

ORIGINAL

Decision No. 34668

BEFORE THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA

PACIFIC MOTOR TARIFF BUREAU,

Complainant

-vs-

Case No. 4414

VALLEY EXPRESS CO., a
corporation,

Defendant.

REGINALD L. VAUGHAN, for Complainant.

WARE & BEROL, by EDWARD M. BEROL, for
Defendant.

R. E. WEDEKIND and WILLIAM MEINHOLD, for
Southern Pacific Company and Pacific
Motor Trucking Company, Interested
Parties.

BAKER, COMMISSIONER:

O P I N I O N

The principal question to be determined in this case is whether Valley Express Co. has a prescriptive right to operate as an express corporation between San Francisco, South San Francisco and certain East Bay points and between San Leandro and Richmond.

Pacific Motor Tariff Bureau, by its complaint as above entitled and the amendment thereto, alleges that the defendant Valley Express Co., has no authority to operate between the points above-mentioned. Defendant admits that it has not obtained a certificate of public convenience and necessity to do so, but avers that it acquired a prescriptive right to conduct business as an express corporation in such territory by virtue of operations

performed prior to August 1, 1933.⁽¹⁾

To aid the Commission in determining the issues thus raised, a public hearing was held in San Francisco October 6 and November 15, 1939, and January 26 and June 18, 1940, where evidence pertaining to the case was introduced. The matter was submitted on briefs to be filed subsequently. These have been received and the case is ready for decision.

The evidence of record shows that in 1932 Valley Express had a truck depot, pick-up trucks and employees in San Francisco and a terminal yard, pick-up trucks and an office force in Oakland. A contract was produced at the hearing which was entered into by Valley Express Co. and Highway Transport Company December 8, 1932, whereby the latter agreed to act as underlying carrier for the former in the territory in question. A tariff publication designated as Original Page 21(c) of Valley Express Co. Local Express Tariff No. 1(B) C.R.C.-3, issued April 26, 1933, effective May 28, 1933, and showing rates between the controversial points, was introduced in evidence. The testimony of a witness for the defendant indicates that the shipping documents and records of the Valley Express Co. up to 1937 were destroyed in large part. This witness also testified that he searched the records of the underlying carrier, Highway Transport Company, and found them to be incomplete. However, some shipping documents were discovered and introduced in evidence. Four shipments thus evidenced had been transported prior to August 1, 1933. One witness testified that defendant had hauled shipments of wine for him during 1933 from Oakland to San Francisco. He did not remember whether any wine was shipped via Valley Express Co.

(1) Section 2(k) of the Public Utilities Act, which defines an express corporation and Section 50(f) of the Act, which requires express corporations to secure certificates of public convenience and necessity before commencing operations, became effective August 1, 1933.

before August 1, 1933. The shipping documents referred to above show that wine was carried between Oakland and San Francisco after that date, however. There is evidence in the record also showing that various commodities in addition to wine were transported by Valley Express Co. between certain of the points in question after August 1, 1933.

Based upon the evidence produced in this matter, complainant argues that the defendant, Valley Express Co., has no prescriptive right, authorizing it to perform the operations complained of because it was not operating in good faith prior to August 1, 1933, when the statute requiring express corporations to secure a certificate of public convenience and necessity became effective. It is argued further that if defendant did secure a prescriptive right by virtue of good faith operation prior to the date of said statute, the right thus acquired was limited to the transportation of the four commodities shown by the above-mentioned shipping documents to have been transported before August 1, 1933. These commodities were canned goods, tin wares (shredders), metals and burlap bags. Finally, it is contended that even if defendant did acquire a limited prescriptive right to haul the four commodities specified, such right was abandoned because of failure of defendant to transport them thereafter. These contentions will be considered in their respective order.

Complainant apparently assumes that defendant did not commence to operate in good faith because it filed a tariff on April 26, 1933, just a few days before the legislature enacted the express corporation statute. The Commission has held in construing such statute that an express corporation operating prior to August 1, 1933, need not obtain a certificate. It is true that the mere filing of a tariff effective before August 1, 1933, does not constitute operating to the extent indicated by such tariff as of that

date. However, when such tariff filing is coupled with the maintenance of terminal and office facilities, pick-up trucks, employees and the actual handling of shipments between points named in such tariff, operation as an express corporation is established. Inasmuch as the statute contemplated and authorized the inauguration and continuance of business by express corporations without certificates before August 1, 1933, those who commenced to operate prior to that date did so lawfully and hence must be deemed to have acted in good faith. It is clear from the evidence that Valley Express Co. actually handled commodities between points named in the complaint prior to August 1, 1933. Therefore, it must be concluded that defendant commenced to operate as an express corporation in good faith before the statute became effective and thus acquired a prescriptive operative right.

Having determined that defendant has a prescriptive right, complainant's next contention must be considered. It is claimed that if Valley Express Co. acquired such a right, it must be restricted to the handling of the only commodities shown to have been transported before August 1, 1933, namely, canned goods, tin wares, metals and burlap bags. It is true that the documentary evidence definitely establishes the transportation of only the four commodities named above. However, when other evidence adduced at the hearing is borne in mind, it seems unlikely that the specified commodities constituted the entire traffic which defendant transported prior to the statutory date.

If it were assumed that Valley Express Co. did handle only the four specified commodities before the effective date of the statute, in fairness to it and in the public interest, defendant should be permitted to transport other traffic after that date if such operation is consistent with its original offer of public

service. It is illogical to assume that a carrier's service will be as extensive when it commences to operate as it will become when the public is aware of the existence of the service and of the transportation facilities it offers. To restrict defendant to the handling of commodities carried before the effective date of the express corporation statute would prevent the natural growth and development of its business along the lines for which it was organized.

When considering the character of a prescriptive right and the extent to which it is restricted, a distinction should be made between the operator who intentionally limits his business to particular commodities and one who is prepared and willing to transport traffic generally, but who is not able to obtain shipments of every commodity it proposes to handle within a few months after its business is inaugurated. The operator who voluntarily limits his services should not be permitted to expand them subsequently unless he first shows that public convenience and necessity requires such enlargement. However, the operator limited by circumstances rather than by choice should be allowed to transport commodities not theretofore handled if commensurate with his original service offer. It is obvious from the evidence that the operations of the Valley Express Co. place it within the latter classification. Therefore, it must be concluded that Valley Express Co. has the right to transport general commodities as an express corporation between the points in question.

Complainant's final contention is disposed of by the previous conclusions reached herein. The argument was that if defendant acquired a limited prescriptive right authorizing it to transport canned goods, tin ware, metals and burlap bags, such a right was abandoned because none of the commodities were handled subsequently. Inasmuch as it has been determined that Valley Express Co. acquired a prescriptive right to handle express traffic generally between the points in question, and has done so continuously from a time prior to August 1, 1933 up to the present, the premise upon which the last argument is predicated becomes purely hypothetical.

It is recommended that the relief sought by the complaint in this proceeding be denied and the case dismissed.

O R D E R

Based upon the evidence of record and the findings and conclusions contained in the above opinion,

IT IS ORDERED that Case No. 4414 is dismissed.

The foregoing opinion and order are hereby approved and ordered filed as the opinion and order of the Railroad Commission of the State of California.

Dated at San Francisco, California, this 14th day of

October, 1941.

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COMMISSIONERS