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Decision No. 58601

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of VALLEY EXPRESS CO. for authority under Section 454 of the California Public Utilities Code to establish charges for the transportation of commodities requiring temperature control.	))))))	Application No. 40718

Crossland, Crossland and Richardson, by Robert S. Crossland, for applicant.
Willard S. Johnson, for J. Christensen Co., protestant.

O P I N I O N

Valley Express Co. is an express corporation operating under prescriptive rights as well as certificates of public convenience and necessity between places in California. By application filed January 2, 1959, it seeks authority to remove the provision of Rule 120 of its Local and Joint Express Tariff No. 9-B which states that, except under certain conditions, articles requiring refrigeration will not be accepted for shipment; and in lieu thereof, to establish the additional charges for refrigeration service prescribed by the Commission in Decision No. 51606 (1955) in Case No. 5432 as the just and reasonable minimum charges for such services.

Public hearing was held May 8, 1959, before Examiner J. E. Thompson, at San Francisco.

On September 18, 1941, applicant, through its tariff publishing agent, filed Application No. 63-16853, as amended October 29, 1941, seeking authority to publish in its tariff a provision declaring that articles requiring refrigeration will not be accepted for shipment unless the consignor furnishes adequate refrigerants which shall become the property of the carrier and that such

transportation, insofar as damage resulting from lack of adequate refrigerants, shall be at consignor's risk. Applicant stated that the authority sought was based upon the following circumstances and conditions:

> "Tariff C.R.C. No. 8 does not provide rates for a refrigerated service. In the past articles have been accepted for shipment which required ordinary refrigeration, such as Fresh Meat. Such shipments, however, have ordinarily been tendered to Carrier with refrigerants. On one or two occasions the Carrier has accepted shipments of Frosen (sic) Vegetables requiring intense refrigeration so as to maintain a temperature not to exceed 20° F. However there is no regular movement of this traffic, nor does Carrier believe there is likely to be one. Such shipments of Frosen Vegetables are ordinarily transported by Carriers specializing in intense refrigeration service, hence the public, as a result of the publication of the proposed Rule, will not be deprived of adequate transportation service of articles requiring refrigeration."

On November 4, 1941, the Commission authorized the publication of the rule. Applicant published the rule effective December 22, 1941. It is this rule that applicant here seeks to cancel and to establish in lieu thereof charges for refrigeration. There is no controversy as to whether the proposed charges are reasonable. They have been prescribed by the Commission as the just, reasonable and nondiscriminatory minimum rates for the services of refrigeration in connection with the transportation of property by common carriers and highway permit carriers. J. Christensen Co., a highway common carrier of articles transported under refrigeration, protests the granting of this application on the grounds that applicant has no authority to transport articles under refrigeration as an express corporation. Applicant contends that the issue in this proceeding concerns rates and that protestant is attempting to unduly broaden the issues.

Section 1010 of the Public Utilities Code provides that no express corporation shall after August 1, 1933, commence operating between points in this State or extend its operations to or from any point or points in this State not theretofore served by it, unless and until it first secures from the Commission a certificate that public convenience and necessity require such operation. A tariff is the instrument by which a common carrier sets forth the services which it holds out to the public. Common carriers are required to file and publish tariffs showing the rates, fares, charges and classifications for the services they perform. They may not publish rates, fares, charges and classifications for services they are not authorized to perform. Whether or not applicant has authority to transport articles requiring refrigeration is material to the issue of whether it should be authorized to publish rates therefor.

Applicant's operative rights are derived principally from tariffs filed and operations conducted prior to August 1, 1933. Prior to 1933 there was little, if any, highway transportation of property under mechanical refrigeration. Some degree of temperature control was achieved in connection with truckload shipments by icing. The practice with respect to less-than-truckload shipments of articles under refrigeration was to place them at one end of a van with some ice and cover them with a tarpaulin. It was common practice for the carriers to require the shippers to furnish, or pay for, the ice so used. The transportation of less-than-truckload quantities under ice was to some degree a hazardous undertaking in that there was a fairly high risk of spoilage of the articles and, when placed in vans with "dry freight" the water from the melting ice resulted in conditions which were susceptible to the damaging of other lading. There is evidence indicating that Valley Express Co.,

prior to December 1941, transported articles under these circumstances. We are of the opinion that the operative rights held by applicant authorized those operations. The question now appears whether applicant has abandoned its operative rights with respect to the transportation of articles in refrigeration service. This matter can be determined from applicant's conduct in relation to surrounding circumstances over the years.

In 1941 it was still the common practice to require shippers to furnish or pay for ice used in refrigeration.[1/] The only charges for refrigeration commonly assessed by carriers was in connection with the transportation of canned goods, soap and related articles, between Los Angeles Basin Territory and San Francisco, Sacramento and Stockton[2/] and on butter, cheese and margarine between San Francisco and Los Angeles.[3/] Said refrigeration charges were applicable only on shipments of 30,000 pounds or more of canned goods and related items and of 20,000 pounds or more of butter, cheese and margarine. Valley Express Co. has maintained rates in its tariff in connection with the transportation under refrigeration of those articles notwithstanding the provision established in December 1941.

