

ORIGINAL

Decision No. 86328

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the matter of the application of  
WILLIAM B. ZAHARIN, an individual,  
and TY-ROE ENTERPRISES, INC., a  
California corporation, for authority  
to sell and transfer operating rights  
of a highway common carrier, pursuant  
to the provisions of Section 851, et  
seq. of the California Public Utilities  
Code.

Application No. 56144  
(Filed December 24, 1975;  
amended March 17, 1976)

O P I N I O N

William B. Zaharin (Zaharin), an individual doing business under the name Walter's Express, applies for authority to sell and transfer a highway common carrier certificate of public convenience and necessity to Ty-Roe Enterprise (Ty-Roe), a corporation.

Zaharin presently holds a certificate to operate as a highway common carrier pursuant to Decision No. 84123 dated February 19, 1975 in Application No. 55379.

That decision awarded a certificate for the transportation of general commodities in the San Francisco Territory, with certain exceptions. Pursuant to the request of the applicant, we made a finding that the public convenience and necessity require that the applicant be authorized to engage in operations in intrastate commerce as proposed in the application, and also that the applicant should be authorized to engage in operations in interstate and foreign commerce within limits which do not exceed the scope of the intrastate operations authorized by our order (Finding No. 7).

As a result of this finding the Interstate Commerce Commission (ICC) authorized coextensive operations in interstate and foreign commerce in ICC Docket MC 121761.

Zaharin also holds permitted authority from this Commission to operate as a radial highway common carrier and a household goods carrier under File No. T-68,104.

Ty-Roe is a California corporation holding radial highway common carrier permit No. T-96,138 and a certificate of public convenience and necessity to operate as a freight forwarder via the lines of air common carriers, highway common carriers, and passenger stage corporations (Decision No. 83363, Application No. 54715).

Zaharin wishes to sell to Ty-Roe in order to concentrate on his existing household goods transfer business. Ty-Roe wishes to purchase the certificate because its own pattern of growth favors the acquisition of this type of authority to serve its customers.

A purchase and sale agreement is attached to the application. This shows that the consideration for the purchase is \$10,000, \$3,000 of which was to be deposited at the time of the execution of the agreement (December 5, 1975) and the remaining \$7,000 is to be paid in cash to the seller at the time of the consummation of the agreement. The agreement defines "time of consummation" as within ten days of the effective date of the final order of this Commission or the ICC, whichever is later, approving the transaction.

A balance sheet as of October 31, 1975, an income statement for a 10-month period ending October 31, 1975, and an equipment list for Ty-Roe are also attached to the application. The balance sheet shows adequate capitalization for the proposed operation. The income statement shows an income for the 10-month period ending October 31, 1975 of in excess of \$21,000.

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The equipment list shows that Ty-Roe owns sixteen 3/4-ton vans, one 1-ton van, three 12,000-pound bobtails, one 1/2-ton pickup, one 3/4-ton Blazer, and four passenger automobiles.

An amendment to the application filed on March 17, 1976 shows that Ty-Roe's terminal facilities and freight handling methods are adequate. Ty-Roe's operation involves, in most cases, direct delivery by the vehicle receiving the freight, or direct vehicle-to-vehicle transfer (all trucks are radio dispatched) rather than across-the-dock handling.

Paragraph XIII of the application requests a deviation from our Rule 37(a), which normally requires service of a copy of the application upon each possible competitor within the San Francisco Territory. This could exceed 200 persons or organizations to be served. Both applicants believe that since this is a transfer proceeding only, and since it involves no new operating authority, there should be relief from this requirement and service should be made only on the California Trucking Association, which customarily prints notice of such applications in its weekly newsletter Caltrux. Applicants point out that they applied directly to the ICC for certain comparable authority, and inasmuch as such application was opposed by three carriers holding conflicting authority, it would of course serve these carriers, which are: Cabs Unlimited, Inc. of Mountain View, Econo-Line Express, Inc. of San Jose, and Peninsula Air Delivery of Mountain View. The request for this deviation is reasonable and will be authorized.

#### Protests to the Application

There are three protests to the application, one from Peninsula Air Delivery (Peninsula); a second from Cabs Unlimited, Inc. (Cabs Unlimited), and a third from Econo-Line Express, Inc. (Econo-Line). The first two protests are similar and the grounds may be summarized as follows:

- (1) That a question exists regarding whether a bona fide certificated operation has existed, since the seller, Zaharin, only held the certificated authority for nine months. (No information in support of the allegation that no bona fide operation exists is furnished.)
- (2) That if the ICC grants the authority requested by Ty-Roe in its Docket MC-140426, Ty-Roe will possess duplicating operating rights.
- (3) That the original public convenience and necessity for the certificate, at the time it was issued, was "at best questionable". (This allegation is similar to (1) above in that it claims, without any supporting facts, that Zaharin might have procured the certificate simply for the purpose of selling it.)

