

ORIGINAL

Decision No. 43825

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of)
CIRCLE FREIGHT LINES, a copartner-)
ship, for a certificate of public)
convenience and necessity as a high-)
way common carrier between San)
Francisco, Oakland, and other East)
Bay Points on the one hand, and)
points in Contra Costa County on)
the other hand.)

Application No. 28856

- Scott Elder, for applicant.
- William Meinhold and E. L. Van Dellen, for Southern Pacific Company and Pacific Motor Trucking Company, protestants.
- Louis M. Welsch and Frederick Jacobus, for The Atchison, Topcka & Santa Fe Railway Company, protestant.
- John E. Hennessey, for Sacramento Northern Railway Company, protestant.
- Frederick W. Mielke, for Delta Lines, Inc., protestant.
- Reginald L. Vaughan, Varnum Paul and John G. Lyons, for Inter-Urban Express Corporation, interested party.
- Spurgeon Avakian, for Stapel Truck Lines, interested party.

O P I N I O N

By their application, as amended, Gilbert J. Munson and Gordon A. Samuelson, partners doing business under the firm name of Circle Freight Lines (referred to hereafter as the applicant), seek a certificate of public convenience and necessity authorizing the establishment of a highway common carrier service between San Francisco, East Bay points and certain points in Contra Costa County, the latter ranging from 25 to 45 miles in distance from

(1) San Francisco. Originally, applicant proposed to serve a more
extensive territory; however, these points later were withdrawn.
With certain exceptions, (2)
(3) general commodities would be transported.
The application was opposed by the common carriers now serving
this area, who appeared as protestants. (4)

A public hearing was had before Examiner Austin at San Francisco, Walnut Creek and Concord. The matter was submitted on briefs, which have since been filed.

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- (1) Applicant seeks operating authority "between San Francisco and Oakland and those parts of Albany, Alameda, Berkeley and Piedmont described in the description of the Oakland pick-up and delivery zone in Highway Carriers' Tariff No. 2." on the one hand, and on the other hand, certain points situated in Contra Costa County, as follows, viz.: "Walnut Creek (including all points within a radius of one mile of the city limits); Danville; Saranap; Concord (including all points within two miles of the city limits); Pacheco; Port Chicago; Pittsburg (including all points within three miles of the city limits); Clayton; all points intermediate to the above named points; and all points within one mile laterally on either side of State Highway 21 between Pacheco and Danville." Operations would be conducted over specified routes. Among the intermediate and lateral points which would be served are Nichols, Pleasant Hills, Galindo, Hookston, Clyde and Bella Vista.
 - (2) In addition to the points mentioned applicant originally proposed to serve Orinda, Lafayette, Diablo, Martinez, Antioch, Oakley and Brentwood; as well as intermediate points situated on specified routes. By an amendment to the application, these points were eliminated.
 - (3) Applicant would not engage in the transportation of high explosives; live animals and birds; uncrated, used household goods, and office and store fixtures; articles likely to damage equipment or other articles; and articles of excessive value.
 - (4) The carriers appearing as protestants comprised Southern Pacific Company, Pacific Motor Trucking Company, The Atchison, Topcka & Santa Fe Railway Company, Sacramento Northern Railway Company, and Delta Lines, Inc. For brevity, they will be referred to as Southern Pacific, Pacific Motor, Santa Fe, Sacramento Northern, and as Delta, respectively. Inter-Urban Express Corporation and Stapel Truck Lines appeared as interested parties.

Applicant's proposal was described by one of the partners, Gordon A. Samuelson. Shipper-witnesses were also produced. Through their respective operating officials, protestants described the character of the service which they severally provide. They called no shipper-witnesses. On applicant's motion, the testimony offered by certain shipper-witnesses called in the Stapel case, a companion proceeding, was incorporated in the record of the instant proceeding. (5)

Since January, 1946, the partners have served this territory, ostensibly as a highway contract carrier, under permits issued by the Commission. During the preceding two months, Munson alone conducted the service. For several years, he has been engaged in the trucking business, both as a driver and as a permitted carrier. Before the formation of the partnership, Samuelson was employed as Chief operator by Shell Chemical Company, at its Pittsburg plant. Together, the partners purchased from its former owner, the business previously conducted by Circle Freight Line.

