

ORIGINAL

Decision No. 42556

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of)
 FLORENCE V. HILL, as Administratrix)
 of the Estate of George Hill, deceased,)
 said estate doing business as IMPERIAL)
 TRUCK LINE, for a certificate of public)
 convenience and necessity to transport)
 general commodities, excepting various)
 specified items, between Los Angeles)
 Drayage Area, on the one hand, and all)
 points within the Imperial Valley, and)
 all points within a radius of fifteen)
 miles of each and all of the communities)
 therein, on the other hand, via U. S.)
 Highway No. 99 and California State)
 Highway No. 195.)

Application No. 26522
(1st Amended)

James J. Broz, for applicant
Joseph C. Gill, for Southern Pacific Company and Pacific Motor
 Trucking Company; H. J. Bischoff, for Southern California
 Freight Lines and Southern California Freight Forwarders;
 and Hugh Gordon, for Pacific Freight Lines and Pacific
 Freight Lines Express; protestants.
Douglas Brookman, for California Motor Express, Ltd., and
 Merchants Express Corporation, intervenors supporting
 protestants.

OPINION ON REHEARING

By Decision No. 41704, dated June 8, 1948, in this proceed-
 ing, the Commission found that public convenience and necessity do
 not require the operation of a highway common carrier service by
 applicant between the Los Angeles Drayage Area and points in the
 Imperial Valley and denied the application. In doing so, it was
 concluded that the record did not support a finding that the terri-
 tory has been inadequately served by existing common carriers. Subse-
 quently, applicant filed a petition for rehearing which was granted,
 by order dated August 24, 1948, for the limited purpose of permitting
 the parties to be heard in oral argument. The argument was held on

September 22, 1948, before Commissioner Potter and Examiner Bradshaw.

Applicant stresses the fact that protestants did not offer any testimony by consignees in the Imperial Valley that the existing common carrier service is adequate. It is contended that the burden was upon them to do so on the theory that applicant had made a prima facie case by showing her ability to conduct the proposed operation and producing as witnesses 27 shippers and consignees, who stated that applicant's service as a contract carrier had been very satisfactory and they would patronize it in the future if conducted as a common carrier operation.

Attention is directed to the very substantial growth of applicant's traffic since 1940. It is urged that this is a circumstance which proves the inadequacy of protestants' service, in that traffic always gravitates to the carrier which provides the best service. The increase in applicant's business is also claimed to have resulted from the rendition of satisfactory service on civilian traffic during the war years when protestants were unable to do so.

According to applicant, the transportation situation as it existed early in 1945, when the original application in this proceeding was filed, rather than at the time of the hearings in 1947, should be determinative of whether public convenience and necessity require the proposed operation. Reference is made to the decision in Re Dale Ramsey, 45 C.R.C., 623, decided February 27, 1945, in which a highway common carrier certificate to operate between Los Angeles territory and Imperial Valley points was granted upon a showing of inadequate service by existing common carriers. It is urged that the Commission should take judicial notice of this decision and, in the instant proceeding, find that the service of the

existing carriers was inadequate at that time.

Finally, applicant contends that the order denying the application is unlawful for the reason that it is based on findings of fact which do not conform to the evidence. In this connection, it is stated that the findings with respect to protestants' service, improvements therein since the war and its responsiveness to their public obligations are predicated solely upon the self-serving testimony of protestants' officials. This contention is based upon the premise that the testimony should have been supported by evidence presented through shippers and consignees who use the carriers' service.

Protestants argue that certificates of public convenience and necessity should not be granted without affirmative evidence showing (1) that an applicant is able to render the proposed service and (2) that the proposed service will fill a gap in the transportation requirements not supplied by existing carriers. It is said that no such showing has been made and that the production as witnesses of satisfied customers of a contract carrier operation is not enough. To accept applicant's theory that the accumulation of traffic and patronage by satisfied customers indicates inadequate or unsatisfactory service by other carriers, protestants assert, would require speculation as to why or in what manner a service is inadequate or unsatisfactory. For these reasons, they contend that they were justified in relying on applicant's duty to present an affirmative showing and were not required to prove affirmatively that the existing common carrier service is adequate.

