

ORIGINAL

Decision No. 58379

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of PENINSULA MOTOR EXPRESS, a corpora- tion, for a certificate of public convenience and necessity to operate as a highway common carrier.)))))	Application No. 39789
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Marvin Handler and Daniel W. Baker, for applicant.
Berol & Silver, by Bruce Geernaert and Edward M. Silver, for Highway Transport, Inc.; Fortier Transportation Co.; Merchant Express of California; and Sacramento Freight Lines, Inc.; Robert B. Curtiss, for Santa Fe Transportation Company and The Atchison, Topeka and Santa Fe Railway Company; Willard S. Johnson, for Karlson Bros. Trucking Service and Ted Peters Trucking Company, Inc.; Robert S. Crossland, for California Motor Express, Ltd.; California Motor Transport Co., Ltd.; Coast Line Truck Service, Inc.; Delta Lines, Inc.; Southern California Freight Lines, Ltd.; Southern California Freight Forwarders; Stockton Motor Express; Valley Express Co.; and Valley Motor Lines, Inc., protestants.

O P I N I O N

Peninsula Motor Express is a certificated highway common carrier. Peninsula's operating rights may be summarized by stating that it is permitted to haul general commodities in the San Francisco Bay Area and limited commodities from the San Francisco Bay Area to and within a certain portion of the San Joaquin Valley. By this application Peninsula seeks authority to transport general commodities throughout the entire area encompassed by its operating rights, establish through routes and joint rates and classifications among all authorized points, and to expand the area which it is now authorized to serve.

A duly noticed public hearing was held in this matter before Examiner Donald B. Jarvis in San Francisco on April 8, 9, 10 and 11, 1958. The matter was submitted subject to the filing of certain late-filed exhibits and briefs by the parties.

While the matter was under submission Peninsula filed an amendment to the application seeking temporary authority to haul general commodities throughout the entire area it is authorized to serve under its operating rights and serve the additional area requested by the application. The basis for the amendment was that a strike had been called by Local No. 70 of the Brotherhood of Teamsters; that the local pickup and delivery drivers operating in Alameda County belong to Local No. 70; that Peninsula conducts operations in Alameda County but does not employ Local No. 70 drivers since it has no terminal in Alameda County; that Peninsula employs drivers who are members of Local No. 85 of the same union; that the drivers who are members of Local No. 85 were not on strike; that as a result of the strike and the suspension of service by carriers employing drivers who are members of Local No. 70, Peninsula had received numerous requests for service between Alameda County, which it has authority to serve, and the points sought to be served in the application in chief; and that some of these requests sought the transportation of commodities which applicant does not now have authority to handle. The strike involving Local No. 70 of the Brotherhood of Teamsters has been settled. The issues raised by the amendment to the application are now moot and will not be further considered.

On August 1, 1957, Peninsula held operating rights authorizing it to transport general commodities, with limited exceptions, between San Francisco and San Jose, including certain

intermediate and off-route points, and the points included in the San Francisco-East Bay cartage zone. These operating rights were contained in certificates of public convenience and necessity issued by this Commission in Decision No. 51329 in Application No. 35367; Decision No. 49684 in Application No. 34212; Decision No. 46714 in Application No. 32090 and Decision No. 44525 in Application No. 29438; and Decision No. 43772 in Application No. 30958.

In August, 1957, Richard D. Popovich was conducting a business as a highway common carrier under the name of Dick's Transportation. Dick's Transportation held operating rights to transport specified commodities between San Francisco, Bakersfield, Maricopa and intermediate and off-route points. The Popovich operating rights are contained in Decisions Nos. 53587 and 52757 in Application No. 36048. Popovich was in financial difficulty in August, 1957. The United States government threatened to levy a tax lien on his property and his general creditors were demanding payment of their obligations. At that time Peninsula was looking to acquire further operating rights. Peninsula entered into an agreement with Popovich whereby Popovich, subject to Commission approval, would transfer to Peninsula, for a consideration, the Popovich operating rights. Peninsula and Popovich joined in Application No. 39332 seeking Commission approval for said agreement. The Commission, in Decision No. 55438, held that the proposed sale and transfer of the Popovich operating rights was not adverse to the public interest and granted the application.