Cabs Unlimited additionally alleges discrepancies between the ICC application and the one pending before us (which are not specified in the protest) and points out that the ICC might find Ty-Roe unfit to perform the services that the purchase agreement would permit.

Econo-Line in its protest further calls attention to a Civil Complaint filed in the United States District Court by the Interstate Commerce Commission, and suggests a delay until that Court has reached its decision.<sup>1/</sup> Econo-Line also questions the adequacy of purchaser's propane fuel supply. All three protestants request a public hearing.

In response to these protests, the applicants point out that the protests appear to be, primarily, a collateral attack upon the original issuance of the certificate which is the subject of the transfer, and that it has long been held that, in a transfer proceeding, the Commission does not permit a retrial of the issue of public convenience and necessity.

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<sup>1/</sup> Which it did in Civil Action No. C-75-1889-RHS dated April 13, 1976, U.S. District Court for the Northern District of California.

Applicants further assert that there is no real legal issue involved in whether or not duplicative authority from this Commission and the ICC exists.

Discussion

We believe that the three protests fail to raise any proper issue which would necessitate a hearing. It is not necessary to hold a public hearing when the ultimate decision will not be enhanced or assisted by the receipt of evidence. (Denver Union Stockyard Company v Producers Livestock Marketing Association (1958) 356 US 282, 287; 78 S. Ct. 738; 2 L Ed. 2d 771.) And, barring a specific statutory requirement of a hearing, which is not present here, we may determine that an adequate showing exists without a hearing. (Wood v Public Utilities Commission (1971) 4 Cal 3d 288, 93 Cal Rptr. 455.)

A bald expression of doubt that the certificated operation is not bona fide, without any proper supporting allegations or declarations, should not be considered sufficient to force an applicant for a transfer of a certificate to a hearing.

Regarding the statement that if an application pending before the ICC is granted, the buyer, Ty-Roe, would hold duplicative authority, there is no bar to this. It is normal procedure, when a certificate of this sort is first issued, for this Commission to make a finding, if such is requested and if the basis for it exists, that public convenience and necessity require the proposed service in intrastate, interstate, and foreign commerce. As stated previously, such a finding was requested in Application No. 55379 and was made in Decision No. 84123 dated February 19, 1975.

Regarding the allegation in Cabs Unlimited's protest that there are discrepancies between the application before this Commission and that which is before the ICC, there is no allegation or showing that this Commission issued any authority in excess of that requested in Application No. 55379. A review of that file shows that we issued the proper certificate. Therefore, if there is any inconsistency between what we awarded and the authority granted by the ICC, the proper protest is to that agency and not this Commission.

The consent judgment of the United States District Court rendered on April 13, 1976, following a consent stipulation, perpetually enjoins Ty-Roe from transporting property in interstate or foreign commerce unless there is in force an Interstate Commerce Commission authority authorizing such transportation. By the stipulation the Interstate Commerce Commission agreed not to use the stipulation or the consent judgment in any manner adverse to Ty-Roe unless Ty-Roe subsequently violates the Interstate Commerce Act.

In considering the propane storage issue raised by Econo-Line, we note that to the extent it is available, use of propane does ease the pollution problem, but in a transfer proceeding, where the public interest has previously been found to require a service, absent changes in policy or new requirements imposed by law or Commission order, we will require no more of the transferee than was required of the transferor. We note that the certificate granted Zabarin by Decision No. 84123 dated February 19, 1975 in Application No. 55379 did not require propane operation. We further note there were no protests to that application.

Lastly, the final paragraph of Peninsula Air Delivery's protest is directed, again to the issue of whether the certificate should have been issued in the first place. We agree with applicants that the issue of whether a transfer of a certificate is consistent with the public interest is not the same issue as whether public convenience and necessity require the issuance of the certificate in the first instance. (Airline Limousine Service, Inc. Decision No. 85255 dated December 16, 1975 (Application No. 55458); In re Lee (1966) 65 CPUC 635; Anna Bezera dba Sonoma Express Company (1944) 45 CRC 151; Lawson Taylor, Inc. (1964) 63 CPUC 392; Todd Freight Lines, Inc. (1963) 63 CPUC 723.)

