Decision No. 36345

ORIGINAL

BEFORE THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA

UNITED PARCEL SERVICE BAY DISTRICT, Complainant, vs. VIOLET M. KELLER, doing business as MENLO PARK AND SAN FRANCISCO PARCEL DELIVERY, Defendant.	Case No. 4605
In the Matter of the Investigation and suspension by the Commission, on its own motion, of rates, rules and regulations published by VIOLET M. KELLER, doing business under the firm name and style of MENLO PARK AND SAN FRANCISCO PARCEL DELIVERY for the transportation of property between San Francisco and Palo Alto and intermediate points.	Case No. 4606

ATHEARN, CHANDLER & FARMER and PRESTON W. DAVIS, by Preston W. Davis, for complainant in Case No. 4605, and interested party in Case No. 4606.

HARRY ENCELL, for defendant in Case No. 4605, and for respondent in Case No. 4606.

WILLARD S. JOHNSON, for Valley Motor Lines, Inc., intervener on behalf of complainant in Case No. 4605, and interested party in Case No. 4606.

DOUGLAS BROOKMAN, for Holmes Express, intervener on behalf of complainant in Case No. 4605, and interested party in Case No. 4606.

JOHN E. HENNESSY, for Pacific Southwest Railroad Association, interested party.

HAROLD M. HAYS, for Intercity Transport Lines and Pioneer Express Company, interested parties.

JOSEPH ROBERTSON, for Highway Transport, Inc., intervener on behalf of complainant in Case No. 4605, and interested party in Case No. 4606.

BY THE COMMISSION:

OPINION ON REHEARING

These proceedings, which were consolidated for hearing and decision, involve the lawfulness of the operations conducted by defendant and respondent, Violet M. Keller, doing business as Menlo Park and San Francisco Parcel Delivery, as a highway common carrier; the propriety and reasonableness of certain rates published by defendant; and the validity of a consolidation assertedly effected between defendant and Automotive Purchasing Company, Inc., operating both as a highway common carrier and as a freight forwarder. In Case No. 4605 a complaint was filed by United Parcel Service Bay District,[1] raising these questions; and in Case No. 4606 the Commission suspended the operation of a tariff published by defendant, pending the determination of the propriety of the rates.[2]

Following a hearing, the Commission rendered its Decision No. 35219 on April 7, 1942, substantially upholding complainant's contentions. Here it was found as a fact that defendant's operative

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(1) For brevity, Violet M. Keller, doing business as Menlo Park and San Francisco Parcel Delivery, the defendant in Case No. 4605, and the respondent in Case No. 4606, will be referred to as the defendant; Automotive Purchasing Company, Inc. will be referred to as Automotive; and United Parcel Service Bay District, the complainant in Case No. 4605 and at whose instance the Commission suspended defendant's tariff in Case No. 4606, will be referred to as the complainant.

(2) By its order initiating Case No. 4606, the Commission instituted an investigation into the propriety of the rates published in Tariff C.R.C. No. 2, filed by defendant, to become effective September 4, 1941, and suspended their operation pending the hearing and determination of the matter. By subsequent orders, the rates were suspended for the maximum period permitted under Section 63(b), Public Utilities Act. This expired July 2, 1942, but defendant has agreed not to observe these rates pending the determination of this proceeding.

right was limited to the performance of "a specialized, restricted, 'on-call' operation in the nature of a messenger service" confined to the transportation of foods, flowers and art goods, subject to a weight limitation of 100 pounds per shipment on traffic moving between San Francisco and Menlo Park and 50 pounds per shipment between Menlo Park and Palo Alto. Hence, the decision concluded, defendant was not authorized to engage in the general parcel delivery service; but no limitation, it was held, should be placed upon the volume of the equipment which defendant could use to conduct her operations. By its order the Commission directed defendant to limit her service accordingly, to cancel the suspended tariff, and to submit a new tariff containing rates reflecting the operative authority with which she was held to be invested.

