

ORIGINAL

Decision No. 46308

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Investigation into the operations,
rates and practices of 20TH CENTURY
DELIVERY SERVICE, INC., a corporation.)

Case No. 5206

John Power, for the Field Division of the Public Utilities Commission of California. Frank P. Doherty and Scott Elder, by Scott Elder, for the respondent. Turcotte and Goldsmith, by Frank Turcotte, for the Goodman Delivery Service, interested party.

O P I N I O N

In this case an "Order Instituting Investigation" was filed by the Commission on June 7, 1950. This order called for an investigation into the operations, rates and practices of the 20th Century Delivery Service, Inc., respondent herein, for the following purposes:

1. To determine whether respondent has operated, or is operating, as a highway common carrier over regular routes or between fixed termini anywhere within the State of California, without having obtained a certificate of public convenience and necessity and without having possessed or acquired a prior right so to operate, as required by Section 50-3/4 of the Public Utilities Act of the State of California.

2. To determine whether respondent is performing operations as an express corporation, as defined in Section 2 (K) of the Public Utilities Act of California, and as a highway

contract carrier, in transporting the same commodities between the same points, in violation of Section 4 of the Highway Carriers' Act of the State of California.

3. To determine whether respondent may have charged, demanded, collected, or received, or may be charging, demanding, collecting, or receiving, a greater or less compensation for the transportation of property than the rates and charges applicable to such transportation as specified in its filed schedules, in violation of Section 17 (a) (2) of the Public Utilities Act of the State of California.

4. To determine whether respondent may have made or granted, or may be making or granting, preference or advantage to certain corporations or persons, or may be subjecting certain corporations or persons to prejudice or disadvantage, in violation of Section 19 of the Public Utilities Act of the State of California.

5. To determine whether any or all of respondent's operating authority should be canceled, revoked or suspended ^{1/-}.

1/ Subsequent to the hearings herein the Public Utilities Code was adopted (Statutes 1951, Chapter 764); (a) Section 50-3/4 of the Public Utilities Act is Sections 1061-1070 and Section 1072 of the Public Utilities Code, (b) Section 17 (a) (2) of the Public Utilities Act is Section 494 of the Public Utilities Code, (c) Section 19 of the Public Utilities Act is Section 453 of the Public Utilities Code, (d) and Section 4 of the Highway Carriers' Act is Section 3542 of the Public Utilities Code. The second paragraph of Section 4 has been deleted.

The "Order Instituting Investigation" was served on the respondent on June 19, 1950. Hearing thereon was set for August 29, 1950, and, at the requests of the various parties, was continued from time to time until April 25, 1951, at which time the matter was partially heard before Examiner Rogers and continued to a date to be set. Thereafter, by agreement of the parties, further hearing was held on June 5, 1951, and the matter was submitted on briefs which have been filed.

At the outset of the hearings the following stipulations were made by all parties:

1. That the respondent has the following permits issued by the Public Utilities Commission of the State of California:

(a) radial highway common carrier, issued December 20, 1935;
(b) highway contract carrier, issued March 12, 1942; (c) city carrier, issued December 21, 1935, which was recalled on or about August 31, 1950, and a "grandfather" city carrier permit issued on September 1, 1950.

2. That the respondent has a "grandfather" express corporation right.

3. That the respondent's express tariff, both the current and the historical, be included in evidence by reference, and that Exhibit No. 1 be received in evidence as photostatic copies of the pages in the tariff that they purport to represent.

4. That the respondent had gross operating revenues from the transportation of property during each of the months of April, May and June, 1950.

5. That the respondent operates in excess of forty vehicles in its business.

The witness called by the Field Division of the California Public Utilities Commission testified that, at the time of the hearings, he had been employed by the Commission as an Associate Transportation Representative since September 11, 1935, and had been employed by the Commission as an Assistant Transportation Rate Expert for approximately 14 years prior to that period. This witness, in his official capacity, received from the respondent corporation on June 26, 1950, all of the respondent's shipping tickets for its motor carrier operations for the months of May and June, 1950, to and including June 26. He also selected a portion of the tickets representing the express corporation operations of respondent for the same period. The witness selected the week of June 5 to June 9, inclusive, 1950, as representative of the respondent's operations and from the shipping tickets, which the respondent segregates into express corporation operations and motor carrier operations, prepared Exhibit No. 3, "Summary of all highway carrier operations of 20th Century Delivery Service, Inc., except those performed wholly within the boundaries of an incorporated city, during the period noted.", Exhibit No. 4, "Partial summary of express certificated operations of 20th Century Delivery Service, Inc., within the State of California (covering the same commodities transported as a highway contract carrier), between Los Angeles and Burbank on the North, Santa Monica on the West, Monrovia on the East and Long Beach on the South, during the

period noted.", and Exhibit No. 5, "Summary of certain shipments transported for wholesale business firms by 20th Century Delivery Service, Inc., as an express corporation, during the period June 5 to 9, 1950." Each of the twenty shippers named in Exhibit No. 3, has a written contract with the respondent for the transportation of merchandise between named points^{2/}.

