

ORIGINAL

Decision No. 69607

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application
of RELIABLE DELIVERY SERVICE, INC.,
a corporation for an extension of
its Certificate of Public Con-
venience and necessity to operate
as a highway common carrier for
the transportation of property in
intrastate and interstate and
foreign commerce.

Application No. 46295
(Filed March 17, 1964)

Murchison & Stebbins by Donald Murchison and
Roy Davis, for applicant.
Arthur H. Glanz, for Boulevard Transportation
Company, California Cartage Company,
California Motor Transport Co., Delta Lines, Inc.,
Desert Express, Di Salvo Trucking Company,
Fortier Transportation Company, Merchants Express
of California, Oregon-Nevada-California Fast
Freight, Pacific Intermountain Express Co.,
Pacific Motor Trucking Company, Ringsby Truck
Lines, Inc., Shippers Express, Southern California
Freight Lines, Inc., Sterling Transit Co., Inc.,
T.I.M.E. Freight, Inc., Valley Motor Lines, Inc.,
Valley Express Co., Willig Freight Lines,
Victorville-Barstow Truck Line, Kern Valley Transfer,
Los Angeles City Express Inc., and Halverson
Transportation; Karl K. Roos, for Scott Transpor-
tation Company; and Russell & Schureman by
R. Y. Schureman, for Certified Freight Lines,
Griley Security Freight Lines and Smith Trans-
portation Co.; protestants.

O P I N I O N

Public hearings on the above-entitled application were held before Examiner Rogers on various dates in Los Angeles, Lancaster, Barstow and Santa Barbara. The hearing in Santa Barbara was on May 4, 1965 at which time the matter was submitted.

Notices of hearing were served on all interested parties as required by this Commission. Notice of the filing of the

application and of the hearing was published in the Federal Register as required by Section 206(a) (6) of the Interstate Commerce Act.

Applicant is a highway common carrier transporting general commodities with the usual exceptions to, from and between places in the Los Angeles Basin Territory (as described in Minimum Rate Tariff No. 2) which generally extends from Chatsworth and Thousand Oaks on the west to San Bernardino, Redlands, Yucaipa, Temecula and San Clemente on the east. It also has authority to serve to San Diego and El Cajon on the south; to Twentynine Palms and Durmid on the east; and Victorville, Lucerne Valley and Big Bear City on the north, (Decision No. 64985, dated February 19, 1963, in Application No. 44423). In addition it has a Radial Highway Common Carrier, a City Carrier, a Contract Carrier and a Household Goods Carrier permit, each issued by this Commission. By a prior decision, (Decision No. 63395, dated March 13, 1962, in Application No. 40044), applicant was granted authority to serve the Los Angeles Basin Area and to serve to and from San Diego, El Cajon, Victorville and Hesperia. This authority was registered with the Interstate Commerce Commission (Exhibit 2). The enlarged authority granted by Decision No. 64985 was not.

After an investigation (Case No. 6122) this Commission, on October 6, 1959, issued Decision No. 59118 in which, among other things, it was ordered "That Babe Talsky, doing business as Reliable Delivery Service, and Reliable Delivery Service Inc., a corporation, be, and they hereby are, ordered to cease and desist from operating any auto truck as a highway common carrier, as defined in Section 213 of the Public Utilities Code, over any of the highways in the State of California between the following termini: between San Bernardino on the one hand and . . . Lancaster . . . Barstow . . . on the other hand; and between Los Angeles on the one hand and Lancaster, Palmdale . . . Barstow . . . on the other hand, unless and until he shall

have first obtained from this Commission a certificate of public convenience and necessity authorizing such operation, as required by Section 1063 of said Code." The evidence at the hearings herein shows that the applicant is providing daily service to the Palmdale, Lancaster, Littlerock and Barstow areas as a permitted carrier. The witnesses who appeared on applicant's behalf had no contracts for transportation other than the usual shipping documents. Applicant's literature (Exhibit 6) lists the prohibited points as places served.

By the application herein applicant seeks authority to transport general commodities with the usual exceptions in intrastate and interstate commerce as follows:

- (1) Between all points and places in the Los Angeles Basin Territory, as described in Item No. 270 of Minimum Rate Tariff No. 2.
- (2) Between all points and places on and within five miles laterally of the following highways:
 - a. U. S. Highway 101 between the southerly limits of the Los Angeles Basin Territory and Chula Vista, inclusive.
 - b. State Highway 78 between its junction with U. S. Highway 101 and Escondido, inclusive.
 - c. U. S. Highway 395 between Escondido and San Diego, inclusive.
 - d. U. S. Highway 80 between San Diego and El Cajon, inclusive.
 - e. U. S. Highway 66, 91 and 466 between San Bernardino and Yermo, inclusive, including the off-route point of Hesperia.
 - f. State Highway 18 and U. S. Highway 66, 91 and 466 between San Bernardino and Yermo, inclusive.
 - g. U. S. Highway 99 between the easterly limits of the Los Angeles Basin Territory and Indio, inclusive.

