

SW

ORIGINAL

Decision No. 76851

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of Application of
JOSEPH N. LE BOW, doing business
as DESERT EMPIRE EXPRESS, to
extend highway common carrier
operations.

Application No. 48271

(Filed February 24, 1966;
amended May 24, 1967)

Jack O. Goldsmith, for Joseph N.
Le Bow, applicant.

Donald Murchison, for Milton's
Express, Inc., protestant;
Reliable Delivery Service, Inc.,
and Auto Fast Freight, inter-
ested parties.

O P I N I O N

Joseph N. Le Bow, an individual doing business as Desert Empire Express, operates as a highway common carrier under the authority of a certificate of public convenience and necessity granted by Decision No. 65511, dated June 4, 1963, in Application No. 44397. He also holds authority to operate as a radial highway common carrier and as a highway contract carrier.

Applicant's authority to operate as a highway common carrier is confined to the transportation of commodities which require protection from heat by the use of ice, mechanical refrigeration, or liquefied gas. Said commodities are further limited to specified items such as dairy products, fish, meats and poultry, salad dressing and mayonnaise, cold-pack vegetables, and certain other foods. Said commodities may be transported only in shipments at rates subject to minimum weights of 10,000 pounds or less. Territorially, applicant's highway common carrier operating authority is limited to transportation from the Los Angeles Territory to Coachella, including service to intermediate points along specified highways and points within five miles from said highways.^{1/}

Applicant's authority to operate as a radial highway common carrier provides for the transportation of commodities requiring refrigeration, alcoholic beverages, and groceries and grocers' supplies Statewide. His authority to operate as a highway contract carrier provides for the transportation of commodities sold by grocery stores, processed fresh meats and liquors within a radius of 150 miles of Los Angeles.

By this application Le Bow seeks authority to extend the scope of his highway common carrier operations. More specifically, he asks that he be permitted to operate as a

^{1/} The commodities which applicant may transport as a highway common carrier, the Los Angeles Territory, and the highways over which the transportation may be performed are more specifically described in Decision No. 65511.

highway common carrier from the Los Angeles Territory, on the one hand, to the points which are generally identified as follows, on the other hand:

- a. All points and places in Los Angeles County south or southerly of the San Gabriel Mountains;
- b. All points and places in Orange County;
- c. All points and places within an area designated as San Diego Territory (in general, that area south or southerly of La Jolla to the International Border with Mexico and west or westerly of Lakeside);
- d. Santa Barbara area and southward to Los Angeles Territory;
- e. Big Bear City and vicinity.^{2/}

Applicant proposes to transport the same commodities as those which he may now transport in his present certificated operations. He also proposes to limit the proposed service to shipments which are transported in all of the following circumstances:

- a. Temperature-controlled service is provided;
- b. The transportation is performed in carrier's vehicle(s) specially designed and constructed for said temperature-controlled service; and
- c. The rates which are assessed are subject to a minimum weight(s) not in excess of 10,000 pounds.

^{2/} The territorial scope of the proposed service is also set forth more specifically in Appendix "A" attached hereto and by this reference made a part hereof.

Public hearings on the application were held before Examiner Abernathy at Los Angeles on October 4 and 5, 1967, on July 23, 24, 25, 30 and 31, 1968, and on July 30, 1969.^{3/} Evidence in support of the application was submitted by applicant, by his bookkeeper, and by twenty shipper witnesses. Milton's Express, a highway common carrier now providing refrigerated transportation to virtually the same areas as those which applicant seeks authority to serve, participated in the hearings as protestant to the granting of the application, and presented evidence through its general manager and through four shipper witnesses. The matter was taken under submission on September 15, 1969, with the receipt of closing statements.

According to testimony presented by applicant, his business consists mainly of the transportation of fresh and frozen meats, fish and poultry, and certain other foodstuffs that require refrigeration in transit. The shippers whom applicant serves are packers, processors, wholesalers, jobbers and suppliers of said foodstuffs who are located in and about Los Angeles. Deliveries are made mainly to markets, restaurants, hotels, clubs, institutions and owners of home freezers in the southern California coastal area from Goleta to the Mexican Border and in the inland valley areas easterly of the Los Angeles territory to Coachella, Riverside, Hemet and Elsinore. In general, the involved shipments are picked up by applicant Mondays through

^{3/} An initial hearing was held before Examiner Barnett at Los Angeles on June 6, 1966. No evidence was received, and the matter was continued to a date to be set.

