

ORIGINAL

Decision No. 42528

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Commission Investigation into the operations)
 and practices of V. Fred Jakobsen, doing)
 business as Trans Bay Motor Express Company,)
 operating, among other places, between San)
 Francisco, Oakland, and Berkeley, on the one)
 hand, and San Jose and points intermediate)
 thereto along or near U. S. Highways 101 or)
 101 Alternate, on the other.)

Case No. 5004

Clair W. MacLeod, for respondent.
Douglas Brookman, for Merchants Express Corporation;
Reginald L. Vaughan and John G. Lyons, for
 Kellogg Express and Draying Company and Inter-
 Urban Express Corporation; Edward M. Berol, for
 Highway Transport, Inc.; Wayne F. Maloney, for
 Peninsula Motor Express; Woodrow Crabtree, for
 Peninsula Delivery Service; Clifton E. Brooks,
 for Delivery Service Company; Aaron H. Glickman,
 for Vincent A. Lamarra and De Wayne P. Flannagan,
 doing business as Lamarra Trucking Service;
Fred N. Bigelow, for Pacific Southwest Railroad
 Association; and T. H. Losee, for Coffin
 Reddington Company and Drug Shippers Association,
 interested parties.
Boris H. Lakusta, for Transportation Department, Public
 Utilities Commission of the State of California.

O P I N I O N

This proceeding is an investigation instituted on the
 Commission's own motion into the operations and practices of V.
 Fred Jakobsen, doing business as Trans Bay Motor Express Company,
 hereinafter called respondent.

The purpose of the investigation is to determine

- (1) whether respondent has operated, or is operating,
 as a highway common carrier, as defined in Section 2-3/4
 of the Public Utilities Act, anywhere within the State
 of California, without having obtained a certificate of
 public convenience and necessity or having possessed or
 acquired a prior right so to operate, as required by
 Section 50-3/4 of the same Act;

(2) whether he should be ordered to cease and desist from operating as a highway common carrier until he shall obtain authority so to do; and

(3) whether the certificated and permitted rights, or any of them, held by respondent should be cancelled, revoked or suspended.

The record discloses that respondent has been engaged in business as the Trans Bay Motor Express Company, transporting property for compensation over the public highways at least since March, 1948. He possesses a certificate of public convenience and necessity authorizing highway common carrier operations between San Francisco, on the one hand, and Oakland, Alameda, Berkeley, Emeryville and Piedmont, on the other hand. The authority thereunder is limited to the transportation of shipments weighing 100 pounds or less, except in the case of phonograph records (Decision No. 41163, dated January 27, 1948, in Application No. 28456). Respondent does not hold any other rights as a highway common carrier, but does possess a permit to operate as a highway contract carrier, as defined in the Highway Carriers' Act, which was issued February 17, 1948.

A representative of the Commission's field division submitted a report, prepared from respondent's records, listing shipments transported between San Francisco and Oakland and points south of San Francisco to and including San Jose during the periods from October 4 to 15, inclusive, and from November 15 to 26, inclusive, 1948. A total of 1,499 shipments are shown as having been transported during the periods in question. These data indicate that shipments were transported for 42 different consignors, who in each instance engaged respondent's service and prepaid the transportation charges. According to the testimony of this witness,

1,449 of the 1,499 shipments (or 97 per cent) weighed 100 pounds or less, 48 weighed from 124 to 135 pounds and the remaining two shipments weighed 300 and 900 pounds. It was stated that the latter two shipments consisted of phonograph records. A breakdown showing the nature of the shipments and the number of consignors by whom they were shipped appears in the following tabulation:

	<u>Number of Shipments</u>	<u>Number of Consignors</u>
Drugs	532	12
Phonograph Records	201	8
Hardware	180	2
Jewelry	159	3
Dry Goods	149	1
Laboratory Supplies	85	1
Paper	57	2
Leather Goods	30	2
Electrical Goods, Fixtures or Supplies	29	3
Liquor	19	1
Stationery	17	1
Photo Supplies	15	2
Machine Parts	11	2
Artists' Supplies	8	1
Rubber Goods	5	1
Hand Trucks	2	1

Included in the record are copies of freight bills covering 56 shipments purported to have been transported by respondent from San Francisco to Martinez. Apparently the shipments moved between June, 1948, and May, 1949, but many of the documents are not sufficiently legible to determine the exact shipping date or the names of some of the consignors. With the exception of 3 shipments, all appear to have weighed less than 100 pounds. The parties stipulated that the charges were prepaid.