It is urged that the decision in the Ramsey case disproves

the validity of applicant's position, in that the Commission in that proceeding took action upon whatever need existed for additional common carrier service and no inadequacy of service since that time has been shown. Protestants further contend that the record discloses that applicant would be unable to operate a non-discriminatory service to all shippers and consignees throughout the territory involved, as proposed.

The intervenors supporting protestants joined in the contentions advanced in opposition to applicant's argument. They also commented upon the unusual changes in transportation conditions which took place during the war and subsequently. It was urged that under the circumstances the Commission in cases of this nature should carefully consider the situations presented from a broad economic viewpoint and predicate its conclusions upon conditions as they exist at the time decisions are rendered.

Before granting applications of this nature, a showing of the existence of a definite public need for a proposed operation has been required in the past, although the degree of proof deemed to be necessary has varied depending upon particular situations in individual cases. A departure from this requirement, in our opinion, does not appear to be justified in the instant proceeding by any circumstance which has been brought to the Commission's attention.

The ability on the part of a carrier to develop traffic and maintain a service which has proven satisfactory to its shippers, standing alone, should be deemed insufficient evidence that public convenience and necessity require the establishment of a proposed common carrier operation. It is well recognized that highway contract carriers are not subject to the same responsibilities that

control the operations of common carriers.

Heretofore, the Commission usually has judged the service of existing common carriers as of the day applications are filed, that is, when competition "knocked on the door", e.g., Re Santa Fe Transportation Co., 41 C.R.C. 239, 267. All other factors which affect the situation, however, should be taken into consideration. Re Auto Ferry Co. of Coronado, 34 C.R.C. 201, 207.

The original application in this proceeding was filed January 10, 1945. After two days of hearing had been held commencing the day after the decision in the Ramsey Case was rendered, the matter was removed from the calendar. It was not revived until 1947, when the first amended application herein was filed. The failure to prosecute the application during the intervening period should be regarded as a temporary abandonment of the proposal to establish common carrier operations. Our findings with respect to public convenience and necessity in the instant proceeding, therefore, should not be predicated upon conditions as they existed when the original application was filed.

It also appears that the conditions existing at the time decisions are rendered should not be controlling. The observance of such a test without taking into consideration other factors would undoubtedly convey the impression that the Commission has abandoned the long-standing principle that it is incumbent upon every utility to be abreast with public needs, regardless of whether there is competition facing it or not. Re Harm & Frasher, 36 C.R.C. 539, 549; 36 C.R.C. 866, and cases cited.

In view of the unusual conditions which confronted carriers

as a result of the war and subsequent events, the findings in the instant proceeding should not be predicated solely upon the transportation situation which existed at any specified time. The question of public convenience and necessity, to the extent that the service of existing carriers may be determinative, should depend upon whether protestants have been dilatory in rendering adequate public service. In this connection, they presented considerable evidence, particularly concerning their efforts to provide better service than practicable during the war and their accomplishments in this regard.

Moreover, the obligation did not rest upon protestants to present the detailed showing which might otherwise have been necessary. Applicant failed to produce evidence of the need for a new common carrier in an already occupied field. A re-examination of the record confirms the correctness of the finding in the prior decision that the few complaints expressed regarding the service of protestants were vague, uncertain and lacking in detail. The evidence offered by protestants was, therefore, sufficient in definiteness to overcome that presented by applicant. We do not subscribe to the view that this evidence should have been supported by the testimony of shippers and consignees.

Upon careful consideration of all of the facts of record in the light of the argument presented by the parties, the Commission is of the opinion that the findings and conclusions set forth in Decision No. 41704 in this proceeding are supported by substantial evidence and that our order denying the application should be affirmed.


ORDER ON REHEARING

A rehearing having been had in the above-entitled proceeding

and, based upon the oral argument presented by the parties and upon the conclusions set forth in the preceding opinion on rehearing,

IT IS ORDERED that the order in Decision No. 41704, dated June 8, 1948, in this proceeding be and it is hereby affirmed.

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

Dated at San Francisco, California, this 24th day of February, 1948. 

R. J. Anderson
Justus F. Quaker
Max Powell
Harold A. Kula

COMMISSIONERS