

ORIGINAL

Decision No. 39402

BEFORE THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of)
WAYNE F. MALONEY an individual doing)
business as PENINSULA MOTOR EXPRESS,)
for a certificate of public convenience)
and necessity to transport property, as)
a common carrier, for compensation, over)
the public highways between San)
Francisco and San Jose, Agnew, Los)
Gatos, Los Altos and Permanente,)
California, and intermediate points.;

Application No. 24468

- CLAIR W. MACLEOD, CARL R. SCHULZ and ARTHUR GLANZ, for Wayne F. Maloney, doing business as Peninsula Motor Express, applicant.
- BEROL & HANDLER, for Highway Transport, Inc., Valley Motor Lines, Inc. and Valley Express Company, protestants.
- WM. MEINHOLD, for Southern Pacific Company and Pacific Motor Trucking Co., protestants.
- JOHN E. HENNESSY and FRED M. BIGELOW, for Pacific Southwest Railroad Association, protestant.
- DOUGLAS BROOKMAN, for Peninsula Delivery Service and Automotive Purchasing Co., Inc., protestants.
- HAROLD M. HAYS, for Intercity Transport Lines and Pioneer Express, protestants.
- EDWARD STERN, for Railway Express Agency, Inc., protestant.
- JOHN L. AMOS, JR., for Western Pacific Railroad Company, protestant.

O P I N I O N

By his application in this proceeding, Wayne F. Maloney doing business as Peninsula Motor Express seeks a certificate of public convenience and necessity under Section 50-3/4, Public Utilities Act, authorizing the establishment of a highway common carrier service between San Francisco, Los Gatos, San Jose and

(1) intermediate points. The granting of the application was protested by the carriers in the field. (2) Following public hearings had during 1942, the application, which was filed September 23, 1941, was dropped from the calendar. Thereafter, further hearings, extending from November 1944 to June 1945, were had before Examiner Austin at San Francisco, Palo Alto and San Jose. The matter was submitted upon briefs, subsequently filed.

In support of his proposal, applicant Maloney testified, describing in detail the service sought to be established. In addition, many shipper witnesses, engaged in business at San Francisco and at peninsula points, were produced. Through their respective operating officials, protestants described the service afforded this territory, and they also called various shipper witnesses.

Applicant plans to establish between San Francisco, San Jose and intermediate points and over the branch lines described, a twice daily service, affording, at San Jose and peninsula points,

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- (1) Applicant seeks authority to operate between San Francisco and San Jose and intermediate points, including Colma, South San Francisco, San Bruno, Lomita Park, Millbrae, Burlingame, San Mateo, Belmont, San Carlos, Redwood City, Menlo Park, Palo Alto, Mountain View, Sunnyvale and Santa Clara; between Mountain View and Permanente; between Palo Alto and Los Altos; between Sunnyvale and Los Gatos; between San Jose and Los Gatos; and between San Jose and Agnew. Subject to certain restrictions, service would be provided within a lateral zone extending one mile on each side of the routes described in the application, and within a radius of one mile of the cities and towns specified therein.
- (2) The carriers operating within the territory which applicant proposes to serve entered appearances as protestants. They comprise Highway Transport, Inc., Valley Motor Lines, Inc., Valley Express Company, Southern Pacific Company, Pacific Motor Trucking Company, Western Pacific Railroad Company, Railway Express Agency, Inc., Pacific Southwest Railroad Association, Peninsula Delivery Service, Automotive Purchasing Co., Inc., Intercity Transport Lines and Pioneer Express.

over-night delivery of shipments originating at San Francisco on the preceding day, and also according afternoon delivery of San Francisco shipments picked up that morning. To provide the service, some 15 units of equipment would be employed, including both line haul and pick up trucks. Terminals would be maintained at San Francisco, Palo Alto and San Jose, where pick up trucks would also be stationed. Shop facilities would be located at Palo Alto. The record indicates that applicant is financially qualified to conduct the service.

Applicant, as was shown, is an experienced truck operator. For some years, he has served the territory described, purportedly operating as a highway contract carrier under a permit duly issued by the Commission. That the service was conducted efficiently, clearly appears from the testimony of the shipper witnesses.

During the hearings had in 1942, shippers engaged in business both at San Francisco and at peninsula points were called in support of the application. Some were served under transportation agreements into which they had entered with applicant. Their dissatisfaction with the existing carriers centered around the slow service assertedly provided, and the delays encountered in the settlement of freight claims. Subsequently, protestants moved to strike the testimony from the record, on the ground it was too remote and that the record had become stale. The motion was denied by the presiding examiner - a ruling which is now affirmed. However, in weighing this evidence, we shall consider the long period which has since elapsed.