Another exhibit of record consists of copies of documents representing 17 additional shipments transported from 10 San Francisco consignors to Martinez between August 3, 1948, and May 11,

1949. Fifteen of these shipments apparently weighed less than 100 pounds. With the exception of one shipment, as to which the information is not stated on the shipping document, the charges appear to have been prepaid.

According to the testimony of the Commission's field division representative, respondent provides service 6 days a week to San Jose, Palo Alto, Durlingame, San Mateo, Redwood City and Menlo Park. He stated that he was not able to ascertain whether other Peninsula points were actually served daily. It was asserted that respondent operates over U. S. Highways 101 and 101-Alternate from San Francisco as far south as San Jose and between San Francisco and San Jose also uses State Highway 17 via Oakland. This witness declared that his investigation disclosed that respondent commenced operations in the territory between San Francisco and San Jose on or about September 20, 1948.

The record includes a copy of a circular entitled "Trans Bay Motor Express Co. Time and Rate Schedule (Contract Operation Only)". This document sets forth that effective February 1, 1949, an 11 a.m. pick-up with deliveries the same afternoon would be rendered on shipments to certain East Bay points not included in respondent's certificated right, a number of points between Oakland and San Jose, various points in Marin County, and Santa Clara and San Jose. The same document stated that a 4 p.m. pick-up with deliveries the following morning would be furnished on shipments to the same points as well as to Peninsula points north of Santa Clara, a number of Contra Costa County points and Vallejo.

A copy of a similar document, also of record herein, indicates the availability, effective February 14, 1949, of a 4 p.m.

pickup with following morning deliveries to Marin County points as well as an 11 a.m. pickup with same day delivery and a 4 p.m. pickup with following morning delivery to the other points listed in the previous announcement.

The record does not reveal the extent to which these circulars were distributed among shippers. A witness employed by one shipper, who entered into a written contract for transportation with respondent, stated that they were used as a guide in informing customers when the delivery of shipments could be expected.

The stock control manager of a wholesale distributor of drugs testified that respondent has been transporting certain shipments pursuant to a written contract. This instrument, a copy of which is of record herein, is dated March 29, 1948. It provided that respondent shall transport for this shipper from San Francisco to customer drug stores in Albany, El Cerrito and San Leandro (including returned shipments, when directed) all shipments except those "which, in the judgment of the party of the first part, require handling by express, postal service or special messenger delivery." The contract further provided that respondent will be compensated at the rates published in Highway Carriers' Tariff No. 2, subject to a minimum weekly charge of \$2, and contained provisions respecting respondent's liability for loss of, or damage or delay to, shipments. The term of the contract was stated as one year, subject to cancellation by either party on 90 days' written notice.

An amendment, dated April 27, 1948, stipulated that respondent shall pick up shipments between 11 a.m. and 12 noon daily, except Saturdays, Sundays and holidays, when consigned to the points covered by the original contract and numerous others

south of San Leandro to and including San Jose, and in addition shall pick up between 4 p.m. and 5 p.m. and deliver the following morning shipments destined to Albany, El Cerrito, San Leandro and various points in Contra Costa County beyond El Cerrito embracing a route via Martinez, Concord, Walnut Creek, Lafayette and Orinda. Vallejo was also included as a destination.

A second amendment, dated September 3, 1948, provided for the inclusion within the scope of the contract shipments to customers at Peninsula points north of San Jose on which transportation charges are prepaid, such shipments to be picked up between 4 p.m. and 5 p.m. daily, except Saturdays, Sundays and holidays, and delivery effected the following morning.

By another amendment, dated January 26, 1949, the arrangement was extended to include shipments to specified points in Marin County and also provided that such shipments shall be picked up between 11 a.m. and 12 noon, except Saturdays, Sundays and holidays, and delivered the same afternoon.

The latest amendment to this contract of record herein is dated February 14, 1949. It provided for the transportation of shipments weighing over 100 pounds on which the charges are prepaid destined to the points embraced in respondent's certificated right. Pick-ups between 11 a.m. and 12 noon with deliveries the same afternoon and between 4 p.m. and 5 p.m. with following morning deliveries were provided for. As hereinabove stated, respondent's certificated authority is limited to the transportation of shipments weighing 100 pounds or less, except in the case of phonograph records.

The witness employed by this shipper of drugs stated that at the beginning respondent's service was used as a result of requests of customers; that he understands respondent furnishes 3 pickups a day; and that his service is used exclusively for small shipments, with the exception of (a) articles such as narcotics which have to be registered and are shipped by railway express and (b) some shipments which are forwarded by parcel post. According to this witness, respondent transports about 98 per cent of the small shipments destined to Peninsula points. It was asserted that the charges on all shipments are prepaid.