- h. State Highway 111 between its intersection with U. S. Highway 99 near Whitewater and Durmid, inclusive.
 - i. Unnumbered highway between its intersection with U. S. Highway 99 near Whitewater and Twentynine Palms, inclusive, including the off-route point of Desert Hot Springs and the U. S. Marine Corps Base near Twentynine Palms.
 - j. U. S. Highway 6 between the northerly limits of the Los Angeles Basin Territory and Lancaster, inclusive; also State Highway 138 between Palmdale and U. S. Highway 66.
 - k. U. S. Highway 101, 101 Alternate, 99 and State Highways 126 and 150 between the northerly limits of the Los Angeles Basin Territory and Santa Maria, inclusive, and the off-route points of Lompoc and Vandenberg Air Force Base.
 - l. Between U. S. Highway 6 at Lancaster, California, via unnumbered highways to Edwards Air Force Base, inclusive.
- (3) U. S. Highway 395 between Escondido and the Los Angeles Basin Territory as a highway traversed but without service thereon.
- (4) Through routes and rates may be established between all points and places described in subparagraph 1 and 2a through 1 above.
- (5) Lateral miles referred to above are statute miles of 5,280 feet each, measured in a straight line without regard to terrain features.

Applicant proposes to use all available public highways between points proposed to be served as hereinabove mentioned, and within the cities hereinabove proposed to be served, and applicant proposes to use such streets and highways as may be necessary to serve consignors and consignees located within said cities.

This proposal includes extending service north of Victorville to Yermo; to the United States Marine Corps Base above Twentynine Palms; to Palmdale, Lancaster and Edwards Air Force Base; and to points north and west of the Los Angeles Basin Territory as far as Santa Maria, Lompoc and Vandenberg Air Force Base, in each

instance including intermediate points, none of which applicant is presently authorized to serve as a highway common carrier. It also includes a request for authority to use U. S. Highway 395 between Escondido and Temecula without service thereon.

Applicant proposes to provide the service herein requested on a daily basis Monday through Friday with Saturday service to Lancaster, Palmdale, Littlerock, Pearblossom, Barstow and Yermo, Sundays and holidays excepted. Applicant proposes that in the Los Angeles Basin Territory where pickups are made prior to 1:00 P.M. of any given day, delivery will be made at destination on the same day, and that with respect to all pickups made after 1:00 P.M. deliveries will be made the following morning at destination points.

Applicant is a party to Western Motor Tariff Bureau, Inc., Agent, Local, Joint and Proportional Freight and Express Tariff No. 111 Cal., P.U.C. No. 15 in the publication of its rates and charges with respect to the commodities which it presently transports intrastate between those points which it now serves as a highway common carrier. Applicant alleges it is a party to Western Motor Tariff Bureau, Inc., Agent, Local, Joint and Proportional Freight Tariff Nos. 103 and 107, MF-ICC Nos. 8 and 16, respectively, with respect to its present interstate operations.

Applicant proposes to establish rates substantially in conformity with rates presently published in the above-described tariffs.

Applicant has terminals in Los Angeles, Long Beach and San Bernardino. If it receives authority to serve Santa Maria and intermediate points it will establish a terminal in the vicinity of Santa Barbara.

Applicant has approximately 170 pieces of equipment of all

types. It has approximately 144 employees in addition to management. For the four months ending April 30, 1964, applicant had a net profit from operations of \$21,548.

In support of its request applicant called as witnesses, or their testimony was received by stipulation, representatives of approximately 40 consignees or consignors. It divided its services into four areas, viz: the Santa Maria leg extending from the northwest limits of the Los Angeles Basin Territory (MRT No. 2) via U. S. Highways 101 Alternate, 101 and 99, and State Highways 126 and 151 through Oxnard, Santa Paula, Ventura and Santa Barbara to Lompoc and Santa Maria including the off-route point of Vandenberg Air Force Base above Lompoc; the Edwards Air Force Base leg extending from the northerly limits of the Los Angeles Basin Territory via U. S. Highways 99 and 6 and State Highway 138 serving Palmdale, Lancaster, Edwards Air Force Base, Littlerock, Pearblossom and Llano; the Yermo leg extending from Victorville through Helendale and Barstow to Yermo via U. S. Highway 91 including the off-route point of the United States Marine Corps Depot near Yermo; and the United States Marine Corps Base near Twentynine Palms.

Applicant apparently has not been providing direct service to the first leg described above except for shipments of 20,000 pounds or more which it carries pursuant to its permits and the record fails to show the frequency of such service. For two or more years applicant has been providing direct services to the remaining areas.

Eighteen witnesses appeared on behalf of applicant in Los Angeles, 12, including two by stipulation, in Lancaster and 10, including one by stipulation, in Barstow.

