

ORIGINAL

Decision No. 42592

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Commission investigation into the)
operations and practices of California)
Freight Service, Inc., a corporation,)
operating, among other places, bet-)
ween the Los Angeles area, on the one)
hand, and the San Francisco area, on)
the other.)

Case No. 5077

F. W. Turcotte and Jack Oliver Goldsmith for respondent.
Douglas Brookman for California Motor Express, Ltd. and
Valley Express Co.; Fred N. Bigelow for Pacific
Southwest Railroad Association; and Donald Murchison
for Pacific Freight Lines and Pacific Freight Lines
Express, interested parties.
Boris H. Lakusta for Field Division, Public Utilities
Commission of the State of California

O P I N I O N

The purpose of this proceeding, which is an investigation
instituted on the Commission's own motion, is to determine

- (1) whether California Freight Service, Inc., a corporation, hereinafter called 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 respondent should be ordered to cease and desist from operating as a highway common carrier until it shall obtain authority so to do; and
- (3) whether the permitted rights, or any of them, held by respondent should be cancelled, revoked or suspended.

Hearing were held before Examiner Bradshaw at Los Angeles.

Briefs have been filed.

It was stipulated that respondent is a California corporation

having its principal office in Vernon; that since about June 1, 1946 it has owned, controlled, operated, or managed auto trucks used in the transportation of property for compensation over public highways in California; that it holds permits to operate as a radial highway common carrier and highway contract carrier, as defined in the Highway Carriers' Act, and as a city carrier, as defined in the City Carriers' Act, but does not possess any authority to operate as a highway common carrier, as defined in the Public Utilities Act; that since about May, 1946, offices and terminals have been maintained at Vernon and Oakland; and that at the time the hearings were held an office and terminal was maintained at Fresno.

Evidence was presented by an employee of the Commission's field division concerning the results of an inspection of respondent's records and an interview with its president. The witness testified that, according to statements made to him by respondent's president, (1) operations are conducted principally between the Los Angeles and San Francisco Bay area, (2) some operations take place between Los Angeles and San Diego and points nearby Los Angeles, (3) U. S. Highways 49, 50, 99 and 101 are used in respondent's operations and (4) the Los Angeles-San Francisco Bay operations are usually conducted daily Monday through Saturday of each week.

An exhibit was received in evidence purporting to list all intrastate shipments transported by respondent between Los Angeles Territory and San Francisco Territory, as defined in

Highway Carriers' Tariff No. 2, during three 5-day periods. Copies of freight bills appearing in respondent's records constituted the source of the information. A summarization of some of the facts disclosed by this exhibit is set forth in the following tabulation:

	August 9 to 13, <u>Incl., 1948</u>	September 20 to 24, <u>Incl., 1948</u>	October 25 to 29, <u>Incl., 1948</u>
Number of shipments.....	166	221	243
Number of consignors.....	36	35	37
Number of parties by whom charges were paid.....	32	31	33
Consignors.....	30	30	31
Consignees.....	3	3	5
Number of parties who engaged respondent's services so far as ascertainable.....	30	31	33
Consignors.....	30	30	31
Consignees.....	2	2	3
Range in weight of ship- ments, in pounds.....	72 to 79,800	75 to 74,853	48 to 64,956

According to the testimony, it was not possible in all instances to definitely establish whether the consignor or consignee engaged respondent's services. It appears, however, that in most cases the party who paid the transportation charges engaged the carrier's service and that for the combined three 5-day periods covered by the exhibit 49 different shippers paid the transportation charges. Another exhibit indicates that during the same three 5-day periods respondent transported a total of 825 shipments, exclusive of service performed wholly within an incorporated city, of which 630 shipments (or 76 per cent) moved between the Los Angeles and San Francisco territories. The commodities comprising the shipments were of a diversified nature.