The traffic manager of a wholesale hardware distributor testified that, having heard of respondent's service through its sales department, this shipper entered into a contract with respondent, dated May 11, 1948. Originally, this document provided that respondent shall pick up between 11 a.m. and 12 noon daily, except Saturdays, Sundays and holidays, and deliver the same afternoon all shipments on which the shipper prepays the charges when destined to customers at points between San Leandro and San Jose, both inclusive, and at Albany and El Cerrito. It also provided that respondent shall pick up between 4 p.m. and 5 p.m. and deliver the following morning all prepaid shipments for customers at points in the territory extending from Albany to Orinda via Martinez, Concord and Walnut Creek and at Vallejo and San Leandro. The same provisions respecting liability and duration of the contract as embodied in the contract with the shipper of drugs, already referred to, were included. It was stipulated that respondent shall be compensated at the rates named in Highway Carriers' Tariff No. 2, subject to a minimum weekly charge of \$10.

Except for the requirement that charges be prepaid, this contract made no reference to the classes of shipments which were covered thereby. However, in an amendment, dated September 24, 1948, and effective October 4, 1948, the instrument was referred to as a "contract for transportation of all of your package merchandise between certain points". This amendment provided for the inclusion of the shipper's package merchandise weighing up to 100 pounds to Peninsula points north of San Jose and on which charges are prepaid. A pick up between 4 p.m. and 5 p.m. with deliveries the following morning was specified. A second amendment was entered into effective February 1, 1949, covering transportation of the same class of shipments to specified points in Marin County, the shipments to be picked up between 11 a.m. and 12 noon and delivered the same afternoon.

The traffic manager for the hardware shipper asserted that all shipments to Peninsula points covered by the contract are tendered to respondent, with the exception that some shipments of less than 100 pounds are occasionally given to other carriers, such as articles comprising part of an order with respect to which routing instructions are specified by the customer. The witness estimated that 80 to 90 per cent of the less-than-100-pound shipments to Peninsula destinations are handled by respondent. He also declared that all shipments under 100 pounds to the other destinations covered by the contract are tendered to respondent and that the latter will not accept any shipments of greater weight. According to the witness' understanding, respondent picks up shipments 4 times a day during 5 days of the week. He stated that the 4 daily schedules and the type of service offered induced his concern to enter into the contract.

The general policy of this shipper, the testimony indicates, is to prepay charges on certain articles shipped to some destinations when deemed necessary to meet competition. The major portion of its business, however, was stated as being on a charges-collect basis. In view of the provisions of the contract with respondent, it was asserted, the charges on shipments which would otherwise be forwarded "collect" are now prepaid and the amount of the charges is usually billed against the customer.

An employee of a shipper of mechanical rubber goods testified that, having heard through customers that respondent operated a delivery service to Peninsula points, he made inquiry about it and, after ascertaining the nature of the service, entered into a written contract which respondent insisted upon before providing service. This instrument is dated August 1, 1948. The provisions are identical to the contract originally entered into with the hardware shipper, except that the minimum weekly charge was stated as \$2 instead of \$10. This contract was amended effective October 4, 1948, to include points north of San Jose, the phraseology used being identical to that appearing in the amendment to the hardware shipper's contract which became effective on the same date. The arrangement with the shipper of rubber goods was terminated by mutual consent effective January 24, 1949, because of a decline in business and the shipper did not consider the continued payment of the minimum weekly charge of \$2 to be justified. It was testified that this shipper does not prepay shipments weighing under 200 pounds, but when using respondent's service the charges were prepaid and billed against the customers. The witness estimated that about 95 per cent of the shipments for Peninsula points within the 100-pound weight range were tendered to respondent, the balance being

very light packages forwarded by parcel post or shipments upon which customers specified that some other means of transportation be used. The shipments to other than Peninsula points appear to have been infrequent.

It does not appear from the record that respondent has transported shipments not covered by his certificated rights for consignors other than those with whom written contracts have been entered into. The record indicates that between February, 1948, and March, 1949, written contracts were executed by 58 shippers. The provisions thereof and amendments thereto, it appears, were in nearly every instance identical or substantially similar to those embodied in the documents hereinabove described. In most cases the original arrangements related to transportation from San Francisco to specified points in Alameda, Contra Costa and Santa Clara Counties as well as Vallejo; in others, they also included Peninsula points north of San Jose. Subsequently, the scope of these arrangements was enlarged by amendments extending the contract provisions; first, to include Peninsula points north of San Jose when the instrument did not already so provide; and, later on, by adding various points in Marin County.

