

ORIGINAL

Decision No. 35429

BEFORE THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application  
of

KELLOGG EXPRESS AND DRAYING CO.,

a corporation, for an Order authorizing it to issue shares of its Capital Stock.

Application No. 24137

Reginald L. Vaughan for Kellogg Express and Draying Co.  
David Glickman for Louis Friedman, Protestant Donahue, Richards & Hamlin, by O.D. Hamlin, Jr. for Lloyd Swayne  
Oliver Dibble for Henry F. Hiller and San Francisco Warehouse Company, interested parties.

BY THE COMMISSION:

O P I N I O N

Kellogg Express and Draying Co., referred to in the petition as Kellogg Express and Draying Company, asks permission to issue and sell sufficient of its unissued shares of its capital stock at such price per share as the Commission may fix therefor to net the corporation \$140,000, and to expend the proceeds realized from the sale of such stock for the purposes hereinafter stated.

This application was filed on April 16, 1941. Hearings were had thereon on September 26, November 10, January 28, March 2, and April 22. On the last mentioned date the matter was taken

under submission subject to the filing of certain exhibits and financial statements. These were filed on May 11.

The granting of the application is protested by Louis Friedman, a stockholder of Kellogg Express and Draying Co., and its former vice president and general manager.

Kellogg Express and Draying Co., hereinafter sometimes referred to as applicant, operates under the jurisdiction of the Railroad Commission as a highway common carrier within and between points and places within the City and County of San Francisco and the Counties of Alameda and Marin; as a radial highway common carrier, highway contract carrier and city carrier within the State of California, and as a warehouseman in the City of Emeryville, California.

Applicant has an authorized stock issue of 500 shares, each share having a par value of \$100. One hundred (100) shares of applicant's stock are outstanding. Its petition shows that said 100 shares of stock have been issued to the following:

San Francisco Warehouse Company	63-2/3	shares
Louis L. Friedman	30-1/3	shares
Henry F. Hiller	1	share
Wilbur L. Hiller	1	"
Lloyd Swayne	1	"
David Glickman	1	"
D. A. Sargent	1	"
J. Clayton Orr	1	"

Henry F. Hiller, Wilbur L. Hiller and Lloyd Swayne are nominees of San Francisco Warehouse Company, while David Glickman, D. A. Sargent and J. Clayton Orr are nominees of Louis Friedman.

Kellogg Express and Draying Co., as of March 31, 1942, reports assets and liabilities as follows:

ASSETS

CURRENT ASSETS

Cash		\$ (2,384.92)
Working Funds		350.00
Accounts Receivable		48,339.14
Material and Supplies		3,106.78
Advance Freight		209.13
	Total Current Assets	<u>49,620.13</u>

TANGIBLE PROPERTY

Revenue Equipment	\$120,650.82	
Less: Reserve for Depreciation	<u>76,587.36</u>	44,063.52
Service Cars and Equipment	1,515.39	
Less: Reserve for Depreciation	<u>947.24</u>	568.15
Shop and Garage Equipment	2,919.54	
Less: Reserve for Depreciation	<u>1,408.92</u>	1,510.62
Furniture and Office Equipment	7,420.70	
Less: Reserve for Depreciation	<u>2,217.46</u>	5,203.24
Miscellaneous Equipment	408.23	
Less: Reserve for Depreciation	<u>80.19</u>	328.04
Improvements to Leasehold Property	37,013.79	
Less: Reserve for Depreciation and Amortization	<u>2,314.13</u>	34,699.66
Unfinished Construction		25.75
	Total Tangible Property	<u>86,398.98</u>

INTANGIBLE PROPERTY

Franchises		
Less: Reserve for Amortization	1,500.00	
Other Intangible Property	<u>300.00</u>	1,200.00
Less: Reserve for Amortization	<u>8,864.37</u>	7,091.61
	Total Intangible Property	<u>8,291.61</u>

DEFERRED DEBITS

Prepaid Taxes and Licenses		3,125.16
Prepaid Insurance		196.93
Other Deferred Debits		<u>387.18</u>
	Total Deferred Debits	<u>3,709.27</u>

MISCELLANEOUS DEBIT ITEMS

Commission and Expense on Capital Stock		171.10
	Total Miscellaneous Debit Items	<u>171.10</u>

Total Assets \$148,191.09

LIABILITIES

CURRENT LIABILITIES

Notes Payable		\$ 25,950.00
Payable to Associated Companies		5,236.27
Accounts Payable		2,747.60
Vouchers Payable		31,038.45
Wages Payable		1,886.25
C.O.D.'s Unremitted		271.62
Taxes Accrued		<u>355.89</u>
	Total Current Liabilities	<u>67,486.08</u>

ADVANCES PAYABLE

Open Accounts		104,391.42
	Total Advances Payable	<u>104,391.42</u>

RESERVES

Reserve for Uncollectible Accounts		671.01
Injuries, Loss and Damage Reserve		137.18
	Total Reserves	<u>808.19</u>

CAPITAL STOCK

SURPLUS - Dr.		10,000.00
		<u>34,494.60</u>
	Total Liabilities	<u>\$148,191.09</u>

Fred H. Chestnut, Consulting Engineer, in Exhibit 16 estimates the present value of applicant's trucks and trailers, as of October 15, 1941, at \$101,140. This, according to his testimony, is the amount of money applicant would have to spend to replace the equipment with similar units in a similar state of repair. His present value is \$48,321 in excess of the depreciated cost of said equipment as shown in applicant's balance sheet as of September 30, 1941. The difference is due in part to applicant's excessive depreciation charges on some equipment, and in part to a general increase in the cost of the equipment.

