Decision No. 37016

ORIGINAL

BEFORE THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of CANTON EXPRESS COMPANY to sell and A-B-C TRANSFER & STORAGE CO., INC., to purchase an automobile freight line operated between San Francisco and Oakland, Alameda, Emeryville and Berkeley, California.	Application No. 25182
INTERURBAN EXPRESS CORPORATION, a corporation, KELLOGG EXPRESS AND DRAYING COMPANY, a corporation, MERCHANTS EXPRESS CORPORATION, a corporation, UNITED TRANSFER COMPANY, a corporation, PEOPLES EXPRESS COMPANY, a corporation, A. PASTERIS, an individual dba EAST BAY DRAYAGE AND WAREHOUSE COMPANY, LOUIS ERICKSON, dba WEST BERKELEY EXPRESS AND DRAYING COMPANY, and HASLETT WAREHOUSE COMPANY, a corporation, Complainants, vs. FRANK WONG DUN, an individual, dba CANTON EXPRESS COMPANY and A-B-C TRANSFER & STORAGE CO., INC., a corporation, Defendants.	Case No. 4652

BEROL & HANDLER, by EDWARD M. BEROL, for Frank Wong Dun, doing business as Canton Express Company, and A-B-C Transfer & Storage Co., Inc., applicants in Application No. 25182 and defendants in Case No. 4652.

DOUGLAS BROOKMAN, for Interurban Express Corporation, Kellogg Express and Draying Company, Merchants Express Corporation, United Transfer Company, Peoples Express Company, A. Pasteris, doing business as Eastbay Drayage and Warehouse Company, Louis Erickson, doing business as West Berkeley Express and Draying Company, and Haslett Warehouse Company, protestants in Application No. 25182 and complainants in Case No. 4652.

BY THE COMMISSION:

O P I N I O N

These proceedings, which were consolidated for hearing and decision, involve the scope and extent of an operative right as a highway common carrier sought to be transferred by applicant Frank Wong Dun, doing business as Canton Express Company, to applicant A-B-C Transfer & Storage Co., Inc.,[1] which also forms the subject of a complaint filed by certain common carriers operating between San Francisco and Eastbay points. A public hearing was had before Examiner Austin at San Francisco when the matter was submitted on briefs, since filed.

By Application No. 25182 applicant A-B-C Transfer proposes to acquire from applicant Canton Express an operative right as a highway common carrier allegedly authorizing the transportation of general commodities between San Francisco and Oakland, Alameda, Emeryville and Berkeley. To the consummation of this transfer, the complaining carriers have objected, asserting that the operative right is subject to certain limitations, presently to be described.

Certain transbay carriers named in the caption,[2] by their

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(1) For brevity, applicants Frank Wong Dun, an individual doing business as Canton Express Company, and A-B-C Transfer & Storage Co., Inc., (a corporation) will be referred to, respectively, as Canton Express and as A-B-C Transfer. Canton Express will also be designated, at times, as the defendant or as defendant Dun.

(2) Other than Haslett Warehouse Company, all of the complainants are highway common carriers operating, in part, between San Francisco, on the one hand, and Oakland, Alameda, Emeryville and Berkeley, on the other hand, excepting West Berkeley Express and Draying Company which does not operate between San Francisco, on the one hand, and Oakland and Alameda, on the other. Haslett Warehouse Company is an express corporation operating through underlying carriers between San Francisco and Oakland, Alameda, Emeryville and Berkeley.

complaint in Case No. 4652, have questioned the operative right sought to be transferred, asserting that it is limited not only as to the scope of operations permissible thereunder, but also in respect to the communities that may be served. Allegedly, defendant Canton Express had engaged only in the transportation of "Chinese merchandise," for shippers of that nationality, between San Francisco and Oakland alone. If this defendant ever had held a more comprehensive operative right, it had been abandoned, so complainants claimed, to the extent that it may have contemplated the performance of a service more extensive than that last described. By their answer, defendants Canton Express and A-B-C Transfer denied these charges. They also alleged affirmatively that by Decision No. 25960, rendered in 1933, the Commission had found that defendant Canton Express (3) was authorized, under its grandfather operative right, to transport general commodities between San Francisco and Oakland, Alameda, Emeryville and Berkeley; and that said defendant ever since had been engaged continuously in the performance of such a service.