During the final series of hearings, applicant called some 57 shipper witnesses, of whom 20 were engaged in business in

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 San Francisco and 37 at various peninsula points: The tonnage which they offered, it was shown, moved regularly, in substantial volume. A wide variety of commodities was offered for transportation. Those produced at San Francisco were wholesale distributors; the peninsula shippers, for the most part, conducted retail establishments of various sorts.

Throughout the period covered by the hearing and during the preceding two years, the service supplied by the carriers in the field had been inadequate in many respects, so the San Francisco shippers testified. They complained of delayed pick ups, failure to pick up freight in response to calls, and pick up service accorded at inconvenient hours. Assertedly, the carriers had been derelict in the settlement of freight damage claims.

The peninsula shipper witnesses likewise voiced their dissatisfaction with the service afforded, during the period mentioned, by the existing carriers. Although no single shipper condemned every carrier (some even having expressed approval of the service rendered by one or more of the protestants), their complaints, nevertheless, considered collectively, embraced all of the carriers in the field. The service had been inadequate, they testified, because of delays encountered in picking up freight at San Francisco, in conducting the line haul transportation, and in effecting deliveries at peninsula points; because of the failure

(3) The peninsula shippers whom applicant called were distributed among these communities, as follows:

Redwood City	2
Menlo Park	1
Palo Alto	14
Mountain View	1
San Jose	18
Los Gatos	1

to pick up traffic both at San Francisco and at peninsula points; and because of the failure to deliver as a whole shipments which had been accepted for transportation, portions of such shipments having been lost or delayed. A few complained of shortages, or of damage caused by breakage. Some had suffered discourteous treatment at the hands of drivers. Many criticized the failure to settle freight damage claims promptly. A few, it was shown had complained to the carriers, without avail, concerning these conditions. Until two years preceding the hearing, some testified, these carriers had furnished a satisfactory service.

During the two year period preceding the final hearings, substantially all of applicant's shipper witnesses, it was shown, had used his service. Of the San Francisco shippers, two had entered into written transportation agreements with applicant; two had negotiated oral arrangements; and six, admittedly, had entered into no contractual relationship whatever. Of the peninsula witnesses called, three were served under written contracts; twenty-eight admittedly had entered into no contractual arrangements, either written or oral; and five made no reference to the subject.

These shippers, without dissent, expressed their approval of the service which applicant had supplied, asserting that it had been both adequate and expeditious. Universally, they testified that it was faster and more reliable than the service accorded by the existing carriers.

Through their operating officials, certain protestants described the service which they had supplied within this territory. Such a showing was made on behalf of Highway Transport, Inc.,

Valley Motor Lines, Inc., Valley Express Company, Intercity Transport Lines, Southern Pacific Company and Pacific Motor Trucking Company.⁽⁴⁾

The facilities provided and the service rendered by these carriers were fully described. The evidence dealt with the terminal facilities maintained at San Francisco and at various peninsula cities; with the equipment used to provide both the line haul and the pick up and delivery service; with the schedules observed; with the line haul operations; and with the pick up and delivery service afforded both at San Francisco and at peninsula points. Owing to war conditions, shortages of both manpower and equipment had developed, it was said. Needed equipment had been ordered but could not be delivered. To comply with the regulations promulgated by the Office of Defense Transportation, schedules maintained before the war had been greatly curtailed.

That the San Francisco pick up service was deficient, in many respects, was conceded. This was due mainly, it was said, to inexperienced drivers, who had replaced those called to the armed service or who had sought employment in war-time industries. Frequently these drivers had neglected to report missed pick ups to the dispatcher, with the result that the traffic could not be picked up until the shippers had called attention to the oversight. To facilitate the full loading of equipment, pursuant to war-time regulations, freight occasionally was held over. The carriers endeavored, it was said, daily to dispose of the freight brought

(4) The pick up and delivery service provided for Pacific Motor Trucking Company, at San Francisco, by Walkup Drayage Company, and at San Jose, by Security Truck Lines, was described by operating officials of those carriers.

to their terminals, thus avoiding congestion and delay. Because of war-time needs, the volume of traffic had increased substantially, it was shown.

Through their operating officials, both Southern Pacific Company and Pacific Motor Trucking Company, submitted data regarding the service which actually had been performed during representative periods. Owing to the preference necessarily accorded war-occasioned traffic, some delays had ensued, it appeared, in the delivery of freight throughout this territory.