The record contains nothing to indicate that during the period noted, excluding operations wholly within incorporated cities, and express corporation operations, respondent performed any transportation services other than those reflected in Exhibit No. 3.

Did respondent, during the stated period, perform services as a highway common carrier as defined in Section 2-3/4 of the Public Utilities Act?

In a prior matter^{3/} the respondent was ordered to cease and desist operations as a highway common carrier until it secured a certificate of public convenience and necessity. At the time of that decision respondent had contracts with about 480 shippers. Respondent's superintendent testified in the instant case that, in order to comply with the order of the Commission, respondent reduced the number of its contracts with

^{2/} Exhibits Nos. 7, 8, 10, 11 and 12.

^{3/} Decision No. 41475, dated April 13, 1948, on Case No. 4887, and Application No. 28494.

shippers to the twenty which are in evidence herein^{4/}. This witness further testified that, at the time of the hearing herein, respondent had further reduced the number of its contracts to ten. The contracts which are in evidence show consideration by each party, are for definite periods of time, state between which places the hauling is to be performed, and are binding contracts.

In two recent decisions^{5/} the Supreme Court of the State of California held that the common law test of common carriage requires an unequivocal intention to dedicate property to a public use. The evidence herein shows no such intention, and, on the contrary, the only reasonable inference from the evidence of record is that the respondent intended to and did transport merchandise in its own trucks only for those shippers with which it had binding contracts. Upon the evidence of record the Commission is unable to find that respondent operated as a highway common carrier during the period embraced by Exhibit No. 3.

Is the respondent engaged in the transportation of property on the public highway both as a common carrier and as a contract carrier of the same commodities between the same points, in violation of Section 4 of the Highway Carriers' Act?

This question requires that the Commission determine two matters: first, is the respondent engaged in the transportation of property on the public highways both as a common carrier and as a contract carrier, and, second, if the Commission

^{4/} See note (2) supra.

^{5/} Samuelson v. Public Utilities Commission, 36 Cal. 2d 722(1951)
Souza v. Public Utilities Commission, 37 A.C. 539 (1951).

determines the first question in the affirmative, is the respondent, in both capacities, transporting the same commodities between the same points? Only in the event that both questions are answered in the affirmative will a violation of Section 4 of the Highway Carriers' Act be shown to exist.

The first paragraph of Section 4^{6/} of the Highway Carriers' Act provides:

"No person or corporation shall be permitted by the Railroad Commission to engage, nor shall any person or corporation engage in the transportation of property on the public highway, both as a common carrier and as a highway contract carrier of the same commodities between the same points."

Respondent contends that Section 4, supra, does not reach respondent's dual operations nor those of any other express corporation for the reason that express corporations do not transport property "on the public highway."

It was stipulated herein that respondent operates as an express corporation and as a highway contract carrier. Section 2 (l) of the Public Utilities Act defines an express corporation as a common carrier and Section 2 (k) provides that an express corporation engages in the transportation of property. The principal effect of the expression contained in Section 4, "on the public highway", is to preclude the application of the section to transportation by rail or water. Such an interpretation appears so patent as to preclude argument.

^{6/} Codified by Statutes of 1951, Chapter 764 as Section 3542 of the Public Utilities Code.

The Commission has heretofore interpreted Section 4 as applying to dual operations by express corporations and highway contract carriers^{7/}, and the Commission so finds herein.

The Commission having determined that an express corporation is subject to the provisions of Section 4 of the Highway Carriers' Act, the question remains as to whether or not the evidence shows the transportation by respondent of the same commodities between the same points both as an express corporation and as a highway contract carrier. A comparison of the transportation of phonograph records as a contract carrier, as shown in Exhibit No. 3, for the period June 5 to 9, 1950, inclusive, with the transportation of phonograph records as an express corporation during the same period as shown on Exhibit No. 4, will suffice to show such activities.

Exhibit No. 3 shows that respondent, during the check period, transported as a contract carrier, phonograph records from Los Angeles to Alhambra, Burbank, Compton, Glendale, Huntington Park, Inglewood, Long Beach, Pasadena and Santa Monica, for the Capital Records Distributing Co., Inc., and from Los Angeles to Compton, Huntington Park, Long Beach and Pasadena, for Decca Distributing Corporation. Exhibit No. 4 shows that during the check period respondent transported, as an express corporation, phonograph records from Los Angeles to Alhambra, Burbank, Compton, Glendale, Huntington Park, Inglewood and

^{7/} See, for example, citation in re San Diego Forwarding Co., Decision No. 40172, dated April 15, 1947, in Application No. 28091.