Exhibits of record purport to show (1) that by July 1, 1948, 30 of such contractual arrangements had been consummated; (2) that up to January 1, 1949, an additional 19 contracts had been signed; (3) that a total of 58 contracts had been entered into as of April 1, 1949; and (4) that during this period 11 of the contracts were cancelled. The record does not reveal the circumstances surrounding the cancellation of these contracts, with the exception of that entered into between respondent and the

shipper of mechanical rubber goods, hereinabove referred to.

An analysis of the number of written arrangements with consignors as of July 1, 1948, January 1, 1949, and April 1, 1949, excluding those made with 3 shippers which apparently did not follow the same pattern as customarily entered into, follows:

	<u>July 1, 1948</u>	<u>January 1, 1949</u>	<u>April 1, 1949</u>
Number of agreements covering shipments to various Alameda, Contra Costa and Santa Clara County points and Vallejo. (See Note 1).....	29	43	52
Number of agreements covering shipments to Peninsula points north of San Jose. (See Note 2)	--	36	42
Number of agreements covering shipments to Marin County points. (See Note 3)	--	--	40

Note 1: These agreements provided for a noon pick-up for shipments to San Leandro, San Lorenzo, Mt. Eden, Alvarado, Centerville, Newark, Irvington, Warm Springs, Milpitas, San Jose, Mission San Jose, Miles, Decoto, Hayward, Albany and El Cerrito; as well as an afternoon pick-up for shipments to Albany, El Cerrito, Richmond, Point Richmond, San Pablo, Pinole, Rodco, Vallejo, Crockett, Martinez, Pacheco, Concord, Walnut Creek, Lafayette, Orinda and San Leandro.

Note 2: These agreements provided for an afternoon pick-up.

Note 3: These agreements provided for a noon pick-up for shipments to Belvedere, Corte Madera, Fairfax, Kentfield, Larkspur, Manor, Marin City, Mill Valley, Ross, San Anselmo, San Rafael, Sausalito and Tiburon.

An exhibit compiled from respondent's records sets forth the following data concerning the shipments transported on April 20 and 21, 1949, in operations other than those conducted pursuant to respondent's certificate of public convenience and necessity:

<u>Weight of Shipments</u>	<u>Number of Shipments</u>	<u>Per Cent</u>
1 to 30 pounds.....	312	62.6
31 to 60 pounds.....	123	24.6
61 to 100 pounds.....	57	11.4
Over 100 pounds.....	<u>7</u>	<u>1.4</u>
	499	100.0

Respondent did not testify at the hearings in this proceeding. His counsel in oral argument urged that the order instituting the investigation be dismissed. He stressed the fact that the record is devoid of evidence of any solicitation of business by respondent and contended that no showing has been made that the service has been held out to the general public. In support of his assertion, counsel referred to the absence of evidence that service has been extended to all who wanted it. The insistence by respondent on written contracts and the restriction of his operations to the transportation of prepaid shipments were characterized as evidence of respondent's efforts to maintain a private business. It was also contended that respondent's service is a specialized one which no other carrier in the Bay Area is rendering, in that service is performed 3 or 4 times a day and, except in isolated instances, the transportation is confined to the small package field.

Counsel for the Commission's transportation department, participating in the oral argument, contended that respondent has at least since September, 1948, been operating as a highway common carrier without authority under the guise of a highway contract carrier operation. He called attention to the variety of articles comprising the shipments transported, declaring that the record does not contain any evidence that special equipment is used or that special service or handling is offered. Good or superior service,

or the restriction of operations to small shipments, counsel argued, do not constitute a service indicative of a contract carrier operation. It was also urged that the contracts which respondent entered into by their terms and stereotyped form demonstrate the absence of any special features which distinguish contract carriage from common carriage. The similarity of the type of service rendered by respondent under his certificated rights and his alleged contract carrier operations was also referred to. In these contentions, a number of the other interested parties concurred.

The primary question for determination in this proceeding is whether respondent is engaged in the transportation of property as a highway common carrier for compensation between fixed termini or over a regular route outside of and beyond the scope of his presently certificated rights. We conclude from the record that this question must be answered in the affirmative. There is no dispute that respondent's operations are between fixed termini and over regular routes. The evidence discloses that numerous San Francisco mercantile concerns which make many small shipments utilize respondent's services between points not covered by his operating authority as a highway common carrier.