In this present proceeding the buyer has shown financial and operational ability to continue the operation. The equipment and facilities appear to be sufficient. The protests do not allege financial irresponsibility, the possibility of abandonment, unwillingness to continue the service (cf. Ringsby-Pacific Limited (1971) 72 CPUC 204) or any other proper issue connected with whether it is in the public interest to transfer the certificate.

#### Findings

1. This application is for the purpose of transferring operating rights of a highway common carrier, originally authorized by our Decision No. 84123 dated February 19, 1975 (Application No. 55379), from Zaharin to Ty-Roe.

2. Zaharin wishes to sell to Ty-Roe to concentrate on his household goods transfer business. Ty-Roe wishes to purchase the certificate because growth of its business favors the acquisition in order to serve its customers.

3. Ty-Roe possesses the necessary finances, equipment, and facilities to perform the transportation required by the certificate.

4. A deviation from Rule 37(a) should be authorized, permitting service of the application as set forth in the order.

5. The protests to the application do not set forth grounds or information which form a proper basis for a protest for this type of application, and no public hearing is necessary.

After consideration the Commission finds that the proposed transfer would not be adverse to the public interest and concludes that it should be authorized. A public hearing is not necessary. The order which follows will provide for, in the event the transfer is completed, the revocation of the certificate presently held by Zaharin and the issuance of a certificate in appendix form to Ty-Roe.

Ty-Roe Enterprises, Inc. is placed on notice that operative rights, as such, do not constitute a class of property which may be capitalized or used as an element of value in rate fixing for any amount of money in excess of that originally paid to the State as the consideration for the grant of such rights. Aside from their purely permissive aspect, such rights extend to the holder a full or partial monopoly of a class of business. This monopoly feature may be modified or canceled at any time by the State, which is not in any respect limited as to the number of rights which may be given.

The authorization granted shall not be construed as a finding of the value of the rights and properties authorized to be transferred.



O R D E R

IT IS ORDERED that:

1. On or before October 1, 1976, William B. Zaharin may sell and transfer the operative rights referred to in the application to Ty-Roe Enterprise.

2. Within thirty days after the transfer the purchaser shall file with the Commission written acceptance of the certificate and a true copy of the bill of sale or other instrument of transfer.

3. Purchaser shall amend or reissue the tariffs on file with the Commission, naming rates and rules governing the common carrier operations transferred to show that it has adopted or established, as its own, the rates and rules. The tariff filings shall be made effective not earlier than five days after the effective date of this order on not less than five days' notice to the Commission and the public, and the effective date of the tariff filings shall be concurrent with the transfer. The tariff filings made pursuant to this order shall comply in all respects with the regulations governing the construction and filing of tariffs set forth in the Commission's General Order No. 80-Series. Failure to comply with the provisions of General Order No. 80-Series may result in a cancellation of the operating authority granted by this decision.

4. In the event the transfer authorized in paragraph 1 is completed, effective concurrently with the effective date of the tariff filings required by paragraph 3, a certificate of public convenience and necessity is granted to Ty-Roe Enterprise, a corporation, authorizing it to operate as a highway common carrier, as defined in Section 213 of the Public Utilities Code, between the points set forth in Appendix A of this decision.

5. The certificate of public convenience and necessity granted by Decision No. 84123 is revoked effective concurrently with the effective date of the tariff filings required by paragraph 3.

6. Purchaser shall comply with the safety rules administered by the California Highway Patrol and the insurance requirements of the Commission's General Order No. 100-Series.

7. Purchaser shall maintain its accounting records on a calendar year basis in conformance with the applicable Uniform System of Accounts or Chart of Accounts as prescribed or adopted by this Commission and shall file with the Commission, on or before April 30 of each year, an annual report of its operations in such form, content, and number of copies as the Commission, from time to time, shall prescribe.

8. Purchaser shall comply with the requirements of the Commission's General Order No. 84-Series for the transportation of collect on delivery shipments. If purchaser elects not to transport collect on delivery shipments, it shall make the appropriate tariff filings as required by the General Order.

9. A deviation from Commission Rule 37(a) is granted to allow applicants to make service of this application, and any subsequent service which is necessary, upon California Trucking Association, Cabs, Unlimited, Inc. of Mountain View, California, Peninsula Air

Delivery of Mountain View, California, and Econo-Line Express, Inc.  
of San Jose, California.

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

Dated at San Francisco, California, this 31<sup>st</sup>  
day of AUGUST, 1976.

William J. Brown President  
Leonard Von  
Robert B. Farnham Commissioners

Ty-Roe Enterprise, a California corporation, by the certificate of public convenience and necessity granted in the decision noted in the margin, is authorized to conduct operations as a highway common carrier as defined in Section 213 of the Public Utilities Code for the transportation of general commodities between all points and places in San Francisco Territory as described in Note A.