The Popovich rights contained restrictions which provided that through routes and joint rates and classifications could not be established with respect to the separate operating authorities

therein granted and that Popovich could not serve any intermediate points other than those specifically enumerated. These restrictions were not removed in the order authorizing the transfer of operating rights to Peninsula and are still in effect.

Peninsula, by acquiring the Popovich operating rights, had authority to transport general commodities in the San Francisco Bay Area and, under Public Utilities Code, Section 1066, to link the Popovich rights with the existing ones and transport restricted commodities between the San Francisco Bay Area and the San Joaquin Valley points enumerated in the Popovich rights and to establish through routes and joint rates, charges and classifications therefor.

This application requests an in lieu certificate of public convenience and necessity. However, Peninsula seeks herein not only a restatement of its current operating authority but the redrafting of its San Francisco Bay Area rights; the removal of the restricted commodity provisions from its operating rights and to substitute general commodities with limited exceptions therefor; the right to establish through routes and joint rates, charges and classifications among all points included in its operating authority; and authority to serve an area not now included within its operating rights.

The restricted commodities set forth in the Popovich operating rights encompass 12 generic headings as they existed in the Western Classification on the date of Decision No. 55438. These generic headings comprehend hundreds of subitems. Peninsula contends that the Popovich operating rights are "virtually a general commodity authority but ... so limited that it prevents rendering a complete or satisfactory service for any type of shipper." For example, Peninsula contends that under the Popovich portion of its operating rights, it may transport stationery but it is not permitted to handle such items as paper, paste, glue and pencil sharpeners; it may handle

drugs, medicines, and toilet preparations but it may not handle costume jewelry and other items that are handled by drugstores and wholesale drug houses. Peninsula also contends that when it purchased the Popovich operating rights it believed that Popovich was operating within the terms of his certificate of public convenience and necessity; that it believed that Popovich was only receiving freight, authorized under his operating rights; that after assuming the Popovich operating rights Peninsula discovered that former customers of Popovich were tendering to it items which it could not haul under the Popovich operating rights; that Peninsula refused to handle such freight shipments; and that as a result thereof this has had a serious effect on Peninsula's financial position as well as adversely affecting the shippers in question. Peninsula further asserts that a grant of operating rights to serve the additional area herein requested together with authority to establish through routes and joint rates and classifications among all points within its operating rights would give it a better rounded financial operation which would enable it to give better common carrier service throughout its system and would benefit the shipping public.

Each of the protestants operates in a portion or all of the area for which Peninsula seeks authority to serve. All of the protestants have, in the area in question, authority to transport general commodities, with limited exceptions. Protestants take the position that awarding additional operating rights to Peninsula in the area for which said rights are sought would dilute their business, thereby injuring each of the protestants. Protestants also contend that Peninsula is financially unsound and does not have the financial ability to assume additional common carrier duties and obligations.

Evidence concerning Peninsula's financial picture was adduced at the hearing. This evidence discloses that Peninsula's

financial position is weak. Peninsula has been able to maintain its operations by virtue of loans and capital contributions made by its principal stockholder, bank loans and agreements with its creditors. However, Peninsula's financial situation was much worse prior to December 1, 1955 when its present management assumed control of the company. The present management has considerably improved Peninsula's financial position. Peninsula's operating ratio in 1956 was 98.3 per cent and in 1957 it was 99.5 per cent.

Protestants put forth as one of their contentions the argument that the application should be denied on the ground of lack of financial responsibility. Peninsula takes the position that the application should be granted on the ground that this would improve its financial position.

"In considering the granting of certificates of public convenience and necessity, it is the policy of the ... Commission to require evidence of the financial ability and responsibility of the applicant commensurate with the character and extent of the operations proposed. Without such provision the public cannot be assured of adequate or permanent service." (In re United Stages, 25 C.R.C. 203, 207.)

