

Decision No. 38311

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 (a) author-)
izing it to abandon its vessel)
service between San Francisco Bay)
points, on the one hand, and Mare)
Island, Vallejo and Napa and points)
between Napa and Vallejo, on the)
other, (b) authorizing it to substi-)
tute a highway common carrier service)
in lieu thereof and (c) authorizing)
it to abandon its vessel service be-)
tween San Francisco and Richmond.)

ORIGINAL

Application No. 26523

REGINALD L. VAUGHAN, for applicant.

DOUGLAS BROOKMAN, WARD G. WALKUP and CLYDE L. EDDY,
for Vallejo Express Company and Merchants
Express Corporation, protestants.

BY THE COMMISSION:

O P I N I O N

Kellogg Express and Draying Co. has highway common carrier operative rights in general between San Francisco, Oakland, Richmond, Alameda, San Leandro and intermediate points, and between San Francisco, Sausalito, Mill Valley, San Rafael, Fairfax, Hamilton Field and intermediate points. It has a vessel operative right between San Francisco and Richmond, and a similar right between San Francisco, on the one hand, and Mare Island, Vallejo, Napa, and points between Napa and Vallejo, on the other hand. In conjunction with the latter vessel right it has a temporary highway common carrier operative right which expires February 28, 1946, which is in addition to a truck right between San Francisco and Napa to be operated in conjunction with its vessel operation.

In the above entitled proceeding applicant requests the authority of the Commission to abandon all of its vessel operative rights, and that it be issued a permanent certificate to conduct a highway common carrier service between San Francisco, on the one hand, and Mare Island, Vallejo and Napa and points between Napa and Vallejo, on the other hand, as a substitute for and in lieu of such vessel operative right.

On August 27, 1945, applicant filed an amendment to its original application requesting that it be given temporary authority to provide the above described substitute service during the pendency of this proceeding. A public hearing was had before Examiner Paul at San Francisco on August 29, and 31, 1945. The matter was submitted upon concurrent briefs which have been filed.

It is not necessary to discuss applicant's request for interim authority, as the entire matter will be disposed of at this time.

Applicant's engineer's report submitted in evidence (Exhibit No. 12) shows that for the six months period January 1 to June 30, 1945, applicant's out-of-pocket loss from its Vallejo vessel operation amounted to \$6,211. It was shown that if truck operation had been conducted in lieu of the vessel operation this out-of-pocket loss would have been reduced to \$1,013. The out-of-pocket saving for such period for applicant would have been \$5,198, which is equivalent to about \$800 a month. A balance sheet statement of applicant in evidence shows a net loss from all operations for the six months period ending June 30, 1945 to be \$38,048.44 (Exhibit No. 13).

However; the president of applicant testified that the estimates of the engineer were too conservative and, in his opinion, if the application were granted, sufficient economies could be effected to more than defray the out-of-pocket loss due to the vessel operation. Duplicate terminal facilities could be eliminated, and unnecessary transfers of shipments from truck to boat and boat to truck could be avoided, thereby eliminating excessive handling and damages to shipments accruing therefrom. There would also be additional savings of time of drivers and clerical help. He pointed out that applicant would also be able to provide a more efficient service under the proposed operation.

In 1941 applicant leased a wharf at Vallejo for a term of five years at a monthly rental of \$150. Evidence shows that this facility and the entrance roadway are in a very bad state of deterioration. Appropriate repairs to render the facility safe for continued use would cost about \$20,000. The owner refuses to make any repairs. No other wharf facilities at Vallejo are available which applicant could use for its vessel. Likewise at Napa no wharf is available, the one formerly used having become unfit for use was removed by its owner, the City of Napa.

Protestants contend that in so far as the operation between San Francisco and Napa is concerned the vessel operative right has been abandoned and therefore the granting of the right to applicant to operate trucks would be the granting of a new certificate for which there has been no showing of public convenience and necessity.

Decision No. 30107 granted a certificate to a predecessor

of applicant, authorizing highway common carrier service between San Francisco and Napa subject to the following conditions, among others:

"The authority herein granted for a highway common carrier service, as hereinabove defined, is to be operated in coordination and conjunction with the vessel service now being operated by applicant between San Francisco and Napa, said highway service to be operated only on alternate days from San Francisco to Napa, and only on alternate days from Napa to San Francisco."

Thereafter Decision No. 35307, among other things, modified the foregoing provision as follows:

"IT IS ORDERED that Decision No. 30107, dated September 17, 1937, be and it is hereby amended so as to permit Napa Transportation Company to operate the highway common carrier service therein authorized as traffic requirements demand, rather than on alternate days as now designated."

