

Decision No. 36971

BEFORE THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Investigation by)
the Commission, upon its own motion,)
into the operations of HIGHWAY EXPRESS)
AND FORWARDING COMPANY, as an express)
corporation.)

Case No. 4655

ORIGINAL

WALTER S. CLAYSON, for Highway Express and Forwarding Company, respondent.

I. L. LONGWORTH, for Southern California Freight Lines and Southern California Freight Forwarders, interested parties.

WYMAN C. KNAPP, for Transportation Department.

BY THE COMMISSION:

O P I N I O N

In this proceeding the Commission instituted upon its own motion an investigation into the operations, practices, rates, rules, regulations and charges of Highway Express and Forwarding Company, a corporation (the respondent herein), to determine whether it had abandoned any service it may previously have conducted as an express corporation, as defined by section 2(k), Public Utilities Act, or as a freight forwarder, as defined by section 2(ka), or as both; and whether any such operative right should be revoked because of such abandonment. A public hearing was had before Examiner Austin at Los Angeles, when the matter was submitted on briefs, since filed. The Transportation Department called an inspector of the Truck and Stage Division, and offered certain documentary evidence. Respondent's showing was made through its president, who voluntarily testified in its behalf.

The contentions of the respective parties may be briefly stated. The Transportation Department asserts that during the years 1940 and 1941, respondent, without previously having obtained the Commission's consent, had discontinued its operations and had provided no service to the public; and that former customers requesting service were referred by respondent to other carriers, who served them directly and retained the transportation revenue, sharing none of it with respondent. Respondent, on the other hand, contends that it has been ready and able to provide the service through underlying carriers; that it actually has done so, though these transactions did not appear on its books; that since respondent expressly disclaimed an intention to abandon the service, no presumption of abandonment can arise from the absence of any revenues; and that the revocation of respondent's operative right--a matter resting within the Commission's discretion--would interfere with the war effort, and, under present conditions, would be inequitable.

Respondent's authority to operate rests upon the "grandfather" provisions of section 50(f), Public Utilities Act. It is predicated upon operations conducted in good faith by respondent's predecessor, Willard E. Mullikin, Jr., on and prior to August 1, 1933.⁽¹⁾ The operative right was acquired by respondent from Mullikin pursuant to Decision No. 27615, rendered December 22, 1934, in Applications Nos. 19592 and 19593. That decision, however, did not define the precise nature of the operation, referring to it merely as "an express and forwarding business" conducted by Mullikin.

(1) Re Pacific Motor Transport Co., 39 C.R.C. 242, (Decision No. 27593, rendered December 17, 1934). Here, the existence and validity of respondent's operative right was recognized, but it was not defined.

In its published tariff, respondent has designated the points which it undertook to serve. The tariff filed by Mullikin, effective September 26, 1934, and subsequently adopted by respondent, specified some 511 points, extending from the San Francisco Bay Area, Modesto and Bishop, on the north, to San Diego, El Centro and Blythe, on the south, scattered throughout an area embracing more than half the state.

Mullikin, it was shown, had entered into written agreements with eleven highway common carriers to provide the underlying service. All of these contracts were negotiated during 1934; none has been filed since. No contract between respondent itself and any underlying carrier has ever been filed.

During a conversation between the Commission's inspector, Wm. M. Larimore, and respondent's president, Harry S. Payne, which occurred in July, 1942 at the latter's office in Corona, Payne described the character and extent of respondent's activities. Payne stated, so Larimore testified, that he was not actively soliciting any business for respondent. Occasionally, he received telephone calls from those desiring to ship by respondent but these inquirers were referred to another common carrier whom he believed suitable to handle the transportation. Respondent derived no revenue whatever from these transactions. It issued no freight bills covering these shipments, they being issued directly by the carrier actually transporting the traffic. Respondent had conducted no operations for a long time, so Payne stated; he could not remember exactly when it had last handled any shipments. Although requested by Larimore to produce the freight bills covering shipments last handled by respondent, Payne was unable to do so.

To indicate the character of the business conducted by respondent, copies of its annual reports, filed with the Commission,

for the years 1940 and 1941 were offered. They reveal certain facts which may be summarized. Respondent, it is stated, owned no rolling equipment. No payments had been made by respondent to any other carrier for the transportation of express. Due allegedly to respondent's methods of operations, no record of any shipments appears on its books. No revenues were reported; because of the method of operation these were shown, assertedly, in the books of the underlying carriers alone. And for the same reason, no operating expenses were recorded. Respondent had no direct employees, all being employed and compensated by the underlying carriers. The record also shows that throughout the period, 1933 to 1939, inclusive, gross operating revenues of varying amounts were reported. ⁽²⁾

Respondent's defensive showing was presented through Payne, its president, and principal shareholder. Other companies, which he controls, operate as radial, as highway contract, and as highway common carriers, respectively, and also conduct a public warehouse at Corona, where his headquarters are maintained. Some

(2) The annual gross operating revenue reported to the Commission during the years 1933 to 1939, inclusive, as shown by Exhibit No. 4, are as follows:

<u>Year</u>	<u>Gross Operating Revenue</u>
1933	\$ 2,403.51
1934	7,167.71
1935	12,027.07
1936	7,220.41
1937	798.62
1938	2,696.97
1939	<u>1,626.75</u>
Total	\$33,941.04

Revenues for 1933 and 1934 were reported by Mullikin; those for the following years were reported by respondent.

