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Decision No. 50877

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of V. Fred Jakobsen doing business as Trans-Bay Motor Express Co., for an extension and amendment of his certificate of public convenience and necessity as a highway common carrier.	Application No. 34969 (As Amended)

Scott Elder, for Applicant.
Frederick W. Mielke, for Delta Lines, Inc.;
Marvin Handler, for Peninsula Motor Express and Nielsen Freight Lines;
Douglas Brookman, for Merchants Express Corporation, California Motor Express Ltd., Valley Express Co., Valley Motor Lines, Inc., Stockton Motor Express, and Pacific Greyhound Lines;
Robert W. Walker, Matthew H. Witteman and Henry M. Moffat, for The Atchison, Topeka and Santa Fe Railway Company and Santa Fe Transportation Company;
William Meinhold and Frederick E. Fuhrman, for Southern Pacific Company, Pacific Motor Trucking Company and Railway Express Agency;
Bertram S. Silver, Thomas P. Brown, Jr., and Edward M. Berol, for Highway Transport, Inc., and Highway Transport Express;
Frank Loughran, for Peninsula Delivery Service;
Willard S. Johnson, for J. Christenson Company;
William E. Shuholm, for West Berkeley Express & Drayage Company;
Daniel W. Baker, for M and L Trucking Co., West Berkeley Express, Beckman Express, United Transfer, Nielsen Freight Lines, Peninsula Motor Express and Inter-Urban Express Corporation, protestants.
Philip A. Winter, for C. R. Becker, doing business as Delivery Service Company;
Roger Ramsey and Preston Davis, for United Parcel Service, and
Maurice A. Owens, for Draymens' Association of Alameda County, interested parties.

O P I N I O N

V. Fred Jakobsen doing business as Trans-Bay Motor Express Co., conducts a highway common carrier service between San Francisco and Oakland, Berkeley, Albany, El Cerrito, San Leandro, Piedmont, Alameda and Emeryville under authority of this Commission. The service was originally instituted, using three-wheel motorcycle trucks,

by Wm. M. and Makin H. Smith, doing business under the firm name of Trans-Bay Motor Express Co.[1] Applicant joined the partnership in May, 1939,[2] and became sole owner in October 1944.[3] The use of four-wheel motor trucks was authorized in 1948 and the restriction that no shipment was to be carried in excess of 100 pounds, was added by the same decision.[4] The Commission in Decision No. 41163 found that this applicant's service is that of a transbay package service. This is clear from the language therein employed by the Commission,

> "Indeed, if anything, the 100-pound-per-shipment limitation would restrict applicant's operating authority more rigidly to the package transportation field."

This fact becomes manifest when the definition of shipment in Highway Carriers' Tariff and in Applicant's Tariff is considered. Therein a shipment is stated to mean a quantity of freight tendered by one shipper on one shipping document at one point of origin at one time for delivery to one consignee at one point of destination.

By this application filed December 17, 1953 applicant seeks to amend his certificated rights so that he will continue to be restricted to the transportation of parcels and packages weighing no more than 100 pounds and by raising the limitation as to the weight of shipments to 500 pounds. In addition a new certificate of public convenience and necessity is requested which would authorize operations as a highway common carrier with like restriction and limitation for the carriage of freight not requiring refrigeration and also excluding dangerous explosives and merchandise sold by retail department or specialty stores to customers, between applicant's present

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(1) Decision No. 27975 dated May 20, 1935 in Application No. 19893, Decision No. 29281 dated November 23, 1936 in Application No. 19893 and Decision No. 31863 dated March 27, 1939 in Application No. 22497.
(2) Decision No. 31972 dated May 2, 1939 in Application No. 22709.
(3) Decision No. 37433 dated October 24, 1944 in Application No.26363.
(4) Decision No. 41163 dated January 27, 1948 in Application No.28456.

service area on the one hand, and on the other hand, Los Gatos and San Jose on the south, Santa Rosa on the north, and Sacramento and Stockton on the east, serving all intermediate points.

Public hearings were held before Examiner John Rowe in San Francisco on February 24 and 25, March 1, 2, 3, April 19, 20, 21, 22 and May 21 and 24 and in Oakland on March 9, all in 1954. On May 24, 1954 the matter was duly submitted upon concurrent briefs which have now been duly filed.

Twenty-three shipper witnesses testified on behalf of applicant. Fifteen of these witnesses represented concerns located in San Francisco. Two are located in Berkeley and six in Oakland. The only freight movement described was an outward movement from those three cities. There is a complete absence of any attempt to introduce evidence justifying the grant of any other freight transportation rights except a possible return of freight rejected or otherwise to be returned to those three cities.

