operate as an)
express company between Oakland and)
San Jose, and intermediate points.)

Application No. 22264

- BEROL & HANDLER, by Edward M. Berol, for Applicant
- T. G. DIFFERDING, for Oakland Chamber of Commerce,
in support of Applicant
- DOUGLAS BROOKMAN, for Valley & Coast Transit Company
and Coast Line Express, Protestants.
- ANSEL S. WILLIAMS, JR., for Southern Pacific Company
and Pacific Motor Trucking Company, Protestants.
- R. S. ELLIOTT, for Railway Express Agency, Incorporated,
Protestant.
- F. M. MOTT, for Merchants Express Corporation,
Protestant.
- L. N. BRADSHAW, by John L. Amos, for Western Pacific
Railroad Company, Protestant.
- HARRY A. ENCELL, by L. D. Benamati, for Automotive
Purchasing Company, Protestant.

BY THE COMMISSION:

O P I N I O N

Valley Express Co., a corporation, in the above-entitled application, as amended, requests a certificate of public convenience and necessity authorizing it to establish and operate a common carrier service as an "express corporation," as that term is defined by section 2(k) of the Public Utilities Act, between Berkeley, Emeryville, Oakland, Alameda, San Jose, and Santa Clara and intermediate points via San Leandro, Hayward, Niles, Mission San Jose, San Lorenzo, Mt. Eden, Alvarado, Newark, Centerville, Irvington, Milpitas, Sunol,

Pleasanton, Livermore, Santa Rita, and Dublin, including all points within two (2) miles of the highways to be used in serving the aforesaid points. Applicant does not propose any service locally between Berkeley, Emeryville, Alameda, Oakland, San Leandro, and Hayward.

The proposal, as disclosed by the record, contemplates a correlated operation in which applicant proposes to use as its underlying carrier the highway common carrier facilities of Frasher Truck Co., a corporation, presently operating and providing service over the routes between the points involved for express corporations only,⁽¹⁾ as more definitely described in the margin.⁽²⁾ It was shown that the control of both corporations rests with Harold Frasher.

(1) By Decision No. 33749 Valley Motor Lines, a corporation, was authorized by the Commission to acquire all the highway common carrier operative rights of Frasher Truck Co. Valley Motor Lines is also controlled by the same interests as Valley Express Co., applicant herein.

(2) Frasher Truck Co., by Decision No. 29585, was authorized to acquire from Harold Frasher a highway common carrier operative right created by Decision No. 28199,

"...for the transportation of property between Oakland, Livermore, and San Jose and Santa Clara and the intermediate points named in the foregoing opinion, over and along the following route:

"Between Oakland and Santa Clara via Highway No. 101, via Hayward and Niles and/or Highway No. 17 between San Leandro and Warm Springs; and between Livermore and Hayward via Highway No. 50; and between Livermore and Niles, via Pleasanton and Sunol or via U.S. Veterans' Hospital, with alternate route via Mission San Jose to Warm Springs;..."

Subject to the condition, among others:

"...that the certificate is accepted with the precise limitation of service to the transportation of property consigned to the Valley Express Company, a corporation, and/or any other express company, authorized to operate under Section 2(k) of the Public Utilities Act, for transportation to such points as said express company or companies are authorized validly to serve and for no other service."

The intermediate points named in the opinion, as referred to in the order of Decision No. 28199, are as follows:

The financial ability of applicant and the ability of the underlying carrier to provide sufficient service was not questioned.

Eight days of public hearing were had before Examiner Paul during which evidence was offered and the matter having been submitted on briefs, since filed, is now ready for decision.

For a number of years applicant has been engaged in business as an express corporation between various points in California. Prior to November 1, 1938, it admittedly had been providing such service between the points it now seeks to serve by certificate. It was shown that operations between Oakland and San Jose and intermediate points were discontinued on that date pursuant to an order of the Commission (3) based upon a finding that those operations had been conducted without any operative right therefor. Thereafter, the instant application was filed seeking a certificate of public convenience and necessity authorizing the reestablishment of the service so discontinued.

