

Decision No. 73170

ORIGINAL

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application
of AZTEC TRANSPORTATION CO., 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, and for an In
Lieu Certificate of Public Con-
venience and Necessity therefor.

Application No. 48466
Filed May 11, 1966

Donald Murchison, for applicant.
Arthur H. Glanz, for Southern
California Freight Lines, Ltd.;
Harold F. Culy, for Padre
Freight Lines, Inc.; and Russell &
Schureman, by R. Y. Schureman,
for Film Transport Co. of Cal., Inc.,
Imperial Truck Lines, Inc., and
Thomas H. Marrow Trucking Co.;
protestants.

O P I N I O N

Aztec Transportation Co., Inc. (Aztec) presently operates as a certificated highway common carrier pursuant to Decision No. 62488 in Application No. 43325 and Decision No. 67654 in Application No. 46676, and, pursuant to Certificates of Registration, MC-120575 (Sub No. 1 and 2) for the transportation of general commodities, with the usual exceptions, in intrastate, interstate, and foreign commerce, between (1) points and places in the San Diego Area and (2) between the City of San Diego and points and places within Borrego Valley, via county roads, State Highway 78, and U. S. Highway 395. Aztec seeks to extend its

highway common carrier operations north to San Juan Capistrano along U. S. Highway 101 and east to all major points of service in that portion of San Diego County beyond its present authority, and to Calexico, El Centro and other points of service in Imperial County.

Aztec holds permits to operate as a radial highway common carrier, a highway contract carrier, and a city carrier. Aztec has been performing service under its radial highway common carrier and city carrier permits within the area it now seeks to serve as a certificated carrier.

Aztec intends to register its proposed new rights, if granted, with the Interstate Commerce Commission (ICC) and, therefore, requests a finding that public convenience and necessity require that it be authorized to engage in operations in interstate and foreign commerce within limits which do not exceed the scope of the intrastate operations authorized to be conducted. Copies of the application and the notices of hearing were served in accordance with the Commission's procedural rules. Protestants, Southern California Freight Lines, Ltd. (SoCal), Padre Freight Lines, Inc. (Padre), Film Transport Co. of Cal., Inc. (Film), Imperial Truck Lines, Inc. (Imperial), and Thomas H. Marrow Trucking Co. (Marrow), are certificated carriers presently serving in the area sought to be served by Aztec. Public hearings were held before Examiner Robert Barnett at San Diego on August 2 and 3, 1966, October 10, 1966, and March 17, 1967, and at El Centro March 15, and 16, 1967.

Aztec Evidence

Aztec presented the testimony of its president, the manager of its Calexico facility, and 26 public witnesses.

The testimony of Aztec's operating witnesses may be summarized as follows:

Aztec started in business about 15 years ago as a permitted carrier. It was started by its current president, a man who now has over 20 years experience in the trucking business. In 1959 Aztec was granted a certificate of public convenience and necessity to operate in the San Diego vicinity (Decision No. 59245, dated November 10, 1959, in Application No. 41290); this authority was extended to the San Diego Area in 1961 (Decision No. 62488, dated August 29, 1961, in Application No. 43325). In 1962 Aztec, under a radial highway common carrier permit, initiated general commodity service between the San Diego Area and the Imperial Valley. Such service, from its beginning, has been rendered on a regular overnight basis, five days a week. Aztec does not render service to the Imperial Valley from San Diego under its highway contract carrier permit. Aztec has approximately 30 to 40 shipments per day to the Imperial Valley with an average total weight of 20,000 pounds, 30 percent of which are destined for Mexican consignees. Aztec maintains a terminal in San Diego and, since 1964, a warehouse in Calexico near the international boundary with the Republic of Mexico. This warehouse is staffed by a permanent employee. A bobtail truck is garaged in Calexico to make local deliveries. Traffic to the Imperial Valley is carried in a tractor-semitrailer combination and, for all practical purposes, is an eastbound service only since there is no general commodity traffic of any

significance available for westbound service out of the Imperial Valley.