Applicant's outstanding notes consist of the following:

Crocker First National Bank of San Francisco	\$20,250.00
Henry F. Hiller	700.00
Dora O. Swayne	<u>5,000.00</u>
Total	<u>\$25,950.00</u>

Applicant also owes the San Francisco Warehouse Company \$5,000, represented by a 6% demand note, and Lloyd Swayne \$104,391.42, recorded as a noninterest-bearing account payable. It is for the purpose of paying said notes and accounts payable and providing applicant with a small amount of working capital that it seeks permission to issue additional stock, and to sell such stock at a price that will net applicant \$140,000.

The following tabulation shows applicant's operating revenues and net income for each of the years from 1933 to 1941, both inclusive, and its accumulated surplus at the end of each of said years.

: Year :	Operating Revenues :	Net Income :	Accumulated Surplus :
1933	\$ 81,511.14	\$ 5,518.96(1)	\$ 2,437.22(2)
1934	125,373.13	1,062.53	1,374.69(2)
1935	174,607.54	2,414.25	1,039.56
1936	244,465.73	4,663.99	5,703.55
1937	240,810.01	9,212.71(2)	3,490.69(2)
1938	222,180.97	10,530.58	7,039.89
1939	244,857.10	2,169.35	9,209.24
1940	249,902.63	12,078.60(1)	2,869.36(2)
1941	302,401.74	22,919.98(1)	32,187.96(2)

(1) Loss      (2) Deficit

The operating revenues are the gross operating revenues less ferry or bridge tolls. The losses in 1940 and 1941 are in part attributed to increased labor expense; to increased cost of materials and supplies, and to increased depreciation charges on account of the purchase of additional equipment. In 1941 applicant wrote off \$6,398.62 of accounts receivable.

By Decision No. 25744, dated March 20, 1933, in Application No. 18745, the Commission authorized Kellogg Express and Draying Co. to issue \$10,000 par value of its capital stock in payment for the properties acquired from William Bolt. By the same decision it authorized San Francisco Warehouse Company to acquire and hold said \$10,000 par value of stock of Kellogg Express and Draying Co. As heretofore indicated, San Francisco Warehouse Company and its nominees presently own two-thirds, and Louis Friedman and his nominees one-third, of applicant's outstanding stock.

During the hearing reference was made to a letter, dated February 16, 1933, signed by Louis Friedman, and addressed to Henry F. Hiller, care of San Francisco Warehouse Company.

The letter reads as follows:

"This is to advise you that immediately upon the purchase by you of the business and assets of the Kellogg Express Co. of Oakland for the sum of \$10,000 I will immediately sever my connection with the Merchants Express & Draying Company of Oakland.

"One-third of said purchase price is to be paid by me, as follows: \$2,000 in cash, the balance by way of a promissory note payable within 2 years after date, secured by my stock in Kellogg Express & Draying Co.

"It is understood that the business and assets of the Kellogg Express Company are to be transferred to a corporation to be immediately organized in which stock is to be issued of the par value of \$10,000 and no more, two-thirds of which is to be issued to you and one-third to me.

"It is further understood that immediately upon the termination of my employment with my present employer I shall be employed by the newly organized corporation mentioned above at a salary for the time being of \$300 per month, said salary to be increased from time to time as the condition of the business will justify.

"The newly organized corporation above referred to shall have a board of three directors, of which the undersigned shall be a member thereof."

It is of record that the letter was approved by said Henry F. Hiller. The letter antedates the filing of said Application No. 18745, but it was not called to the Commission's attention in that proceeding.

Protestant takes the position that this letter constitutes an agreement limiting the amount of stock which Kellogg Express and Draying Co. might issue. It is not for us to construe the agreement of February 16, 1933. Suffice it to say that it is not binding upon the Commission and we, therefore, will disregard it.

Protestant further contends that the underlying motive in the filing of this application is to enable Lloyd Swayne, a creditor, a director, and an officer of Kellogg Express

and Draying Co., and a director of San Francisco Warehouse Company, to gain control of Kellogg Express and Draying Co.; that the acquisition of truck equipment and the construction of the Oakland terminal was unnecessary, and that the other sums of money loaned to applicant were not to its best interest.

The minutes of Kellogg Express and Draying Co.