The circumstance that respondent requires the prepayment of transportation charges may or may not be of significance in determining whether his operations are those of a common carrier as distinguished from a contract carrier. It is one factor to be considered. However, common carriers may and in many cases do insist upon the prepayment of their charges.

Solicitation of traffic is merely an incidental rather

than a controlling factor in determining common carrier status in this instance. In this connection, it is noteworthy that in each instance to which our attention is called where purported contracts were amended from time to time the amendments were in the form of a letter upon respondent's stationery and the shipper was asked to execute and return a duplicate copy. In most cases, the amendments providing for service to additional territory became effective within a relatively short period of time.

The rendition of more frequent service than given by other carriers is not evidence of an operation indicative of that of a contract carrier. A like service was held out to all whom respondent elected to serve. It is true, as stated by respondent's counsel, that the evidence does not show that service has been extended to all who wanted it. However, it must be borne in mind that acts of discrimination in serving certain shippers and refusing to serve others cannot be recognized as ipso facto transforming an otherwise common carrier operation into that of a contract carrier. Nor does the restriction of respondent's service to the so-called small package field indicate something other than a common carrier status. Such carriers may restrict service to the transportation of goods of a kind that they undertake or are accustomed to carry. (Company Civil Code Sec. 2169.)

After carefully considering the entire record, we are of the opinion and find that respondent has operated, and is still operating, auto trucks used in the business of transporting property as a highway common carrier (as defined by Section 2-3/4 of the Public Utilities Act), for compensation, over the public highways of the State of California between fixed termini and over regular routes, to-wit: between San Francisco, Oakland and Berkeley, on

the one hand, and numerous points in Alameda, Santa Clara, San Mateo, Contra Costa and Marin counties and Vallejo, on the other hand, as specified in the order following this opinion, that said respondent has conducted, and still conducts, such operations without possessing a prior operative right therefor, and without first having obtained from this Commission a certificate of public convenience and necessity authorizing such operations, in violation of Section 50-3/4 of said Act.

An order will be entered directing respondent to cease and desist from conducting the operations herein found to be unlawful and suspending for an indefinite period of time his permit to operate as a highway contract carrier insofar as it authorizes operations between such points, with the understanding that respondent may file a petition for the termination of said suspension accompanied by a detailed showing of the nature of whatever operations he may desire to render in the future as a highway contract carrier.

O R D E R

Public hearings having been had in the above-entitled proceeding, evidence having been received and duly considered, the Commission now being fully advised and basing its order upon the findings and conclusions set forth in the preceding opinion,

IT IS ORDERED:

(1) That V. Fred Jakobsen, doing business as Trans Bay Motor Express Company, be and he is hereby directed and required to cease and desist from operating, directly or indirectly, or by any subterfuge or device, any auto truck as a highway common carrier (as defined in Section 2-3/4 of the Public Utilities Act) for

compensation, over the public highways of the State of California between San Francisco, Oakland and Berkeley, on the one hand, and (1) points in San Mateo and Santa Clara counties south of San Francisco and north of San Jose and (2) the following points, on the other hand:

San Leandro	Albany	Orinda
San Lorenzo	El Cerrito	Belvedere
Mt. Eden	Richmond	Corte Madera
Alvarado	Point Richmond	Fairfax
Centerville	San Pablo	Kentfield
Newark	Pinole	Larkspur
Irvington	Rodeo	Manor
Warm Springs	Vallejo	Marin City
Milpitas	Crockett	Mill Valley
San Jose	Martinez	Ross
Mission San Jose	Pacheco	San Anselmo
Niles	Concord	San Rafael
Decoto	Walnut Creek	Sausalito
Hayward	Lafayette	Tiburon

unless and until said V. Fred Jakobsen shall have obtained from this Commission a certificate of public convenience and necessity therefor.

(2) That Highway Contract Permit No. 1-6300, heretofore granted to V. Fred Jakobsen, doing business as Trans Bay Motor Express Company, be and it is hereby suspended, insofar as said permit authorizes the transportation of property for compensation between the points described in the preceding paragraph of this order, until such time as the Commission may upon petition otherwise direct by supplemental order in this proceeding.

The Secretary is directed to cause a certified copy of this decision to be personally served upon respondent V. Fred Jakobsen.

The effective date of this order shall be 20 days after the date of such service.

Dated at San Francisco, California, this 15th
day of November, 1949.

R. E. [unclear]

Justus J. Casper

Harold H. Hild

Renold Potter

COMMISSIONERS