Aztec is currently providing and, if certificated, proposes to render daily overnight service for both truckload and less than truckload traffic from San Diego to the Imperial Valley, delivering Tuesday through Saturday. Vehicles operating out of Aztec's San Diego terminal will pick up commodities in the San Diego area during the day and until 3:00 o'clock in the evening Monday through Friday, and on Saturday until 2:00 p.m. Line-haul movements will move overnight five days a week to Imperial Valley points for delivery at destinations the next morning, including Saturday deliveries. At the present time Aztec is performing a daily overnight service to all principal points in the Imperial Valley i.e. Niland, Brawley, Calexico, Holtville, and El Centro. Aztec is currently providing and, if certificated, proposes to render daily service to Mexicali, Mexico utilizing four methods of delivery: 1) goods are picked up by Mexican consignees at Aztec's dock in Calexico and taken across the border by the consignees; 2) goods are picked up at Aztec's dock in Calexico by brokers who use their own means of transportation for delivery into Mexico; 3) goods are picked up by a private Mexican transportation company (SMAT) at Aztec's Calexico dock for delivery into Mexico; and 4) about four or five times a year Aztec gets a substantial load destined for Mexico and takes it across the border into an area set apart as a free zone where the trailer is detached from the Aztec tractor and attached to a SMAT tractor for delivery in Mexico.

Protestants Imperial, Padre, and Film turn over to Aztec their l.t.l. shipments originating in San Diego and destined to points along U. S. Highway 80, and off route points located within ten miles laterally of the highway, between the eastern limits of Aztec's present authority and Plaster City.

Presently Aztec serves Borrego Springs three days a week by a truck that goes from San Diego to Borrego Springs, and returns over the same route. Under its new proposal Aztec will offer five-day a week service to Borrego Springs and will change its routing. Aztec proposes to operate to the Imperial Valley through Borrego Springs five days a week. It will load a tractor and two trailers in San Diego and drop one trailer off at Borrego Springs from which delivery would be made by a local resident driver. The other trailer, plus an empty trailer picked up at Borrego Springs, would continue on to the Imperial Valley where the loaded trailer would be unloaded and both empty trailers would return to San Diego via U. S. Highway 80.

Aztec presently operates a peddle line-haul operation daily between points within the San Diego Area and the San Juan Capistrano-San Clemente area. Its peddle truck performs pickup and delivery service with morning deliveries at San Clemente and San Juan Capistrano, and deliveries from said points to the San Diego area the next morning. Its volume to this area varies from 1,000 pounds to 2,000 pounds daily. There is very little back-haul.

Aztec feels that its service to the San Juan Capistrano-San Clemente area, and to the Imperial Valley, is approaching that of a certificated carrier and, therefore, Aztec requests to be certificated to these areas.

Twenty-six shippers and consignees testified in support of Aztec's request for an extension of its authority. All testified to the need for Aztec's service to the Imperial Valley and eight of them also testified to the need for Aztec's service to the San Juan Capistrano-San Clemente area. These witnesses testified that they have been using Aztec's service for periods of a few months to many years. The service has been good. Many of the witnesses need Saturday delivery service in the Imperial Valley and Aztec renders such service. Some of the witnesses also tender freight to the protestants and will continue to do so. For the most part the witnesses were not complaining about protestants' service; they were testifying about their satisfaction with Aztec's service. Many of the shippers ship goods via Aztec which ultimately come to rest in Mexico. Delivery is accomplished by the four methods set forth above.

Protestants' Evidence

Generally speaking, each of the protestants in this proceeding operates in the same manner as does Aztec. Each maintains pickup and delivery service in the San Diego area. Traffic picked up in the San Diego area is moved to terminals of each of the protestants in the Imperial Valley where it is delivered, usually with bobtail equipment. Again, as in the case

of Aztec, protestants each hold themselves out to provide an overnight service.^{1/}

Film operates a 27-foot semitrailer each day from San Diego to its terminal in El Centro, an overnight service. Until 1967 it held a mail contract with the Post Office Department but this was terminated when the Post Office determined to reroute its San Diego-Imperial Valley postal service. Because of this loss of revenue it is estimated that Film will lose money on its traffic moving between San Diego and the Imperial Valley in 1967. It maintains service to the Imperial Valley in the face of steady losses because its basic business is the transportation of motion picture film and related products throughout Southern California. Many of its customers are motion picture theatre chains with theatres in the Imperial Valley. To retain the over-all business Film must continue its Imperial Valley service. Film's San Diego-Imperial Valley operation was never profitable and has always been supported by system-wide revenues. Film turns over freight to Aztec for delivery along Route 80.

