(ds)

Decision No. 56210

ORIGINAL

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of BIGGE DRAYAGE COMPANY, a corporation, for issuance of a certificate of public convenience and necessity under Section 1063 of the Public Utilities Code, authorizing operations as a highway common carrier between points and places in California.	)	Application No. 36284

Gordon, Knapp and Gill, by Wyman C. Knapp, for Bigge Drayage Company, applicant.

O P I N I O N

On November 12, 1954, Bigge Drayage Company filed this application in which it sought a certificate of public convenience and necessity to operate as a highway common carrier. The application was filed pursuant to Decision No. 50448 in Case No. 5478. In the application Bigge requested "alternatively a confirmation of its ..... view that a certificate of public convenience and necessity is not required in the conduct of its operations, or, in lieu thereof, a grant of authority under Section 1063 of .... /the Public Utilities Code/ authorizing transportation as follows: Machinery, equipment, materials and supplies, in lots of not less than 4,000 pounds, over all Federal, State, and County highways, between points and places in California."

This Commission in Decision No. 51654 dated July 5, 1955 determined that a public hearing was not necessary and, based upon

the allegations of the application and the representations filed pursuant to a notice given all common carriers subject to the Commission's jurisdiction, Bigge was awarded a certificate of public convenience and necessity to transport commodities which, by reason of size or weight, require special equipment between San Francisco and Oakland, Oakland and Alameda, Oakland and Richmond, and Vallejo and Fontana.

On October 13, 1955, Bigge filed a petition in which it declined to accept the certificate awarded and requested a public hearing at which it could present further evidence. On November 1, 1955, this Commission entered an order granting a hearing in this matter.

A duly noticed public hearing was held in San Francisco on September 25, 1957 before Examiner Donald B. Jarvis. Evidence was taken at the hearing and permission was granted to file a memorandum of points and authorities. The matter was submitted on November 22, 1957.

Bigge contends that the previous decision in this matter cannot stand because it forces Bigge against its will to become a common carrier thereby violating the rule of Frost v. Railroad Commission, 271 U.S. 583. This argument is untenable for several reasons. First, the certificate granted Bigge a portion of the alternative relief sought in its application and it cannot be said that Bigge was forced to accept anything it did not seek. In addition, it would seem that Frost has lost much of its

vitality and, except for general statements of law therein contained, is no longer controlling. (See discussion and cases collected by Frank, J., in Fordham Bus Corporation v. United States, 41 F. Supp. 712, 715; California State Auto., etc., Bureau v. Downey, 96 Cal. App. 2d 876, 891, affd. 341 U.S. 105.) Even if the majority opinion in Frost retained its original vigor, the case would not aid applicant. In Frost the court held unconstitutional the application of a statute which compelled admittedly private carriers to become common carriers in order to operate. The opinion was careful to state that "we are not to be understood as challenging the power of the state, or of the railroad commission under the present statute, whenever it shall appear that a carrier, posing as a private carrier, is in substance and reality a common carrier, to so declare and regulate his or its operations accordingly." (271 U.S. 599-600.) Here, the Commission must determine as a question of fact under a valid statute the character of applicant's operations. (Nolan v. Public Utilities Commission, 41 Cal. 2d, 293, 397; Ashbury Truck Co. v. Railroad Commission, 52 F. 2d, 263, affd., 287, U.S. 570.)

Casting aside the psuedo constitutional issues raised by Bigge, we treat this matter as if on rehearing to determine if the previous order of this Commission "is in any respect unjust or unwarranted, or should be changed ....." (Pub. Util. Code, Section 1736.)

Bigge "concedes that a substantial portion of its operation is common carrier in nature, but contends that such

portion is conducted as an 'indifferent whole,' no part of which is between fixed termini or over a regular route." Bigge contends that many of its shipments are "one shot" in nature although conceding that "so-called 'one-shot' shipments, if sufficiently cumulative in number for a variety of shipping interests, might upon a proper record form a basis for concluding the presence of highway common carriage."

At the public hearing, Bigge produced evidence which in detail explained certain of the representations which it filed along with this application. From this evidence, it appears that approximately 45 percent of Bigge's traffic in the period covered by the application was hauling for the Raymond Concrete Pile Company. The evidence further shows that, subsequent to this application, Bigge has been hauling in the same manner for Raymond Concrete at less than minimum rates under authority granted by this Commission in Decisions Nos. 53344 and 55352. Implicit in the special rate grant is a determination that the carriage by Bigge for Raymond Concrete is not common carriage. (Pub. Util. Code, Section 3666.) Although this determination is not controlling as to the character of the hauling done in the period covered by this application, we find it persuasive on this record. Many of the shipments to and from Oakland, indicated in said representations, were for Raymond Concrete.

The evidence further shows that the shipments between Vallejo and Fontana set forth in the previously filed representations were the transporting of dismantled temporary structures

purchased at Vallejo from the Federal Housing Authority by a Fontana buyer. William F. Scott, manager of the Bigge Trucking Department, testified that, to his knowledge, these were the only shipments Bigge ever had between Vallejo and Fontana.

It also appears from the evidence that a large number of the shipments listed in the previously filed representations as forwarded or received in Oakland were hauled under contract for U. S. Gypsum Company, an account no longer serviced by Bigge.

It would seem that many of the movements indicated in the representations previously filed by Bigge were not set forth with sufficient clarity to indicate the true nature thereof.

The allegations of the application, the representations filed in this matter and the evidence adduced at the hearing indicate and the Commission finds that as of September 10, 1953, applicant was conducting its operations within the scope of the permits heretofore issued by this Commission.

In the light of the evidence adduced at the public hearing and the application and representations previously filed, the Commission finds that the previous decision herein should be revoked.

The applicant is hereby placed on notice that the Commission, by this decision, makes no finding and expresses no opinion as to whether applicant has or has not been conducting its operations within the scope of its permitted authority since September 10, 1953; and that the provisions of Section 1063 of the Public Utilities Code will be strictly enforced.

O R D E R

Based upon the evidence of record and the findings and conclusions hereinbefore set forth,

IT IS ORDERED that Decision No. 51654 is revoked.

Dated at San Francisco, California, this 4th day of FEBRUARY, 1958.

President

Commissioners

Commissioner Rex Hardy, being necessarily absent, did not participate in the disposition of this proceeding.