These witnesses almost invariably praised applicant's service, his closed equipment and, those who had seen it, his terminal operation. Where more than 100 pounds of freight was involved the shippers stated that it was necessary to have multiple bills of lading prepared. They criticized this as an unnecessary expense and annoyance. Usually the larger shipments, those in excess of 150 pounds, were destined for Stockton, Sacramento, San Jose or Santa Rosa, or intermediate points, although some shipments in excess of 100 pounds moved between San Francisco and Oakland and other East Bay points. A few of these shipper witnesses testified that rather than bother with multiple billings they used other carriers where the 100-pound-per-shipment limits were exceeded.

There was, however, not much adverse criticism of the limitation that parcels be restricted to 100 pounds in size. One witness representing a wholesaler of jewelry and small appliances

indicated that he preferred having these articles separately wrapped but frequently needed to move shipments in quantities in excess of 100 pounds. Where the article individually weighs more than the 100 pounds applicant is presently refusing to carry it even under his contracts for shipment to points beyond his certificated territory. This is due to the fact that his terminal with its conveyor belt is not designed to handle bulky freight.

None of these witnesses offered any reason why they thought that certification of applicant into the contract area would be beneficial to them. A few when asked replied that applicant was at present meeting a need in their business and if he were authorized to serve them as a highway common carrier they would continue to ship over his facilities. Only a few of these witnesses stated they had contracts with applicant. The question was not asked by counsel for applicant. It was asked on cross-examination by counsel for protestants. Those to whom the question was propounded answered that they had entered into a contract with Mr. Jakobsen.

His contract service is performed purportedly pursuant to the only intercity permit he possesses. It was issued February 17, 1948 and is Highway Contract Carrier Permit No. 1-6300. Applicant testified that he served 2500 customers in his transbay highway common carrier operation. His highway contract carrier service was strictly limited to those with whom he had contracts. He testified there were 109 such contracts. However, over the eleven-day period of November 24, 1953 to and including December 4, 1953, applicant served only 62 contract customers. Three shippers in addition were represented by witnesses at the hearings.

As to service beyond applicant's presently certificated area it appears that there is no evidence which would justify considering applicant as falling within the so-called policy decisions.

(Decision No. 42646 dated March 22, 1949 in Case No. 4823; Decision No. 50448 dated August 17, 1954 in Case No. 5478). The evidence discloses no instances where shippers have been served without contractual arrangements. A definite limit has been placed on the weight of shipments which applicant would carry. Applicant testified that he would not serve those with whom he did not have contract arrangements. The evidence is uncontradicted that he regularly refused shipments offered by those with whom he had no such contracts.

There is definite evidence produced by applicant that he had no intention to dedicate any of his property to a public use in this area except that he now seeks to do so by applying to the Commission for such rights. His highway contract carrier permit authorizes him to carry on a contract operation now and there is nothing in the record to indicate that he may not continue to do so in the future. The contention was not made that applicant's contract carrier service exceeds his authority.

Referring to the limitation of the weight of each parcel and of the weight of shipments inserted in each of his contracts applicant testified that the 100-pound-per-package limitation is entirely for his own convenience. It is also, he admitted, so restricted because it represents the most desirable traffic so far as he is concerned.

These contracts also, according to the applicant's testimony, contain provisions designed to increase the volume of business he would handle. These provisions require minimum weekly charges, ranging from $5.00 to $50.00. These minimums depended upon whatever he wished "to set it at". He stated further, "I am a little choosey in my contract operation". He continued by saying that he fixes the minimum charge so that he is assured the volume of traffic will return

revenue at least as high as the minimum. He testified that this was the "purpose of the guarantee as well as to have a consideration in our contract, because the contract without a consideration is worthless". (Tr. 144) This indicates that applicant has had no intention of dedicating his services to the public generally beyond his presently certificated area.

Support in the record as justification for granting operative rights because of testimony of shipper witnesses as to opinions of a public need is entirely lacking. Applicant failed to show that existing carriers are not adequately serving the public. On the contrary the evidence reveals that especially to the outlying points protestants are not carrying freight to the extent of full capacity and consequently are either operating at a loss or upon a very narrow margin of profit. The witnesses representing these protestants testified that certification of applicant would tend to adversely affect their revenue and tend to force them to curtail service to such points as Santa Rosa, Sacramento, Stockton and San Jose.

The protestants attempted to demonstrate that applicant seeks to carry only the so-called "cream" of the freight business. It is unnecessary to decide this narrow question because applicant's own expert witness conceded that protestants would be hurt by any loss of business diverted to applicant.

Applicant, in addition, has failed to show that he possesses the financial resources to provide and maintain the proposed highway common carrier service. During 1953 applicant suffered a loss from operations of $30,526.16. Applicant's witness testified that during the month of December 1953 applicant's operations became

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profitable. However, analysis of the evidence indicates that there was probably a loss from operations of more than $1500 for the month instead of constituting a profit of $379.09 as claimed. It appears from the evidence that applicant must continue to pick and choose his customers under his contract permit so that the volume of his business will continue to be large and his pickup and delivery service area small if he is to operate profitably.

The evidence does not support the thesis that certification of his existing contract operation will materially improve applicant's financial position.