Three of the Los Angeles witnesses were freight forwarders. Each uses certificated highway common carriers authorized to carry

interstate shipments and would like to have applicant certificated and given interstate rights as an additional available carrier.

The remaining shippers in Los Angeles have mostly intrastate shipments. They have available many certificated carriers who can carry shipments to and from either all or the majority of the places in the Santa Maria leg. None of them were familiar with all the available carriers. One or two claim to have been using applicant on this leg. Some have satisfactory carriers but want only one or two carriers serving all points; use applicant to other points now served by it, and want applicant's services available to the extended areas. Some of the witnesses want a later pickup than that now provided by the carriers with whom they are familiar. Concerning service from Los Angeles to the remaining requested service areas, some shippers use Desert Express to the Lancaster-Palmdale area and Victorville-Barstow Truck Line to the Barstow-Yermo area and had no complaints relative to these carriers but will use the applicant. One found the services of Victorville-Barstow Truck Line slow. Some want as few carriers as possible. Approximately 13 of the Los Angeles witnesses stated that they have been using applicant either exclusively or in conjunction with other carriers for periods ranging from two to five years; they like the services of applicant; and, they desire that the services remain available.

Of the 12 witnesses appearing in Lancaster one desired as many carriers as possible and will support any carrier. The majority of the witnesses have been using applicant for service from Los Angeles for periods ranging from two to seven years. Four specifically stated that they have no contract with the applicant and all receive daily service by applicant when needed. The majority of the witnesses are served by applicant exclusively for

their intrastate shipments and approximately six of these have interstate shipments which are carried by highway common carriers and desire to have the applicant carry such shipments. It was claimed by two or three of these witnesses that the carriers they were familiar with took longer in transit than applicant. One of the witnesses had a claim on an intrastate shipment, which it was alleged, Victorville-Barstow Truck Line had not settled.

Of the 10 witnesses who appeared in Barstow, the majority were consignees only and had their shipments routed by the consignor although some of these witnesses could and did request a particular carrier. Service was provided in some instances by Victorville-Barstow Truck Line, Desert Express or Scott Transportation Company, and a few had complaints against the other carriers.

Thirteen of the competing carriers appeared as protestants. These carriers each have from 15 to over 5,000 pieces of equipment and all purport to provide overnight service between the Los Angeles area and some or all of the points proposed to be served by applicant. Each claims to need additional traffic and to have sufficient finances and equipment to handle such traffic.

Victorville-Barstow Truck Line serves all of the area applicant proposes to serve east of Castaic Junction including Edwards Air Force Base, Yermo and the Marine Corps Base above Twentynine Palms. It has terminals in Los Angeles, San Bernardino, Victorville and Barstow, and provides service on Saturdays on request. It also has coextensive interstate authority in the territory involved and competes with Desert Express, Kern Valley Transfer, Scott Transportation Company, Hilliard Truck Line and Pacific Motor Trucking Company.

Kern Valley Transfer operates between the Los Angeles Basin area and Lancaster, Palmdale, Littlerock and Pearblossom. It competes with the same carriers as Victorville-Barstow Truck Line including the latter. It has coextensive interstate authority.

Southern California Freight Lines, Ltd., operates between points in the Los Angeles Basin Territory and the points applicant proposes to serve between the territory and Santa Maria, and it also serves the United States Marine Corps Base at Twentynine Palms. It has terminals in Los Angeles, Oxnard, Twentynine Palms and Santa Maria. It also has interstate rights duplicating its intrastate rights except for laterals.

California Cartage Company serves between the Los Angeles area and Santa Maria including intermediate points proposed to be served by applicant. It has one terminal in Los Angeles. It claims its main competitors are Southern California Freight Lines, Ltd. and Pacific Motor Trucking Company. It has interstate rights coextensive with its intrastate rights.

Pacific Motor Trucking Company serves the Lancaster-Palmdale leg and the Santa Maria leg. It has approximately 5,700 pieces of equipment and has terminals in Oxnard, Santa Barbara, Santa Maria, San Luis Obispo, Anaheim, San Bernardino and Los Angeles. On the Santa Maria leg it competes with California Cartage Company, Griley Security Freight Lines, Certified Freight Lines, Smith Transportation Co., Carr Bros., Halverson Transportation and Southern California Freight Lines, Ltd. In the Palmdale-Lancaster area it has the competition heretofore listed. This carrier has no interstate authority in the requested areas.

Los Angeles City Express, Inc. serves the Twentynine Palms

area exclusive of the Marine Corps Base from the Los Angeles Basin. It has coextensive interstate rights and has terminals in Los Angeles and Banning.

Desert Express has interstate authority and serves all of the desert area including Lancaster, Palmdale, Victorville, Barstow and Yermo. It has terminals in Ridgecrest, Lancaster, Barstow and Los Angeles. It competes with the Victorville-Barstow Truck Line, Pacific Motor Trucking Company, Hilliard Truck Line, Scott Transportation Company and Auto Fast Freight.