Applicant would continue to use the facilities devoted to its present operations. It now has four units of equipment, and plans to secure another unit, if the service is certificated. (6) Should these temporarily be overtaxed, another truck operator stands ready to supply additional equipment, it was stated. A terminal is

(5) Application of Harold A. Stapel, Harland H. Stapel and Clayton C. Koons, partners doing business as Stapel Truck Lines (Application No. 28649), for authority to operate as a highway common carrier between San Francisco, Emeryville and Oakland, and certain Contra Costa County points, serving substantially the same territory as that involved in the present proceeding. That matter has been heard and submitted.

(6) Applicant's present equipment consists of one tractor, one 10-ton van semi-trailer, and two 5-ton van trucks. If its operations are certificated, applicant intends to purchase an additional Ford truck.

(7)
situated at Concord, where applicant maintains its headquarters. No terminal would be established in the Bay Area. However, applicant would continue its Oakland telephone listing, currently provided under an arrangement with a local trucking concern, thus permitting shippers to transmit their orders for pickup service. One full-time driver is employed, who is assisted over week-ends by a part-time driver; otherwise, the operations are conducted by the partners themselves and members of their families.

Statements were submitted disclosing applicant's financial status. As of December 31, 1947, (during the course of the hearing) these reveal total assets of \$14,150.89; total liabilities of \$169.09 (covering current taxes payable); and capital, amounting to \$13,981.80. For the calendar year 1947, total income was shown as \$17,929.57; total expenses, as \$7,790.17; and net profit, as \$10,139.40. Admittedly, the expenses would be relatively higher if the operation were certificated.

Applicant offers to provide an overnight service. Freight picked up during the afternoon in San Francisco or the East Bay would be delivered on the following morning at Contra Costa points. The trucks would return immediately to the Bay Area, where west-bound freight would be delivered, and outboundshipments picked up. (8)

(7) At this terminal, both dockage facilities and office space are provided, as well as a garage equipped to handle servicing and minor repair jobs.

(8) Trucks carrying shipments picked up that afternoon would leave both San Francisco and Oakland about 4:30 p.m. At the Concord terminal, the freight would be segregated and reloaded for distribution throughout the Contra Costa territory. On the following morning, delivery would commence by 8:30 at Concord, Walnut Creek and Pittsburg, respectively. Nearby points would be served on-call. Thus, on-call service would be provided by the Concord truck at Pacheco and Clayton; by the Walnut Creek truck, at Alamo and Danville; and by the Pittsburg truck, at Port Chicago. Ordinarily, the same equipment would supply both the pickup and the line-haul service.

At the principal points, same day service would be furnished for emergency shipments.⁽⁹⁾

A steady growth is anticipated in the volume of traffic handled between the points here involved. This consists of general commodities, it was stated. From San Francisco and East Bay points, the traffic moving eastbound averages some 7,000 pounds daily; westbound, the movement does not exceed 300 pounds a week. Should the operation be certificated, an increase of about 50 per cent in the eastbound tonnage is anticipated. This alone would not be sufficient to utilize the full capacity of the equipment now devoted to the operation. Samuelson testified that applicant does not aspire to become one of the larger carriers within this field; it would prefer, rather, to continue functioning on a more modest scale. He conceded, however, that within the limitations of its available facilities, applicant would accept all traffic offered for transportation.

Applicant has undertaken no extensive traffic survey within the affected territory. However, several shippers whom it currently serves have complained of the limitations observed, which necessarily are incidental to applicant's status as a private carrier, and they have requested that a more comprehensive service be provided, Samuelson testified. These shippers, he stated, universally require an overnight service.

