

Decision No. 53227

ORIGINAL

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of)
 ROBERTSON DRAYAGE CO., INC., a corp-)
 oration, for authority to depart from)
 the rates, rules, and regulations of)
 City Carriers' Tariff No. 1-A, under)
 the provisions of the City Carriers')
 Act and from the rates, rules and)
 regulations of Minimum Rate Tariff)
 No. 2 (formerly Highway Carriers')
 Tariff No. 2), under the provisions)
 of the Highway Carriers' Act.)

Application No. 29587
(Eighth Supplemental)

- Edward M. Berol, for Robertson Drayage Co., Inc., applicant.
- A. L. Russell, for Sears, Roebuck and Co., interested party.
- L. H. Gulick, A. R. Day and Arthur M. Mooney, for the Commission's staff.

NINTH SUPPLEMENTAL OPINION

Prior orders in this proceeding have authorized Robertson Drayage Co., Inc., to deviate from the established minimum rates for the transportation of property for Sears, Roebuck and Co. By this supplemental application authority is requested to continue to deviate from the minimum rates for a further one-year period. In Decision No. 51891, dated August 30, 1955, the Commission extended the authority until December 15, 1955, and stated that it had come to the Commission's attention that the applicant, hereinafter termed Robertson, may be the alter ego of Highway Transport, Inc., a highway common carrier hereinafter called Transport, or Highway Transport Express, an express corporation hereinafter called Express, and that as alter ego of Transport or Express may be engaged in the transportation of property on public highways both as a common carrier and as a highway contract carrier for the same commodities between

the same points.¹ In view of these circumstances the Commission was of the opinion that further investigation should be had.

By interim supplemental orders the expiration date of the authority granted has been extended to June 30, 1956, pending determination by the Commission of this matter.

Public hearing on the matter was held October 21, 1955, at San Francisco before Examiner J. E. Thompson. The matter was taken under submission November 3, 1955, following the filing by the parties of memoranda of points and authorities.

Evidence was adduced through the testimony of the assistant traffic manager of Sears, Roebuck and Co., the accountant of Robertson and the president of applicant. The facts of the operations of Robertson, Transport and Express are uncontroverted.

Robertson was incorporated in California in 1938. The directors and officers are Joseph Robertson, president, F. S. Reed, vice president, A. L. May, secretary, and H. L. Robertson, treasurer. It has 600 shares of common stock outstanding; 470 shares issued to Joseph Robertson, 48 shares to F. S. Reed and 82 shares to H. L. Robertson. It has been issued by the Commission permits authorizing operations as a city carrier, a highway contract carrier and a radial highway common carrier. It conducts business at 195 Channel Street, San Francisco.

Transport was incorporated in California in 1935. The directors and officers are Joseph Robertson, president, F. S. Reed, vice president, A. L. May, secretary and H. L. Robertson, treasurer. E. T. Linn is vice president but not a director. It has 1100 shares of common stock outstanding; 834 shares issued to applicant Robertson Drayage Co., Inc., 185 shares to Joseph Robertson,

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Section 3542 of the Public Utilities Code reads as follows: "No person or corporation shall engage or be permitted by the Commission to engage in the transportation of property on any public highway, both as a common carrier and as a highway contract carrier of the same commodities between the same points."

1 share to F. S. Reed, 30 shares to Edwin Linn and 50 shares to H. A. Sommerfield. It has been issued certificates of public convenience and necessity authorizing operations as a highway common carrier between East Bay points, San Francisco peninsula points and the Monterey Bay area. It holds permits from the Commission authorizing operations as a city carrier and as a household goods carrier.

Express was incorporated in California in 1948. The directors and officers are Joseph Robertson, president, F. S. Reed, vice president and H. L. Robertson, vice president and treasurer. A. L. May is secretary but is not a director. It has 600 shares of common stock outstanding, all 600 shares being issued to applicant Robertson Drayage Co., Inc. It has acquired operating authority to conduct operations as an express corporation between San Francisco Bay points and San Jose and intermediate points. It also holds a permit from the Commission authorizing operations as a city carrier.

Since 1948 Robertson has been providing Sears, Roebuck and Co., hereinafter called Sears, with a specialized transportation service whereby it undertakes to deliver goods sold at retail from Sears' warehouses in San Francisco and Emeryville to consumers located within what it terms the delivery zone, an area of approximately 14 air-line miles from downtown San Francisco, and also to points outside the delivery zone on the peninsula as far south as Portola, Los Altos, Sunnyvale and Agnew. In this service two men are assigned to each vehicle. The rates charged are \$2.00 per 100 pounds for delivery of shipments within the delivery zone and \$2.50 per 100 pounds for delivery outside the delivery zone. Other rates and charges are assessed for C.O.D.s, setting up lawn swings, and delivery of deep freezers.