Fridays and delivered by noon of the following day. Some of the consignees or receivers of the shipments require early morning delivery. Others are not open for the receipt of early deliveries and require delivery at a later time. Applicant undertakes to schedule both the pickup and the delivery of the shipments he transports so as to meet the diverse needs of those whom he serves.

Applicant testified in effect that his proposals herein are an outgrowth of his presently authorized highway common carrier operations from Los Angeles Territory to Coachella. In the conduct of said operations he is also called upon to transport shipments to destinations outside of his highway-common-carrier service area. He has undertaken to accommodate such other requests for service, assertedly under the authority of his highway contract carrier and radial highway common carrier permits.^{4/} These other services have developed to the point where they account for about 60 percent of his total revenues. It is principally these other services that applicant seeks to have certificated in this matter.

Applicant stated that he regularly operates over six different routes or runs: Palm Springs, San Bernardino, Riverside, Santa Barbara, Santa Ana and San Diego. Three of these routes, San Bernardino, Santa Barbara and Palm Springs/Calimesa are operated by subhaulers, and the remainder are operated by employees. Applicant's employees, including the subhaulers,

^{4/} Applicant indicated that he limited his services as a radial highway common carrier mainly to the transportation of shipments of 10,000 pounds or more.

total fifteen. Thirty pieces of equipment -- eight tractors, eight refrigerated trucks, nine refrigerated trailers, two dollies and three automobiles are used in the operations. Three of the trucks are owned by the subhaulers and five of the tractors and one truck are owned by applicant's employees who lease said vehicles to applicant under option-to-purchase agreements.

Financial statements covering the years 1965, 1967 and a portion of 1968 were submitted by applicant to show his financial position at the close of, and his financial results of operations for, those periods. Balance sheet and profit and loss data which he submitted for 1967, the most recent full year, are set forth in Tables Nos. 1 and 2 below:

Table No. 1
Balance Sheet
as of December 31, 1967

<u>ASSETS</u>		
Cash		\$ 1,286
Accounts Receivable		40,821
Employee Advances		6,326
Deposits		1,790
Prepayments		700
Equipment	\$87,944	
Less Reserve for Depreciation	<u>52,060</u>	<u>35,884</u>
Total Assets		<u><u>\$86,807</u></u>
* * * *		
<u>LIABILITIES</u>		
Payroll Taxes Payable		\$ 2,250
Unremitted C.O.D.'s		1,428
Contracts Payable		<u>78</u>
Total Liabilities		\$ 3,756
<u>NET WORTH</u>		<u>83,051</u>
<u>TOTAL LIABILITIES and NET WORTH</u>		<u><u>\$86,807</u></u>

Table No. 2
Income and Expense Statement
for Year Ending with December 31, 1967

Revenues	\$417,043
Expenses (a)	<u>397,648</u>
Net Operating Revenues (b)	\$ 19,395

(a) Before provision for compensation for services performed by J. N. Le Bow.

(b) Before provision for income taxes.

The substance of the testimony of the shipper witnesses who testified in applicant's behalf is that they ship foodstuffs to hotels, restaurants, institutions, nightclubs, markets and home freezer users located in the areas which applicant is herein seeking authority to serve as a highway common carrier; that the foodstuffs which they ship consist of fresh or frozen meats, poultry and fish, cold-pack vegetables, dairy products and certain other items; that such foodstuffs require protection from heat while in transit; that they utilize applicant's services; that they have found said services eminently satisfactory, and superior in some respects to the services of other carriers whom they have used, and that they would like to be able to continue using applicant's services.

Milton's Express, who participated in the proceeding in opposition to the granting of the application, presented evidence through its general manager that it provides highway common carrier refrigerated transportation service to the same areas (except Big Bear City and vicinity) as those which

applicant is seeking authorization to serve; that in addition it serves other southern California areas including the Imperial Valley, the Antelope Valley, the Santa Clara River Valley, and the area along U.S. Highway No. 99 northward as far as Bakersfield; that it uses a total of 81 pieces of equipment -- 14 tractors, 25 trailers, 37 trucks and 5 dollies -- in its operations; and that it operates in virtually the same manner as does applicant in that it provides pickup of shipments Mondays through Fridays with delivery to destinations outside of Los Angeles the following day.