Pasadena, for Mercury Record Distributors, Inc., and from Los Angeles to Burbank, Compton, Glendale, Long Beach, Inglewood, Pasadena and Santa Monica, for Redwood Record Sales, Inc.

It will thus be seen that during the check period involved, respondent was transporting phonograph records, both as an express corporation and as a contract carrier, between Los Angeles on the one hand, and Alhambra, Burbank, Compton, Glendale, Huntington Park, Inglewood, Long Beach, Pasadena, and Santa Monica, on the other hand. The Commission finds that such operations are in violation of Section 4 of the Highway Carriers' Act, and respondent will be ordered to cease and desist from any and all operations wherein and whereby it transports the same commodities between the same points, both as an express corporation and as a highway contract carrier.

Has the respondent charged, demanded, collected or received a greater or less or different compensation for the transportation of property than the rates and charges applicable to such transportation as specified in its filed schedules, in violation of Section 17 (a) (2) of the Public Utilities Act of the State of California?

Section 17 (a) (2) of the Public Utilities Act, so far as pertinent, provides:

"No Common Carrier shall charge, demand, collect or receive a greater or less or different compensation for the transportation of ... property, ... than the rates, fares and charges applicable to such transportation as specified in its schedules filed and in effect at the time;" (underlining added)

The Commission has hereinbefore determined that in transporting property for the contracting parties listed in Exhibit No. 3, respondent was operating as a contract carrier,

and it follows that the respondent's services reflected in Exhibit No. 3, are not subject to the provisions of Section 17 (a) (2) of the Public Utilities Act.

The evidence of record shows, and the Commission finds, that all express corporation services performed by respondent and reflected in Exhibit No. 4 and Exhibit No. 5 (summaries of express services rendered during selected periods), with the exception of services performed for one shipper and hereinafter noted, were performed at the rates specified in respondent's express tariff in effect at the time the services were performed (20th Century Delivery Service, Inc., Local Express Tariff C.R.C. (now Cal. P.U.C.) No. 6; see Exhibit No. 1), and were not in violation of Section 17 (a) (2) of the Public Utilities Act.

The one shipper listed on Exhibit No. 4, which apparently was given service at rates other than those set forth in respondent's filed express tariff (Exhibit No. 1) was the Spool Cotton Company of Los Angeles, for which company the respondent allegedly transported property via an underlying carrier at the rates specified in Highway Carriers' Tariff No. 2. The Spool Cotton Company is one of the ten companies with which the evidence herein shows respondent has had a written contract at all times herein involved (See Spool Cotton contract, Exhibit No. 11). This contract provides that respondent will transport merchandise in the suburban delivery zone at the rate of 49 cents for shipments of 25 pounds or less. Each of the Spool Cotton shipments listed on Exhibit No. 4, respondent's express operations, weighed less than 25 pounds and respondent charged 49 cents

for each service (Exhibit No. 4, pages 4 and 5). Respondent's superintendent explained that the services which respondent allegedly performed for Spool Cotton Company as an express corporation were actually performed by respondent as a contract carrier under respondent's contract with Spool Cotton Company (Exhibit No. 11, supra), and that the shipments moved via respondent's own trucks. The witness who testified as a member of the Field Division of the Commission stated that the Spool Cotton transactions referred to were the only ones which allegedly show a deviation from the respondent's filed express tariffs. Inasmuch as there is no claim that the respondent violated its express tariff in any other respect than as above noted, the Commission is of the opinion and finds that there is no substantial evidence that respondent violated Section 17 (a) (2) of the Public Utilities Act and, therefore, that charge will be dismissed.

Has the respondent made or granted preference or advantage to certain corporations or persons, or has it subjected certain corporations or persons to prejudice or disadvantage in violation of Section 19 of the Public Utilities Act?

Section 19 of the Public Utilities Act of California provides, in part:

"No public utility shall, as to rates, charges, service, facilities or in any other respect, make or grant any preference or advantage to any corporation or person or subject any corporation or person to any prejudice or disadvantage."

Under its express tariff (Exhibit No. 1) respondent holds itself out to transport as an express corporation via

an underlying carrier, packages within certain weight limits picked up in Los Angeles and delivered to numerous points, including the City of Long Beach. The rate set forth in respondent's express tariff for packages shipped by wholesale merchants is 16 cents per package plus $1\frac{1}{2}$ cents per pound, or portion thereof of its weight.