The president of Imperial testified that he is not concerned with Aztec's providing additional service throughout San Diego County but is only concerned with Aztec's Imperial Valley traffic.

^{1/} Protestants introduced evidence that they pay their drivers union wages of \$5.25 to \$6.00 per hour, including fringe benefits; Aztec pays its drivers \$2.00 per hour. Protestants assert that these facts must be considered in this decision. We will not consider them. (Pac. Tel & Tel v PUC (1950) 34 C 2d 822, 829; Oakland v Key System Transit Lines (1953) 52 CPUC 779.)

Imperial maintains a daily overnight service, with occasional Saturday delivery, between San Diego and the Imperial Valley where it maintains terminals in both El Centro and Calexico. It provides such service either with a 40-foot trailer or two 27-foot trailers, depending upon the amount of traffic available. It estimated its load factor on traffic originating in San Diego to the Imperial Valley runs approximately 60 percent of capacity. Much of the freight destined to the Imperial Valley originates in Los Angeles and is routed through San Diego as it is not economical to operate a daily schedule just for freight originating in San Diego. The witness had no idea as to how much traffic Imperial would lose if Aztec is granted a certificate. Notwithstanding steady growth in Imperial's revenue, tonnage, and employees on the San Diego-Imperial Valley service, it was the witness's opinion that traffic originating in San Diego showed little profit.

The vice-president of Marrow testified that his company has terminals in Los Angeles, San Diego, El Centro, and Calexico. It combines traffic from Los Angeles at San Diego for shipment to Imperial Valley points. There is one schedule daily between San Diego and the Imperial Valley usually consisting of two 27-foot trailers, but sometimes only one. The traffic originating in San Diego does not fill one 27-foot trailer; it averages 15,000 pounds a day. The other trailer carries traffic originating in Los Angeles. In the witness's opinion the San Diego-Imperial Valley traffic is not profitable, but no operating data was offered to substantiate this claim of operating loss. Also, within the next few months Marrow expects to lose

one-third of the traffic originating in San Diego when work on Interstate Highway 8 is completed. In the past four years Marrow's total number of employees has dropped from 65 to 59 but there has been an increase in equipment.

A representative of SoCal testified that his company provides a service similar to that provided by Aztec to the Imperial Valley. His company serves all the major points sought to be served by Aztec. He sponsored an exhibit showing the number of shipments, and their weights, carried by his company from San Diego to the Imperial Valley since 1962. The tabulation is:

<u>Year</u>	<u>Shipments</u>	<u>Weight</u>
1962	14,769	6,117,964
1963	14,501	5,498,599
1964	11,380	4,599,184
1965	12,361	4,827,685
1966	12,727	5,017,297

Analysis of the exhibit shows an over-all drop in shipments and weight since 1962 but an increase in the last two years. The witness testified that both the San Diego area and the Imperial Valley area are growing and that he did not expect to lose traffic to Aztec if Aztec were certificated. His company provides Saturday delivery service in the Imperial Valley, but only because competition has forced it. It would be preferable to eliminate this service so as to save the time and a half over-time wage cost of providing the service.

So far as interstate service is concerned, each of the protestants handles its interstate and foreign traffic in much the same manner as Aztec. A portion of the traffic of the protestants is picked up by Mexico consignees, another portion by SMAT, and, generally, larger shipments are moved across the international boundary into the free zone in Mexicali. Film, Imperial, and Marrow, as well as SoCal, all hold intrastate certificates of public convenience and necessity authorizing them to provide all of the intrastate service for which Aztec seeks a certificate, insofar as San Diego-Imperial County traffic is concerned. In addition, Film, Imperial, and Marrow hold Certificates of Registration from the Interstate Commerce Commission authorizing concurrent service in interstate commerce, while SoCal holds a certificate of public convenience and necessity authorizing a service in interstate and foreign commerce which authorizes delivery in Mexicali.