Protestant's manager testified that protestant solicits business throughout its service area. However, its flow of traffic is virtually all one way -- outbound from Los Angeles. He stated that protestant's operations are being conducted at less than capacity; that protestant's average load factor within the Los Angeles Basin Territory is about 60 to 75 percent; that it is about 75 percent southward to the San Diego area and about 80 percent northward to the Santa Barbara area. He opposed the granting of the highway common carrier authority which applicant seeks, because, he asserted, the extension of applicant's highway common carrier operations would result in a diminution of the traffic which protestant now enjoys, and a consequent lessening of protestant's ability to maintain its own highway common carrier services at an adequate and efficient level.

The four shipper witnesses who were called in protestant's behalf testified that they use protestant's services; that the protestant provides the kind and quality of service which

they require, and that they find protestant's service to be adequate and satisfactory.

In a closing statement protestant's counsel pointed out that by Decision No. 75734, dated June 3, 1969, applicant was authorized to acquire rights held by Reliable Delivery Service, Inc., to transport, as a highway common carrier, general commodities which require protection from heat by refrigeration or temperature control between all points and places in Los Angeles Basin Territory and between certain other points also.^{5/} Protestant's counsel further pointed out that the service area which is covered by the rights acquired from Reliable Delivery Service, Inc., is substantially larger than the service area which applicant is otherwise to serve as a highway common carrier, and that the providing of service under said rights will require a material expansion of applicant's operations. He questioned whether applicant has the capacity to meet the highway common carrier obligations and responsibilities thus assumed and to meet, in addition, the corresponding obligations and responsibilities which would ensue if the authority which is sought in this matter were to be granted.

^{5/} In general the Los Angeles Basin Territory, as defined in Decision No. 75734, includes that area in southern California which lies between Topanga Canyon, Chatsworth and San Fernando on the west, Yucaipa, Hemet and San Clemente on the east, the San Gabriel and San Bernardino Mountains on the north and the Pacific Ocean on the south.

Discussion, Findings and Conclusions

The record herein is clear that the transportation services which applicant is providing is meeting the needs of his patrons to their satisfaction. Some of said patrons, it appears, prefer applicant's services over those of other carriers because of his prompt pickups of their shipments, absence of complaints, and courteous conduct of his drivers. Others indicated support of his services as a matter of policy, believing that the element of competition which he provides results in the availability of a better quality of refrigerated transportation service for the public generally. In some instances, notably in the transportation of fresh fish in boxes, water-iced, the record shows that applicant is providing service not offered by other carriers.^{6/} Inasmuch as applicant is seeking certification for traffic which he is already handling, it does not appear that the granting of the authority which applicant seeks would result in a substantial diversion of traffic from other carriers.

^{6/} It appears that other carriers refuse to transport fresh fish, in boxes, water-iced, because of possible contamination of other cargo by leakage from the boxes of fish as the ice melts. However, applicant has experienced no difficulties in this respect. Inasmuch as applicant and protestant Milton's Express, Inc., are assertedly engaged in the same kind of transportation service, applicant's freedom from complaints in transporting fresh fish suggests that Milton's Express, Inc., and the other refrigerated carriers also may be unjustifiably refusing service which is within the scope of their certificates.

In general, applicant's showing is quite similar to that which led to his initial certification as a highway common carrier pursuant to Decision No. 65511, supra. Hence, it might be surmised that similar action should be taken here. However, such public need for applicant's services as has been shown in this instance is not sufficient to justify the granting of the sought authority. Material infirmities in applicant's showing otherwise prevent such action.