Respondent's gross revenues during 1948 and the first-half of 1949, as reported to the Commission pursuant to the provisions

of the Transportation Rate Fund Act, were as follows:

	<u>Year 1948</u>	<u>Year 1949</u>
First Quarter	\$63,729.75	\$75,159.07
Second Quarter	65,423.65	75,719.28
Third Quarter	72,751.14	
Fourth Quarter	80,554.40	

Another exhibit, compiled from respondent's records, consists of a list of 21 written contracts assertedly entered into by respondent with various shippers located at either Los Angeles, San Francisco or the East Bay cities. It appears that 14 of these contracts were made during February, 1948, and that four bear earlier dates.

The record indicates that with the exception of one instance where the contract is in letter form these instruments contain substantially the same general provisions. They state that the shipper will have merchandise for transportation by truck between certain points; that the shipper agrees to tender to respondent not less than a specified percentage (by weight) each month of all such merchandise the shipper shall have for transportation between said points; that the carrier agrees to accept and transport all such merchandise by truck as a highway contract carrier; that the rates and charges shall be those established by the Commission as minima for contract carriers; and that the carrier shall provide adequate cargo insurance. These contracts also provide for their cancellation by either party on 30 days' written notice.

According to the list of these contracts, 14 provide that 90 per cent (by weight) of the shipper's consignments shall be tendered to respondent. Three of the contracts provide for the tendering to respondent of 10,085 or 75 per cent of the shipments,

while in four instances the volume to be tendered is not specified.

The Commission's field division representative also produced a list of 25 shippers with whom he understood from his investigation respondent claims to have effective oral contracts for transportation. The dates on which the arrangements were supposed to have been consummated or their nature are not of record herein. According to the data describing the shipments which moved during the three 5-day periods hereinabove referred to, respondent performed transportation services for 14 shippers as to which there is no claim that either written or oral contracts had been entered into.

The traffic manager of a shipper of cosmetics testified concerning the use of respondent's facilities. He stated that for a number of years his concern utilized the service of a trucking company formerly operated as a copartnership by respondent's president and another person; that upon learning of the dissolution of the copartnership in 1945 and the formation of a new company by respondent's president under the name of California Freight Service, he decided to tender future shipments to the new company; and that when respondent was organized as a corporation in 1946 he agreed to continue to use the service in the same manner as it had been utilized when operated by respondent's president as an individual. This witness asserted that an oral arrangement was entered into because respondent's president asked for the business and that some time later a written contract was signed.

According to the testimony, this shipper agreed to tender to respondent 90 per cent of the shipments, because the latter's president insisted upon obtaining that volume of service was to

be provided. In the routing of shipments, the witness indicated that the volume he agreed to tender to respondent is determined by estimate and that the balance is given to other carriers. It was stated that, as between respondent's service and that of other carriers, the equipment used and the physical handling accorded shipments are the same. Personal friendship between its president and the witness was given as the real reason for using respondent's service.

A departmental manager of a shipper of copper and aluminum cable, having supervision over its shipments from Los Angeles, testified that about 90 per cent of the shipments to the Bay area are transported by respondent. He stated that respondent calls for shipments at any specified time desired, whether once or three times a day and as late as 5:00 p.m., but that, aside from special protection in blocking reels and spools on which the cable is wound-- the blocking being furnished by the shipper for all carriers--, regular transportation service suffices for its material. This witness testified that the use of respondent's service began before he became employed in his present position almost three years ago; that he understands an arrangement was negotiated orally with respondent by the Company's general traffic manager located in New Jersey; and that he was instructed to tender the greater portion of the shipments for the Bay area to respondent, although was never ordered to give respondent any specific amount. He could not recall using other carriers for shipping to the Bay area, except in cases where consignees specifically requested that he do so.

A shipping clerk for a Los Angeles shipper of paper napkins testified that his employer has been using respondent's service since he assumed his present employment about three years

ago; that he understands some sort of a "gentlemen's agreement" existed between the company and respondent; and that respondent made an effort to obtain a written contract, but his employer refused to enter into such an arrangement. The understanding of the parties, according to this witness' information, is that all prepaid shipments for the Bay area are to be tendered to respondent; that a notice of one week or ten days is to be given respondent should the shipper desire to terminate the arrangement; and that respondent will pick up shipments as late as 5:00 p.m., if necessary. It was testified that about 90 per cent of the shipments are tendered to respondent; that it performs daily service, except on Saturdays and Sundays; and that, when tendered shipments on which the charges were to be collected at destination, respondent's president stated that he could not handle them.