The rates to be established would be predicated on the minimum class rates prescribed by the Commission's Highway Carriers'

(9) Same-day emergency delivery service is offered for shipments destined to Concord, Pacheco, Clayton, Walnut Creek, Alamo and Danville. As indicated by the proposed time schedule, this service would be afforded "...when possible to make such deliveries without interference with regular schedules and without undue special handling of other lading on equipment."

Tariff No. 2. Rules and regulations would be adopted which are substantially the same as those provided by the tariff mentioned, insofar as they may be appropriate to highway common carrier operations.

During the past ten years, this territory has experienced a substantial growth of population, and has developed both commercially and industrially. Such was the testimony of one of the partners, who was corroborated by the shipper witnesses. Data submitted disclosed the details. (10) Pittsburg and its environs have grown in importance as an industrial area; the other communities are still, in large part, agricultural centers. Some have become flourishing residential tracts.

Applicant called 40 shipper-witnesses, and at its instance,

(10) The population figures shown in the following schedule are predicated upon the federal census returns for 1940, and upon an average, based on estimates (which apparently are reliable) made by various civic organizations, for 1947. The township figures were not broken down to indicate the population of the cities and communities mentioned, individually:

<u>Township No.</u> <u>(Contra Costa County)</u>	<u>Cities and</u> <u>Towns Included</u>	<u>1940</u>	<u>1947</u>
3	Walnut Creek, Alamo Canyon, Lafayette, Moraga, Orinda	7,100	22,500
4	Diablo, Danville, Highland, San Ramon Tassajara	1,775	3,000
5	Avon, Concord, Cowell, Oak Grove, Pacheco, Pleasant Hill	6,990	12,600
6	Ambrose, Pittsburg	11,713	16,500
13	Clayton, Morgan Territory, Mt. Diablo	431	400
16	Port Chicago, (Bay Point and Nichols)	<u>1,683</u>	<u>3,500</u>
	TOTAL	29,692	64,500
	Increase in population (1947 over 1940)	-	34,808

the testimony of 23 witnesses, who had testified in support of the application in the Stapel case, supra, was made a part of the record in the instant proceeding. Allowing for duplications, some 61 shippers were represented, including wholesale distributors located at San Francisco and Oakland, and retail establishments situated at Contra Costa points. (11) Considered collectively, they dealt in, or were engaged in the distribution of, general commodities.

The testimony of the shipper witnesses, offered and received in the instant proceeding both directly and by reference, is substantially the same as that embraced within the record in the Stapel case. With minor exceptions, the evidence supplied by the local dealers, situated at Contra Costa points, is identical in both matters. (12) However, none of the testimony given in either of these proceedings by representatives of Bay Area suppliers or distributors was incorporated in the record of the other.

Witnesses appearing on behalf of three shippers, engaged in business in the Bay Area, (13) described the requirements of their respective organizations for an adequate transportation service. All market their products at Contra Costa points. An expeditious

(11) The 61 shippers represented by the witnesses produced, both in the instant proceeding and in the Stapel case, were distributed throughout the territory, as follows: San Francisco, 1; Oakland, 2; Orinda, 1; Walnut Creek, 22; Alamo, 1; Danville, 3; Clayton, 1; Concord, 22; Port Chicago, 2; and Pittsburg, 6.

(12) All the evidence offered in the Stapel case by the retail dealers situated at Contra Costa points was received by reference in the Circle case, except the testimony of a shipper engaged in business at Lafayette (a point which Circle does not propose to serve), and the testimony of two shippers, situated at Walnut Creek and Concord, respectively, who also were called as witnesses by Circle, and who testified at the hearing in that proceeding.

(13) The Bay Area firms mentioned were engaged in business as wholesale distributors of their respective products. One, at San Francisco, was a supplier for retail establishments dispensing ice cream and candy. The remaining two, situated at Oakland, each dealt in wines, liquors and bar supplies.

transportation service is essential, it was said, to enable them to meet the severe competition encountered; one not affording overnight delivery would be too slow. Store-door delivery also is required; depot delivery would not be satisfactory. During the year preceding the hearings, all had used Pacific Motor for the transportation of their shipments throughout the affected territory. They characterized the service as slow, chiefly because of its failure to provide overnight delivery. Customers constantly had complained of these delays, they said. One shipper testified that this carrier had failed to respond promptly to calls for pick-up service. No dissatisfaction was expressed concerning the service supplied by the other common carriers reaching this territory. All had employed the applicant to carry their products; the service had fully met their needs, it was said.