Except that pursuant to the authority herein granted carrier shall not transport any shipments of:

1. Used household goods, personal effects and office, store and institution furniture, fixtures and equipment not packed in salesmen's hand sample cases, suitcases, overnight or boston bags, brief cases, hat boxes, valises, traveling bags, trunks, lift vans, barrels, boxes, cartons, crates, cases, baskets, pails, kits, tubs, drums, bags (jute, cotton, burlap or gunny) or bundles (completely wrapped in jute, cotton, burlap, gunny, fibreboard, or straw matting).
2. Automobiles, trucks and buses, viz.: new and used, finished or unfinished passenger automobiles (including jeeps), ambulances, hearses and taxis, freight automobiles, automobile chassis, trucks, truck chassis, truck trailers, trucks and trailers combined, buses and bus chassis.
3. Livestock, viz.: barrows, boars, bulls, butcher hogs, calves, cattle, cows, dairy cattle, ewes, feeder pigs, gilts, goats, heifers, hogs, kids, lambs, oxen, pigs, rams (bucks), sheep, sheep camp outfits, sows, steers, stags, swine or wethers.

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4. Liquids, compressed gases, commodities in semi-plastic form and commodities in suspension in liquids in bulk, in tank trucks, tank trailers, tank semitrailers or a combination of such highway vehicles.
5. Commodities when transported in bulk in dump-type trucks or trailers or in hopper-type trucks or trailers.
6. Commodities when transported in motor vehicles equipped for mechanical mixing in transit.
7. Portland or similar cements, in bulk or packages, when loaded substantially to capacity of motor vehicle.
8. Logs.
9. Articles of extraordinary value.
10. Fresh fruits and vegetables.

## NOTE A

## SAN FRANCISCO TERRITORY

San Francisco Territory includes all the City of San Jose and that area embraced by the following boundary: Beginning at the point the San Francisco-San Mateo County Line meets the Pacific Ocean; thence easterly along said County Line to a point one mile west of State Highway 82; southerly along an imaginary line one mile west of and paralleling State Highway 82 to its intersection with Southern Pacific Company right-of-way at Arastradero Road; southeasterly along the Southern Pacific Company right-of-way to Pollard Road, including industries served by the Southern Pacific Company spur line extending approximately two miles southwest from Simla to Permanente; easterly along Pollard Road to W. Parr Avenue; easterly along W. Parr Avenue to Capri Drive; southerly along Capri Drive to Division Street; easterly along Division Street to the Southern Pacific Company right-of-way; southerly along the Southern Pacific right-of-way to the Campbell-Los Gatos City Limits; easterly along said limits and the prolongation thereof to South Bascom Avenue (formerly San Jose-Los Gatos Road);

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northeasterly along South Bascom Avenue to Foxworthy Avenue; easterly along Foxworthy Avenue to Almaden Road; southerly along Almaden Road to Hillsdale Avenue; easterly along Hillsdale Avenue to State Highway 82; northwesterly along State Highway 82 to Tully Road; northeasterly along Tully Road and the prolongation thereof to White Road; northwesterly along White Road to McKee Road; southwesterly along McKee Road to Capitol Avenue; northwesterly along Capitol Avenue to State Highway 238 (Oakland Road); northerly along State Highway 238 to Warm Springs; northerly along State Highway 238 (Mission Blvd.) via Mission San Jose and Niles to Hayward; northerly along Foothill Blvd. and MacArthur Blvd. to Seminary Avenue; easterly along Seminary Avenue to Mountain Blvd.; northerly along Mountain Blvd. to Warren Blvd. (State Highway 13); northerly along Warren Blvd. to Broadway Terrace; westerly along Broadway Terrace to College Avenue; northerly along College Avenue to Dwight Way; easterly along Dwight Way to the Berkeley-Oakland Boundary Line; northerly along said boundary line to the Campus Boundary of the University of California; westerly, northerly and easterly along the campus boundary to Euclid Avenue; northerly along Euclid Avenue to Marin Avenue; westerly along Marin Avenue to Arlington Avenue; northerly along Arlington Avenue to San Pablo Avenue (State Highway 123); northerly along San Pablo Avenue to and including the City of Richmond to Point Richmond; southerly along an imaginary line from Point Richmond to the San Francisco waterfront at the foot of Market Street; westerly along said waterfront and shoreline to the Pacific Ocean; southerly along the shoreline of the Pacific Ocean to point of beginning.

(END OF APPENDIX A)

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