The complaining and protesting transbay carriers (referred to hereafter as the complainants), are well qualified financially and by experience to provide this service. These carriers compete intensively with one another to participate in the transbay traffic, which is quite substantial in volume. It is an established fact that A-B-C Transfer, were it permitted to acquire the operation in question, would become a far more formidable competitor than Canton Express ever has been. It enjoys

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(3) Assertedly, others were associated with Dun as the owners of the operative right when the decision mentioned was rendered. However, by a transfer subsequently authorized, Dun became, and still is, the sole proprietor of the operation.

greater financial backing; it commands an extensive fleet of equipment; and because of connections with affiliated carriers, it reasonably could expect to obtain a substantial share of the trans-bay business. Its ability to provide the service, should the transfer be authorized, has not been challenged.

The issues raised by the parties may be summarized as follows:

1. Was the operative right in question defined and confirmed by Decision No. 25960, rendered by the Commission in 1933?

2. Has the conduct of Canton Express, subsequent to that decision, been such as to result in a partial abandonment of its operations, in that it has limited its service to the transportation of "Chinese merchandise" for people of that nationality?

3. Has the conduct of Canton Express since the rendition of that decision been such as to result in a partial abandonment of the operation, in that it has discontinued its service as to certain Eastbay points?

These will be considered in the order mentioned. At the outset, we shall discuss the 1933 decision.

The operative right with which we are concerned arose under the "grandfather" clause of the Auto Truck Transportation Act (Stats. 1917, Chap. 213, as amended). It rests upon operations, established originally in 1912, in which the predecessors of defendant Dun actually were engaged on May 1, 1917, the critical date prescribed by that statute. Its scope was determined by Decision No. 25960, rendered May 22, 1933, in Case No. 3505 (Re Frank Wong Dun, et al, 38 C.R.C. 727).

By that decision Canton Express was held to be a "transportation company," as highway common carriers were then designated; the extent of its operative right was defined; and

the continuation of its operations was authorized. In that proceeding the Commission had suspended a tariff filed by Canton Express, it appearing that that carrier held no certificate under the 1917 statute, nor had it ever before filed a tariff. With a single exception,[4] the protestants there were identical to those appearing here. The Commission found that on May 10, 1917,[5] and continuously thereafter, Canton Express had been operating in good faith as a common carrier by motor truck between San Francisco and Oakland, Alameda, Emeryville and Berkeley, and that it was entitled to maintain such a service between these communities. The order expressly authorized the continuation of this service, under proper tariffs.

The decision dealt specifically with the characteristics of the operation actually conducted by Canton Express. The traffic handled, it was stated, consisted mainly "of Chinese merchandise" transported for consignors and consignees of that nationality. However, the opinion continued, "Freight for other than Chinese has been and will be accepted by the Canton Express, but it is not solicited." The protestants therein introduced no testimony, conceding, instead, "...that the Canton Express as such had without doubt been rendering a transportation service to the public during the past twenty years or more."[6]

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(4) West Berkeley Express and Draying Company, one of the protestants in the instant proceeding, made no appearance in Case No. 3505.

(5) In Decision No. 25960 the Commission found(38 C.R.C. at p. 729) that on May 10, 1917 (referred to therein as the effective date of the Auto Stage and Truck Transportation Act), Canton Express was actually operating in good faith as a common carrier by truck between San Francisco and certain Eastbay points. As the critical date prescribed by that statute was May 1, 1917, the finding obviously was erroneous. From the context it is clear that the Commission had in mind the correct date and the decision should be read accordingly.

(6) 38 C.R.C. at pp. 728, 729.

The parties to the present proceeding are of divergent views concerning the significance of this decision. As regarded by defendant Canton Express, it upheld the right of that carrier to serve the public generally; and having become final, it may not now be attacked collaterally. Protestants contend, on the contrary, that the opinion on its face discloses that Canton Express never had offered to handle other than Chinese traffic. The concession of protestants in that proceeding to the effect that Canton Express had served the public generally should be construed, so protestants herein assert, in the light of the fact that this admission assertedly had been induced by the affidavit of Frank Wong Dun, introduced in evidence in Case No. 3505 and also made a part of the present record, which alleged, in substance, that the service had been designed essentially to accommodate the Chinese trade. Had this affidavit not been presented, it is claimed, the protestants in the earlier proceeding would have made a complete defensive showing.