Halverson Transportation serves between Los Angeles, Santa Barbara and Goleta on the coast and it has interstate authority. It has a terminal in Los Angeles.

California Motor Transport Co. has terminals in Santa Barbara, Oxnard, Los Angeles and Bakersfield and has interstate authority. It serves all points west of Newhall to Santa Maria proposed to be served by applicant.

Scott Transportation Company serves the Barstow leg and has interstate authority. It has a terminal in San Bernardino and competes with Desert Express and Victorville-Barstow Truck Line.

Griley Security Freight Lines serves the Ventura and Santa Barbara area and has interstate rights coextensive with its intrastate rights.

Smith Transportation Company serves Santa Maria and intermediate points from Los Angeles and has coextensive interstate authority.

Certified Freight Lines serves the Santa Maria leg and has interstate rights.

Approximately 55 witnesses were called by the various protestants in opposition to the application. These witnesses enumerated the numerous carriers available in the areas and testified that they are satisfied with the carriers they use and that they would have no use for additional carriers.

Upon consideration of the evidence the Commission finds that:

1. Applicant is a California corporation and has permits issued by this Commission for all types of general commodity transportation plus household goods transportation. It also has a certificate of public convenience and necessity as a highway common carrier authorizing it to transport property with the usual exceptions, between places in the Los Angeles Basin Territory and between the said territory and San Diego, Dermid, Twentynine Palms and Victorville.

2. Applicant has interstate authority coextensive with a prior decision which authorized it to serve the Los Angeles Basin Area and to serve to and from San Diego, El Cajon, Victorville and Hesperia.

3. Applicant seeks authority to extend both interstate and intrastate services so that it can serve along the coast via Highway 101 and 101 Alternate, U. S. Highway 99 and State Highways 126 and 150 to Santa Paula, Oxnard, Ventura, Santa Barbara, Santa Ynez and Lompoc to Santa Maria including Vandenberg Air Force Base;

to serve to Edwards Air Force Base, Palmdale, Lancaster, Pearblossom, Littlerock and Llano via an unnumbered highway, U. S. Highway 6 and State Highway 138; to serve between Victorville and Yermo via U. S. Highway 66, including service to the Marine Corps Depot near Yermo; to serve the United States Marine Corps Base above Twentynine Palms; and to use an alternate route between Escondido and Temecula via U. S. Highway 395 without rendering any service thereon.

4. Applicant has been ordered by this Commission to cease any service between Los Angeles on the one hand and Lancaster, Palmdale and Barstow on the other hand, and between San Bernardino on the one hand and Lancaster, Palmdale and Barstow on the other hand, until it shall have secured a certificate of public convenience and necessity from this Commission. Applicant has been providing a daily service between the prohibited points for two or more years without having contracts with the parties for whom such services are rendered and applicant is advertising to the public that it renders such service.

5. The witnesses who appeared for the applicant desire that applicant be authorized to render the service it seeks authority to render. Many desire applicant's services in interstate and intrastate commerce. Many of the witnesses use no carrier other than applicant to both the prohibited points and to other areas requested. Some of the witnesses use applicant's services and the services of other carriers. Many of the witnesses had no complaints with the other carriers and a few of the witnesses had specific

complaints against the various carriers but none of the witnesses were familiar with all carriers serving the various areas involved.

6. The records of this Commission show that between 10 and 15 carriers serve between the Los Angeles Basin Territory or a portion thereof and the Santa Maria portion of applicant's proposal and none of the applicant's witnesses were familiar with all of the carriers rendering such service. Very few of applicant's witnesses were familiar with all carriers serving the remaining portions of the requested service areas or routes.

7. The majority of the protesting carriers serve both in interstate and intrastate commerce and have the equipment, facilities and finances to enable them collectively to render services to all points proposed to be served by applicant.

8. The needs and requirements of applicant's customers for highway common carrier service and trucking service in intrastate, and interstate and foreign commerce can be met by the presently certificated and authorized interstate and intrastate carriers.

9. Applicant has failed to establish that public convenience and necessity require that applicant render the proposed service or any part thereof either in intrastate or interstate and foreign commerce except that public convenience and necessity require that applicant be authorized to use U. S. Highway 395 as a route traversed but not served between Escondido and the southern boundary of the Los Angeles Basin Territory south of Temecula.

Upon the foregoing findings the Commission concludes that the application should be denied except for the authorization to use U. S. Highway 395 as specified in the order herein.

D 69607

ORDER

IT IS ORDERED that applicant may use U. S. Highway 395 between Escondido and Temecula as a route traversed but not served and that in all other respects the application herein is denied.

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

Dated at San Francisco, California, this 24th day of August, 1965.