Defendant thereupon applied for a rehearing, which was granted. The rehearing was had before Examiner Austin at San Francisco on July 16, 1942, when the matter was submitted upon briefs, since filed. The present record includes the evidence offered in previous proceedings.(3)

The issues arising from the contentions of the parties may thus be summarized:

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(3) The record in the instant proceeding includes the transcript and exhibits in three other proceedings, viz., Application No. 21879 (application of Melvin Roy, doing business as Flo'Del Co, to operate as a highway common carrier between San Francisco and Palo Alto, among other points), Application No. 22424 (application of Vernon D. Bradbury, doing business as Menlo Park and San Francisco Parcel Delivery, to extend service to Palo Alto), and Application No. 24065 (application of Vernon D. Bradbury and Samuel Lilienthal to transfer to Violet M. Keller the operative right involved in the present proceeding). The record in Applications Nos. 21879 and 24065 was not before the Commission upon the original hearing in the present proceeding.

(1) Does defendant possess an operative right arising under the "grandfather" clause of the 1917 statute?

(2) Are the operations conducted by defendant, or those proposed to be performed under the suspended tariff, in excess of and beyond the scope of her operative right?

(3) Has defendant or her predecessor in interest abandoned, in part, the operative right which originally had been established, and thereby narrowed its scope?

(4) Are any of the rates, rules and regulations contained in the suspended tariff unlawful?

(5) Has defendant, without authority, merged and consolidated her operations with those of Automotive Purchasing Company, Inc.?

For convenience the first three questions will be considered together.

Existence of the Operative Right Itself, Its Scope, and Extent of Operations Conducted.

Although the existence of the operative right in question, under the "grandfather" clause of the Auto Truck Transportation Act, (Statutes 1917, Chapter 213, as amended) was disputed, the record, we believe, convincingly shows that on and prior to May 1, 1917, the critical date prescribed by that statute, defendant's predecessor, B. Liedberg, was operating as a transportation

company[4] between San Francisco and Menlo Park and intermediate points. This was shown by the testimony of Vernon Bradbury, who subsequently acquired the operative right from Liedberg,[5] and by the testimony of Joseph J. Bullock who for many years had acted as Liedberg's attorney. To his knowledge, so the latter testified, Liedberg commenced the business long before May 1, 1917 and was conducting it at that time. It is true that Liedberg did not file his initial tariff until 1920 but his failure to observe the requirements of General Order No. 51 (14 C.R.C. 378), although a serious breach of the Commission's regulations, which might well have subjected him to appropriate penalties, does not of itself warrant the conclusion that no operative right ever came into existence. And a forfeiture of the operative right for that reason, at this late date, would be highly inequitable. We hold, therefore, that defendant's predecessor was vested with an operative right under the grandfather clause of the 1917 statute.

The extent of the service provided by Liedberg during the critical period was shown by evidence both oral and written. From the testimony of Vernon Bradbury and that of Joseph J. Bullock, it appears that in 1917 Liedberg conducted a daily service between San Francisco and Menlo Park with varying hours of departure and arrival, handling general commodities for individuals and stores

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(4) Under the terms of the Auto Truck Transportation Act of 1917 highway carriers of the class now known as highway common carriers were then designated as transportation companies.

(5) The operative right with which we are concerned was acquired from B. Liedberg (the original operator) by Vernon Bradbury pursuant to Decision No. 28969, rendered July 7, 1936, in Application No. 20643. Subsequently, the operative right was extended to Palo Alto (Decision No. 31865, in Application No. 22424, dated May 27, 1939). On July 1, 1941, Bradbury was authorized to transfer the operation to defendant Keller (Decision No. 34374, in Application No. 24065).

where the packages were not too heavy or bulky. The initial tariff, filed by Liedberg, discloses that he undertook to carry packages and parcels of all descriptions subject to a limit of 100 pounds each. It is clear, therefore, that defendant's predecessor was authorized, under his "grandfather" operative right, to transport merchandise generally, when tendered in small packages.

Whether or not the scope of the operation originally conducted by Liedberg was subsequently enlarged, would appear from a comparison of his service with that provided by his successors. And the asserted partial abandonment of the service by Bradbury, if it in fact ever occurred, would be reflected by the evidence indicating the character of his operations. Both Bradbury and defendant's general manager described their respective operations, and defendant's offer of service is disclosed by the terms of the suspended tariff.

