

Decision No. 3478

BEFORE THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Suspension by)
the Commission on its own motion of) Case No. 3478
local Freight Tariff No. 1, C.R.C.,)
U.C. EXPRESS AND STORAGE CO.)

ORIGINAL

IRVING W. LINER, for U.C. Express and Storage Co., respondent.

C. P. VON HERZEN, for American Van Lines, Lyon Van Lines and Bakers Transfer and Storage Co., protestants.

JACKSON W. KENDALL, for Bekins Van Lines, Inc., protestant.

CHARLES G. LONG, for Lyon Van Lines, Inc., protestant.

E. L. VAN DELLEN, JR., for Southern Pacific Company, interested party.

BY THE COMMISSION:

O P I N I O N

It becomes the province of the Commission in this re-opened proceeding to determine from the evidence of record whether U.C. Express and Storage Co., hereafter called U.C., acquired a prescriptive right to transport household goods from the San Francisco Bay area to points in California south of Gilroy and Escalon.

Public hearing was held January 19 and 20, 1942 in San Francisco before Examiner Howard. Prior to submission of the case on the last mentioned date counsel for protestants moved to strike certain testimony of witnesses appearing for U. C. Protestants were advised that the motion would be considered and the ruling thereon included in the decision setting forth the Commission's conclusions and judgment as to the case. The respective parties to this proceeding were granted permission to file briefs treating with both the motion and the case proper. These have been received and considered together with the evidence of record.

The occurrences preceding the reopening of this case are varied and somewhat complex. The essential happenings will be summarized as simply as practicable. On October 17, 1932, by Decision No. 25261, in Case No. 3226, U. C., among others, was found to be operating as a common carrier between San Francisco, Los Angeles and intermediate points without authority and was ordered to cease such operation until a certificate of public convenience and necessity was obtained or the right to continue service was otherwise established. Such decision by its terms was not to become effective until January 1, 1933, and it provided further that if U. C. filed a tariff prior to that date the order was to be ineffective as to service covered by such tariff allowed to go into effect, or justified, if the tariff was suspended. Pursuant to said decision U. C. filed a tariff naming rates generally between the San Francisco Bay area, Los Angeles and intermediate points. This tariff was suspended by the Commission pending investigation thereof. Such suspension proceeding was designated as Case No. 3478. In addition to filing the tariff U. C. made application for a certificate of public convenience and necessity authorizing it to act as a common carrier of household goods, furniture and related articles between the points covered by its tariff. This filing became formally Application No. 18655. The suspension case and the application were heard on a consolidated record. Subsequently on April 30, 1934, Decision No. 26993 was issued approving the tariff as to certain points, which were generally between the San Francisco Bay area, Escalon and Gilroy, but ordering U. C. to cancel rates not specifically approved which comprised those applying to points south of Gilroy and Escalon. Application No. 18655 was denied. Such decision was affirmed by Decision No. 27301 after a rehearing held at the request of U. C. Thereafter U. C. requested another

rehearing. This last petition was filed too late to stay the effective date of the order hence the operative rights of U. C. became co-extensive with the tariff as partially approved by Decision No. 26993. Although further hearing was held and additional evidence introduced, no decision was issued in connection therewith. After a considerable lapse of time it was deemed advisable to reopen the proceeding to afford U. C. another opportunity to present evidence in support of its position. This was done and hearing was held, as above stated, in connection with both Application No. 18655 and Case No. 3478. During the course of the hearing U. C. determined to rely solely on evidence claimed to establish prescriptive rights and hence requested dismissal of its application for a certificate of public convenience and necessity. Therefore Application No. 18655 was subsequently dismissed. Hence only the evidence relating to operations performed by U. C. on and prior to May 1, 1917⁽¹⁾ will be considered hereinafter.