The sought authority should not be granted. It is evident that the expansion of applicant's services pursuant to the operative authority acquired from Reliable Delivery Service, Inc., will result in a very substantial change in applicant's operations. Whereas applicant's holding-out is limited at present to the transportation of specified foodstuffs, under the operative authority acquired from Reliable Delivery Service, Inc., he will be committed to the transportation of commodities generally, subject to the usual exceptions. His holding out in terms of size of shipments handled will also be increased. At present applicant's highway common carrier operations are limited to the transportation of shipments at rates which are subject to minimum weights of 10,000 pounds or less. This limitation does not apply in connection with the operative authority acquired from Reliable Delivery Service, Inc. Hence, whereas applicant's services have been heretofore restricted to the transportation of less-truckload traffic, his expanded services will include truckload traffic as well. Furthermore, the territorial scope

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of applicant's operations will be expanded to the point where it approaches that of Milton's Express, Inc. As has been previously noted herein, Milton's Express, Inc., utilizes a total of 81 pieces of equipment in its operations whereas applicant is utilizing only 30 pieces of equipment at present. Hence, it seems most probable that with the assumption of the highway common carrier obligations under the operating authority acquired from Reliable Delivery Service, Inc., applicant will be required to make a material increase not only in his fleet but in his terminal facilities also.

Applicant did not undertake to present evidence by which the probable impact of the expansion of his operations can be estimated. He said that the actual acquisition of the rights of Reliable Delivery Service, Inc., had not been consummated and that under the provisions of Decision No. 75734 the transfer of the rights may be made any time to and including December 31, 1969. Nevertheless, he did not disavow the transfer. In the circumstances it is reasonable to conclude that the transfer will be accomplished, and that it should be taken into account herein.

In view of the substantial scope of the changes, and the imminence thereof, the level and quality of applicant's present operations can hardly be regarded as indicative per se of the level and quality of the expanded operations. Will, for example, applicant be able to maintain in his expanded operations the promptness and dependability that characterize his present services? Without information concerning applicant's

anticipated operations under the rights acquired from Reliable Delivery Service, Inc., the record is not sufficient to permit a determination of applicant's capability to assume the further common carrier obligations which are involved in this matter.

Another circumstance to be taken into account in connection with the fitness of applicant to conduct the highway common carrier operations which he seeks to have authorized is the fact that applicant has been providing the services involved for several years assertedly as a contract carrier. However, the record shows that applicant's patrons disclaim that they are bound by any contractual arrangements which commit them to the use of applicant's services. Applicant himself did not undertake to substantiate his allegation that said operations are those of a contract carrier. The evidence appears to indicate that in his conduct of said operations applicant has been serving the public in essentially the same manner as he has been pursuant to Decision No. 65511. If true it would appear that the so-called contract operations have been, and are, highway common carrier operations provided without the authority required by Section 1063 of the Public Utilities Code. If applicant is undertaking to engage in common carrier operations in the guise of a contract carrier such conduct would have bearing upon his fitness to be certificated for said operations. When an applicant, in operating under permits, has not shown that high degree of responsibility which the law also requires of a highway common carrier, authorization to expand operations as a highway common carrier may be denied.^{7/}

^{7/} Compare Re Application of Aztec Transportation Co., Inc., Decision No. 73170, dated October 3, 1967, in Application No. 48466; Re Arrow Pacific Drayage, 54 Cal. P.U.C. 126 (1955).

Findings of Fact

1. Applicant is engaged in the transportation of designated foodstuffs under refrigeration as a certificated highway common carrier, in quantities subject to rates for 10,000 pounds or less, between the Los Angeles Territory, on the one hand, and points and places along specified highways easterly thereof to Coachella.

2. Applicant holds permits from this Commission authorizing operations as a highway contract carrier and as a radial highway common carrier.

3. Applicant is engaged in the transportation of certain foodstuffs under refrigeration, assertedly as a highway contract carrier, in quantities subject to rates for 10,000 pounds or less, between the Los Angeles Territory, on the one hand, the San Bernardino/Big Bear City area, the Santa Barbara area, the San Diego area and intermediate points, on the other hand.

4. Applicant provides certain other transportation services, assertedly as a radial highway common carrier.

5. By Decision No. 75734, dated June 3, 1969, applicant was authorized to acquire on or before December 31, 1969, certain highway common carrier operative rights of Reliable Delivery Service, Inc., authorizing the transportation of general commodities requiring refrigeration between points and places within the Los Angeles Basin Territory and between points and places within said territory, on the one hand, and various other designated points and places mainly in the Mojave Desert, on the other hand.