Applicant proposes to provide two scheduled trips daily, except Sundays and holidays, in each direction between the points

(2) Concluded)

" . . . between Oakland, Emeryville, Berkeley, Alameda, and San Leandro, on the one hand, and Hayward, Decoto, Nilcs, Mission San Jose, San Lorenzo, Mt. Eden, Alvarado, Midway, Newark, Centerville, Irvington, Warm Springs, Milpitas, Wayne, Sunol, Pleasanton, Livermore, Santa Rita, Dublin, Castro Valley and San Jose and Santa Clara, on the other hand."

(3) Decision No. 31185, dated August 8, 1938, in Case No. 4184.

involved. (4) The morning schedules are designed to provide delivery of shipments at destinations on the same day that they are received for transportation. The evening schedules are designed to provide delivery of shipments the next morning after receipt for transportation except that as to some of the intermediate points shipments would be delivered the same day that they are received. Schedule III (5) would provide two services a day to and from all points located on a so-called loop route including Niles, Mission San Jose, Sunol, Pleasanton, Livermore, Santa Rita, and Dublin. It is

(4) Schedules

II	I	
P.M.	A.M.	
5:30	11:00	Lv. San Jose
5:45	11:15	Wayne
5:50	11:25	Milpitas
6:00	11:35	Warm Springs
6:10	11:45	Irvington
-	-	*Mission San Jose
-	-	*Niles
	P.M.	
6:30	1:00	Centerville
-	1:30	*Newark
-	1:45	*Decoto
7:00	2:00	*Alvarado
7:10	2:15	*Mt. Eden
-	2:45	*Haywards
7:30	3:00	*San Lorenzo
7:45	3:30	*San Leandro
8:30	3:45	Ar. Oakland

Schedules

I	II
P.M.	P.M.
2:00	10:30
1:45	10:15
1:35	10:10
1:25	10:00
1:15	9:50
-	-
-	-
1:00	9:30
-	-
-	-
12:45	9:00
12:30	8:50
12:15	-
A.M.	
11:45	8:30
11:30	8:15
Lv. 11:00	7:30

* Pickups or deliveries will be made at these points on Schedule II only on requests before truck leaves Oakland or San Jose.

(5) Schedule III

A.M.			P.M.
7:00	Lv.	Oakland	Ar. 5:30
7:45		San Leandro	5:00
8:00		San Lorenzo	-
8:10		Mt. Eden	-
8:45		Haywards	4:30
9:45		Dublin	3:20
9:55		Santa Rita	3:10
10:30		Livermore	2:45
11:00		Pleasanton	2:15
11:15		Sunol	2:00
11:45		Mission San Jose	1:30
12:00		Niles	1:15
12:15	Ar.	Centerville	Lv. 1:00

designed to effect a connection at Centerville where a transfer of shipments could be made with the two morning schedules from Oakland and San Jose.

The rates proposed to be charged are the minimum rates established by the Commission as set forth in Exhibit "A" attached to the application which are governed by the rules and regulations of applicant as established and in effect in its tariffs now on file with the Commission.

In support of its proposal applicant called approximately 56 representative shippers and receivers of property, including manufacturers of fabricated steel products, packers and canners of fruit and fruit products, food processors, tile manufacturers, dealers in automobile parts, tires and supplies, hardware merchants, wholesale grocers, and those engaged in numerous other enterprises. These witnesses testified, in substance, that they are in need of and would use the proposed service. With few exceptions they stated that they had used the services of applicant before its discontinuance and had found it to be satisfactory. Many express a need and a desire for a service by which deliveries could be made on the same day of shipment, particularly for shipments of an emergency nature. A number of them complained that the present common carrier services were inadequate to meet their needs. Practically no complaints, however, were voiced in regard to the services of Railway Express Agency, Incorporated, but most of them avoided its use except for small shipments because of the higher rates charged. Many witnesses complained that in order to fully meet their needs since the discontinuance of applicant's former service, they have been compelled to resort to the use of their own or leased equipment, the services of highway contract carriers, or passenger stage operators or Railway Express Agency at higher rates. There was testimony that delays of