Applying this test to the case at bar, we note that Peninsula seeks two types of relief in this proceeding: (1) Removal of restrictions in current operating rights and (2) Additional operating authority. Peninsula now owns 93 pieces of operating equipment. The evidence of record indicates that if the commodity restrictions in Peninsula's operating authority were removed it would be able to handle general commodities with the same personnel and equipment which it now uses. This fact discloses a weakness in the financial ability argument proffered by protestants, in so far as Peninsula seeks to haul additional commodities in existing equipment in the area it is now authorized to serve. The Commission is of the opinion and finds that Peninsula has the financial ability to transport

general commodities within the Popovich portion of its operating rights if such authority be granted. The Commission is also of the opinion that Peninsula's financial situation is such that there should be removed from consideration herein any request for additional operating rights which might reasonably require Peninsula to expend additional capital or incur additional operating expenses.

Peninsula's contention that the authority herein sought should be granted because this would help its financial position cannot be accepted. The general rule is that the needs and desires of an applicant are not alone sufficient to justify the granting of a certificate of public convenience and necessity or additional operating rights. (In re Southern Pacific Golden Gate Ferries, Ltd., 40 C.R.C. 709, 729 et seq.) There may be special situations in which the economic needs of a carrier are an important consideration in determining whether additional operating rights should be granted. (In re Airline Bus Company, 41 C.R.C. 602.) This application, however, does not present a factual situation requiring deviation from the general rule above stated. We, therefore, turn our attention to the question of whether public convenience and necessity require the granting of all or part of this application.

Peninsula's president testified with respect to its personnel and operating equipment. He also testified that in his opinion this personnel and equipment would be adequate to handle the additional traffic which he hoped would be tendered if the application were granted. He conceded, however, that there was a probability that if the application were granted additional drivers and new terminal facilities might be needed in the areas for which additional operating authority is sought.

Eleven shipper witnesses testified in behalf of applicant at the hearing. The traffic foreman of the Brunswig Drug Company, located in Fresno, testified that his company ships approximately 135,000 items including pharmaceuticals, cosmetics, toilet preparations, toys, clocks and various items referred to in the trade as sundries; that Brunswig owns and operates two trucks which make deliveries to its customers in the Fresno area; that Peninsula transports property for Brunswig in the area included in the Popovich portion of its operating rights and to certain other points under authority of Peninsula's contract carrier permit; that Peninsula provides same-day service from Fresno to various San Joaquin Valley points served and overnight service from Fresno to Bakersfield; that the same-day service like that rendered to it by Peninsula was necessary to meet competition; that if such same-day service were not available Brunswig would resort to proprietary trucking; and that no other common carrier had offered Brunswig a similar service. Peninsula contends that most of the items shipped by Brunswig are commodities included in the restricted commodity description in the Popovich portion of its operating rights and that as a practical matter it is almost impossible to examine each package shipped by Brunswig to determine whether any of the numerous items therein is not one which may be hauled by Peninsula under the Popovich portion of its operating rights. The witness further testified that if Peninsula could not haul the items referred to as sundries Brunswig would discontinue shipping by Peninsula.

Another witness for applicant was the manager of the Redwood City plant of Morningstar-Paisley, Incorporated, which manufactures industrial adhesives. He testified that his company was using the services of Peninsula generally in the San Francisco Bay

Area; that the service rendered by Peninsula was excellent; that Morningstar-Paisley was using another certificated highway common carrier to transport its products to certain San Joaquin Valley points within the scope of this application; that Morningstar-Paisley was not satisfied with the service rendered by said other carrier, particularly with respect to the picking up and returning of empty drums to Morningstar-Paisley; that there were a large number of empty drums outstanding; that if these drums are brought back to Morningstar-Paisley by the same carrier which originally transported them a lower rate applies; that although Morningstar-Paisley desired better service, because of the economic loss which would be involved, it was unwilling to shift to any other common carrier except Peninsula; but that if the authority herein sought were granted Morningstar-Paisley would ship to the points involved via Peninsula and suffer a temporary economic disadvantage "because in the long run we would be ahead of the game."

