

ORIGINAL

Decision No. 45095

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of Commission investigation into the)
operations and practices of DON D'ONOFRIO,)
doing business as Donofrio Drayage & Record)
Express.)

Case No. 5213

Robert C. Dunn, for respondent.
Russel Bevans, for Draymen's Association of San Francisco;
Clair W. MacLeod for Fred V. Jakobsen;
Daniel W. Baker and Reginald L. Vaughn, x
for Pacific Motor Tariff Bureau;
George D. Hart, for United Transfer Co.;
Bertram S. Silver and Edward M. Berol,
for Highway Transport, Inc., interested parties.
John Power, for Field Division, Public Utilities Commission
of the State of California.

O P I N I O N

This proceeding was instituted upon the Commission's own motion to determine whether Don D'Onofrio, hereinafter called respondent, has operated as a highway common carrier without having obtained a certificate of public convenience and necessity or having possessed a prior right so to operate, as required by Section 50-3/4 of the Public Utilities Act.

Public hearings were held on October 20, 1950 and October 30, 1950 at San Francisco before Examiner Silverhart, and the matter submitted for decision.

It was stipulated that respondent possesses city, highway contract and radial highway common carrier permits, and that he does not possess any certificated or prescriptive right to operate as a highway common carrier, that since September 16, 1946, he has owned, controlled, operated or managed, one or more auto trucks used in the business of transporting property for compensation over public highways in California; that his principal place of business is located

at 772 Commercial Street, San Francisco.

An employee of the Commission's field division testified that respondent stated to him that he rendered service between San Francisco and San Jose and intermediate points and between San Francisco and East Bay points five days a week. The witness examined respondent's freight bills for the month of April 1950, as a result of which, he prepared an exhibit, in evidence herein, setting forth all intercity shipments transported by respondent during the 10 working days from April 9, 1950 to April 15, 1950, and April 23, 1950 to April 29, 1950. This exhibit discloses that respondent carried various commodities during the periods surveyed and may be summarized in the manner following:

<u>Nature of Shipment</u>	<u>Number of Shipments</u>
Radios	144
Liquor & Wine	143
Phonograph Records	123
Metal Furniture	30
Household Appliances	4
Musical Instruments	13
Cameras - Photo Supplies	13
Grass Seed	16
Earthenware	2
Electric Appliances	5
Amusement Machines	5
Rugs	3
Table Pads	7
Ceramics, Photo Murals,)	
Glass & Silverware, Outboard)	
Motors, Furniture, Paper)	
Goods)	6
Total	519

(1) Exhibit 1.

Points ServedNumber of Days Served

<u>From</u>	<u>To</u>	
San Francisco	Brisbane	2
" "	Daly City	2
" "	South San Francisco	3
" "	Colma	1
" "	San Bruno	5
" "	Lomita Park	1
" "	Millbrae	7
" "	Burlingame	8
" "	San Mateo	10
" "	Belmont	3
" "	San Carlos	7
" "	Redwood City	10
" "	Woodside	3
" "	Atherton	1
" "	Menlo Park	9
" "	Palo Alto	10
" "	Los Altos	5
" "	Mountain View	6
" "	Sunnyside	3
" "	Santa Clara	1
" "	San Jose	10
" "	Los Gatos	6
San Francisco	Oakland	10
" "	Berkeley	10
" "	Albany	3
" "	El Cerrito	4
" "	San Pablo	3
" "	Richmond	8
" "	Alameda	4
" "	San Leandro	4
San Francisco	Sausalito	1
Number of Consignors		36
Number of Consignors by whom charges were paid		5
Number of Consignees to whom collect shipments were directed		183
Number of persons who engaged respondent's services		
Consignors		32
Consignees		4

Range in weight of shipments,
in pounds

4 to 3200

The witness further testified that respondent transported shipments to Peninsula and East Bay points as shown in the following tabulation:

	<u>Number of Shipments</u>	
<u>1950</u>	<u>San Francisco to Peninsula Points</u>	<u>San Francisco to East Bay Points</u>
April 10	30	12
11	23	23
12	51	14
13	40	31
14	51	21
24	19	14
25	43	9
26	38	15
27	34	32
28	16	3
	<u>345</u>	<u>174</u>

Total 519

Reports filed by respondent pursuant to the provisions of the Transportation Rate Fund Act indicate his gross revenues for the first three-quarters of 1950 were as follows:

January	\$3,707.76	April	\$3,402.52	July	\$3,689.00
February	2,986.50	May	3,998.99	August	4,778.86
March	3,763.15	June	3,258.91	September	\$3,905.83

It would appear therefore, that the periods encompassed within the scope of the exhibit, April 10 to 14, 1950, inclusive, and April 24 to 28, 1950, inclusive, are not atypical of respondent's operations.

A member of the firm of Lewis-Westco & Co. was called as a witness by the Commission and testified that he has used respondent's service for some time. The witness stated that his company shipped distiller's spirits and wines, transportation charges prepaid, to wholesale establishments, bars and retail stores; that all shipments destined for Peninsula and East Bay points are delivered to respondent to effect the carriage thereof; that respondent calls at his place of business from one to three times daily; that his company and respondent have not entered into a written contract; that the volume of shipments tendered respondent

is not fixed; that the oral agreement is terminable at any time.

The Commission also called the branch manager of the Decca Distributing Company as a witness. He testified that respondent, upon request of Decca Distributing Company, has been rendering it service between San Francisco and Peninsula points to and including San Jose since December, 1949; that respondent's truck calls daily between 9:00 a.m. and 9:45 a.m. but is not required to arrive at any definite time; that Decca Distributing Company does not designate the routes respondent uses in making delivery of its shipments; that the arrangement between his company and respondent is oral and service thereunder may be terminated at its discretion.