some consequence were encountered in the use of Pacific Motor Trucking Company service, the only highway common carrier presently operating between the points involved. While many witnesses stated that the service of Pacific Motor Trucking Company was adequate for overnight shipments, they also stated that it does not provide a service needed for the same day delivery. Many of the witnesses averred that they need a more frequent and expeditious service to place them in a position of parity with competitive dealers in San Francisco. It was pointed out by some of them that common carrier services between San Francisco and San Jose are much more frequent and satisfactory than between Oakland and San Jose, which places them at a definite disadvantage in competing with firms engaged in similar businesses. Some shippers in Oakland, in order to receive same-day delivery at San Jose, occasionally route shipments via San Francisco. Likewise, some shippers in San Jose who are competing for business in Oakland face the same situation.

The manager of the traffic department of the Oakland Chamber of Commerce testified in support of the application. He stated that the Chamber supported the application chiefly on the following grounds: First, that it would provide an improved and expedited service between the points involved over that furnished by any other carrier presently operating, and also a competitive truck service by an independent agency; second, that it would place Oakland shippers and receivers of freight on a parity with San Francisco competitors in regard to service received by them which is a matter of much importance to Oakland enterprises in endeavoring to meet San Francisco competition. It was his opinion that there is ample traffic to support an additional carrier.

The application was opposed by Merchants Express Corporation, Automotive Purchasing Company, The Western Pacific Railroad

Company, Railway Express Agency, Incorporated, Valley & Coast Transit Company, Coast Line Express, Southern Pacific Company, and Pacific Motor Trucking Company.

Merchants Express Corporation withdrew its opposition by a stipulation with applicant under which the offer of service was modified to exclude any local service between Berkeley, Emeryville, Oakland, San Leandro, Hayward, and intermediate points.

It was shown that Automotive Purchasing Company is providing services as a highway common carrier and a freight forwarder for the transportation only of automotive parts, accessories and supplies, between Oakland and San Jose via San Francisco. It also serves other points not involved. Two schedules are operated daily, except Sundays and holidays. In addition to its own equipment, it uses the facilities of Pioneer Express Company, Holmes Express and Highway Transport, Inc.

The Western Pacific Railroad Company operates a freight train which provides an overnight rail service between Oakland and San Jose for less-than-carload and carload traffic. It also operates a local rail service between Oakland and Livermore and intermediate rail points via Niles which provides delivery the same day of shipment. Pick up and delivery service is provided for less-than-carload traffic at Oakland and San Jose.

Railway Express Agency provides two daily round-trip schedules between Oakland and San Jose with intermediate service at Newark on Southern Pacific trains. One daily westbound service is operated from Niles to Oakland. It also provides services on the facilities of Pacific Motor Trucking Company on its schedules as hereinafter described.

Valley & Coast Transit Company in its opposition to the application took the position that it had pending before the

Commission its application (No. 20706) for a certificate of public convenience and necessity authorizing the establishment and operation of a highway common carrier service between Richmond and Hayward and intermediate points, including Berkeley, Emeryville, Oakland and Alameda, on the one hand, and points south of Hayward to and including King City, Salinas and San Jose, on the other hand,⁽⁶⁾ and that if its application were granted there would then be adequate service between the principal points involved.

Southern Pacific Company operates local freight train services between Oakland and Livermore; between Oakland, Newark, and

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- (6) By Decision No. 31978, dated May 2, 1939, on Application No. 20706, Valley & Coast Transit Company was granted a certificate as a highway common carrier.