As stated, the evidence offered in this proceeding by the shipper-witnesses, situated at Contra Costa points, was essentially the same as that received in the Stapel case. In general, this showing dealt with the requirements of these shippers for an adequate and expeditious service for the transportation of their supplies from Bay Area points; with the nature of the service which had been afforded them by the common carriers in the field; and with the deficiencies in the service provided by certain carriers, such as delays both in transit and in delivery, breakage of shipments, rough handling of freight, delays in the adjustment of claims, and discourteous conduct on the part of drivers. Most of them had used the service which has been provided by applicant, professedly as a contract carrier. This service had been expeditious and satisfactory, they said. They would continue to use it if applicant were certificated. In the opinion accompanying our decision in the

Stapel case, this day rendered (Decision No. 43878), the testimony relating to these subjects has been summarized. To avoid unnecessary repetition, we now adopt and make a part of this decision our discussion of the testimony of these witnesses, appearing in that opinion.⁽¹⁴⁾

This brings us to a consideration of the showing presented by the protesting carriers.

Through their respective operating officials, certain protestants described the character of the service which they severally provide. Evidence of this nature was offered on behalf of Southern Pacific-Pacific Motor, Santa Fe, Sacramento Northern, Merchants Express Corporation (referred to hereafter as Merchants) and Delta. Save only as to Merchants (which confined its operating showing to the Stapel application, it not appearing as a protestant in the instant proceeding), this testimony was received jointly in both of these proceedings, upon a common record.

Some of the protestants submitted performance records, covering the movement of specified shipments, between the points involved, during selected periods. Evidence of this nature was offered by Southern Pacific-Pacific Motor, Sacramento Northern and Delta. This testimony likewise was received upon a record common to both this and the Stapel applications.

(14) In this proceeding, applicant called two witnesses engaged in business at Port Chicago, and one located at Clayton, whose testimony was not offered by reference in the Stapel case, since the latter applicant does not propose to serve either of these points. Both of the Port Chicago shippers complained of the service provided by Pacific Motor; one referred to delays, and the other to breakage, encountered in the transportation of their respective shipments. The Clayton shipper testified that that community was not directly served by any common carrier, the nearest point where shipments could be picked up being Walnut Creek. There was need for such a service at Clayton, he said.

The evidence relating to the character of the operations conducted by these protestants, as well as that dealing with the nature of their performance, has been fully considered in the decision rendered in the Stapel case, to which we have alluded. To avoid unnecessary repetition, reference is made to our discussion of these topics in the opinion in that matter, which we now incorporate in this opinion.

In the Stapel decision, we announced certain conclusions which were predicated upon the facts of record, there reviewed. As indicated above, the record in that proceeding is identical, in all substantial respects, to that presented here. With few excep-
(15)
tions, the same points are involved. To avoid duplication, we adopt those conclusions in full, as part of this opinion.

Summarizing those conclusions: We there found that the lines of the protesting carriers do not reach all the points which the applicant therein proposes to serve; that some of these carriers, and particularly, Santa Fe and Sacramento Northern, do not supply overnight service, or pick up and delivery service, respectively, at all of the points involved, which their lines may reach; that the service provided by certain protestants, such as Southern Pacific-Pacific Motor and Sacramento Northern, has not adequately met the shippers' requirements; and that the performance records offered by some protestants, and particularly, by Southern Pacific-Pacific Motor and by Sacramento Northern, afford no sufficient answer to

(15) In the Stapel application, authority was sought to serve the following points which are not included in the present application, viz.: Orinda, Lafayette and Antioch. In the instant proceeding, applicant proposes to serve certain points not included in the Stapel application, viz.: Saranap (which adjoins Walnut Creek), Pacheco and Port Chicago.

the shippers' complaints. We referred to the inconvenience and annoyance to which Pacific Motor had subjected its patrons because of undue breakage and rough handling of their shipments; and we also pointed out that the deficiencies in that carrier's service cannot be excused solely because it may have become involved in labor difficulties with its employees. With respect to the instant proceeding, we reaffirm these findings and conclusions.