Of the total revenue received by respondent during the period, 1935 to 1939, inclusive, aggregating \$24,369.82, the sum of \$19,247.48 represents the earnings during 1935 and 1936, the first two years of operation, or an average of \$9,623.74 per year. For the remaining three years the revenues totaled \$5,122.34 -- an average of \$1,707.44 per year.

58 units of equipment, he stated, are used in the trucking operations.

Payne described the general nature of respondent's business. It operated either as an express corporation or as a freight forwarder; he did not specify the type of operation actually conducted. Prior to 1940, respondent itself provided a pickup and delivery service, the line-haul service being furnished through underlying carriers. Generally, its traffic moved between Los Angeles and the Imperial Valley, the San Joaquin Valley and San Francisco; the greater share, however, was handled within a 75-mile radius from Los Angeles.

Respondent's failure to report any revenues for 1940 and 1941 was attributable, Payne testified, both to decreasing business and to poor accounting methods. Due to lack of cooperation among the underlying carriers, he said, the traffic actually had declined. At Los Angeles, Associated Carriers, acting as the representative of the highway carriers using the terminal at 1201 East 5th Street in that city, since 1940 had provided terminal facilities, had performed a pickup and delivery service, had billed all merchandise, and had collected all charges payable at Los Angeles. Charges payable at other points were collected by the line-haul carriers individually. A large share of the traffic formerly enjoyed by respondent, he stated, moved over the lines now using this terminal. Under an arrangement between Associated Carriers and the highway carriers, terminal employees were carried on the former's payroll. Respondent had arranged with the underlying carriers and with Associated Carriers that the latter should handle directly the business offered for respondent's account.

Denying that respondent ever had abandoned or had intended to abandon, its operations, as an express corporation or as a freight

forwarder, Payne asserted that it stood ready and willing to provide such a service; that it had kept its tariffs up to date; and that it had pickup equipment available for use. A need for the service exists, he stated. At present, because of the war emergency, terminals are congested and there is a shortage of both manpower and equipment. It is respondent's expectation, however, to become more active in the future.

As stated, the primary issue presented is the asserted abandonment of respondent's operations. This necessarily involves an inquiry into the nature of its duties as a common carrier. The record does not disclose whether respondent's operations were those of an express corporation or a freight forwarder. ⁽³⁾ However, we need not determine that question. It will be sufficient to ascertain whether respondent, viewed in either capacity, has performed the duties resting upon it. We shall consider the essential characteristics of these obligations, dealing first with those of an express corporation.

As defined by section 2(k), Public Utilities Act, an express corporation is a common carrier engaged in the business of transporting property for compensation "on the line of any common carrier or stage or auto stage line...." It need operate no motor

(3) The tariff filed by respondent's predecessor and adopted by respondent (Exhibit No. 2) purports to be a local express tariff prescribing both class and commodity rates for the transportation of express. This would indicate that respondent had held itself out as an express corporation. Payne characterized respondent either as an express corporation or as a freight forwarder operating over the lines of other common carriers. (Tr. p. 25) However, the annual reports for the years 1940 and 1941, filed by respondent, state that it had operated as a freight forwarder (Exhibits Nos. 5 and 6, pp. 10 and 14).

vehicle equipment of its own.⁽⁴⁾ Through the instrumentality of another common carrier it offers to provide for the public a complete transportation service from origin to destination of the traffic tendered, under its own published tariffs.⁽⁵⁾ An express corporation may contract with the underlying carrier for the transportation of its traffic at rates differing from those published in the latter's tariff.⁽⁶⁾

A freight forwarder, as defined in section 2(ka), Public Utilities Act, undertakes the collection and shipment of the property of others, and as consignor or otherwise, ships or arranges to ship such freight over the line of a common carrier at the latter's tariff rates; or acting as consignee, receives such shipments. This, of course, must be in the nature of a public undertaking.⁽⁷⁾

Each type of carrier alike undertakes to deal directly with the public, offering to perform for all shippers seeking to avail themselves of its facilities the character of service appropriate to the business in which it is engaged. Neither can delegate that duty to an underlying carrier; this is a function which the overlying carrier cannot surrender. We shall now inquire whether respondent has met this test.