Robertson also performs transportation of property between Sears' warehouses and retail stores in San Francisco and Emeryville. The rates assessed are hourly and monthly vehicle unit rates which

are equal to and in some cases greater than the monthly and hourly rates prescribed in City Carriers' Tariff No. 1A.

Much of the transportation is exempt from the minimum rates, rules and regulations of the Commission and another substantial portion is transported at or above the established minimum rates. For the most part this application seeks authority to deviate from the rules respecting application of rates rather than authority to charge rates lower in volume than the minimum rates established for the transportation services involved. In these circumstances such authority has been granted to applicant in the past and to other carriers upon a showing of unusual transportation conditions and upon a showing that applicant would receive a reasonable return under the proposed rates. The applicant has shown that transportation conditions have not changed from those which prevailed when this matter was last considered. Exhibit No. 1 shows that applicant has earned a reasonable return under the rates herein involved. The principal issue therefore is whether Robertson is the alter ego of Transport or Express and is performing transportation over public highways both as a common carrier and as a highway contract carrier of the same commodities between the same points.

The evidence shows that Express is wholly owned and controlled by Robertson. Robertson owns 75.8 per cent of the voting power represented by Transport securities. Joseph Robertson is the president of all these corporations. H. L. Robertson, F. S. Reed and A. L. May are officers of all three corporations. John R. McKean is the chief accountant for all three corporations. The general offices of the officers and the chief accountant are located at 195 Channel Street, San Francisco. The business offices of Robertson are at 195 Channel Street, San Francisco and the business offices of Express and Transport are at 155 De Haro Street, San Francisco. Robertson's corporate books are completely separate from those of Transport and Express and the books are maintained by a separate group of employees.

Each corporation issues its own checks which are in a separate and distinct form and color. The checks, however, are all drawn from the same commercial bank account which is in the name of Robertson. Under an agreement between the three corporations and the bank, all monies are deposited in trust with Robertson, which guarantees the payment of all checks and drafts drawn by or against Transport and Express. ✓

The operating department of Robertson is completely separate and apart from Transport and Express. They have separate employees and operate out of different business addresses. The motor vehicle equipment such as tractors and trailers of Robertson are not interchangeable with Transport or Express in that they have different type trailer hitches. The color and insigne of the motor vehicle equipment of Robertson are different from Transport or Express. Transport performs regular repair service for itself and Robertson and Express and charges such affiliates at actual cost for such maintenance and repair services. The operating manager and the solicitor of Robertson are not the same persons as the operating managers and solicitors of Express and Transport.

The evidence shows that Transport and Express, as common carriers, have published tariff rates for the transportation of property usually designated as general commodities, including deep freezers, appliances and lawn swings, between Emeryville and San Francisco and between said points on the one hand and points and places on the San Francisco peninsula on and along U. S. Highway 101, State Highway 1 and various county roads in San Mateo and Santa Clara counties, on the other hand. The tariffs provide that shipments will be accepted in any form or container which will render the transportation of freight reasonably safe and practical. The tariffs also provide rates and charges for accessorial services. The president of the carriers testified that Transport and Express are engaged in the transportation of general freight of the type ✓

and character of what is known in the trade as sidewalk pickup and delivery. He stated that they are not equipped to transport unprotected articles which are readily susceptible to damage. During the times that Transport and Express have been engaged in operations there have been only a few occasions, and those in the Santa Cruz mountains area outside the geographical scope of this proceeding, in which the drivers of Transport vehicles have undertaken to assist consignees in the placing or installing of furnishings or appliances in the home. He characterized these occasions as accommodations to consignees furnished by the driver because of the remoteness of the consignee's dwelling from any place where other assistance could be readily secured.

The record shows that in the transportation of property for Sears, Robertson transports all commodities that are sold at retail by Sears, including, among numerous items, lawn swings, deep freezers and appliances from Emeryville to San Francisco and from said points on the one hand and points and places on the San Francisco peninsula on and along U. S. Highway 101, State Highway 1 and various county roads in San Mateo and Santa Clara counties. Robertson, in its application, avers that the operation is conducted as a highway contract carrier. The articles are tendered by Sears in the form in which the customer can put them to use; in other words, unpacked, assembled and set up, except in the case of lawn swings. In providing the service, which involves the delivery of merchandise to the dwellings of Sears' customers, the two men assigned to the vehicle place the article in the home, install appliances and see that they function, lay rugs that have been delivered, set up lawn swings and perform any other service which involves the placing of the article in the home ready for use. (2)

(2) The service was characterized by the assistant traffic manager of Sears as "We do everything except feed the baby."

There is no controversy respecting the facts of the actual operations of Robertson, Transport and Express. In their memoranda of points and authorities both the applicant and the staff undertook to compare these facts with those in the matter of Direct Delivery System, 54 Cal P.U.C. 258 and those in the case of Farnsworth and Ruggles, 54 Cal P.U.C. 371 in order to support their contentions and arguments.