"...between Richmond and King City and intermediate points, via El Cerrito, Albany, Berkeley, Emeryville, Piedmont, Alameda, San Leandro, San Lorenzo, Alvarado, Centerville, Newark, by diversion, Hayward, Niles, San Jose, Gilroy, and Salinas as an extension and enlargement of applicant's present operative rights now operated on schedule in general between Lompoc, San Luis Obispo, King City and San Francisco, as created by Decision No. 23643, dated May 4, 1931, on Application No. 16704, Decision No. 19262, dated January 18, 1928, on Application No. 14339, and Decision No. 20115, dated August 15, 1928, on Application No. 14887, over and along U. S. Highways 40, 50, and 101, and State Routes 17 and 21, subject to the following restrictions:

- "1. No local service may be given to and from Richmond and Hayward and intermediate points.
- "2. No local service may be given to and from Hayward and Salinas and intermediate points, excluding Hayward."

A petition for a rehearing on Application No. 20706 was filed by Frasher Truck Co. and Valley Express Co. more than ten days prior to the effective date of Decision No. 31978, thereby staying the order. No decision has yet been rendered on that petition.

Centerville; from San Jose to Niles via Alvarado, returning via Newark; between Oakland and Niles via Ravenswood, Wayne, and Presser, and between Bay Shore and Livermore. These trains operate daily, except Sundays, and provide service to and from all points on the rail lines. From the record, it does not appear that these trains generally handle merchandise traffic. However, it was stated that the San Jose - Niles train handles less-than-carload traffic to a few intermediate points, principally Alvarado. An occasional merchandise car is moved from Newark to Oakland. Merchandise cars are also moved in through overnight freight trains from Oakland to Livermore and from Oakland to San Jose. Other than that, the entire territory is served by Pacific Motor Trucking Company.

It appears that the predecessor of Pacific Motor Trucking Company provided service twice a day, except Sundays and holidays, between Oakland and San Jose. Soon after Pacific Motor Trucking Company acquired the right (1934) the service was reduced to one round trip schedule which was continued until December 22, 1938, during the course of the hearing in this proceeding. On that date, so it was shown, a new schedule was added which leaves Oakland at 11:30 a.m. and arrives at San Jose at about 2:00 p.m., leaving there soon thereafter on a return trip to Oakland. This schedule provides a complete service between the termini and intermediate points and, according to the record, was established as a result of testimony adduced in this proceeding. This schedule provides delivery at all points served on the same day of shipment. Prior to the establishment of this schedule shipments destined to points intermediate to Oakland and San Jose were generally handled by two trucks leaving Oakland at 6:00 a.m. and 7:00 a.m., respectively, which met, at a midway point, a truck leaving San Jose at 8:00 a.m.

Together these three trucks performed a so-called integrated service to and from the intermediate points but handled no through traffic between termini, nor was any traffic interchanged between the trucks. Through shipments between Oakland and San Jose were handled as an overnight movement over the rails of Southern Pacific Company on Pacific Motor Trucking Company billing. The pickup and delivery of the shipments was performed by independent contract draymen.

Protestants produced evidence adduced from the testimony of approximately twenty-six public and operative witnesses in opposition to the application. The substance of such evidence was to the effect that their services in general were adequate to meet the needs of shippers and receivers of freight using their facilities.

The principal opposition to the application was made by Valley & Coast Transit Company, and the rail carriers and rail carrier affiliates which include Pacific Motor Trucking Company and Railway Express Agency, Incorporated.

In brief, these protestants argue in substance, among other things, that applicant, though seeking a certificate as an express corporation under section 50(f), Public Utilities Act, had chosen to rest its case upon evidence of the character usually presented in applications for authority to operate, under section 50-3/4, as a highway common carrier. Here, it is claimed, applicant has the burden of establishing public convenience and necessity for the operation actually proposed. It is further argued by the rail group that on this record a finding cannot be made, supportable in law, that public convenience and necessity has been shown to require the proposed operation.

It is clear that an express corporation may not, at this time, establish a service between points in California until it has

first obtained from this Commission a certificate of public convenience and necessity. An express corporation is defined in section 2(k) of the Public Utilities Act as follows:

"The term 'express corporation,' when used in this act, includes every corporation or person, their lessees, trustees, receivers, or trustees appointed by any court whatsoever, engaged in or transacting the business of transporting any freight, merchandise, or other property for compensation on the line of any common carrier or stage or auto stage line within this State."