Fredrick B. Holdhoff
President

George G. Grover

Augustus

Commissioners

I would grant the authority as requested by the applicant. I shall set forth my reasons separately.
William L. Beards

COMMISSIONER PETER E. MITCHELL DISSENTING:

The present decision is clearly indicative there is no unity of understanding among the majority of the Commission in the issuance of common carrier certificates. Prior and subsequent to this decision, we have adhered to a standard of reasonableness in passing judgment on certificate applications. A reasonable need of a cluster of shippers for a particular carrier was sufficient to authorize common carrier operations.

In the Railway Express Decision No. 69586, Application No. 46714, which was signed by the Commission on the same day as the instant decision (August 24, 1965), the Commission, with virtually the same circumstances before it, granted a certificate. Both matters contained evidence supporting a need for the specific carrier; protestant carriers alleged a surplus of transportation equipment at certain times. Why then should one application be approved while the kindred request is denied?

The absence of any hypothesis to support the majority draws attention to recent developments in the highway common carrier field in California. The number of applications for a highway common carrier certificate has diminished noticeably. Status investigations by the Commission itself have been minimal. The conclusion is apparent that the slender line dividing permitted operations and certificated operations has been erased and the distinction remaining is one in law not in fact.

There is no necessity to review "a situation which has commanded the attention of the Commission over the years and which does not improve with age, but on the contrary, grows progressively worse as the highway carrier industry grows".^{1/} These words, written in 1954, re-echo in 1965. Now, as then, we emphasize the disharmony of the statutes, the absence of judicial guidance and the indecisiveness within the carrier and shipping industries. I do not disagree. But, I do disagree there has to exist within the Commission disharmony in decisions, absence of judicial guidance and indecisiveness in action -- as exemplified by the majority decision.

The majority decision conflicts with earlier and later orders of the Commission. No distinguishing reasons are given for the denial of a certificate extension. And the majority is silent even though the record contains convincing evidence the applicant has been in violation of a cease and desist order of this Commission.^{2/}

The application of Reliable Delivery Service, Inc., should be granted.

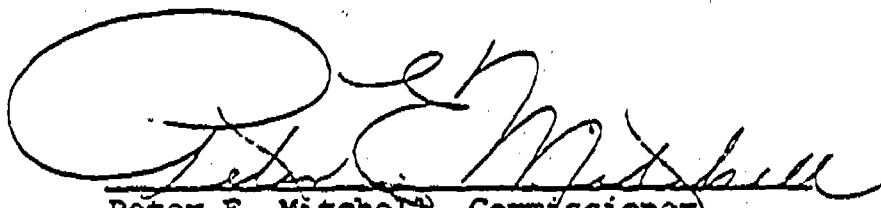
An order instituting investigation of Reliable Delivery Service, Inc., for its violation of a cease and desist order of this Commission should be issued forthwith.

^{1/} Investigation of Regulation of Carriers of Property 53 PUC 366 at 380 (1954)

^{2/} Decision No. 59118, Case No. 6122, dated October 6, 1959

The Commission and its staff should review and renew its efforts with representatives of the trucking and shipping industry:

- (1) to prepare amendatory language to the statutes for submission to the Legislature;
- (2) to establish criteria for the Commission to utilize in the separation of carriers.



Peter E. Mitchell, Commissioner

San Francisco, California

August 31, 1965

Order 22 8/24
Filed 4 P.M. 9/1/42

AG

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DISSENT

BENNETT, William M., Commissioner, Dissenting Opinion:

I would grant the application in its entirety. This is as it should be in a growing economy so that the demands of shippers may be met and the public needs serviced. The fact of growth permits this to be done without violence to existing rights since in short there is enough for all.

Of late the Commission has not issued certificates such as applied for here and this is in part by virtue of the vigorous protests which meet such applications and make the process of obtaining a certificate costly and burdensome. This matter represents one of the few instances of late in which a certificate has been requested.

The decision of the majority ignores past precedents. In Decision 63024, "In the Matter of the Application of AMERICAN TRANSFER CO., ... for a certificate of public convenience and necessity, A. 43207," the Commission made these observations pertaining to the transition from permitted type operations to those which are or border on the illegal until made whole by the granting of a certificate. As set forth in the American Transfer Co. decision:

"A radial highway common carrier is an anomalous statutory creature. Its legal status becomes more and more questionable as the public demand for its services increases. Unfortunately it is a condition over which the carrier has little control. By law it cannot operate between fixed points or over regular routes, but it is a common carrier, with the right to solicit and advertise, and it is expected to provide requested service. (Calif. Civil Code, Section 2169. "A common carrier must, if able to do so, accept and carry whatever is offered to him, at a reasonable time and place, of a kind that he undertakes or is accustomed to carry.") The public demand for a radial highway common carrier's service thereby determines the frequency of its operation and,

"by the same token also determines whether the carrier requires a certificate. When the public demand reaches the point that the radial carrier's service between points becomes fixed or of a constant nature it is then incumbent upon the carrier to seek certification in conformity with such demand. In the instant proceeding certification to the extent hereinafter authorized will enable applicant to continue the operations that it and its predecessor have conducted for almost forty years consonant with public demand and legal propriety.