The record as a whole establishes certain significant facts. Respondent, it was shown, since 1939 has solicited no business, referring all requests for service to another carrier,

(4) Re Pacific States Express, 22 C.R.C. 925, 926.

(5) Re Elmer E. Frost & Co., 31 C.R.C. 668, 670.

(6) Re Pacific States Express, supra, at p. 932.

(7) Re Mutual Shippers Assn., 43 C.R.C. 786, 792.

which actually transported the traffic. It has no employees in its service. It has neither owned nor used any rolling equipment. It has performed no pickup and delivery service. It has issued no shipping documents. Other than the contracts of its predecessor, to which it succeeded, respondent has entered into no written agreement with any underlying carrier. And finally, it has received no revenue nor incurred any expense attributable to operation as an express corporation or as a freight forwarder.

Respondent, it was shown, has undertaken no direct responsibility to the public to provide any transportation service. Instead, it has shifted that burden to others who themselves have directly performed the service, borne the expenses of operation, and retained the revenues. The latter cannot be regarded as underlying carriers since respondent itself never assumed in relation to them the status of an overlying carrier. Respondent's failure to issue shipping documents, to participate in the revenues and to share the costs of operation negative any intention on its part to continue in the transportation business. The obligation to provide service cannot be delegated; one may not do so and still remain a common carrier.⁽⁸⁾

It is well settled, under our rule of decision, that a common carrier may not abandon its operations without the Commission's consent.⁽⁹⁾ It rests under the obligation to continue the service which it has offered.⁽¹⁰⁾ Should it abandon operations without

(8) Re J. K. Nelson, 44 C.R.C. 225, 227, 228.

(9) Re De Luxe Transp. Co., 17 C.R.C. 565, 567; Pickwick Stages v. Craig, 18 C.R.C. 516, 521; Re California Transit Co., 21 C.R.C. 211, 215; Re M. Haydis, 22 C.R.C. 944, 947; Re S. H. Tobias, dba Elmer E. Frost & Co., 34 C.R.C. 444, 446.

(10) Encinal Terminals v. Parr-Richmond Terminal Corp., 39 C.R.C. 4, 9.

(11)

proper authority, its operative rights may be revoked.

The revocation of its operative right, respondent contends, would be inequitable under prevailing war conditions. Assertedly, the harm it would suffer from such a step would offset the public benefit; the public has not been injured by its conduct; respondent still has the facilities to resume operations; and it should be permitted to meet the conditions responsible for the present situation. Respondent suggests that the Commission formulate a plan under which it may serve the shippers more effectively.

Respondent, we are convinced, has shown no equities sufficient to warrant the preservation of its operative right. As an experienced carrier it is well aware of its duty to continue the operation of its service unless relieved by the Commission from so doing. The public would be deprived of no needed transportation service, since it would continue to patronize the former underlying carriers. And the holders of dormant operative rights should not be encouraged to traffic in them, nor be permitted to reassert them in order to compete with other carriers who meanwhile have adequately served the field. Accordingly, respondent's operative right will be revoked.

O R D E R

An investigation having been instituted as above entitled; a public hearing having been had; the matter having been duly submitted; and the Commission being now fully advised,

IT IS ORDERED as follows:

(1) That the operative right now owned and held by

(11) Re M. L. O'Callaghan, 42 C.R.C. 264, 268; Re Vessel Operations, 43 C.R.C. 50, 53, 65; Re J. R. Martin, 28 C.R.C. 210, 213.

respondent Highway Express and Forwarding Company, a corporation, both as an express corporation, as defined by section 2(k), Public Utilities Act, and as a freight forwarder, as defined by section 2(ka) of said Act, or as either such express corporation or freight forwarder, acquired by respondent from Willard E. Mullikin, Jr. pursuant to Decision No. 27615, rendered December 22, 1934, in Applications Nos. 19592 and 19593, between any and all points which respondent has heretofore served as such express corporation and freight forwarder or either thereof, be and it hereby is revoked, cancelled and annulled.

(2) That respondent Highway Express and Forwarding Company be and it hereby is required to abstain from any operation as such express corporation and as such freight forwarder, or either thereof, as described in paragraph (1) hereof.

(3) That any and all tariffs and time schedules filed with the Commission by respondent Highway Express and Forwarding Company and now in effect, relating to the operations described in paragraph (1) hereof, be and they hereby are, and each of them is, cancelled and annulled.

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

Dated at San Francisco, California, this 4th day of April, 1944.

Richard L. Lusk
Justus F. Calver
Francis C. Havens
Wm. W. Clark
Frank J. Tamm
COMMISSIONERS