In the early stages of his operation, so the record shows, Bradbury offered a service which, though not extensive as to the volume of traffic handled, was available for the transportation of various commodities.(6) Between San Francisco and Menlo Park he provided a daily service, ordinarily using a single truck, but occasionally an additional vehicle was required. The truck left Menlo Park early in the morning, reaching San Francisco before noon, and returned during the afternoon, the hours of arrival and departure varying slightly from day to day. The traffic usually moved between San Francisco and Peninsula residences, and from San

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(6) This was shown by Bradbury's testimony given in Application No. 22424, heard during January and February, 1939, and from his testimony in Application No. 21879, heard during June, 1938. He acquired the operation in 1936.

Francisco and Peninsula stores to Peninsula homes. Between the San Francisco and the Peninsula residences, he handled garden greens, flowers and clothing principally. The Peninsula stores offered but little business, as they provided their own delivery facilities. From the San Francisco stores a wide range of commodities was transported.(7) For a short time he handled flowers from San Francisco florist shops to Peninsula residences, deriving about one-quarter of his revenue from this source, but he later lost a large part of this traffic.

Subsequently, as shown by Bradbury's testimony given during the hearing of Application No. 24065, during May, 1941, the operation became more comprehensive. Between San Francisco and Pensinula homes, he handled cut flowers, wet greens, and other commodities. Frequently, he was the bearer of verbal messages regarding these shipments. From the San Francisco stores, he carried merchandise generally, subject only to the weight limitations described,(8) but from the Peninsula stores the traffic was less diversified, and smaller in volume. He continued to operate daily under a fluctuating schedule, ordinarily using but one truck. Thus he was enabled to maintain personal contacts with his patrons.

It was characteristic of Bradbury's operation that no protective packing requirements, similar to those enforced by other

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(7) From the San Francisco mercantile establishments, comprising markets, grocery stores, confectioners, art good dealers and gift shops, Bradbury transported a wide variety of commodities, including groceries, fresh meats, fish, fruit, vegetables, candy, confectionery, bakery goods, pastries, art goods, ornamental furniture and wrought iron ornaments.

(8) The business establishments served included, among others, department stores, dry goods stores, art goods stores, confectioners, grocery stores, and markets. The commodities handled included groceries, dry goods, foods, flowers, art goods, automobile supplies and accessories, and merchandise generally.

carriers, were observed. For example, bon voyage baskets, special cakes, lamp stands and shades, and silver platters would be accepted without protective wrapping. The shipments were of light weight, well within the 100 pound weight limit. The same truck was used to provide both pickup and delivery, and line-haul service. The terminals at San Francisco and Menlo Park functioned merely as places were shippers could telephone their instructions.

In the light of these facts it is clear that the operation has not been expanded beyond the scope of that originally conducted by Liedberg. From the outset, defendant and her predecessors have offered to carry commodities generally, when tendered in small packages, within the weight limits specified. In its essential and inherent characteristics the service has not been modified or enlarged.

This brings us to the contention that the service has been in part abandoned. Specifically, complainant contends that the service has been so restricted, in view of the nature of the commodities handled by Bradbury and the method of his operations, that from San Francisco mercantile concerns to Peninsula points defendant may now transport only flowers, food and art goods, moving in a single truck, and operating under an on-call schedule.(9) Assertedly, Bradbury had conducted merely a personal or an accommodation messenger service. For this reason, it is claimed, the right to handle additional commodities, in any other manner, if it ever existed, has been abandoned, and consequently, defendant, in

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(9) No claim is advanced that the service between San Francisco and Peninsula residences should be restricted, nor has any question been raised as to the points that may be served. The alleged limitation affects only the commodities to be carried and the number of vehicles that may be used.

the absence of a further grant of authority by the Commission, is not now at liberty to expand the operation beyond these limits. To ascertain whether Bradbury had, in part, abandoned his service, it is necessary to examine the character of the operations conducted during the period when this was alleged to have occurred. The scope of these operations must be measured by his public holding out or offer of service, with which must be coupled the character of the operation actually performed.