There appears to be little or no basis for protestants' argument that the certification of applicant would lead to a material diversion of traffic from the existing certificated carriers. From a practical point of view it would be economically impossible for the average permitted carrier to incur the additional overhead costs in the form of equipment, terminals and employees to become competitive with the large existing certificated carriers in the field of less-than-truckload transportation. The argument is even less plausible when one considers that applicant is but one of many thousands of permitted carriers who are presently serving the proposed area and will continue to so operate regardless of whether this application is granted or denied. The only less-than-truckload shipments transported by applicant are split deliveries and "fill-ins", which for the most part constitute an accommodation to applicant's customers by providing them with a complete service. From the public witness testimony there is nothing in this record to indicate that the public's use of applicant would materially change if it were certificated. On the contrary, the public witness testimony shows that applicant has been used as a truckload carrier. There was little evidence that these witnesses intend to discontinue the use of existing common carriers for their less-than-truckload shipments."

The applicant herein is confronted with a dilemma. That public convenience and necessity, i.e. demand for its services exists is evident from the record. The majority opinion recites the frequency of operation of this carrier pursuant to its present authority. While the standard of public convenience and necessity is broad and the interpretation rests with this Commission, nonetheless it seems contrary to all common sense and particularly contrary to the undisputed record herein that this applicant is serving the public from which it must follow that its services

are needed. And it should be borne in mind that the word "public" as used in the statute can be met by the existence of a single shipper.

Having been denied the requested authority applicant is now operating at its peril. While apparently not persuasive toward the majority in terms of establishing public convenience and necessity, nonetheless applicant's operations confront it with the possibility that such operations may be the subject of a Commission investigation and disciplinary action. This carrier is simply representing to the Commission by its application for certificate authority the growth in operations and the change in the nature of such to the point in which it is now indulging in common carriage. This result could have been averted by the carrier only by an uneconomic decision to restrain expansion and growth and to confine itself for all time to a relatively small operation. There is nothing in the law which dictates that a carrier such as here is not entitled as are others to become a successful carrier to the point where additional future authority for operations is required. And having openly advised the Commission of the present nature of its operation and in my judgment in an understandable desire to avoid violating the law, now the carrier is rejected.

The question remains however whether applicant requires certificate authority. And if so, then even though denied a certificate, the Commission must decide whether applicant should cease and desist from present operations since they may cross beyond the line of present authority.

One drastic but highly effective remedy is available to this applicant -- the transfer of all of those accounts which he services with frequency on a regular basis to its competitors.

I also disagree most strongly with the position of this

Commission that no new certificates should issue in the so-called "desert" area. The logic, wisdom and lawfulness of such a policy in a growth area such as here is beyond understanding. Further it is highly discriminatory on the part of a public agency such as this which by law is enjoined to accord certificates upon an equal basis to all qualified applicants. Certificates of common carriage were not intended to issue only for the purpose of creating a monopoly and to channel all growth into existing carriers and no others. The logic of such a cold policy of exclusion has never been explained nor justified and I suspect for the reasons that no valid justification could be forthcoming.

The realities and the economics of the truck transportation industry in California expose the myth of the so-called policy of restricting authority in the desert area. Permitted carriers enter the field almost at will. Why then the highly restrictive selection pertaining to the entry by certificated carriers to the benefit of a favored few?

The instant proceeding comes to us for the second time following the judgment of the Supreme Court of the State of California set forth in Talsky v. Public Utilities Commission, 56 C.2d 151. And while the Commission was sustained in the Talsky case, nonetheless the dissenting opinion of Justice McComb is touched with the appeal of logic. It is noted that even the majority opinion suggested that "the commission might well consider the reduction or amelioration of this penalty in view of the considerable doubt which has existed as to the exact extent of the operations which may be legally engaged in under radial and contract highway carrier permits." (Page 163) Emphasis added. This is but another way of saying as does the dissenting opinion in Talsky that the law is in a state of confusion.

And the instant decision of the Commission sheds no light upon that confusion whatsoever. The majority opinion at Page 12 specifically says:

"Applicant has been ordered by this Commission to cease any service between Los Angeles on the one hand and Lancaster, Palmdale and Barstow on the other hand, and between San Bernardino on the one hand and Lancaster, Palmdale and Barstow on the other hand, until it shall have secured a certificate of public convenience and necessity from this Commission. Applicant has been providing a daily service between the prohibited points for two or more years without having contracts with the parties for whom such services are rendered and applicant is advertising to the public that it renders such service." Emphasis added.

It is noted in passing that the application here was filed as long ago as March 17, 1964, and now after 17 months a decision finally issues.

The Commission, ignoring the obvious from the finding hereinabove just quoted, to wit, that applicant has customers and is serving them, then goes on to hold such carriage illegal and to say that other carriers may meet the needs and requirements of applicant's customers. This is but a short way of saying that applicant's customers are no longer his except under future violation of law.