The shipping superintendent of W. J. Lancaster Co. testified upon respondent's behalf. The witness stated his company had a verbal contract with respondent under which he transported its television, radio and shopsmith shipments to East Bay and Peninsula points including San Jose. His testimony disclosed that all shipments moved transportation charges collect; that such verbal contract had no stated term, contained no provision for minimum poundage, made no promise that transportation charges would be paid and could be terminated at any time he desired.

Respondent testified that he has been engaged in the transportation business since 1939; that his only place of business is situated at 772 Commercial Street, San Francisco; that he neither owns nor operates any terminals; that he employs five drivers and owns and operates three 1-1/2 ton van trucks, two 1-1/2 ton stake trucks and one 1/2 ton pickup truck.

Respondent stated that he had specialized in the transportation of wines and liquors and fragile merchandise, and that his drivers were trained in the proper handling of such commodities. He

testified that he did not engage in solicitation of business; that he has refused service to Peninsula points despite availability of space in his equipment; that he will not accept shipments to destinations in excess of a 50 mile radius from San Francisco; that he has discontinued service to eight of the consignors shown on Exhibit 1.

Respondent testified that he had no written contracts but asserted he had oral contracts with 10 consignors; of whom six pre-paid transportation charges, three shipped collect and one utilized both methods. He stated that he also had an oral contract with a person named "Jean". According to the testimony "Jean", a clerk in the employ of the San Francisco Furniture Mart, handles shipping matters for any of the tenants thereof. It appears that "Jean" used respondent's service to transport shipments for several tenants, the charges therefor being paid by someone other than "Jean".

The evidence demonstrates that respondent's services were engaged by 36 persons; that he transported collect shipments to 183 consignees; that the kind of equipment he used was not possessed of unusual features; that he transported a wide variety of commodities none of which required unusual treatment; that the 11 alleged verbal contracts imposed no legal obligation; that there is an absence of close identification or relationship of respondent with the business or operations of those to whom he renders transportation services.

The record shows that respondent's operations do not possess the degree of restrictiveness or limitation sufficient to constitute contract carriage. We conclude therefore that respondent is not engaged in operations between the points with which we are here concerned as a highway contract carrier.

In the matter of Pacific Southwest Railroad Association, et al., vs. Harold A. Stapel, et al., Decision No. 43828, Case No.

4927, February 14, 1950, 49 Cal P.U.C. 407, wherein the defendant was charged with having engaged in business as a highway common carrier without proper operating authority, we said at page 413,

"In administering the present statute, however, we believe we are justified in holding that where, as here, the evidence shows operations by a common carrier on a daily basis between any two or more points, or over any definable route, being conducted on such a scale, or in such a manner, as to exhibit a permanent or indefinitely continuing nature, such points are "fixed termini" within the meaning of the statute. And where the carrier serves other points, or traverses other routes, as a common carrier, making use of the same personnel, equipment, and facilities for all his operations, then the entire service is unlawful in the absence of a certificate of public convenience and necessity."

The evidence establishes that respondent rendered daily service between San Francisco and San Jose, and between San Francisco and Oakland and Berkeley, while service to the intermediate points ranged from daily to once bi-weekly. The evidence also disclosed that respondent in the conduct of all his operations makes use of the same equipment, facilities and personnel.

We find therefore, that respondent has been engaged in the transportation of property as a highway common carrier for compensation over the public highways of the State of California between fixed termini and over regular routes: between San Francisco on the one hand and Brisbane, Daly City, South San Francisco, Colma, San Bruno, Lomita Park, Millbrae, Burlingame, San Mateo, Redwood City, Woodside, Atherton, Menlo Park, Palo Alto, Los Altos, Mountain View, Sunnyvale, Santa Clara, San Jose and Los Gatos on the other hand, and between San Francisco on the one hand and Oakland, Berkeley, Albany, El Cerrito, San Pablo, Richmond, Alameda, San Leandro on the other hand, without possessing a prior operative right therefor and without first having secured a certificate of public convenience and necessity, in violation of Section 50-3/4 of the Public Utilities 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 permits to operate as a radial highway common carrier, and 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 such evidence and the findings and conclusions set forth in the preceding opinion,

IT IS ORDERED:

(1) That Don D'Onofrio is 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 between fixed termini, to wit: between San Francisco on the one hand and Brisbane, Daly City, South San Francisco, Colma, San Bruno, Lomita Park, Millbrae, Burlingame, San Mateo, Redwood City, Woodside, Atherton, Menlo Park, Palo Alto, Los Altos, Mountain View, Sunnyvale, Santa Clara, San Jose and Los Gatos, on the other hand; between San Francisco on the one hand and Oakland, Berkeley, Albany, El Cerrito, San Pablo, Richmond, Alameda and San Leandro on the other hand, unless and until said Don D'Onofrio shall have obtained from this Commission a certificate of public convenience and necessity therefor.

(2) That Radial Highway Common Carrier Permit No. 38-4253 and Highway Contract Carrier Permit No. 38-6047 heretofore issued to

C-5213 CS:GH

Don D'Onofrio, are suspended until for good cause shown, the Commission by supplemental order herein otherwise directs.

The secretary is directed to cause a certified copy of this decision to be personally served upon Don D'Onofrio.

The effective date of this order shall be forty (40) days after the date of such service.

Dated at San Francisco, California, this 5th day of December, 1950.

A. J. Zimmerman
Justice J. Green
Frank A. Russell
Harold P. Kula
Kenneth Potter
 Commissioners