Respondent did not offer any evidence. Its counsel on brief contends that the record is devoid of any evidence that respondent has violated any provisions of the Public Utilities Act or of any rule or regulation of the Commission.

It is asserted that no showing has been made that the three contractual arrangements with the shippers whose employees testified were a subterfuge or not entered into in good faith.

With respect to the transportation of shipments for parties with whom respondent did not claim to hold any oral or written agreements, counsel argues that there is no evidence that such shipments were not actually bona fide movements as a radial highway common carrier. It is stated that the record does not show that on the days and dates these radial movements took place respondent was acting as a contract carrier of the same commodity between

the same points.

Respondent's counsel also contends that the evidence of record concerning the transportation of shipments for others than the three shippers whose representatives testified merely discloses a resume of the business transacted by respondent during certain periods. The absence of a showing of the conditions under which the shipments were transported, according to counsel, renders the evidence of no value as proof of the existence of a highway common carrier operation. In connection with this and the other contentions advanced on respondent's behalf, it is argued that the burden of proof rests upon the Commission's staff; that there must be a fair preponderance of the evidence showing that respondent's operations have been or are in violation of the Public Utilities Act; and that "every man, person, firm, association or corporation is presumed to obey the law".

Counsel for the Commission's field division in his brief contends that the evidence conclusively establishes unauthorized operations by respondent as a highway common carrier. Attention is called to the volume of the shipments, the regularity of the operations between the Los Angeles and San Francisco territories, the number of shippers involved and the wide variety of commodities transported. The evidence in these respects is characterized as establishing a holding out by respondent to serve a sizeable portion of the public generally in the transportation of general commodities between fixed termini. The failure of respondent to controvert the showing presented and the absence of any elements which distinguish private carriage from common carriage are also stressed.

In view of the frequency of respondent's operations and

the volume of traffic transported between the Los Angeles and San Francisco territories, it is clear that he is engaged in operations between fixed termini and over regular routes, as defined in Section 2-3/4 of the Public Utilities Act. The paramount question presented for decision, therefore, is whether in conducting such operations respondent is doing so as a highway common carrier or highway contract carrier.

The record indicates that respondent's service has not been restricted to transportation for shippers with whom contracts are claimed to have been entered into. While respondent asserts that there is no showing that shipments transported for others than his so-called contract customers did not constitute bona fide movements as a radial highway common carrier, the argument advanced is, in our opinion, without merit. The prohibition in Section 4 of the Highway Carriers' Act against the transportation both as a common carrier and as a highway contract carrier of "the same commodities between the same points" is not restricted to transportation performed on the same day or days.

No physical characteristics in the nature of respondent's operations over and beyond those usually or normally performed by common carriers appear to exist. Indeed, according to the testimony, the only difference between the service of respondent and of other carriers is that respondent will pick-up shipments more frequently and at a later hour. The mere rendition of more convenient service is, in our opinion, insufficient to distinguish the nature of the operation from that customarily supplied by common carriers. Moreover, respondent's contracts, in the instances where the terms thereof have been revealed, do not provide for any unusual services to meet the peculiar needs of particular shippers. Nor does

respondent's operations have the degree of limitation of restrictiveness essential for contract carriage (See Pacific Southwest Railroad Association, et al v. J. P. Nielsen, Decision No. 43557, dated November 22, 1949, in Case 4820.)

In our examination of the record we have not overlooked respondent's contention that the burden of proof rested upon the Commission's staff to show by a fair preponderance of the evidence that the operations herein under consideration have been and are in violation of the Public Utilities Act. We are satisfied that the showing made is sufficient to enable us to reach a correct decision upon the question involved.