On September 30, 1947, by Decision No. 40775, the Commission authorized Mozer's Frozen Food Freight Line to transport frozen commodities under refrigeration between Los Angeles, San Francisco, Sacramento and points in the San Joaquin Valley. It was

1/ It is noted that Item 155 of Minimum Rate Tariff No. 8 (Fresh Fruits and Vegetables) contemplated that the shipper would furnish ice for top-icing or refrigeration and the additional charges prescribed therein were to compensate the carrier for the travel to the ice house and the delay involved in having the load iced.

2/ Decision No. 30410, dated December 13, 1937, in Case No. 4246 established a minimum rate of 1½ cents per 100 pounds in connection with this traffic.

3/ Decision No. 34540, effective October 1, 1941, established a minimum rate of 3/4 cents per 100 pounds for refrigeration on this traffic.

the first of a number of certificates of public convenience and necessity issued by the Commission for the transportation of commodities under refrigeration. A finding in that decision was:

> "The applicant is offering to establish a service of a highly specialized type, not now available, and urgently required by the shippers and receivers of the commodities which it proposes to transport."

On August 1, 1955, the Commission established in Minimum Rate Tariff No. 2, minimum rates for providing a refrigeration service. Included in our findings were the following:

> "a. During the past 15 years motor carriers in California have been called upon to provide an increasing amount of refrigerated transportation service.
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> "b. Such service now constitutes a substantial part of the carriers' total services.
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> "c. Refrigerated transportation is an exacting service which requires close control over temperatures in order to maintain the quality of the commodities transported.
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> "d. The service is a specialized type of transportation which necessitates the use of specialized equipment.
>
> "e. The service is more costly to perform than is the transportation of commodities generally."

In that decision the Commission ordered all common carriers subject to the minimum rates, except common carriers by railroad, to establish in their tariffs, effective not later than August 1, 1955, the increases necessary to conform with the establishment of the refrigeration charges.

Applicant's affiliate, Valley Motor Lines, Inc., published the refrigeration charges in accordance with said Decision No. 51606. Valley Express Co. did not do so and here seeks authority to publish the charges at this time.

The restriction published in 1941, in and of itself, is not conclusive of an abandonment. At the time, there was comparatively little demand for a refrigeration service. Applicant is an express corporation and, therefore, the motor vehicle equipment used to transport its traffic is that of underlying carriers. If the underlying carriers did not possess, or make available to applicant's traffic, vehicular equipment suitable for refrigeration service, it would have been futile for applicant to offer a refrigeration service to the public. Nor do we consider the statements made by applicant in Application No. 63-16853, standing alone, to be conclusive of an abandonment. It, too, must be considered in the light of events at the time of its filing. The forecasting of future circumstances and conditions is an uncertain business. That applicant was not the best of seers is evident from its statement that it was unlikely that, in the future, there would be a regular movement of commodities in refrigeration service. It is the better policy to hold that operative rights are broad enough to encompass new methods and innovations so that the public will have the advantage of them. While the statement in the application is indicative of a positive assertion that Valley Express Co. would not offer a refrigeration service, it might, under the circumstances at that time, be construed as an assertion with a reservation that if there were an increase in the demand by the public for such service sufficient to provide for a regular movement, or sufficient to justify an investment of equipment, Valley Express Co. would provide such a service.

A demand for refrigeration service did develop to such an extent that the Commission found that it was necessary to prescribe minimum rates for such service. Other carriers, including applicant's affiliate, offered services to meet this demand by the public.

Valley Express Co., except in connection with shipments of certain commodities in lots of 20,000 pounds or more, continued to refrain from entering the field. An operative right entails obligations and responsibilities to the public as well as privileges. An operative right contemplates that the holder will perform its services for the public continuously. It has been held that a prescriptive right confers upon the holder the right to continue the type of operations conducted prior to the "grandfather" date, but that it does not automatically confer upon the holder the right to extend or expand operations not maintained continuously. United Parcel Service v Keller, 44 CRC 122 (1942). While, as we have said hereinabove, it appears the better policy to construe operative rights to be sufficiently broad to permit carriers and shippers to have the benefits of new methods and techniques, the holder has the obligation to inaugurate the service when the public requires it. In 1950 it was evident that there was an increasing demand for refrigeration service. In 1955 it was readily apparent that refrigeration service was a substantial part of the State's transportation economy. Applicant's affiliate and principal underlying carrier, Valley Motor Lines, Inc., apparently recognized the importance of this service in that it filed rates and charges pursuant to Decision No. 51606. It is evident that, until the filing of the application herein, applicant has, since December 1941, steadfastly demonstrated its intention not to offer a refrigeration service generally. We find that other than the transportation for which rates are set forth in Items 490 and 710 of Valley Express Co., Local and Joint Express Tariff No. 9-A, applicant has failed to exercise, and, in fact, has abandoned, whatever operative rights as an express corporation it may

have held for the transportation of commodities generally under refrigeration service. Applicant not having authority to perform a refrigeration service, it necessarily follows that the authority sought herein must be denied.

O R D E R

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

IT IS ORDERED that the application of Valley Express Co. is denied.

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

Dated at San Francisco, California, this 16th day of June, 1959.

E. Lyn Fox
President

Commissioners

Theodore H. Jenner
Commissioner Everett C. McKeage, being necessarily absent, did not participate in the disposition of this proceeding.