Protestants' contentions, we are convinced, cannot be upheld. On its face Decision No. 25960 unequivocally established the right of Canton Express to transport general commodities for the public at large; it imposed no limitation regarding the nature of the traffic to be handled nor the characteristics of the shippers to be served. This decision, long since final, is not now susceptible to collateral attack. There is no claim that it is void on its face. And we are not at liberty, in this proceeding, to review the evidence underlying that decision in order to arrive at its meaning.

Obviously, this decision defined the operative right of Canton Express as it then existed. We shall now consider whether that operative right subsequently was partially abandoned, as claimed by complainants.

During recent years, complainants contend, defendant Canton Express has served only the Chinese trade, and consequently, they assert, any right it may have possessed to handle other traffic has been abandoned. Defendant, on the other hand, contends that its service has been made available to the public at large.

Dun, the proprietor of Canton Express, who is of Chinese descent, testified that defendant continuously has maintained its principal office and terminal in Chinatown, San Francisco, and had also maintained a terminal at a garage in Chinatown, Oakland. Both areas are inhabited by people of Chinese descent, who conduct within these districts business institutions of various types. Defendant's telephone is listed in the San Francisco China Exchange. To provide the service defendant operates four trucks, one of which is used to transport transbay shipments, the other three being employed within San Francisco to handle local traffic. The service is available daily excepting Sundays and holidays. Chinese drivers only are employed. Commodities of all descriptions have been carried.

The character of the traffic handled was described by defendant Dun, who produced summaries of that actually moving. Dun asserted he had handled merchandise tendered by all shippers indifferently. He denied that the service ever had been limited to those of Chinese descent. On no occasion, he stated, had he refused to transport shipments offered by others. The pickup and delivery service, he said, extended to points beyond the boundaries of Chinatown both in San Francisco and in Oakland. Admittedly, he

had neither solicited nor advertised extensively for business.

Statements were introduced summarizing the shipments moving between San Francisco and the Eastbay points served, during selected periods in 1938, 1939, 1940, 1941 and 1942. Admittedly, these did not include all of the traffic handled, the statements being designed rather to reflect the general trend of the movement. Summaries of the shipments carried between San Francisco and Alameda, Berkeley and Emeryville were also offered, covering traffic moving during the years 1934 to 1938, inclusive.

From these summaries it appears that since the rendition of the 1933 decision the tonnage handled by defendant Canton Express for the Chinese trade largely preponderated. While defendant did not intentionally limit its service to business of this character, nevertheless, the circumstances surrounding the operation operated effectively to that end. Notwithstanding this fact, a substantial part of the traffic, it was shown, was transported for shippers other than those of Chinese descent.

The record, in our judgment, impels the conclusion that defendant Canton Express has not dedicated its facilities to the service of those of Chinese descent exclusively. We therefore hold that defendant has not abandoned its right to serve the public generally. Although this finding might well foreclose further discussion of the subject, it is not inappropriate to touch briefly upon the propriety of complainants' contentions. The acceptance of racial distinction as a basis for the classification of those to be served by a carrier would set up a standard vulnerable to the objection that it is both uncertain and impracticable. The application of such a rule would necessarily involve inquiries into the racial characteristics and antecedents of both shippers

and consignees. Border-line cases might present insuperable difficulties. Such a test would open the door wide to discrimination of the rankest sort. And if the racial characteristics of the shipper should be adopted as a proper means to measure the sphere of the carrier's dedication, why should not language, religion or political creed be likewise accepted as a basis for classification? Clearly, the standard of racial characteristics is contrary to the public interest. The field within which a carrier may operate should not be thus defined.

This brings us to the question whether defendant Canton Express has lost, by abandonment, the right to serve any of the points which the Commission held, in Decision No. 25960, that it was entitled to serve.(7)

Complainants contend that Canton Express has discontinued its service to and from Eastbay points other than Oakland; and that as to Oakland itself, an eastbound service only has been maintained. Defendant challenges this contention, asserting, on the contrary, that service has been regularly provided in both directions, between San Francisco and Oakland, Alameda, Emeryville and Berkeley. The showing in this regard rests upon the testimony of defendant Dun and upon the summaries of shipments previously mentioned.