Several witnesses employed by U. C., both prior to and after May 1, 1917, testified as to transportation to points south of Gilroy and Escalon. Such witnesses gave evidence generally as to service performed by U. C., before the statutory date, between east bay cities and Los Angeles, Pasadena, Hollywood, Bakersfield, San Luis Obispo, Santa Barbara, Long Beach, San Diego, Modesto, Merced, Fresno, Altadena, San Martin, Santa Maria and King City. It was alleged also by one witness that various points intermediate to

(1) The Auto Truck Transportation Act, Statutes 1917, Chapter 213, required common carriers by motor vehicle to obtain certificates of public convenience and necessity before commencing operations after May 1, 1917.

those named were served. This same witness said that where the term "east bay points" was used it was intended to include San Francisco. All of the witnesses testified from memory without any documentary evidence to refresh recollection. A time book was introduced in evidence which showed who some of the employees of U. C. were prior to May 1, 1917 but this exhibit did not contain any reference to origins or destinations of shipments. It was stated by the manager of U. C. that only meager records were kept in the early days and that most of them were destroyed by fire in 1922. A Mr. Dagner was said to have been the U. C. driver who made most of the long trips. He did not testify at this hearing. However, another witness said Dagner made twelve trips to Los Angeles as a driver for U. C. before May 1, 1917 and also trips to other distant points south of Escalon and Gilroy, prior to the statutory date.

When U. C. rested its case, counsel for protestants moved to strike the testimony of U. C.'s witnesses in so far as it related to operations alleged to have been conducted by U. C. before May 1, 1917. The reasons advanced were that such testimony was too remote, speculative and not ordinarily within the remembrance of persons. The motion to strike is hereby denied as we choose rather to determine the matter upon its merits. The sworn statements of these witnesses are admissible. The weight to be accorded such testimony will now be discussed.

The lack of specific data is apparent immediately from a review of the evidence adduced. Neither the names nor the addresses of consignors and consignees for whom U. C. is alleged to have transported property is stated. The exact dates of movements claimed to have been made are not given. The origins and

destinations to and from which service was said to have been performed are referred to in vague general terms. Certain inconsistencies in the evidence are plain. Dagner was said to have made twelve trips to Los Angeles as well as trips to other points between Los Angeles and the bay area before May 1, 1917. The evidence shows that at that time it took seven days on the average to make a round-trip from an east bay city to Los Angeles. The time book of U. C. introduced in evidence shows that Dagner was employed from March 29 to May 25 in 1916, a period of 58 days. It is obvious that if Dagner had done nothing during such period but travel between the bay area and Los Angeles he would have had time to complete only eight round-trips. This discrepancy may be explained by the testimony of the manager of U. C. who said that prior to the time Dagner was on the payroll of U. C., the latter contracted with Dagner to haul most of its long distance movements in Dagner's own truck. The witness may have been confused as to the number of trips Dagner made as an independent contractor and the number made as an employee of U. C.

Great stress was laid on the fact that a fire occurred in 1922 and destroyed most of the U. C. records relating to transportation movements. However, at the previous hearing this was not mentioned. Furthermore the evidence shows that U. C. kept no real records until sometime after 1922 relying on word of mouth arrangements or oral agreements.

The manager of U. C. stated that he did not know of the Commission's order directing U. C. to cease operations as a highway common carrier until it obtained a certificate of public convenience and necessity. However, another witness who solicited business for U. C. testified that he was told to stop further

solicitation in 1933 because of such Commission order. There may have been some confusion about the status of the order referred to as a result of the subsequent petitions for rehearing and the filing of other related pleadings.

It is interesting to note also that while some of the witnesses, who testified unequivocally that U. C. transported shipments as far south as Los Angeles before May 1, 1917, were employed by U. C. prior to 1917 and still work for the company they did not testify at previous hearings in this matter.

In our opinion the evidence presented on behalf of petitioner is so insubstantial that it is entitled to but little weight. The only testimony offered is of isolated occasional movements to different points. Under these circumstances it must be held that there is no substantial evidence to support a finding of operations in good faith on May 1, 1917 between fixed points or over a regular route. Therefore, after a careful review of the evidence adduced in this proceeding it is our judgment that petitioner has failed to show that it was in fact conducting operations as a highway common carrier between any points in California south of Escalon and Gilroy on or prior to May 1, 1917. This proceeding will be dismissed.

O R D E R

A public hearing having been had in the above entitled proceeding, evidence adduced, briefs filed, the matter submitted and the Commission now being fully informed therein,

IT IS HEREBY FOUND that U. C. Express and Storage Co., a highway common carrier, was not operating as a highway common carrier to, from or between points in California south of Escalon and Gilroy on or prior to May 1, 1917.

IT IS ORDERED that this proceeding is hereby discontinued.

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

Dated at San Francisco, California, this 14th day of December, 1943.

James R. Havenue

Justus F. Galeano
Arthur Pacheco

Francis A. Clary
COMMISSIONERS