Bradbury's holding out to the public, as indicated by his published tariff, contemplated the transportation of general merchandise, subject to the weight limits mentioned. And the operations which he actually conducted during the period in question comprehended the transportation of a wide range of commodities, representative of the merchandise generally handled by grocery stores, markets, art goods stores and gift shops engaged in business within a metropolitan district. The service, however, was restricted to the handling of shipments weighing 100 pounds or less between San Francisco and Menlo Park, and to the handling of shipments not exceeding 50 pounds in weight between Menlo Park and Palo Alto. This being so, it cannot be said that he had ever abandoned any portion of his operative right. We now find that defendant is vested with such an operative right, subject to the weight limitations last described. By our decision in the transfer proceeding, under which defendant Keller acquired this operation, we arrived at a similar conclusion.(10) We now reaffirm that decision.

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(10) Decision No. 34374, dated July 1, 1941, in Application No. 24065. There, we also held that the matter of protective packing, including the waiver of such requirements, essentially affects the rate to be charged and does not form a part of the carrier's operative authority.

Complainant's contention that defendant's service should be confined to that which may be made available through a single truck, operating under an on-call schedule, is equally without merit. As stated in Decisions Nos. 34374 and 35219, the Commission after having created an operative right, should not undertake arbitrarily to limit the volume of business which could be conducted under it or to circumscribe the number of vehicles that may be used. And since the operation was performed daily, it cannot be regarded as an on-call service. A frequent variation in the hours of arrival and departure is not of controlling importance in this proceeding.

Complainant contends, however, that because of representations assertedly made by defendant's predecessors, Liedberg and Bradbury, during the course of certain proceedings before the Commission, including some of those previously mentioned, concerning the character of the service conducted, defendant is estopped to deny the partial abandonment of the operative right. Allegedly, some of these representations had induced action on the part of the Commission; others, it is claimed, were relied upon by complainant to its detriment. In some of the instances cited it appears that complainant was not a party to the proceeding in which the representation had been made, consequently it could not have been prejudiced by any such statement. Some of the representations related essentially to matters of opinion and hence could not form the basis of an equitable estoppal. As to representations made during the course of proceedings in which complainant itself participated, it would seem that the facts surrounding the asserted statements were known equally to both complainant and defendant's predecessor. Under the circumstances complainant obviously was guided by the entire record and could not have been

misled. This contention, therefore, cannot be upheld.

This brings us to a consideration of the propriety of the rates appearing in the suspended tariff.

Lawfulness of Suspended Rates

Case No. 4606 was instituted to determine whether the tariff filed by defendant contained unauthorized increases in rates, in violation of Section 63(a), Public Utilities Act; whether it disregarded the Commission's rules and regulations concerning the construction of tariffs; whether it contained rates for service of a type that defendant was not authorized to perform; and whether it provided rates that were below the established minimum rates. By the order initiating this proceeding, the tariff was suspended. By its previous decision herein (Decision No. 35219), the Commission held that the suspended tariff provided rates for a service that defendant was not authorized to perform under its operative right, as defined in that decision; and accordingly its cancellation was directed. However, in view of the contrary conclusion we have now reached, that claim is no longer tenable.(11)

Some of the violations and defects attributed to this tariff were conceded by defendant. Thus it was admitted that the suspended tariff contained some rates resulting in increases for which no previous authority had been secured. An informal application for approval of these increases has been submitted but is

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(11) To the extent, however, that the tariff provides rates and charges for the transportation of shipments weighing in excess of the weight limitations applicable to defendant's operative right, as above described, it contemplates the performance of an unauthorized service. In this respect, the tariff cannot be approved.

being held in abeyance pending the determination of this proceeding. Admittedly, certain rates, rules and regulations did not comply with the Commission's tariff rules. Though defendant offered evidence relating to certain rates which assertedly would fall below the minimum rates prescribed by Decision No. 31606, as amended, in Case No. 4246, and which were for that reason alleged to be unreasonable, the showing made was meager and unsatisfactory. Under the circumstances, the proposed tariff will be cancelled, and defendant will be expected to file a tariff that may be appropriate, in the light of this opinion.

We turn now to a consideration of the asserted consolidation of the operations of defendant and Automotive.

Merger and Consolidation of Defendant's Operations With Those of Automotive Purchasing Company, Inc.