Turning next to a consideration of applicant's request to change the wording of the restriction against carrying shipments in excess of 100 pounds to a more appropriately worded prohibition against carrying packages and parcels weighing in excess of 100 pounds, it appears that this should be granted. The restriction against the size of shipments was originally designed to limit the size of the parcels. It has actually served that purpose. But in addition it has imposed the unnecessary and undesirable burden of multiple shipping documents where several parcels are to be moved. There is no beneficial purpose served by writing additional shipping documents.

Under applicant's present certificate of public convenience and necessity there is no limitation of the tonnage he may lawfully carry for any shipper. His only actual restriction is that parcels may not exceed 100 pounds in weight. Needless to say, no one would

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seriously contend that a three hundred pound parcel would be shipped by applicant by the issuance of three sets of shipping documents to cover it. Consequently the present restriction of 100 pounds amounts only to a limitation of the size of the parcel.

But since there is no restriction against the number of shipments applicant may carry, no good reason appears for making the transportation of multiple shipments more complicated and difficult. The only reason for limiting the size of the parcels to be carried is so that they will be of an appropriate size to pass over his mechanized terminal. So long as the weight of the parcel is restricted there is no benefit to applicant, to protestants and other competitors or to the public in limiting the size of shipments. He should be permitted to carry more than one parcel for any shipper destined to any one consignee whatever the total weight of the shipment.

Applicant's request for an examiner's proposed report is denied since it is not shown that such procedure will promote the administration of justice. The request of United Parcel Service and of C. R. Becker doing business as Delivery Service Company that applicant be restricted to filing tariffs setting forth charges on the "per shipment" basis instead of charges "per parcel" will not be granted. Such a restriction has not been shown to be in the public interest.

Applicant's petition for review of the examiner's rulings excluding evidence does not state an appropriate basis for relief in the absence of a request to set aside the submission. It is fundamental that after submission no additional evidence may be considered without a reopening of the hearing and the giving to the adverse parties full rights of cross-examination and rebuttal. The petition, however, will receive some discussion. The petition so far as it contains a request to review the ruling of the examiner sustaining objections to the admission in evidence of Exhibits 77 and 78 appears pointless. Both exhibits were received in evidence. See the transcript of evidence, Volume 12, page 1092, lines 3 to 9, inclusive.

The only other error asserted to have been committed by the presiding officer is stated by applicant as follows:

> "Mr. Hopkins established the appropriateness of these figures to the traffic considered in the cost studies. He testified that the average weights of the shipments and the per cent of weight included in the various weight groups in Table F are fairly comparable with the traffic considered in Exhibit 3-16, Case 5441 (Tr. 1025-14). He set forth his comparison on page 3 of his Exhibit 77 id. He further testified that in his opinion the distribution of shipments in the several weight groups in both studies is so comparable that the costs of handling the traffic on February 17 would be as high as or higher than those derived from Exhibits 3-16 and 9-7 (Tr. 1025-16). The examiner erroneously granted a motion to strike this expression of expert opinion by Mr. Hopkins (Tr. 1025-22)."

First it should be noted that the Exhibits 3-16 and 9-7 are not exhibits in this proceeding and consequently are not a part of the record herein. Next it should be pointed out that the above testimony of Mr. Hopkins was stricken from the record as not responsive to the question asked. Subsequently, counsel for applicant, asked a similar question of this witness and when objection thereto was made applicant's counsel withdrew it without giving the examiner an opportunity to rule thereon. This amounted to a waiver on the part of applicant's counsel. Finally, the testimony in question would

have been largely cumulative. Applicant's said petition for review of the examiner's rulings is therefore denied.

O R D E R

Application No. 34969 as amended, having been filed, public hearings thereof having been held, the matter having been duly submitted on briefs now on file, and the Commission being fully advised in the premises,

IT IS ORDERED:

(1) That the limitation to the operative rights of V. Fred Jakobsen contained in the Order of Decision No. 41163 dated January 27, 1948 in Application No. 28456 be, and it hereby is amended so as to provide that applicant shall transport no parcel or package which weighs in excess of 100 pounds and that said applicant shall not accept from one consignor at one time and place parcels, packages, or pieces of property weighing more than 500 pounds in the aggregate, whether on one or more than one shipping document, consigned to one consignee at one destination.

(2) That applicant shall within 60 days after the effective date of this order duly amend his tariffs, rules and regulations to set forth the limitations as stated in ordering paragraph No. (1) hereof on not less than five days' notice to the Commission and to the public.

(3) That except as granted by ordering paragraph (1) hereof Application No. 34969 be, and it hereby is, denied.

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(4) That the request for review of examiner's rulings is denied.

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

Dated at San Francisco, California, this 19th day of OCTOBER, 1954.

Peter E. Mitchell
President

Justus F. Craemer

Kenneth Potter

Rex Hardy [illegible]

Ray E. Untereiner
Commissioners