(Exhibit 18) and the testimony of Lloyd Swayne show that if the Commission authorizes applicant to issue additional stock, such stock will be offered to applicant's stockholders so that they can subscribe for their pro rata share and maintain their relative position in the corporation. The order herein will require that such an offering be made. Any stock not subscribed for within thirty (30) days after it is offered may be sold to the public generally. Lloyd Swayne has offered to buy the stock at \$350 per share. It is only if the present stockholders do not exercise their preemptive rights that Lloyd Swayne will obtain control of Kellogg Express and Draying Co. The fact that a present stockholder of a utility may not be in a position to acquire his pro rata share of stock offered for sale is no ground for denying an application of a public utility to issue additional stock.

This brings us to the main issue of this proceeding, to-wit: Is the issue of additional stock to the best interest of applicant? As said, protestant contends that the purchase of some equipment and the construction of the new Oakland terminal was unnecessary. On these points there is a conflict in the evidence. Protestant testified against the construction of the Oakland terminal and the purchase of some of the equipment, while the testimony of the president of applicant shows

such construction and the purchase of new equipment advisable and necessary. The testimony shows that protestant, while general manager of applicant, was interested in expanding applicant's operations. He negotiated, or was a party to negotiations, looking toward the purchase of Marin Express and the stock of Napa Transportation Company (Application No. 24215). He was unsuccessful in consummating the purchase of other properties. He proposed that applicant join other truck operators in the construction of a union truck terminal in Emeryville. He testified that while he favored the purchase of Marin Express he objected to applicant borrowing money from Lloyd Swayne to finance that transaction. His testimony that applicant had a bank credit and could have used it to acquire Marin Express and for other purposes was refuted by an officer of the bank. The union terminal was not constructed. Instead, applicant constructed a new terminal at 21st and Adeline Streets in Oakland. Prior to the completion of this terminal applicant rented a terminal at Second and Jackson Streets, Oakland, at a total rental of \$375 per month. In its new location applicant pays a ground rent of \$89.00 per month and, of course, must bear the carrying charges on an approximate \$38,000 investment in the terminal. The new terminal has a larger platform area than the old terminal, can accommodate all the trucks of applicant parked on the east side of the Bay, has a spur track connection, is located near the end of the San Francisco-Oakland Bay Bridge, and has modern shop facilities. Its construction, we feel, has been fully justified.

The record does not show that applicant has a surplus of equipment. On the contrary, its president testified that it



has need for more equipment and that at times shipments have to be deferred for lack of proper equipment.

Though the record shows that none of applicant's creditors have made a demand for the payment of their claims, it is evident that if such demands were made applicant would have no funds at hand to meet them. Provision should be made for the payment of applicant's indebtedness. We will, therefore, authorize applicant to issue 400 shares of its capital stock at not less than par. We have no objection to applicant accepting the offer of Lloyd Swayne to purchase, at \$350 per share, such shares of stock as may not be purchased by applicant's stockholders at that price.

#### O R D E R

Kellogg Express and Draying Co. having applied to the Commission for permission to issue 400 shares of capital stock, public hearings having been held on said application by Examiner Fankhauser, the Commission having considered the evidence submitted at such hearings and it being of the opinion that the money, property or labor to be procured or paid for by the issue of 400 shares of capital stock of Kellogg Express and Draying Co. is reasonably required for the purposes herein stated; that the expenditures for said purposes are not, in whole or in part, reasonably chargeable to operating expenses or to income, and that this application should be granted subject to the provisions of this order, therefore,

IT IS HEREBY ORDERED as follows:

1. Kellogg Express and Draying Co. may, after the

effective date hereof and on or before December 31, 1942, issue and sell at not less than par 400 shares of its capital stock, provided that said 400 shares of stock are offered for sale to the shareholders of record of Kellogg Express and Draying Co., at a price, but not less than the par value thereof, to be fixed by the Board of Directors of Kellogg Express and Draying Co., such offer to remain open for a period of at least thirty (30) days from and after the date of the offer. Any stock not subscribed for by said stockholders may be sold by Kellogg Express and Draying Co. to Lloyd Swayne or any other person at a price which is not less than the price at which the stock was offered to said stockholders.

2. Kellogg Express and Draying Co. shall apply the proceeds realized from the issue and sale of said stock to pay, in the following order, the following indebtedness.

1. To pay notes due Crocker First National Bank of San Francisco \$20,250.00
2. To pay San Francisco Warehouse Company 5,000.00
3. To pay Dora O. Swayne 5,000.00
4. To pay Henry F. Hiller 700.00
5. To pay Lloyd Swayne 104,391.42

Any remaining proceeds may be used by Kellogg Express and Draying Co. for the reimbursement of its treasury.

3. Kellogg Express and Draying Co. shall keep such record of the issue and sale of the stock as will enable it to file the reports required by the Commission's General Order No. 24-A, which order, insofar as applicable, is made a part of this order.

4. The authority herein granted will become effective twenty (20) days after the date hereof.

Dated at San Francisco, California, this 2nd day  
of June, 1942.

Justus F. Cameron  
Ray A. Ricey

Richard Hachse  
Commissioners