The testimony of defendant Dun indicates that all of these communities have been served regularly. Traffic was picked

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(7) As stated, defendant's right to serve these points was established by Decision No. 25960. There it was found as a fact (38 C.R.C., at p. 729) that on May 10, 1917 Canton Express was, and continuously thereafter had been, "operating as a common carrier trucking service between San Francisco and Oakland, Alameda, Emeryville and Berkeley....." By its order the Commission authorized the continuance of that service.

up daily in San Francisco, he stated, and delivered at Oakland, Alameda, Berkeley and Emeryville. And shipments were picked up, at the direction of the shipper, at these Eastbay points for transportation to San Francisco. Oakland, it appears, ordinarily was served daily, Berkeley five times a week, Emeryville two or three times a week, and Alameda once or twice weekly. No merchandise offered for transportation between these points, he asserted, has ever been refused.

The summaries of shipments, referred to above, reveal a constant and substantial flow of traffic from San Francisco to all of these points, and a smaller movement westbound. The greater share of the eastbound traffic moved to Oakland and Berkeley but there was a continuing and steady movement to the other two communities. In the opposite direction traffic moved from all of these points, with the larger share originating at Oakland. Defendant, it was shown, held itself out to serve all of these cities. It never has refused to carry any shipment tendered. It possessed adequate terminal facilities and equipment to handle all of the traffic offered. We conclude, therefore, that service to none of these points has been discontinued.

In our judgment the application should be granted, and an order will be entered accordingly.

Both the original and the amended application in Application No. 25182 recite that the consideration to be paid by A-B-C Transfer & Storage Co., Inc. for the operative right of Canton Express is $7,500. They further recite that no equipment or property other than such operative right is proposed to be transferred. Section 52(b) of the Public Utilities Act reads, in part, as follows:

> "The commission shall have no power to authorize the capitalization of the right to be a corporation, or to authorize the capitalization of any franchise or permit whatsoever or the right to own, operate or enjoy any such franchise or permit, in excess of the amount (exclusive of any tax or annual charge) actually paid to the State or to a political subdivision thereof as the consideration for the grant of such franchise, permit or right;...."

We have no knowledge of Canton Express having paid any sum to the State of California in connection with the acquisition of said operative right. In our opinion, the $7,500 paid for the operative right cannot be capitalized through the issue of securities and should not be permanently charged to Account 1511 Franchises. We believe that if A-B-C Transfer & Storage Co., Inc. acquires such operative right, it should charge $7,500 to Account 1550, Other Intangible Property, and during 1944 write it off by a charge to Account 2946, Other Debits to Surplus.

A-B-C Transfer & Storage Co., Inc. is placed upon notice that "operative rights" as such do not constitute a class of property which may be capitalized or used as an element of value in rate fixing for any amount of money in excess of that originally paid to the State as the consideration for the grant of such rights. Aside from their purely permissive aspect, they extend to the holder a full or partial monopoly of a class of business over a particular route. This monopoly feature may be changed or destroyed at any time by the State which is not in any respect limited to the number of rights which may be given.

In view of the conclusions announced the complaint will be dismissed.

O R D E R

A public hearing herein having been had and the Commission now being fully informed herein and good cause appearing,

IT IS ORDERED as follows:

(1) That the complaint in Case No. 4652 be and it hereby is dismissed.

(2) That Frank Wong Dun, an individual doing business as Canton Express Company, is authorized to sell and transfer, and A-B-C Transfer & Storage Co., Inc., a corporation, to purchase and acquire the operative right, as a highway common carrier, referred to in the foregoing opinion, under which general commodities may be transported between San Francisco and Oakland, Alameda, Emeryville and Berkeley, and thereafter to operate thereunder.

(3) That if applicant A-B-C Transfer & Storage Co., Inc. acquires said operative right, and pays therefor the sum of $7,500 it shall charge said sum to Account 1550, Other Intangible Property, and during 1944 it shall write off said sum of $7,500 by a charge of that amount to Account 2946, Other Debits to Surplus.

(4) That applicants shall comply with the provisions of General Order No. 80 and Part IV of General Order No. 93-A by filing, in triplicate, and concurrently making effective, appropriate tariffs and time tables within sixty (60) days from the effective date hereof, and on not less than five (5) days' notice to the Commission and the public.

(5) That in the event the authority to transfer is exercised A-B-C Transfer & Storage Co., Inc. shall notify this

Commission within ten (10) days of the actual date of the transfer.

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

Dated at San Francisco, California, this 25th day of April, 1944.

COMMISSIONERS