The operations manager of the E. S. Edwards Company, a manufacturer of wire rope and wire products located in South San Francisco, was called as a witness in behalf of Peninsula. He testified that Edwards was using Peninsula to ship to points in the San Francisco Bay Area; that Peninsula was rendering excellent service; that Peninsula now provides for Edwards two scheduled daily pickups, as well as providing additional pickups on demand; that if the authority herein requested were granted Edwards would tender approximately one third of its shipments to San Joaquin Valley points; and that, because of the frequent service offered by Peninsula, this would permit Edwards to be more competitive in the area.

The assistant operating superintendent of Schwabacher-Frey Company of San Francisco testified in behalf of Peninsula. He stated

that his division shipped three or four thousand items generally referred to in the trade as stationery items; that Schwabacher-Frey is using Peninsula in the San Francisco Bay Area; that Peninsula renders excellent service; that at one time Schwabacher-Frey attempted to ship via Peninsula to points in the San Joaquin Valley within the scope of this application but found that because of the restricted commodity provisions of the Popovich portion of Peninsula's operating rights that it was necessary to segregate freight in order to tender it to Peninsula; that segregating freight was too expensive; and that Schwabacher-Frey was not shipping via Peninsula to San Joaquin Valley points because of the restricted commodity limitations in Peninsula's operating rights.

The head shipping clerk of Service Exchange Distributors, a wholesaler and distributor of appliances located in San Francisco, testified that his firm handles approximately 6,000 items; that a usual shipment consists of 30 to 40 different items; that Peninsula rendered good service in the San Francisco Bay Area; that Service Exchange attempted to use Peninsula for shipments from San Francisco to the San Joaquin Valley but that Peninsula did not have authority to transport all of the items shipped; that if Service Exchange now shipped by Peninsula to the San Joaquin Valley it would also require the services of another carrier to handle items which Peninsula could not handle, thereby requiring extra packaging and causing higher shipping charges by not being able to consolidate various items into one shipment for a particular consignee; that Service Exchange was unwilling to use Peninsula to San Joaquin Valley points because of its restricted operating authority; and that if Peninsula were permitted to haul general commodities from San Francisco to the San Joaquin Valley, Service Exchange would use Peninsula to transport its freight between those points.

Other witnesses testified generally that their companies used Peninsula in the San Francisco Bay Area; that the service rendered by Peninsula was excellent; and that if Peninsula were authorized to transport to the San Joaquin Valley the commodities shipped by these companies, they would use Peninsula to that area. Some of the witnesses testified to specific instances of dissatisfaction with certificated carriers in the area.

Each of the protestants introduced evidence to show that it held authority, under certificates issued by this Commission, to transport general commodities, with limited exceptions, between some or all of the points involved in this application. In general the witnesses who appeared in behalf of protestants testified that each of their companies was not operating to its fullest capacity and that the removal of the commodity restrictions from Peninsula's operating rights and the granting of additional operating rights to Peninsula would dilute their business, thereby injuring each of these protestants.

The record discloses that Peninsula now has the right to serve the points in the San Francisco-East Bay Cartage Zone and between said cartage zone and San Jose, including intermediate points over specified routes and the off-route points of Los Gatos, Saratoga, Campbell, Cupertino, Permanente and Los Altos. Peninsula seeks authority to serve all points within the San Francisco Territory as described in Item No. 270-3A of Minimum Rate Tariff No. 2 and within 5 miles of the boundaries thereof and the off-route points above named. The San Francisco Territory and requested off-route points are substantially similar to the rights now held by Peninsula under its numerous certificates of public convenience and necessity. The evidence also indicates that some confusion exists in the minds

of Peninsula and a portion of the shipping public with respect to Peninsula's operating rights in portions of the San Joaquin Valley.