As its underlying carrier, applicant proposes to use Frasher Truck Co., a highway common carrier, as defined by section 2-3/4, Public Utilities Act. This would constitute an operation on the line of a common carrier as contemplated by section 2(k), since a highway common carrier must be deemed a common carrier within the meaning of that section.

Since the shippers would come in contact with the express corporation only and not with the underlying carrier, they obviously would be interested primarily, in a proceeding of this nature, in the service to be provided by the overlying carrier; ordinarily, they would give no thought to the relationship between the express corporation and its underlying carrier. Where the need for such a service is in issue, therefore, their testimony properly would be directed to the proposal of the express corporation in so far as it would affect them directly.

This would not extend to the details of the physical transportation performed by the underlying carrier; such a service, which is primarily of interest to the carriers alone, ordinarily is governed by the terms of the agreements between them.

Clearly, then, the character of proof designed to establish the existence of public convenience and necessity justifying the certification of the service to be performed by an express corporation would be similar to that which would warrant the authorization

of a highway common carrier service. It follows that the evidence of the shippers, in so far as it related to the need for the service proposed by applicant, as an express corporation, was material to the issues presented here, and was properly received. Within this category must fall the testimony, so strongly relied upon by the applicant, and which was in fact the basis of its showing, to the effect that the shippers were in need of and would use a service providing for both overnight delivery and for delivery of shipments on the same day they were received by the carrier.

Protestants further contend and argue, in brief, that the sole public witness testimony in support of the application was ad-duced from users of an admittedly unlawful service and that such testimony is incompetent to show public convenience and necessity.

As hereinbefore stated, applicant discontinued its operations between Oakland and San Jose, and intermediate points pursuant to a cease and desist order of the Commission in Decision No. 31185. This decision was based upon a finding that applicant had been performing an express service between those points without an operative right therefor. In that decision we referred to the fact that defendant (applicant herein), contended, in substance, that notwithstanding that a contract had been entered into by it with Oakland-San Jose Transportation Company (7) (then acting as the underlying carrier) providing no local service between Oakland and San Jose and intermediate points would be performed, it had nevertheless established such a right by reason of tariffs it had filed and the operations it had conducted between those points prior to May 1,

(7) Oakland-San Jose Transportation Company was the predecessor in interest of Pacific Motor Trucking Company.

1933. The Commission stated that "The evidence presented relative to such operations before that date is scanty and incomplete." It also stated, in effect, that but little weight could be given to defendant's claim of a prescriptive right based upon its tariff filing, applicable between those points, coupled with a willingness to accept shipments at those rates. There was no finding that the operations of defendant were in willful disregard of the law, but it was found that no operative right had been established as claimed.

After the cease and desist order was issued, a petition for rehearing was filed and denied. Defendant then sought a writ of review from the Supreme Court of this State which was also denied. The cease and desist order of the Commission then became effective during the latter part of October, 1938. The evidence in this record supports the conclusion that service of defendant (applicant herein) between Oakland and San Jose and intermediate points was discontinued on or about November 1, 1938.

In view of the circumstances surrounding this operation, we are not inclined to sustain protestants' contention that applicant, because of its misconduct, should be denied a certificate. The record, we are convinced, would not warrant the conclusion that applicant's operations were conducted in willful disregard of the law. From the inception of this service, it acted under color of tariffs, filed with the Commission, which it contended defined its operative right. Though we held that applicant possessed no such operative right, nevertheless the question was at least debatable and no bad faith can be imputed to applicant for continuing the service until required to discontinue it.

Protestant Valley & Coast Transit Company contends that its proposed highway common carrier service would provide adequate added facilities in the territory. We do not agree with this contention. Although it proposes to provide service between East Bay points and San Jose and intermediate points subject to certain local restrictions, it appears that its proposal was designed essentially to enable it to extend its operations to better serve the general territory it is now serving between King City, San Luis Obispo, Lompoc, and other points. It does not propose to provide a service for the delivery of shipments the same day that they are received for transportation. Nor does it propose to serve Livermore or other points on the routes intermediate to Livermore and the junctions of such routes with the route between Oakland and San Jose.