The record shows that applicant has not operated vessels between San Francisco and Napa since October, 1942. It contends, however, that Decision No. 35307 does not require the operation of vessel service between such points "...unless applicant, in its discretion, should operate the vessel because of the demand of traffic requirements." In support of this position applicant further relies on the certificate granted by Decision No. 35307 which authorized it to operate a highway common carrier service between Vallejo, on the one hand, and Napa, on the other hand, in coordination and in conjunction with existing vessel service between San Francisco and Vallejo.

Decision No. 30107 as modified by Decision No. 35307 is not free from ambiguity. However, even though the decision did not expressly permit the discontinuance of all vessel operations between San Francisco and Napa, we do not believe that such a construction of that decision by applicant indicated an intention to act in

disregard of the Commission's authority.

One of protestants' objections to the granting of this certificate is the financial condition of applicant. It asserts that the total assets of Kellogg as of June 30, 1945, including tangible and intangible property, was \$105,000. At that time the company had a deficit of \$214,526.53. It appears from the record that as of June 30, 1945, Mr. Lloyd Swayne, applicant's president, advanced \$105,000 without interest to the company on an open book account. In addition, San Francisco Warehouse Company had also made advances to applicant on an open book account without interest, which amounted to \$27,304.25 as of June 30, 1945.

Protestants assert that Mr. Swayne is financially able to conduct the operations of Kellogg as a hobby; that Kellogg's venture into vessel service between San Francisco and Vallejo and Napa cannot be salvaged, even with the further aid requested in the present proceeding; and that its motor truck operations as well as its vessel service should be terminated forthwith.

As previously stated, Mr. Swayne believes with the elimination of the boat operation that the truck service will return the out-of-pocket cost of operation. Even if the record showed conclusively that the service would be conducted at a loss, if Mr. Swayne wishes to continue to finance the company out of his personal financial resources in the hope that in the future it will be profitable, we believe that is a question of managerial discretion.

Protestants also contend that the territory under consideration is adequately served and needs no additional highway common

carrier service. It should be borne in mind, however, that applicant is now providing service in this territory, and to grant applicant's request would not place another carrier in this field. The Commission has heretofore stated:

"It would seem as a fundamental principal, that a utility in the field should be permitted to operate and serve its patrons in the most efficient and attractive manner. Where new devices or equipment have been perfected or methods of serving the public developed that are superior to the older ones, it is in the public interest to permit a utility to keep pace with such improvements within the limits of the district it serves." (Re East Bay Street Rwy's, 39, C.R.C. 252, 258)

The Commission has also in numerous decisions authorized carriers to substitute one form of transportation for another when it was shown that the service can be improved and conducted more economically. (Re Pacific Motor Transport, 38 C.R.C. 874, 878; 42 C.R.C. 745)

After full consideration of all the evidence of record in this proceeding, it is our conclusion that it is in the public interest to permit applicant to discontinue and abandon its vessel service and to authorize it to continue to conduct a highway common carrier service in lieu thereof as requested. Such will be the order.

Kellogg Express and Draying Co. is hereby 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.

O R D E R

A public hearing thereon having been held, the matter submitted, and it being hereby found that public convenience and necessity so require,

IT IS ORDERED as follows:

(1) That Kellogg Express and Draying Co. may discontinue and abandon all its vessel operation between San Francisco, on the one hand, and Mare Island, Vallejo and Napa and points intermediate to Vallejo and Napa, on the other hand, and between San Francisco and Richmond.

(2) That a certificate of public convenience and necessity is hereby granted to Kellogg Express and Draying Co. authorizing the establishment and operation of service as a highway common carrier, as defined in Section 2-3/4 of the Public Utilities Act, between San Francisco, on the one hand, and, on the other hand, Mare Island, Vallejo, Napa and points intermediate to Vallejo and Napa, heretofore served by vessel.

(3) That the operative rights granted by Decisions Nos. 30107, 35307, and 38173 and all vessel operative rights upon the inland waters of the State of California are hereby revoked and annulled.

(4) That in providing service pursuant to the certificate herein granted, the following service regulations shall be complied with:

1. Applicant shall file a written acceptance of the certificate herein granted within a period of not to exceed 30 days from the effective date hereof.
2. Applicant shall, within 60 days from the effective date hereof and on not less than one day's notice to the Commission and the public, establish the service herein authorized and 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 satisfactory to the Commission.
3. Subject to the authority of the Commission to change or modify it by further order, applicant shall conduct operations, pursuant to the certificate herein granted, over and along the following route:

U. S. Highway No. 40, State Highway 29 between San Francisco, Vallejo and Napa, with departures therefrom to serve authorized points..

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

Dated at San Francisco, California, this 16th day of Oct. 1945, 1945.

David Anderson
Justice F. Craven

Commissioners