The Commission having weighed the evidence of record in this matter makes the following findings and conclusions:

1. Public convenience and necessity require that Peninsula be granted authority to transport general commodities, with limited exceptions, throughout the entire area encompassed by its operating rights.

2. Peninsula's operating rights are contained in numerous certificates of public convenience and necessity. This situation causes confusion among the shipping public. In some instances the carrier and the public are not certain of the exact territorial limits of Peninsula's operating rights. The Commission concludes that a certificate of public convenience and necessity should be granted Peninsula to replace the many certificates which it now holds. The Commission further finds and concludes that in order to provide operating rights readily understandable by the public, as well as Peninsula, and to assist the Commission in its regulatory functions, certain minor territorial adjustments should be made in Peninsula's operating rights. These adjustments should be consonant with the views above expressed.

Applicant is hereby placed upon notice that operative rights, as such, do not constitute a class of property which may be capitalized or used as an element of value in rate fixing for any amount of money in excess of that originally paid to the State as the consideration for the grant of such rights. Aside from their purely permissive aspect, such rights extend to the holder a full or partial monopoly of a class of business over a particular route. This monopoly feature may be changed or destroyed at any time by the State, which is not in any respect limited as to the number of rights which may be given.

O R D E R

The Commission having considered the application as amended and representations filed herein, a public hearing having been held and based on the evidence therein adduced,

IT IS ORDERED:

1. That a certificate of public convenience and necessity is granted to Peninsula Motor Express, a corporation, authorizing it to operate as a highway common carrier as defined by Section 213 of the Public Utilities Code for the transportation of property between the points as more particularly set forth in Appendix A attached hereto and made a part hereof.

2. That in providing service pursuant to the certificate herein granted, applicant shall comply with and observe the following service regulations:

- a. Within thirty days after the effective date hereof, applicant shall file a written acceptance of the certificate herein granted. By accepting the certificate of public convenience and necessity herein granted, applicant is placed on notice that it will be required, among other things, to file annual reports of its operations and to comply with and observe the safety rules and other regulations of the Commission's General Order No. 99. Failure to file such reports, in such form and at such time as the Commission may direct, or to comply with and observe the provisions of General Order No. 99, may result in a cancellation of the operating authority granted by this decision.
- b. Within sixty days after the effective date hereof, and on not less than ten days' notice to the Commission and the public, applicant shall establish the service herein authorized and file in triplicate, and concurrently make effective, tariffs satisfactory to the Commission.

3. That all certificates of public convenience and necessity held by Peninsula Motor Express other than the one provided for in paragraph 1 herein, shall be canceled concurrently with the

acceptance by this Commission of the tariff required in paragraph 2(b) of this order.

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

Dated at San Francisco, California, this 14th day of May, ~~1938~~ ¹⁹⁵⁴

E. J. Fox President

Theodore H. Jensen

Everett W. Bagley

_____ Commissioners

1. Peninsula Motor Express, by the certificate of public convenience and necessity granted in the decision noted in the margin is authorized to transport general commodities between the points and over the routes hereinafter set forth, provided however that applicant shall not transport any shipments of the following:

- a. Used household goods and personal effects not packed in accordance with the crated property requirements set forth in paragraph (d) of Item No. 10-C of Minimum Rate Tariff No. 4-A.
- b. Automobiles, trucks and buses, viz.: new and used, finished or unfinished passenger automobiles (including jeeps), ambulances, hearses and taxis; freight automobiles, automobile chassis, trucks, truck chassis, truck trailers, trucks and trailers combined, buses and bus chassis.
- c. Livestock, viz.: bucks, bulls, calves, cattle, cows, dairy cattle ewes, goats, hogs, horses, kids, lambs, oxen, pigs, sheep, sheep camp outfits, sows, steers, stags or swine.
- d. Commodities requiring the use of special refrigeration or temperature control in specially designed and constructed refrigerated equipment.
- e. Liquids, compressed gases, commodities in semiplastic form and commodities in suspension in liquids in bulk, in tank trucks, tank trailers, tank semitrailers or a combination of such highway vehicles.
- f. Commodities when transported in bulk in dump trucks or in hopper-type trucks.