There is a saving crumb tossed to applicant in that as the Order finally provides "applicant may use U. S. Highway 395 between Escondido and Temecula as a route traversed but not served and that in all other respects the application herein is denied." The denial here is arbitrary and unsupported by any stated reasons, discussions or findings and for that reason alone the majority opinion would be in error. See California Motor Transport Co. vs. Public Utilities Commission, 59 C 2d, 270. But more importantly than that the Commission is issuing a bare

denial and is further confusing regulation by failing to articulate any standards or guidelines whatsoever. And bearing in mind the past Supreme Court cases upon this entire field of truck transportation, I can only conclude that the manner in which applicant has been denied is inviting review and reversal and properly so! In this respect absent Commission clarification I share the views set forth by Justice McComb in his dissenting opinion in Talsky (supra):

"There has been no clear formula established in California which can be applied to determine whether the dedication necessary to isolate the common carrier is present, no method of deciding the exact point at which a private carrier becomes a public servant, and no circumstances which invariably constitute a 'holding out to serve the public indiscriminately.' (Cf. Public Utilities Regulation, 30 So. Cal. L. Rev. 131 (1957).)" (Page 167)

"The facts in the present case bring it within the rule that a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess as to its meaning and differ as to its application violates the first essential of due process of law. (Citations)

"Hence, since the law which petitioner was found guilty of violating lacked a reasonable or definite standard, the determination of the illegality of petitioner's acts and the assessment of a penalty in the same proceeding deprived him of due process of law." (Page 168)

It is obvious that having stated that applicant "has been providing a daily service between the prohibited points for two or more years without having contracts" is but another way of saying that applicant is violating the law and should be ordered to cease and desist. Thus I think the comments of Justice McComb are quite relevant here.

GENERAL DISCUSSION

During the time I have been with the Commission, first as Chief Counsel and now as a Commissioner, I have been keenly

interested in the Commission's policy pertaining to the regulation of the trucking industry within the State of California. I believe that this proceeding affords me an opportunity to express my personal views.

Without going into a detailed history of regulation in the field of truck transportation we can safely say that our present problems stem from two sources. First, we have the problems relating to the radial highway common carrier and, secondly, those relating to the standards to be used in determining whether public convenience and necessity require the grant of a certificate.

The instant application again raises the question as to what standards shall be employed in determining whether public convenience and necessity require the granting of a certificate.

The radial highway common carrier is a statutory creature entitled to all the rights and privileges of a certificated highway common carrier, providing it does not operate between fixed points. Unlike a highway common carrier, however, it is not required to publish a tariff and is required only to observe the applicable minimum rates established by the Commission. A radial permit is issued upon the payment of the required filing fee and the establishment of financial responsibility. As a result there are thousands of radial carriers operating within the State.

For the most part, the radial carrier transports truckload shipments on an "on-call" basis. Shipments are picked up and delivered from the same unit of equipment. The radial carrier has little or no need for terminals, pickup and delivery equipment and intercommunicating systems. Service is

usually tailored to the business needs and requirements of certain truckload shippers in the form of special equipment, an unusually early, late or frequent pickup and delivery service, and drivers with special training in handling certain commodities. On the other hand, the large highway common carrier engages in the transportation of less-than-truckload shipments. Such service requires the use of terminals, pickup and delivery equipment, line-haul equipment, intercommunicating systems and more or less inflexible scheduling. The operation by its very nature is costly to provide and operate. To acquire a certificate, a carrier must file a formal application and affirmatively establish that public convenience and necessity require the proposed service. In addition to filing a tariff a certificated carrier is held to a high degree of accountability.

The operations of the radial carrier are, therefore, distinguishable from those of the average certificated carrier and are, for the most part, noncompetitive. This does not, however, alleviate the legal problems that may arise with respect to operations performed pursuant to a radial permit. The question foremost in the minds of the Commission, the transportation industry and the practitioners has always been the extent to which a radial carrier may operate without exceeding the scope of its permitted authority. By exclusion we know that it may not operate between fixed points. The Supreme Court in the Nolan decision (41 Cal.2d, 392) has indicated that daily operations between two given points constitute a fixed operation. But for how long a period must it be of a daily frequency before it becomes fixed? The operation of a radial carrier often falls into a pattern, but like many businesses, it will

experience seasonal peaks or unusual demands. For one reason or another, (as for example, shipments moving to job sites) the carrier may operate daily between certain points for a period of time and then not have a shipment between the same points for perhaps a year or more. With matters as they presently stand, we cannot say with any degree of legal certainty at what point the operations of a radial carrier transcend their lawful limits.

The holder of a radial permit is entitled to more consideration. In many cases, the ease with which an individual may acquire a radial permit can lull him into a false sense of security. Without fully understanding the legal uncertainty attached to the operation performed pursuant to a radial permit an individual may invest time, labor and capital in the development of a business which could lead to a formal status investigation before this Commission.