The evidence adduced shows that there is a definite need on the part of many shippers and receivers of freight for the service as proposed by applicant. To a considerable extent this showing was made upon the basis of a need for a service which will provide for the delivery of shipments the same day upon which they are tendered for transportation, where such tender is made during the morning hours of business days. Protestant Pacific Motor Trucking Company, the only highway common carrier in the field, belatedly attempted to meet the need shown to exist for a same-day delivery service. It was also shown that the present overnight services of protestant, while adequate to meet the needs of a substantial proportion of the witnesses, was nevertheless inadequate fully to serve the needs of numerous others.

It was shown that traffic in considerable volume is moving to, from, or between most of the points involved. The largest portion is moving between the East Bay points and San Jose, the preponderance to San Jose. It was not shown that there is any need for

the applicant's proposed service to, from, or between Santa Clara or points off route located within two (2) miles of such route.

In our opinion there exists a public need for the establishment and operation of an express corporation service between East Bay points, on the one hand, and San Jose and intermediate points, on the other hand, as specifically set forth in the following order.

O R D E R

Public hearing having been held in the above-entitled proceeding, during which evidence was adduced, the matter having been duly submitted, the Commission now being fully advised, and it being found that public convenience and necessity so require,

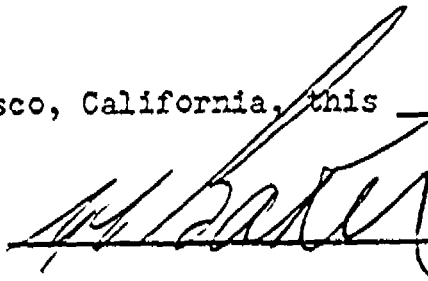
IT IS ORDERED that a certificate of public convenience and necessity is hereby granted to Valley Express Co., a corporation, authorizing it to establish and operate a common carrier service as an express corporation, as that term is defined in section 2(k) of the Public Utilities Act, between Berkeley, Emeryville, Oakland, Alameda, San Leandro, San Lorenzo, Hayward, and intermediate points, on the one hand, and San Jose and points intermediate to San Jose and the southerly city limits of Hayward, on the other hand, including Dublin, Santa Rita, Livermore, Pleasanton, Sunol, Mt. Eden, Alvarado, Centerville, Newark, Irvington, Decoto, Niles, Mission San Jose, Warm Springs, and Milpitas, but not including Santa Clara, Agnew, or Alviso.

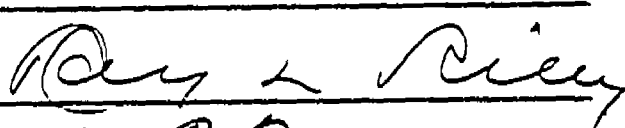
IT IS FURTHER ORDERED that under the foregoing certificate service shall be provided pursuant to the following service regulations, subject to the authority of this Commission to change or modify them at any time by its further order.


- (1) Applicant shall file a written acceptance of the certificate herein granted within a period of not to exceed thirty (30) days from the effective date hereof.
- (2) Applicant shall use the underlying highway common carrier facilities of Valley Motor Lines, a corporation.
- (3) Applicant shall operate not less than one scheduled service by which shipments tendered for transportation before 11:00 A.M. of any business day can be delivered on the same day on which they are so tendered, and an additional scheduled service by which shipments tendered for transportation after 11:00 A.M. of any business day can be delivered not later than the following business day.
- (4) Applicant 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 (10) 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.

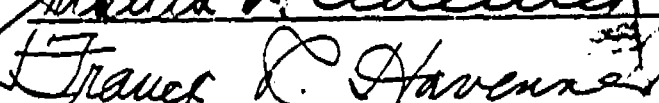
The effective date of this order shall be twenty (20) days from the date hereof.

Dated at San Francisco, California, this 11th day of March, 1941.









COMMISSIONERS