

**ORIGINAL**Decision No. 75311

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application )  
of J. D. TRANSPORTATION CO., for )  
authority to execute and deliver )  
a Security Agreement. )

Application No. 50392  
(Filed July 16, 1968)

Severson, Werson, Berke and Bull, by Bernardus  
G. Smit, for J. D. Transportation Co., appli-  
cant.  
John F. Lewis, for Simplex Wire & Cable Company,  
interested party.  
Janice E. Kerr, Counsel, for the Commission staff.

O P I N I O N

J. D. Transportation Co. (J. D.), a California corporation, doing business as Harbor Truck Lines, seeks authority under Section 851 of the Public Utilities Code to issue a chattel mortgage to Simplex Wire & Cable Company, a corporation with principal offices in Cambridge, Massachusetts (hereinafter sometimes called Simplex). The terms of the security agreement embodying said chattel mortgage is set out in Exhibit A to the application. J. D. holds operative authority as a highway common carrier and as a public utility ware-  
<sup>1/</sup>houseman.

Public hearing was held before Examiner Mallory in San Francisco on October 24, 1968. At that time evidence was presented by a representative of Simplex. The Commission staff counsel requested

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<sup>1/</sup> J. D.'s certificate to operate as a highway common carrier was issued pursuant to Decision No. 59567, dated February 1, 1960, in Application No. 41770. It authorized service between Los Angeles and Lamanda Park. J. D.'s certificate to operate as a public utility warehouseman was issued pursuant to Decision No. 68917, dated April 20, 1965, in Application No. 47226. It authorized the operation of 31,200 square feet of warehouse space in the City of Los Angeles.

that the president of J. D. be made available to verify the statements attested to by him in the application, principally those concerning the financial status of applicant and the nature of the debt. The matter was temporarily removed from the calendar, pending notification by counsel as to the date such witness would be made available. By letter dated December 26, 1968, counsel advised the Commission that J. D. declines to produce further testimony, and desires to submit the matter based upon the record adduced at the October 24 hearing. Staff counsel has no objection to submission on this basis. Therefore, this matter is taken under submission as of December 30, 1968, the date of receipt of the request for submission.

The evidence adduced at the hearing related to the events giving rise to the debt for which the encumbrance is sought, and the manner in which Simplex determined the amounts due to it from J. D. According to the testimony of Simplex's witness, the debt arose as a result of the issuance of freight bills by J. D. for which no transportation services were performed. Because of Simplex's arrangement for the payment of freight charges, Simplex did not discover the mis-billings for a period of about two years. A comparison of the freight bills submitted by J. D. with delivery receipts assertedly showed that Simplex had been billed for transportation services in excess of those actually performed in an amount exceeding \$297,000. A separate analysis was made by J. D. which indicated a lesser amount. Through negotiation between attorneys for J. D. and for Simplex, an agreement was reached that the overbilling involved was \$226,829.01. The parties allegedly agreed that a debt of this amount existed, and that repayment thereof would be made on a periodic

basis by J. D. Assertedly, J. D. had repaid \$62,250.25. The witness testified that the remaining indebtedness, as of the date of the hearing, was \$199,693.62. The witness further testified that J. D. had agreed to repay this indebtedness by making regular payments to Simplex at the rate of \$1,500 per week. Assertedly, regular payments of this amount are being received.

The witness for Simplex further testified that J. D. had agreed to secure the debt described above by entering into the security agreement for which authority is sought in the application herein. Said security agreement describes the assets of J. D. which would be subject thereto. The agreement lists operative equipment, shop and office equipment, security deposits, lease interests, trade accounts receivable, and all operative rights acquired by J. D. from this Commission.

#### Discussion

Section 851 of the Public Utilities Code provides, in part, as follows:

"No public utility ... shall sell, lease, assign, mortgage or otherwise dispose of or encumber the whole or any part of its ... property ..., or any franchise or permit or any right thereunder, ... without having first secured from the Commission an order authorizing it to do so."<sup>2/</sup>

In this application, authority is sought to encumber the operative rights of applicant. Under the security agreement set out in Exhibit A to the application, a security interest is created on behalf of Simplex as to the assets of J. D. enumerated in the agreement, including the operative rights of J. D. Upon default of any

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<sup>2/</sup> Section 816.5 provides that no authority is required from this Commission for a common carrier to execute a conditional sales contract for purchase of equipment or a chattel mortgage on motor vehicle equipment, securing the purchase price of said equipment.

payment due to Simplex under said agreement, all said assets would be subject to public sale if necessary to satisfy the debt secured thereby. In other words, control of the operative rights could pass to Simplex, if the security agreement is authorized by this Commission.

While the appearance by counsel was made for applicant in this proceeding it became apparent during the course of the hearing that said counsel represented Simplex in negotiating the agreement herein. The application herein shows that it was prepared by a different attorney and the record indicates that an attorney other than the one appearing herein represented applicant in its negotiations with Simplex (TR94).

The application, prepared and attested to by applicant's president, contains statements of fact divergent from the evidence adduced by the witness testifying on behalf of Simplex. These statements of fact relate to the nature of the alleged debt, the manner in which it arose, and the amount thereof. Also the application contains financial statements of applicant, to which the witness presented at the hearing had no first-hand knowledge. No witness for applicant appeared at the hearing.<sup>3/</sup> While an appearance was made for applicant by counsel, it is clear that said counsel represents the beneficiary of the proposed encumbrance, not applicant. The only entity having standing before this Commission in an application for authority under Section 851 of the Public Utilities Code is the public utility filing the application. The burden of proof in such proceeding must be sustained by applicant, and no other party can assume that burden.

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<sup>3/</sup> Notice of hearing was served upon applicant's president and upon the attorney named as the person to whom communications should be addressed, as shown in paragraph 2 of the application.

Inasmuch as applicant did not sustain its burden of proof herein, a finding cannot be made that the proposed encumbrance of utility operative rights will not be adverse to the public interest.

The Commission concludes that the application should be denied.

O R D E R

IT IS ORDERED that Application No. 50392 is hereby denied.

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

Dated at San Francisco, California this 11th day of FEBRUARY, 1969.

William J. ...  
President  
August ...  
Fred P. ...  
(M) ...  
Thomas ...  
Commissioners