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- g. Commodities when transported in motor vehicles equipped for mechanical mixing in transit.
- h. Logs.

2. Applicant shall have the authority to transport the commodities set forth in paragraph 1 of this appendix between the points and over the routes as follow:

- a. Between all points in the San Francisco Territory as herein defined.

SAN FRANCISCO TERRITORY includes that area embraced by the following boundary: Beginning at the point the San Francisco-San Mateo County Boundary Line meets the Pacific Ocean; thence easterly along said boundary line to a point 1 mile west of U. S. Highway 101; southerly along an imaginary line 1 mile west of and paralleling U. S. Highway 101 to its intersection with the corporate boundary of the City of San Jose; southerly, easterly and northerly along said corporate boundary to its intersection with State Highway 17; northerly along State Highway 17 to Warm Springs; northerly along the unnumbered highway via Mission San Jose and Niles to Hayward; northerly along Foothill Boulevard to Seminary Avenue; easterly along Seminary Avenue to Mountain Boulevard; northerly along Mountain Boulevard and Moraga Avenue to Estates Drive; westerly along Estates Drive, Harbord Drive and Broadway Terrace to College Avenue; northerly along College Avenue to Dwight Way; easterly along Dwight Way to the Berkeley-Oakland boundary line; northerly along said boundary line to the campus boundary of the University of California; northerly and westerly along the campus boundary of the University of California to Euclid Avenue; northerly along Euclid Avenue to Marin Avenue; westerly along Marin Avenue to Arlington Avenue; northerly along Arlington Avenue to U. S. Highway 40 (San Pablo Avenue); northerly along U. S. Highway 40 to and including the City of Richmond;

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southwesterly along the highway extending from the City of Richmond to Point Richmond; southerly along an imaginary line from Point Richmond to the San Francisco Waterfront at the foot of Market Street; westerly along said water front and shore line to the Pacific Ocean; southerly along the shore line of the Pacific Ocean to point of beginning.

- b. Between the San Francisco Territory, on the one hand, and Los Gatos, Saratoga, Campbell, Cupertino, Permanente and Los Altos, on the other hand. This authority includes the right to serve all intermediate points (including unnamed points); and between any two points, both of which are intermediate to any of the points named above; and also to or from any and all points or places situated within one mile of the city limits of every incorporated city served hereunder.
- c. Between the San Francisco Territory, on the one hand, and Livermore, Tracy, Stockton, Lodi and Sacramento, on the other hand. This authority does not include the right to serve intermediate points. Peninsula Motor Express shall not establish through routes and joint rates, charges and classifications between the authority granted in this paragraph and any other operating rights herein granted.
- d. Between the San Francisco Territory, on the one hand, and all points located on U. S. Highway 99 between and including Manteca and Bakersfield, on the other hand, including also the off-route points of Riverbank, Escalon, Oakdale, Biola, Kerman and Wasco.
- e. Between Fresno, on the one hand, and all points located on U. S. Highway 99 between and including Manteca and Bakersfield, on the other hand, including also the off-route points of Riverbank, Escalon, Oakdale, Biola, Kerman and Wasco.
- f. Between the San Francisco Territory, on the one hand, and all points located on State Highway 33

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between and including Patterson and Maricopa, on the other hand, including also the off-route point of Los Banos.

- g. Between Fresno, on the one hand, and all points located on State Highway 33 between and including Patterson and Maricopa, on the other hand, including also the off-route point of Los Banos.
- h. Between the San Francisco Territory, on the one hand, and all points located laterally within 15 miles of U. S. Highway 99 between and including Fresno and Delano, on the other hand.

Peninsula Motor Express shall not establish through routes and joint rates, charges and classifications between the authority granted in this paragraph and any other operating rights herein granted.

3. The operating authorities herein granted do not include the right to render service to, from or between intermediate points unless otherwise stated.