

Holboell

Assent

missing

**ORIGINAL**

Decision No. 67338

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of )  
EMILE POZAS and FLORENCIO POZAS, a )  
partnership dba POZAS BROS., of )  
Sunnyvale, for a permit as a radial )  
highway common carrier (Appl. No. )  
43-5272-R), for transportation of )  
agricultural commodities, statewide, )  
(Filed No. T-71,941).

Application No. 44129

Marvin Handler, for applicant.  
Paul M. Hogan, for Commission staff.

O P I N I O N

Emile Pozas and Florencio Pozas, doing business as Pozas Bros., request a radial highway common carrier permit for the statewide transportation of general commodities.

A public hearing was held before Examiner Daly on March 13, 1962, at San Francisco.

Applicants formed their partnership in 1943. They, together with a third brother, are the sole stockholders in the Pozas Bros. Trucking Company, a certificated carrier recently authorized by Decision No. 62865 to transport general commodities between its former certificated points (points in the San Francisco Territory; points between the San Francisco Territory and the Los Angeles Basin Territory on Highways Nos. 101, 99, and 50; points between the Los Angeles Basin Territory; points on Highway No. 152 between Highways Nos. 101 and 99), on the one hand, and Sacramento, Stockton, San Diego, Santa Cruz, Watsonville, Monterey and Pittsburg, on the other hand. Authority to serve intermediate points was denied.

The partnership owns the terminal property which is leased to the corporation. The property's approximate market value is \$60,000. The partnership also owns and operates two units of equipment. The corporation will provide the partnership with the necessary management, office help and equipment for which the partnership will be charged.

Applicants request the permit for the following reasons:

1. To facilitate the transportation of split-delivery shipments on a competitive basis with other permitted carriers.
2. To facilitate the transportation of government traffic on the basis of assessed governmental quotations.
3. To minimize the income tax burden.

Because the Commission has held<sup>1</sup> that a carrier may not lawfully combine certificated and permitted authority for the purpose of providing a split-delivery service, applicants claim that the corporation, as a result of the recently certificated extension, will lose traffic to its certificated terminal points. Prior to being certificated the corporation could provide the extended area with a split-delivery service under its permits. Upon being certificated to Sacramento, Stockton, San Diego, Santa Cruz, Watsonville, Monterey and Pittsburg, the corporation could no longer provide a split-delivery service to intermediate points. As a result, applicants contend that the corporation can no longer compete with the permitted carriers and thereby not only loses traffic to the intermediate points but to its certificated terminal points as well.

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<sup>1</sup> Decision No. 61265, *infra*.

Applicants argue that Section 3572 does not provide the Commission with any alternative but to grant the permit once financial responsibility has been shown, although the Commission may attach to the permit such terms and conditions as, in its judgment, are required to assure protection to persons utilizing the operations. Applicants see no need for any restrictions, but would not be seriously concerned so long as whatever restrictions should be affixed would permit accomplishment of the stated purposes.

Applicants contend that while it may not be lawful under the Commission's interpretation for a highway common carrier to split deliver on and off its certificate, there is nothing to make unlawful this rendition of that service by an affiliated permitted carrier. Applicants argue that the mere fact that there are two entities commonly controlled by affiliated interests, one as a common carrier and one as a permitted carrier, does not of itself indicate any illegality. Applicants' counsel states that the Commission has historically issued permits without hearing upon the bare recital in the petition showing the reasons for the relationship of the companies. He referred to the setting of this application for hearing as a change in long-established policy, and cited decisions of the courts in support of a principle of law that long-established administrative interpretation has the effect of a statute and cannot be changed willy nilly by an administrative agency without going through the proper rule-making procedures of general notice to the public, and then only within the framework of the statute pursuant to which they are being promulgated.

In concluding, applicants' counsel argued: "Either the Commission ought to permit this applicant to get competitive as it was before with the others that the Commission has permitted to do

this very thing, or take away from the others the permits which they are operating .... Let us not have one carrier discriminated against while others are permitted to do the very thing that we come here before you openly and ask to be permitted to do."

The Commission has not knowingly issued any permit to be used for circumventing any provision of law, and will take appropriate action with respect to any unlawful operations of which it becomes aware. It is fundamental that no common carrier may deviate from its tariff schedules (Sec. 494, Public Utilities Code), and for a number of years all radial highway common carrier permits issued to entities possessing certificated authority have included the restriction that the carrier shall not engage in the transportation of property under the permit when the transportation is covered by the highway common carrier operative authority.<sup>2</sup>

It likewise is fundamental that a highway common carrier may not do through its alter ego that which it cannot lawfully do directly.<sup>3</sup> For this reason the Commission inquires into applications for permits where it appears that applicant may be the alter ego of a highway common carrier. This inquiry has for its purpose, among possibly others, the determination whether, and if so what, terms and conditions should be attached to the permit to assure protection to persons utilizing the operations. Where appropriate, the inquiry may take the form of a public hearing. Contrary to applicants' arguments, the Commission has made no change in long-established policy with respect to the issuance of permits.

Applicants herein propose to use the requested radial highway common carrier permit for the stated purpose, among others,

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<sup>2</sup> This restriction is no more than a reflection of the statutes. See People v. Geijsbeek, Aug. 16, 1957, 153 C.A. 2d 300.

<sup>3</sup> See Decision No. 50924 dated December 30, 1954, in Application No. 35927, Direct Delivery System, Ltd., 53 Cal.P.U.C. 761.

of transporting as a single split-pickup shipment or a single split-delivery shipment property originating or destined both to points for which its affiliate is certificated and points for which its affiliate is not certificated. The highway common carrier cannot lawfully do this;<sup>4</sup> it follows that its alter ego, the applicants herein, cannot lawfully do so either.

Applicants assert that if the radial permit is granted the partnership will operate under it pursuant to the applicable laws, rules and regulations, and that the permit will not be used for the purpose of discrimination. According to applicants, the partnership operations performed pursuant to the radial permit would not only constitute a legal solution to the problem of handling split-delivery shipments, but would also reduce the income tax burden and thus improve the corporation's net earnings.

After consideration, the Commission finds that applicants have the financial responsibility to perform the operations proposed. The permit will be issued subject to the conditions usual to such permits, and to the additional condition, which the Commission hereby finds to be required to assure protection to persons utilizing the operations, that applicants shall not engage in the transportation of property over the public highways under the permit when such transportation is covered by the highway common carrier operative authority of their alter ego, Pozas Bros. Trucking Company, a corporation. Applicants are placed upon notice that the transportation of split shipments in mixed certificated-permitted operations as proposed would be unlawful (Decision No. 61265, supra).

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<sup>4</sup> See Decision No. 61265 dated December 28, 1960, unreported, in Case No. 6186, Investigation on Commission's own motion of mixed operations of certificated and permitted highway carriers.

O R D E R

IT IS ORDERED that the Secretary of this Commission issue to Emile Pozas and Florencio Pozas a radial highway common carrier permit, said permit to include, in addition to the standard conditions, the following condition:

"Said Carrier shall not engage in the transportation of property over the public highways under this permit when such transportation is covered by the highway common carrier operative authority of POZAS BROS. TRUCKING COMPANY, a corporation."

This order shall become effective twenty days after the date hereof.

Dated at San Francisco, California, this 3rd day of

June, 1964.

William A. Bennett  
President

Robert E. Smith

Robert W. Page

George A. Brown

Commissioners

*I dissent. I will express my views later.*

*Fredrick B. Holshoff*