However, as pointed out in the Stapel opinion, the record does not show the service provided by the existing carriers at Pittsburg to have been inadequate. This also is true as to Port Chicago.

From the record, we find that a public need exists for additional highway common carrier service between the Bay Area and San Ramon Valley points, but no such need was shown for the extension of this service to Pittsburg or Port Chicago. Without further discussion, we adopt the reasons for this conclusion which are set forth in the Stapel opinion.

There is ample room, we believe, for the entrance within this field of both Circle Freight Lines and Stapel Truck Lines. Both have shown a need for additional transportation service which would permit retail dealers at San Ramon Valley points to obtain more expeditious delivery, than is now available, of merchandise purchased from wholesale dealers and suppliers situated both in San Francisco and throughout the East Bay. Accordingly, a certificate will be issued to applicant authorizing such a service; in all other respects, the application will be denied.

Throughout the course of the hearing, protestants repeatedly sought to inquire into the contractual relationship

existing between applicant and the shippers whom it served. In so doing, they undertook to show that applicant, though operating ostensibly as a private carrier, nevertheless actually had been serving the public as a highway common carrier, without proper authority. They contended that, conformably to the established practice, this evidence should be admitted in order to indicate applicant's unfitness to receive the certificate sought. Applicant objected on the ground that such evidence was irrelevant and immaterial, contending that it had no bearing upon the issue presented for determination, i.e., whether public convenience and necessity required the establishment of the service in question.

Following extended argument, the presiding examiner announced that the Commission, after considering the matter, had ruled informally that evidence of this character should not be received; and he accordingly sustained applicant's objection. This ruling, however, was expressly made without prejudice to the rights of the parties to present argument to the end that this question might be further considered by the Commission. The matter has been fully discussed in the briefs submitted.

For many years, in proceedings of this nature, evidence customarily has been received relating to the legality of the carrier operations in which an applicant currently may be engaged, or which he previously has conducted. Evidence indicating unlawful operations on the part of an applicant, it has been held, should not be accepted to show the existence of public convenience and necessity for the establishment of the proposed service. In many instances, certificates have been denied where it appeared that an applicant previously had operated as a common carrier, in violation of law. In so holding, the Commission has applied the familiar

equitable principle requiring that a suitor must come before the court with clean hands. A few of the many cases where this question has been considered, are cited below. ⁽¹⁶⁾ We have also held, however, that a certificate will issue, notwithstanding the unlawful character of an applicant's operations, where the establishment of the service is clearly required by public convenience and ⁽¹⁷⁾ necessity.

The practice of receiving such evidence has resulted in vexatious delays and inordinate expense, both to the Commission and to the interested parties. In most contested applications for carrier certificates, the question of the lawfulness of applicant's operations had been raised. The consideration of the issue thus interposed has operated to prolong unduly the hearings, and to open the door for inquiry into collateral matters. Often, this has served as a means for discovering evidence to be used in a companion complaint proceeding, brought by protestants against the applicant. With the growing importance of these controversies, resulting in more protracted hearings, which are increasing in number, the Commission finds itself impelled to adopt measures which would tend to shorten these hearings, without depriving the parties of any essential right. Only by so doing can necessary efficiency be promoted, and the Commission be enabled to keep abreast of its ever lengthening calendar.

(16) Typical of the cases applying the rule referred to above, are the following:

Re Thornewill, 33 CRC 452
Re Decker, 36 CRC 317
Re Brooks, 37 CRC 672
Re Garofalo & Elwell, 38 CRC 701
Re Peninsula Motor Express, 46 CRC 662.