The staff contends that the tariffs of Express and Transport permit them to transport the same commodities in the same type of service as that performed by Robertson for Sears and that such is prohibited by Section 3542. The staff does not contend fraud, deception or any wrongdoing other than to cite the Commission in its Decision No. 51619 in the matter of Direct Delivery System with reference to the following language:

"the wrong, inequity or injustice with which the regulatory law is concerned in cases of this kind is the employment of separate corporate entities for the purpose of evading and violating the regulatory statute here involved, that is, the carriage by a person both as a common and as a contract carrier of the same commodity between the same points."

It is argued that the tariffs of Transport and Express permit them to conduct the service performed by Robertson in that rates are set forth for the commodities. It is urged that if a given article can be transported by Robertson it is prima facie "reasonably safe and practical for transportation" within the meaning of the terms of the tariffs of Transport and Express. It is also argued because of the accessorial rates and charges contained in the tariffs and particularly because Transport has performed services involving placing and installing articles in the home in remote areas, that the common carriers here involved hold themselves out to the public to perform the type of service Robertson provides Sears. It is contended that the test of Section 3542 is whether a person has it in his power

to perform a carrier service in more than one capacity, to wit, as a highway contract carrier and as a common carrier.

Applicant on the other hand contends that the purpose of Section 3542 is to prevent discriminatory rates by means of one carrier acting in a dual capacity. It is urged that unless the operation results in discrimination in rates, fraud, injustice, deception or bad faith the disregard of the separate corporate entities is not warranted.

Conclusions

We are not wholly in accord with the contentions and arguments of the staff or of the applicant.

In considering the evidence we have looked through the fiction of the separate corporate structures of the three companies and have examined their operations. We find that there is nothing about the transportation service by Robertson for Sears that is adverse to the public interest. From both a practical and a regulatory standpoint the transportation of commodities by Robertson for Sears is entirely different from the transportation of commodities regularly performed for the public between the same points by Transport and Express.

We are not persuaded that by virtue of the tariff rules of Transport and Express that they are offering to the public the transportation services Robertson provides Sears. The packing rule relied upon by the staff is the same as the packing rule prescribed for all common carriers and highway contract carriers by the Commission in its Decision No. 31606 as amended. The rule does not undertake to define for each carrier under every circumstance what shipping form or container will or will not render the transportation of freight reasonably safe and practical. It must be determined in the case of each carrier within the limitations of its facilities and equipment. The evidence shows that Transport and Express

do not have all of the equipment and facilities, as does Robertson, to insure the safe delivery of otherwise unprotected articles that are highly susceptible to damage. ✓

The staff's approach to the accessorial service rule is also syllogistic. They premise that services performed by Robertson for Sears are accessorial to the transportation and that Transport and Express publish rules for accessorial services. They thereupon conclude that Transport and Express offer to perform for the public the same transportation service provided Sears by Robertson. This type of deductive reasoning has appeal because of its simplicity but it does not always provide a correct conclusion. We cannot, on the facts here in evidence, conclude that merely because Transport and Express publish rates for accessorial services that they will perform such services as setting up lawn swings, laying rugs, placing furnishings in the home or installing appliances. These and other services Robertson is required by contract to perform for Sears. ✓

It is argued that because upon occasion in remote areas Transport has assisted consignees in placing furnishings and appliances that such is conclusive of its holding out to provide such services generally. We do not accept this contention. In unusual circumstances such as those involved herein it is not impossible that a carrier may because of public necessity arising out of conditions peculiar to one area afford a service in that area that it does not provide elsewhere. Public convenience and necessity may require a different type of service in one geographical region than may be required in another. According to the evidence Transport and Express do not offer such special services in the area here involved. ✓

From a regulatory standpoint the transportation performed by Robertson for Sears is different from that provided the public by Transport and Express as common carriers. While there is common domination and control of the three companies the transportation is so dissimilar that we find the same not to constitute the transportation of the same commodities between the same points. On this record we can find nothing respecting the operation that is adverse to the public interest or is in conflict with the regulatory purpose of the Public Utilities Code, therefore, the matter of alter ego becomes immaterial.

Upon consideration of all of the facts and circumstances of record the Commission is of the opinion and finds that the rates proposed in Robertson's application filed August 11, 1955, as amended August 19, 1955, for the transportation of property for Sears are reasonable. The application will be granted.

Final Ninth Supplemental Order

Based on the evidence of record and on the findings and conclusions set forth in the preceding opinion,

IT IS ORDERED that the authority granted by Decision No. 51891 dated August 30, 1955, in this proceeding is extended to September 15, 1956, unless sooner changed or further extended by order of the Commission.

The effective date of this order shall be June 30, 1956.

Dated at San Francisco, California, this 12th day of June, 1956.

[Signature]
President
[Signature]
[Signature]
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Commissioners