The charges presented here are two-fold, viz., unauthorized ownership by defendant of the capital stock of another public utility, and the unauthorized merger of defendant's operative rights with those of another common carrier. These will be considered in their respective order.

As to the first point, it is alleged that defendant, without the Commission's sanction, holds part of the capital stock of Automotive Purchasing Company, Inc., a California corporation operating as a public utility, contrary to the provisions of Section 51(b), Public Utilities Act. Defendant admits the ownership of these shares, but alleges that the Commission had full knowledge of this fact when she acquired the operative right. By Decision No. 35219, we held that defendant's ownership of this stock was not violative of Section 51(b).

The record establishes that of the 6,967 shares of Automotive now outstanding, defendant Keller owns 4,982 shares. Aside from qualifying shares held by two other individuals, the remainder is owned by her husband, Thomas Keller. The Commission was apprised of defendant's ownership of this stock by the affidavit of defendant's counsel, Harry A. Encell, filed April 21, 1941, in Application No. 24065.

Clearly, the situation presented does not fall within the purview of Section 51(b). That section provides, in part, that:

> "No public utility shall hereafter purchase or acquire, take or hold, any part of the capital stock of any other public utility, organized or existing under or by virtue of the laws of this state, without having been first authorized to do so by the commission.***"

Defendant became a shareholder of Automotive before she acquired the operative right from Bradbury. At no time subsequently did she purchase, acquire or take this stock. And she was a holder of the stock prior to her acquisition of the operative right. In short, she was a shareholder before she assumed the status of a public utility. The statute, we believe, does not affect a transaction of this character.

Regarding the asserted merger and consolidation of the operations of defendant and Automotive, complainant contends that this is established by the fact that the same management, terminal, terminal facilities and employees were used by both; that Automotive used defendant's truck at will, without payment of compensation; that Thomas Keller, a stockholder of Automotive, drove defendant's truck occasionally, without compensation other than his salary from Automotive; that drivers of the two carriers were

used interchangeably and that they mutually assisted one another; and that a representative of Automotive informed at least one shipper that the two companies were identical. For these reasons, it is asserted, the two operations were interwoven to such a degree that they had become indistinguishable.

Both defendant and Automotive, it was shown serve the same points, although the latter's operations are more extensive. Within the area common to both carriers Automotive operates both as a highway common carrier and as a freight forwarder, under certificates previously granted by the Commission.

The relationship between defendant and Automotive, so the record shows, was very close. As stated, defendant owns a substantial part of the outstanding shares of Automotive. The two carriers maintained a common terminal at San Francisco where they used the same office. Defendant's general manager also acted as Automotive's secretary and traffic manager, devoting part of his time to each. However, each kept separate accounting records.

At times, Automotive has used defendant's equipment. On two occasions Thomas Keller, a shareholder of Automotive, drove defendant's truck in the absence of the regular driver but received no compensation for this service. At another time, a driver employed by Automotive drove defendant's truck; and the drivers of the two carriers have rendered assistance to one another.

Automotive, it was shown, while operating as a freight forwarder, has used defendant for the transportation of automobile parts. On these occasions, defendant acted as an underlying carrier for Automotive. The latter, it was shown, has also used the

facilities of other highway common carriers. Neither Automotive nor defendant perform any pickup service for the other.

The record, we believe, does not establish the claim that the operations of defendant and Automotive have been merged and consolidated.

The complaint, accordingly, will be dismissed, and the suspended tariff cancelled.

ORDER ON REHEARING

A rehearing having been had in the above-entitled proceeding; the matter having been duly submitted; and the Commission being now fully advised:

IT IS ORDERED as follows:

(1) That the complaint in Case No. 4605 be and it hereby is dismissed.

(2) That defendant's Tariff C.R.C. No. 2 be and it hereby is cancelled.

(3) That Decision No. 35219, heretofore rendered in the above-entitled proceedings, be and it hereby is vacated and set aside.

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

Dated at San Francisco, California, this 11th day of May, 1943.

Frank R. Havenner

[signature]

Justus F. Craemer

Richard Sachse

Franck R. Clark

COMMISSIONERS