(17) Such was the ruling in the following decisions:

Re Gilboy, 44 CRC 457
Re Inglewood City Lines, 44 CRC 704

To avoid the intolerable situation which has developed, we have concluded that in applications of this nature, evidence concerning the legality of an applicant's operations no longer will be received. However, in the future, unless circumstances justify the Commission in directing otherwise, no application for a carrier certificate filed after the filing of a formal complaint or Commission investigation relating to the lawfulness of the operations involved in such application will be heard prior to the determination of such complaint or investigation. Pending the disposition of such complaint or investigation, the application will be held in abeyance. This would tend to promote adequate policing of the operations of permitted carriers who may aspire to the status of certificated carriers. It would delay, and probably obviate, the consideration of many purely defensive applications initiated by those against whom a complaint has been preferred, or whose operations were the subject of investigation. And it would safeguard an applicant against the filing of a defensive complaint, the bona fides of which might well be doubtful.

Such a step, we believe, would result in expediting the disposition of applications for certificates, without impairing the substantive rights of interested parties. Accordingly, the examiner's ruling excluding evidence concerning applicant's asserted unlawful operations as a contract carrier, will be upheld.

As pointed out above, the application will be granted in part. Appropriate limitations will be imposed to exclude the transportation of certain commodities.

Gilbert J. Munson and Gordon A. Samuelson, copartners, are 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

Application as above entitled having been filed, a public hearing having been held thereon, the matter having been submitted, the Commission being fully advised in the premises and hereby finding that public convenience and necessity so require,

IT IS ORDERED as follows:

(1) That a certificate of public convenience and necessity be and it hereby is granted to Gilbert J. Munson and Gordon A. Samuelson, copartners, authorizing the establishment and operation of a service as a highway common carrier (as defined in Section 2-3/4 of the Public Utilities Act) for the transportation of general commodities between San Francisco and Oakland and those parts of Albany, Alameda, Berkeley and Piedmont described in the description of the Oakland Pickup and Delivery Zone in the Commission's Highway Carriers' Tariff No. 2, on the one hand, and on the other hand, the following points situated in Contra Costa County, viz.: Walnut Creek (including all points within a radius of one mile of the city limits), Danville, Saranap, Concord (including all points within two miles of the city limits), Pacheco and Clayton; all points intermediate to the above named points in Contra Costa County; and all points situated within one mile laterally on each side of

California State Highway No. 21 between Pacheco and Danville.

Said certificate is granted subject to the following limitations:

Applicant shall not engage in the transportation of:

Unrated household goods and other commodities for which the Commission has prescribed minimum rates in Appendix "A", Decision No. 32325, City Carriers' Tariff No. 3 - Highway Carriers' Tariff No. 4.

Livestock, unrated;

Liquid commodities, in bulk, in tank trucks;

High explosives; and

Commodities requiring refrigerations.

(2) That in providing service pursuant to the certificate herein granted, applicant shall comply with and observe the following service regulations:

- a. Applicant shall file a written acceptance of the certificate herein granted within a period of not to exceed 30 days after the effective date hereof.
- b. Within 60 days after the effective date hereof and on not less than 5 days' notice to the Commission and the public, applicant shall establish the service herein authorized and comply with the provisions of General Order No. 20 and Part IV of General Order No. 93-A, by filing in triplicate and concurrently making effective, appropriate tariffs and time tables.
- c. Subject to the authority of this Commission to change or modify them by further order, applicant shall conduct operations pursuant to the certificate herein granted over and along the following routes:

Between San Francisco and Oakland, via the San Francisco-Oakland Bay Bridge.

Between Oakland and other East Bay points, and Saranap, Walnut Creek and Concord, via State Highway No. 24.

Between Pacheco and Danville, via State Highway
No. 21.

Between Pacheco and Concord, via unnumbered highway.

Between Concord and Clayton, via Marsh Creek Road.

(3) That in all other respects said Application No.
28856 is hereby denied.

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

Dated at San Francisco, California, this 14th
day of February, 1950.

R. J. [Signature]
Justice J. [Signature]
[Signature]
[Signature]
[Signature]
Commissioners