Sixteen shippers or consignees testified on behalf of protestants. They did not testify against Aztec, although some had used Aztec's service and had minor complaints, but confirmed the testimony of protestants' management witnesses that protestants' service to the Imperial Valley was good.

Discussion

One of the primary issues in this case is the fitness of applicant to operate as a certificated highway common carrier. Protestants claim that applicant is unfit because since 1962 it has been continually operating in an illegal manner in both interstate and intrastate commerce. In reply, Aztec asserts that it

never operated illegally in intrastate commerce and that, if it did operate illegally in interstate commerce, such operation was inadvertent.

We discuss first, applicant's interstate and foreign service.

Of the four methods of delivery of goods destined to Mexico, consignee pickup, broker pickup, transfer to SMAT, and delivery into the free zone on the Mexican side of the border, only the last enumerated method is an actual delivery in foreign commerce. Aztec uses this method about four times a year when there is an unusually large shipment of goods to Mexico; it involved less than one percent of Aztec's tonnage destined to Mexico. It is apparent that such delivery cannot be lawfully made under permits or certificates issued by this Commission, nor under federal authority that is coextensive with our certificates. Yet many carriers, including protestants, with no better authority than Aztec do deliver into the free zone. It is only recently that doubt has been cast on operations into the free zone by carriers who do not hold authority to transport commodities in foreign commerce. (See, Re Imperial Truck Lines, I.C.C. Docket No. MC-99745, Sub No. 2, Examiner's proposed decision, Traffic World, July 8, 1967, p. 67.) We conclude that Aztec's deliveries into the free zone are infrequent and, so far as this record shows, are made with no less authority than other carriers similarly situated.

Aztec's method of operations on its Mexico-bound traffic, other than delivery into the free zone, is to have the

consignees, or their representatives, pick up the goods at Aztec's Calexico warehouse. There is nothing improper about having the Mexican consignee or broker pick up his own goods in his own equipment for shipment into Mexico. Nor is there any impropriety when these persons engage Mexican for-hire transportation to make the pickup in Calexico for delivery in Mexico. This is not interlining by Aztec with SMAT. The evidence shows that Aztec did not arrange this transportation, nor did it know that a particular shipment would be picked up by SMAT. There was no arrangement for a continuous carriage; the pickups by SMAT in Calexico were, as far as this record shows, casual and sporadic instances. It is entirely new transportation arranged by third parties and covered by a new contract of carriage to which Aztec is not a party. Satisfactory tests to distinguish intrastate traffic from other kinds have never been developed and demarcation lines are drawn according to the needs of the situation. Currently the ICC holds that traffic handled by a for-hire carrier within a single state which is moving in interstate or foreign commerce and is transferred to a proprietary operator is not subject to regulation by the ICC.

(Motor Transportation of Property Within a Single State (1964)

94 MCC 541, affm'd Penn. R.R.Co. v. United States (1965) 242 F.

Supp. 597, affm'd per curiam, American Trucking Assoc. v. United

States (1966) 382 US 372, 15 L ed 2d 421.) The Aztec-SMAT re-

lationship may not be as clearly exempt from ICC regulation as the Aztec-proprietary carriage relationship but certainly Aztec's actions involving delivery of goods bound for Mexico are not wilful and flagrant and do not amount to such violations of law as would warrant a finding of unfitness.

However, we cannot take the same view of Aztec's service between San Diego and Calexico and El Centro. The operating witnesses of Aztec testified that from the inception of its service to the Imperial Valley from San Diego, in 1962, its service was daily, with Saturday delivery. Aztec's president testified that this service was performed exclusively under its radial highway common carrier permit.

Section 1063 of the Public Utilities Code provides that, "no highway common carrier ... shall begin to operate any auto truck ... for the transportation of property for compensation on any public highway in this State without first having obtained from the commission a certificate declaring that public convenience and necessity require such operation."