In the American Transfer application (Decision No. 63024, dated January 9, 1962, in Application No. 43207), the Commission recognized the problem and suggested that when the operations of a radial carrier became questionable it was incumbent upon the carrier to file an application seeking certification to the extent that said operations may be considered to be of a fixed or constant nature. In such applications the public demand and actual use of the service would be sufficient proof of public convenience and necessity. Certification would not only remove the cloud of legal doubt, but would be in the public interest in that the carrier would be required to publish a tariff and in addition thereto would be subject to more stringent regulatory control. To assure the

continuance of the type of service actually performed and to prevent the truckload carrier from using a certificate as justification for invading the less-than-truckload field, thus affecting the competitive picture, appropriate weight, equipment and terminal restrictions should be imposed.

When an applicant, either one seeking entry to the certificated field in the first instance or an existing certificated carrier seeking an extension of its operation authority, proposes to provide a less-than-truckload service through the means of terminals, pickup and delivery equipment, line-haul equipment, a service directly competitive with the existing certificated carriers, as is the case in the instant proceeding, then certain standards of public convenience and necessity should be established. The adequacy of the existing service, as well as the economic impact of the proposed service, if certificated, should be considered.

In the field of regulation, truck transportation falls within the category of regulated competition and it has been found that healthy competition inures to the benefit of the public. Adequacy of existing service, therefore, should not be viewed in a narrow sense. It should not be a degree of service that meets only the minimum or even the average requirements of the shipping public. Adequate service should satisfy the reasonable transportation demands of all shippers and receivers of freight within a proposed area. Favorable consideration should be given to an application where it can be demonstrated that there is a valid need for the proposed service, the operation is economically and operationally feasible, the applicant is financially responsible, and that granting of the application would result in such benefits as:

(a) faster transit time; (b) use of better equipment; (c) less dock congestion; (d) split-delivery service; (e) use of a carrier with a wide territorial coverage; (f) a more frequent or convenient pickup and delivery service; (g) emergency service; (h) the use of personnel particularly skilled in the handling of certain commodities; (i) the simplification of billing practices; and (j) the elimination of delays in transit and a reduction in damage claims resulting from interchange.

As previously stated the burden of establishing public convenience and necessity rests with the applicant. All too often the quality of proof will vary in accordance with the resistance offered by the protesting carriers. During the recent past it appeared that the existing carriers had mutually decided upon a period of mortification on the protesting of certificate applications. As a result extensive operative rights were granted on not much more than the mere allegations contained in the applications. The danger of this method is that the regulated industry by the extent of its opposition, or lack of opposition, is itself determining the standards of public convenience and necessity. The purpose of certification in the first instance is for the protection of the public and not for the industry. To assure the establishment of uniform standards I believe that the staff should take an active part in these proceedings. The staff should make an objective study reflecting the population and economic trends of the proposed service and the financial ability of the applicant. In addition the staff should conduct cross-examination of all operating witnesses for both applicants and

protestants as well as of public witnesses.

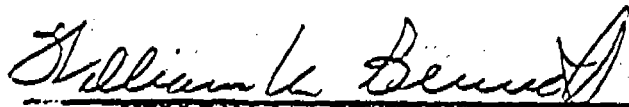
It is my considered opinion that an effective certification program is impossible without an effective status enforcement program. In the absence of enforcement, permitted carriers enjoy all of the advantages of certificated carriers without any of the attendant public obligations and responsibilities. Under such circumstances certificated carriers are placed at a decided disadvantage. I realize the difficulties that are associated with the establishment of a status case, but regardless of the difficulties it is only through a vigorous and consistent enforcement program that we can hope to establish definite legal guide posts and to provide the industry with a necessary stability.

CONCLUSION

The majority opinion herein finds that the applicant has previously been ordered to cease and desist between certain points (Talsky case, supra). The majority opinion does not now direct that applicant cease and desist from such operations. It is obvious that having again found illegal operations the Commission must move to discontinue such just as it did in the first Talsky case.

Unless this be done then present Commission policy at least as illustrated by this case is that operating activity which becomes highway common carriage while not sufficient for the issuance of proper authority despite gradual and unintended de facto status as a common carrier is at the same time neither sufficient to warrant a cease and desist order. The majority opinion inevitably is drawn to the conclusion that an application upon the part of an alleged offending carrier as here will

be rejected but as today's inconclusive decision shows no directive to discontinue such illegal operations will issue. What the majority is saying then is that illegal common carriage made such because authority has either not been sought or alternatively been rejected nonetheless may continue. The great questions of doubt set forth in the Talsky case and particularly the views of Justice McComb would seem to require more than the majority sets forth by way of a sparse denial. The Commission as presently constituted has an arbitrary policy of denial without reason. The reasons for such denial are left to speculation and, in short, we have here an exercise of power which is arbitrary, unexplained, and as to the applicant quite unfair.


WILLIAM M. BENNETT
Commissioner