Exhibit No. 4 shows that from Los Angeles to Long Beach during the period June 5 to 9, inclusive, 1950, respondent transported via an underlying carrier as an express corporation for Winthrop Stearns, Inc., eight shipments of drugs to as many different consignees. All of these shipments were transported at the rate set forth in respondent's express tariff (Exhibit No. 1) i.e. 16 cents per package plus $1\frac{1}{2}$ cents per pound. Winthrop Stearns, Inc., did not, during the period of June 5 to 9, 1950, have a contract with respondent.

Exhibit No. 3 shows, commencing with Page 41 thereof, a list of all shipments of drugs transported by respondent pursuant to its written contract with The Upjohn Company (Exhibit No. 12, Upjohn contract) as a contract carrier, which shipments were transported in respondent's trucks. Commencing on page 42 of Exhibit No. 3, is a list of all shipments of drugs carried by respondent for The Upjohn Company from Los Angeles to Long Beach. Hereinbelow, in tabular form, is a compilation showing the consignee, number of packages, weight of shipment, charges assessed pursuant

to contract, and the charges assessable under respondent's express tariff, as computed by the Field Division's representative, for shipments of drugs transported by respondent from Los Angeles to Long Beach for The Upjohn Company:

<u>Consignee</u>	<u>No. of Packages</u>	<u>Weight of Shipment</u>	<u>Actual Charges</u>	<u>Charges allowable under Express Tariff</u>
Abrams Drug Co.	2	37	.62	.88
Bell's Pharmacy	1	20	.49	.46
Caneer & Pearson	2	41	.62	.92
Caneer & Pearson	4	106	.93	2.23
Caneer & Pearson	2	43	.62	.97
Clinic Pharmacy	1	37	.62	.72
Finer Pharmacy	2	32	.62	.80
Hair Need Drug Co.	1	29	.62	.60
J. Mydall	2	24	.49	.65
Prell Pharmacy	1	33	.62	.66
Professional Pharmacy	3	58	.75	1.35
Sav-On-Drug	4	84	.87	1.90
Seaside Mem. Hosp.	3	76	.87	1.62
Vermillion Rexall Drug	2	86	.87	1.61
Wardlow Pharmacy	2	20	.49	.62

The foregoing comparisons are only some of those pointed out by the Field Division, but the differences in charges for contract services and express services are

typical. It will be noted that the evidence referred to shows:

1. That for transportation of drugs from Los Angeles to Long Beach via an underlying carrier for a shipper with which respondent did not have a contract it charged the rates set forth in its express tariff.

2. That in transporting drugs from Los Angeles to Long Beach via its own trucks for a shipper with which it had a contract respondent assessed different rates than those set forth in its express tariff; and

3. That the rates charged a contracting party whose goods were carried in respondent's own trucks were different than the rates charged to a non-contracting party whose merchandise was carried on the truck of an underlying carrier.

The only evidence presented by the Field Division concerns the difference in rates charged between the same points for the same commodities for the two types of services, i.e. highway contract carrier and express corporation. Upon the state of the record herein it appears that the evidence is insufficient to show that a violation of Section 19 of the Public Utilities Act has occurred. It cannot be presumed that a mere difference in rates creates unlawful prejudice and preference (California Portland Cement Co. v. Southern Pacific Co., 42 C.R.C. 92, at page 116), and to be unlawful under that section the discrimination must be undue, taking into consideration all of the surrounding facts and circumstances (Re Atchison, Topeka and Santa Fe Railway Co.,

43 C.R.C. 25, at page 34). To be undue, preference and prejudice must be shown to be a source of advantage to the parties or traffic alleged to be favored, and a deterrent to other parties or traffic. (Scott Lumber Co., Inc. v. The Atchison, Topeka and Santa Fe Railway Co., 47 C.R.C. 593, at page 599). As the evidence shows two types of services performed and does not show any of the surrounding facts or circumstances upon which the rates are based there is no showing of a violation of Section 19 of the Public Utilities Act. Such a holding is not a determination that the practices complained of are lawful.

O R D E R

A public hearing having been held in the above-entitled matter, and based upon the evidence adduced and the findings set forth in the foregoing opinion,

IT IS ORDERED:

That 20th Century Delivery Service, Inc., a corporation, cease and desist from any and all operations wherein and whereby it transports the same commodities between the same points, both as an express corporation, as defined in Section 219 of the Public Utilities Code, and as a highway contract carrier, as defined in Section 3517 of the Public Utilities Code.

Except as herein provided the "Order Instituting Investigation" in Case No. 5206 is dismissed.

The Secretary is directed to cause a certified copy of this decision to be served upon 20th Century Delivery Service, Inc., a corporation.

The effective date of this order shall be twenty (20) days after the date of service thereof.

Dated at San Francisco, California, this 15th day of October, 1951.

President

Justin F. Calver

Harold P. Huls

James H. Potter

Commissioners