To refute the charge of delayed delivery, preferred by the shipper witnesses, protestants pointed to their actual performance, during selected periods, as disclosed by their records. These records indicated that during the periods shown, no undue delays had occurred. The method of reviewing and adjusting freight damage claims was explained. These claims are paid, it was said, following investigation of their merits. Assertedly an effort was made to dispose of them promptly. Regarding the complaints of some peninsula shippers, who testified that shipments offered by certain San Francisco wholesale distributors had not been picked up promptly, protestants disclosed that these establishments delivered their freight directly to the carriers' San Francisco terminals; under the circumstances, it was contended, the latter could not be held responsible for any delays encountered.

Protestants called some 20 shipper witnesses, eight of whom were San Francisco wholesale distributors, and twelve were engaged in business at various peninsula communities, including Redwood City, Menlo Park, Palo Alto and San Jose. They testified, in substance, that they had used the service of one or more of the

protesting carriers for the transportation of their goods between San Francisco and peninsula points; that the service had been satisfactory; and that they required no additional transportation facilities to meet their needs. The San Francisco shippers also stated they had received no complaints from their peninsula customers regarding the service afforded by protestants. All of the firms represented, it was shown, were substantial shippers.

Applicant contends that a need exists for the inauguration of an additional service throughout this territory. Assertedly this was established by the testimony of the shipper witnesses. The operation contemplated, it is claimed, is not unlike a drayage service designed to accommodate the needs of any heavily populated and rapidly growing community. With respect to its transportation needs, this area, applicant asserts, may well be compared with that surrounding the City of Los Angeles. There, it is said, radial highway common carriers may freely provide such a service, under permits issued by the Commission. They may not lawfully do so, however, within the peninsula territory for to serve that area adequately a carrier necessarily must operate over regular routes and between fixed points. This circumstance, assertedly, should be carefully weighed in considering the public need for an additional certificated service.

Protestants, on the other hand, contend that no need has been shown for the establishment of an additional transportation service. With their facilities, it is claimed, they are in a position fully to satisfy the public demand for any additional transportation service that may be required. Moreover, they have pointed out, applicant's criticism of the service which they have

provided may be traced to war-time conditions; standing alone, evidence of this character, it is said, would not justify the issuance of a permanent certificate. Furthermore, they state, applicant's showing rests primarily upon operations assertedly conducted in violation of law; for that reason, they contend, the application should be denied.

The record is convincing that the defective service supplied by protestants is attributable to war-time conditions. Because of man-power shortages, they were compelled to employ inexperienced drivers, to whom may be traced many of the delays of which the shippers complained. Moreover, war-generated traffic necessarily was accorded priority over the requirements of other shippers. As was pointed out by our decision in the Reader Case, (5) the Commission may not equitably grant a permanent certificate "where the showing of applicant is rested primarily upon the inadequacy of the services provided by the existing carriers when those inadequacies are largely the result of prevailing war-time conditions and limitations."

That applicant's operations, during the period preceding the hearing, were conducted unlawfully, must be regarded as an established fact. Throughout this period he served substantially all of the shipper witnesses whom he produced, and even some of those called by the protestants. The record shows that he had entered into written transportation agreements with but a small minority of these shippers; with the remainder he had entered into no agreements whatsoever, either written or oral.

(5) Re: Reader Truck Lines, 45 C.R.C. 752, 755.

The freedom which applicant thus exercised in selecting those whom he undertook to serve is sufficient, we believe, to establish a general holding out on his part to serve the public generally, and to stamp him as a common carrier. It indicates that the service was available to all who desired to use it. In two consolidated companion cases, heard concurrently on a separate record (Cases Nos. 4339 and 4743), the Commission has this day rendered a decision finding unlawful the operations conducted by applicant (who was named as the respondent and as the defendant in these proceedings, respectively) and directing its discontinuance. It long has been the policy of the Commission to deny an application where the proof of public need rests upon the unlawful operations in which the applicant had been engaged. So well settled is this rule that citation of authority is unnecessary. Only through the observance of such a policy may the Commission hope to insure proper respect for the law, on the part of carriers operating under its jurisdiction as well as by applicants seeking certification at its hands. In view of our conclusions, the application, accordingly, will be denied.

O R D E R

Application having been made as above entitled, a public hearing having been had, the matter having been duly submitted, and the Commission now being fully advised,

IT IS ORDERED that Application No. 24468 be and it hereby is denied.

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

Dated at San Francisco, California, this 20th day of September, 1946.

Harold A. Huls
Justin F. Callen
Thomas E. ...
W. A. Lowell
A. E. ...
COMMISSIONERS