By statutory definition, the distinction between a radial highway common carrier and a highway common carrier is that the highway common carrier operates between fixed termini or over a regular route whereas the radial carrier has no fixed termini or regular route. (Public Utilities Code Secs. 213, 215, 3516.) Here, the evidence is convincing that Aztec daily transported freight from San Diego to Calexico and El Centro, the respective ends of particular transportation lines which it operated. These two cities, therefore, were the termini of daily shipments. Unquestionably, daily transportation to these cities places them within the classification of "fixed termini", those between which the carrier "usually or ordinarily operates." (Public Utilities Code Sec. 215; Nolan v. Public Utilities Com. (1953) 41 C 2d 392, 397, 260 P 2d 790.)

In our opinion, the operation of Aztec in transporting freight between San Diego and Calexico and El Centro was that of

a highway common carrier, and, of course, Aztec does not have a certificate of public convenience and necessity authorizing such operation. Aztec has been operating as a highway common carrier, by its own witness's testimony, for over four years. The testimony of all witnesses presented by Aztec, when considered together, shows that the operation of Aztec to Imperial Valley points has been on a daily basis from its inception. This service has not resulted from a gradual increase in business, i.e., from infrequent trips to more frequent ones to daily, but was a full grown daily service from the beginning. We are dealing here with an applicant of such experience before us (in other matters) and in the transportation business generally that we cannot consider its action to be an inadvertent stumble into an illegal posture. Setting aside, for the moment, the question of public interest, to issue a certificate under the facts as shown in this record on the question of fitness would be to reward illegal operations.

There are other issues which should be discussed.

Aztec claims that the legality of its operation is not an issue in this proceeding, but can only be considered in an investigation of illegal operations. This claim is too broad. Whatever merit it may have in other situations, it has no pertinence in this case where the operation is illegal from its inception. When an applicant has not shown that high degree of responsibility in operating under permits which the law requires also of a highway common carrier, authorization to expand operations as a highway common carrier may be denied. (Re Arrow Pacific Drayage (1955) 54 CPUC 126.)

Protestants assert that, in addition to other reasons, this application should be denied because need for certification

has not been shown and granting a certificate to Aztec would continue the present adverse effect of Aztec's operations on protestants. Protestants' complaint is further based on the fact that Aztec, as a permitted carrier, took business from protestants which it could not have taken if Aztec operated in a lawful manner. The contention of protestants is that "public need," as claimed by applicant, has a fabricated economic base because Aztec's loads were pieced together through diversion and dilution of shipments available to the existing carriers. Further, Aztec, by having assumed the role of a certificated carrier and offering shippers daily service, could quite easily participate in any economic growth in the area. The existing carriers are operating substantially the same service as applicant's illegal service and have considerable excess capacity. Three of the existing carriers are operating at less than 50 percent capacity, and one at less than 60 percent.

Perpetuation of Aztec's service will continue to cause marginal operations for protestants in this area of modest growth.

SoCal was the only carrier protesting Aztec's request for certification to serve San Juan Capistrano and San Clemente. The evidence shows that SoCal provides adequate service to this area.

We conclude that this application should be denied because Aztec is unfit and because it failed to show that its proposed service is required in the public interest.

Findings of Fact

1. Aztec operates as a certificated highway common carrier authorized to transport general commodities, with the usual exceptions, between (1) points and places in the San Diego Area, and (2) between the City of San Diego and Borrego Valley.

2. Aztec seeks to extend its highway common carrier operations north to San Juan Capistrano and east to the Imperial Valley.

3. Aztec holds permits to operate as a radial highway common carrier, a highway contract carrier, and a city carrier. Aztec has been serving under its radial highway common carrier permit within the area it now seeks to serve as a certificated carrier. Aztec performs no service to the Imperial Valley from San Diego under its highway contract carrier permit.