6. Applicant utilizes the services of subhauliers for the transportation which he performs to the Santa Barbara and San Bernardino/Big Bear City areas -- also the Palm Springs/Calimesa area.

7. Applicant seeks to extend his highway common carrier services to include those which are described in Paragraph 3 above.

8. The services which are described in Paragraph 3 above and which applicant performs assertedly as a highway contract carrier, may be highway common carrier services.

9. The operation of the highway common carrier services which applicant is authorized to provide under the authority acquired from Reliable Delivery Service, Inc., will entail a substantial expansion of applicant's operations.

10. Applicant's showing with respect to the level and quality of his present services does not establish that his services under his expanded operations will be of corresponding level and quality.

11. The evidence is insufficient to permit a determination of applicant's capability to assume further highway common carrier obligations in addition to those which applicant will assume in connection with the highway common carrier services to be performed under the authority acquired from Reliable Delivery Service, Inc.

12. Applicant's operation, assertedly as a highway contract carrier, of the services described in Paragraph 3 above may be those of a highway common carrier and in violation of Section 1063 of the Public Utilities Code.

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13. Applicant has failed to establish that public convenience and necessity require that this application be granted.

Conclusions

The Commission concludes that the application should be denied.

O R D E R

IT IS ORDERED that Application No. 48271 is denied.

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

Dated at San Francisco, California, this 3rd day of MARCH, 1970.

William Sproule, Jr.
President

August

J. Williams

James

Vernon L. Sturgeon
Commissioners

APPENDIX A

Territorial Scope of Proposed Service

From Los Angeles Territory, as described in Appendix B to Decision No. 65511, on the one hand, to the following points, territories and areas, on the other hand, via each and all of the following routes:

1. All points and places in Los Angeles County outside of said Los Angeles Territory, but excepting and excluding all points in Los Angeles County north of an east-west line running through the northernmost boundary of the City of San Fernando, via any and all routes.
2. All points and places in Orange County, via any and all routes.
3. All points and places in San Diego Territory, as herein described, via any and all routes.

San Diego Territory. That area embraced by the following imaginary line:

Starting at the northerly junction of U.S. Highways Nos. 101-E and 101-W (4 miles north of La Jolla); thence easterly to Miramar on U.S. Highway No. 395; thence southeasterly to Lakeside on the El Cajon-Ramona Highway; thence southerly to Bostonia on U.S. Highway No. 80; thence southeasterly to Jamul on State Highway No. 94; thence due south to the International Boundary Line; thence west to the Pacific Ocean and north along the coast to point of beginning.

4. The San Diego Territory, as described in Paragraph 3 above, via U.S. Highway No. 101 and U.S. Highway No. 101 Alternate, serving all intermediate points on, and all off-route points within 10 miles air line distance laterally from, U.S. Highway No. 101 between the Orange County-San Diego County boundary line and said San Diego Territory.

APPENDIX A - Cont'd.

5. The San Diego Territory, as described in Paragraph 3 above, via U. S. Highways Nos. 60, 70, 99 and 395, serving all intermediate points on and all off-route points within 10 miles air line distance laterally from, U. S. Highway No. 395 between its intersection with U. S. Highway No. 60 and said San Diego Territory, and serving the off-route points of Gilman Hot Springs, San Jacinto and Hemet.
6. Goleta, via U. S. Highways Nos. 101 and 101 Alternate and State Highway No. 118, serving all intermediate points on, and all off-route points within 10 miles air line distance laterally from, said three highways between said Los Angeles Territory and Goleta.
7. Goleta, via U. S. Highways Nos. 101 and 101 Alternate and State Highway No. 118, - and from the intersection of State Highway No. 126 with U. S. Highway No. 101, via State Highway No. 126 to Santa Paula, thence via State Highway No. 150 to its intersection with U. S. Highway No. 101 south of Carpinteria, serving all intermediate points on, and all off-route points within 10 miles air line distance laterally from, said portions of State Highways Nos. 126 and 150.
8. Big Bear City, via U. S. Highways Nos. 66, 70, 99 and 395, and State Highway No. 18, serving all intermediate points on, and all off-route points within 10 miles air line distance laterally from, State Highway No. 18 between San Bernardino and Big Bear City.

(End)