We conclude that, based upon the facts of record concerning the scope and nature of the service rendered, respondent is not engaged in operations between Los Angeles and San Francisco territories as a highway contract carrier or radial highway common carrier, as defined in the Highway Carriers' Act.

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 in 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 points and places in Los Angeles Territory, as described in Highway Carriers' Tariff No. 2, on the one hand, and points and places in San Francisco Territory, as described in the same tariff, on the other hand; and 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 its permits to operate as a radial highway common carrier and highway contract carrier insofar as said permits authorize 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 it may desire to render in the future as a radial highway common carrier or highway contract carrier, or both.

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 California Freight Service, Inc., a corporation, be and it 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 any point or place in Los Angeles Territory, on the one hand, and any point or place in San Francisco Territory, on the other hand, as said territories are described in the appendix to this order, unless and until said California Freight Service, Inc. shall have obtained

A P P E N D I X

LOS ANGELES TERRITORY includes that area embraced by the following boundary: Beginning at the intersection of Sunset Boulevard and U. S. Highway No. 101, Alternate; thence northeasterly along Sunset Boulevard to State Highway No. 7; northerly along State Highway No. 7 to State Highway No. 118; northeasterly along State Highway No. 118 through and including the City of San Fernando; continuing northeasterly and southerly along State Highway No. 118 to and including the City of Pasadena; easterly along U. S. Highway No. 66 to State Highway No. 19; southerly along State Highway No. 19 to its intersection with U. S. Highway No. 101, Alternate, at Ximeno Street; southerly along Ximeno Street and its prolongation to the Pacific Ocean; westerly and northerly along the shore line of the Pacific Ocean to a point directly south of the intersection of Sunset Boulevard and U. S. Highway No. 101, Alternate; thence northerly along an imaginary line to point of beginning.

SAN FRANCISCO TERRITORY includes that area embraced by the following boundary: Beginning at the point the San Francisco-San Mateo County Boundary Line meets the Pacific Ocean; thence easterly along said boundary line to a point 1 mile west of U. S. Highway No. 101; southerly along an imaginary line 1 mile west of and paralleling U. S. Highway No. 101 to its intersection with the corporate boundary of the City of San Jose; southerly, easterly and northerly along said corporate boundary to its intersection with State Highway No. 17; northerly along State Highway No. 17 to Warm Springs; northerly along the unnumbered highway via Mission San Jose and Niles to Hayward; northerly along Foothill Boulevard to Seminary Avenue; easterly along Seminary Avenue to Mountain Boulevard; northerly along Mountain Boulevard and Moraga Avenue to Estates Drive; westerly along Estates Drive, Harbord Drive and Broadway Terrace to College Avenue; northerly along College Avenue to Dwight Way; easterly along Dwight Way to the Berkeley-Oakland boundary line; northerly along said boundary line to the campus boundary of the University of California; northerly and westerly along the campus boundary of the University of California to Euclid Avenue; northerly along Euclid Avenue to Marin Avenue; westerly along Marin Avenue to Arlington Avenue; northerly along Arlington Avenue to U. S. Highway No. 40 (San Pablo Avenue); northerly along U. S. Highway No. 40 to and including the City of Richmond; southwestwardly along the highway extending from the City of Richmond to Point Richmond; southerly along an imaginary line from Point Richmond to the San Francisco Waterfront at the foot of Market Street; westerly along said water front and shore line to the Pacific Ocean; southerly along the shore line of the Pacific Ocean to point of beginning.

(End of Appendix)

from this Commission a certificate of public convenience and necessity authorizing such operations.

(2) That Radial Highway Common Carrier Permit No. 19-25526 and Highway Contract Carrier Permit No. 19-25527, heretofore granted to California Freight Service, Inc., a corporation, be and they are hereby suspended, insofar as said permits authorize the transportation of property for compensation between the points and places 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 California Freight Service, Inc.

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

Dated at San Francisco, California, this 7th day of December, 1949.

R. E. [Signature]
Justice F. C. [Signature]
[Signature]
[Signature]
[Signature]
Commissioners