4. Aztec has been operating as a common carrier for over 15 years. In 1959 it was granted a certificate of public convenience and necessity as a highway common carrier in the San Diego area. Its president has over 20 years experience in the trucking business. In 1962 Aztec began operating between San Diego and Calexico and El Centro. From its inception this operation was on a daily basis. In 1964 it constructed a terminal in Calexico. Calexico and El Centro are the termini of daily shipments and with San Diego, are fixed termini between which Aztec usually and ordinarily operates. Aztec has never been granted a certificate of public convenience and necessity authorizing highway common carrier operations between San Diego and Calexico and El Centro. This operation is unlawful, in violation of public Utilities Code Section 1063.

5. Based on Finding No. 4, we further find that Aztec is not a fit and proper entity to render highway common carrier

service between San Diego and the Imperial Valley, and San Diego and San Juan Capistrano-San Clemente.

6. Aztec is currently providing daily service to Mexicali, Mexico utilizing four methods of delivery: 1) goods are picked up by Mexican consignees at Aztec's dock in Calexico and taken across the border by the consignees; 2) goods are picked up at Aztec's dock in Calexico by brokers who use their own means of transportation for delivery into Mexico; 3) goods are picked up by a private Mexican transportation company (SMAT) at Aztec's Calexico dock for delivery into Mexico; and 4) about four or five times a year Aztec gets a substantial load destined for Mexico and takes it across the border into an area set apart as a free zone where the trailer is detached from the Aztec tractor and attached to a SMAT tractor for delivery in Mexico.

7. That portion of traffic delivered to Mexico consignees or brokers at Aztec's Calexico warehouse is commerce subject to regulation by this Commission.

8. That portion of traffic picked up by SMAT at Aztec's Calexico warehouse is not in interstate commerce. Aztec did not arrange this transportation, nor did it know that a particular shipment would be picked up by SMAT. There was no arrangement for a continuous carriage; the pickups by SMAT in Calexico were casual and sporadic instances. It is entirely new transportation arranged by third parties and covered by a new contract of carriage to which Aztec is not a party.

9. That portion of traffic moved by Aztec directly across the international boundary into the free zone in Mexicali is foreign commerce subject to regulation by the Interstate Commerce Commission.

10. Aztec has handled traffic moving in foreign commerce without first having obtained appropriate authority, in violation of law, but such violation of law was not wilful or flagrant.

11. The service proposed by Aztec between the San Diego Area and the Imperial Valley, and San Diego and San Juan Capistrano- San Clemente is substantially the same service as presently provided by protestants.

12. Protestants provide satisfactory service between the San Diego Area and those points in the Imperial Valley, and from San Diego to San Juan Capistrano-San Clemente, sought to be served by Aztec.

13. Each of the protestants is presently operating daily schedules between the San Diego Area and the Imperial Valley at considerably less than maximum capacity.

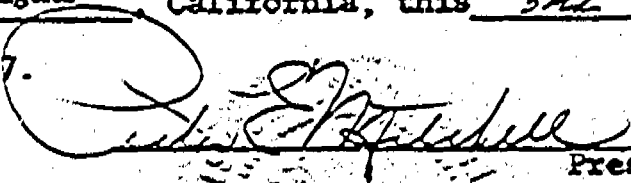
The Commission concludes that the application should be denied.

ORDER

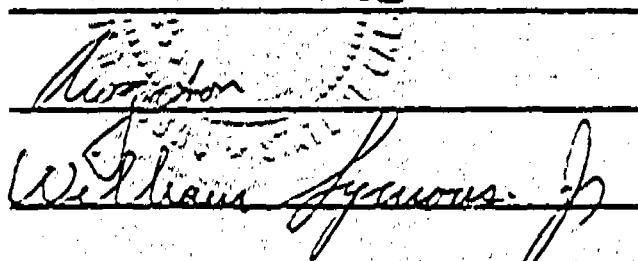
IT IS ORDERED that Application No. 48466 is denied.

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

Dated at Los Angeles, California, this 3rd day of OCTOBER, 1967.



President



Commissioners

-13- Commissioner William M. Bennett, being necessarily absent, did not participate in the disposition of this proceeding.
Commissioner Fred P. Morrissey, being necessarily absent, did not participate in the disposition of this proceeding.