

Decision No. 86732

ORIGINAL

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

H-10 WATER TAXI CO., LTD.,
Complainant,

vs

UNIVERSAL MARINE, a corporation,
Defendant.

Case No. 10076
(Filed March 26, 1976)

Application of UNIVERSAL MARINE
CORPORATION to operate a ship
provisioning operation and crew
launch in Long Beach and Los
Angeles Harbors, and to establish
rates.

Application No. 56366
(Filed March 29, 1976)

James H. Lyons, Attorney at Law, for
H-10 Water Taxi Co., Ltd., complainant.
Donn H. Goss, Attorney at Law, for Universal
Marine, defendant.
John E. deBrauwere, for the Commission staff.

O P I N I O N

The central issue in these proceedings is whether H-10 Water Taxi Co., Ltd. (H-10) will remain the only common carrier by vessel in the Los Angeles/Long Beach Harbors or whether Universal Marine Corporation (Universal) will also be authorized to operate as a vessel carrier.

H-10 operates water taxis under a vessel certificate of public convenience and necessity issued by this Commission in the 1920's. Generally speaking, the certificate authorizes carriage of freight and passengers between points on the shore of Los Angeles and Long Beach Harbors, and to and from vessels

anchored in the harbor. The basic function of H-10's water taxi operation is to carry ship's stores^{1/} and passengers between ships lying at anchor and the shore; however, H-10 will also provide other vessel transportation services needed by the public in its service area, including on-call transportation to and from Catalina.

In 1952, Mrs. Jeanne Seehorn acquired all the outstanding stock of H-10; she has been in control of the corporation and its operations since then. Shortly after Mrs. Seehorn's acquisition, the only other certificated vessel operator in the area ceased operating. Since that event, H-10 enjoyed a monopoly in the Los Angeles/Long Beach Harbors, which lasted until late in 1975.

In the fall of 1975, Universal acquired a barge and outfitted it with an 80-foot crane, having a 25-ton capacity. The barge itself can carry up to 75 tons of freight. In operation, the barge is towed to and from a shipment's destination by an owner-operated tug which Universal trip-charters. In December 1975, Universal began offering the services of this barge and its crew to carry ship's stores from its terminal in Long Beach Harbor to anchored ships. In January of 1976, Universal also began operating a personnel launch service to and from anchored ships, again using owner-operated vessels.

Universal performs a variety of services to shipping. Those services include the application of a surface covering to prevent corrosion, providing divers, mooring and buoy positioning and maintenance service, and providing hose hookups and monitoring to oil tankers and a lightering service to transfer oil from deep draft supertankers to smaller tankers of shallower draft which can transport the oil to dock facilities. Universal has operations at Oceanside, San Diego, El Segundo, in California,

^{1/} Ship's stores include food, lubricants, and machine parts needed for the operation of a ship. It excludes the ship's cargo.

and at Ft. Lauderdale, Florida, and Barber's Point, Hawaii. It owns several small nonoceangoing vessels which are fully committed to these unregulated operations.

History of the Proceedings

On March 26, 1976 H-10 filed this complaint, alleging that Universal was performing uncertificated vessel operations. Three days later, Universal filed its application for a certificate of public convenience and necessity, seeking authority to transport ship's stores and passengers in the harbors.

D.85656 was issued ex parte on March 31, 1976, ordering: "...that Universal Marine, Inc. shall cease and desist from conducting operations as a common carrier by vessel pending further order of this Commission..." The decision was made effective on the date of issuance. On April 8, 1976 it was personally served in San Diego on Mr. Goss as attorney for, and an officer of, Universal.

A hearing was held before Examiner Gilman on April 12, 1976 in Los Angeles to determine whether the cease and desist order should be continued in effect or terminated.

On April 16, 1976 the Commission issued D.85701, which granted Universal an interim limited certificate of public convenience and necessity to operate as a common carrier by vessel as defined in Section 211(b) and Section 238 of the Public Utilities Code. This certificate authorized Universal to transport freight by barge from shore to ships in Long Beach and Los Angeles Harbors, provided that each trip was under exclusive contract with one single ship's agent, and that each shipment was to weigh at least 15 tons, which could be consigned to more than one ship. In all other respects, the order set forth in D.85656 was to remain in full force and effect. The proceedings were consolidated and hearing was conducted in Los Angeles on June 2, 3, and 4, 1976.

Position of the Parties

Universal seeks an unlimited permanent certificate to continue its barge/crane operations. It also seeks additional authority to conduct a water taxi operation from its Long Beach terminal in competition with the operations conducted by H-10 from its Los Angeles terminal.

As a protestant, H-10 seeks an order denying the certificate. This would leave it as the sole water taxi operator in both harbors, and would constitute de jure approval of a monopoly obtained without specific Commission action. If the certificate were denied, H-10 would probably return its vessel "Duke" to service; this vessel can carry up to 20 tons but has no specialized facilities for unloading stores. H-10 owns another out-of-service vessel, the "Ramona". This vessel can carry up to 40 tons; like the "Duke" it has no crane or comparable equipment. If the certificate is granted, H-10 will no longer employ either of its larger vessels in certificated service. In any event, H-10 has no plans to provide handling facilities comparable to Universal's crane on any of its vessels.

As complainant, H-10 seeks a permanent injunction, prohibiting Universal from conducting any common carrier vessel operations. While it seeks no sanctions, H-10 emphasizes that Universal continued operations after being warned of the need for a certificate, and even after a restraining order had been issued and served. As a defendant, Universal claims that the delay in complying with the restraining order was justified by the fact that it was served in San Diego and by the "cumbersome...relay of information because of the distance between San Diego and Long Beach". Universal contends its competition was not unfair and that H-10 was not injured by it. It further contends that all of its activities were for the benefit of the general public. Therefore, it argues that despite its prior activities, it is not unfit to hold a certificate. Universal has not conceded that its present or

proposed operations are those of a common carrier. It sought a certificate to avoid litigation, not because it is convinced that a certificate is required. The staff took no position. Universal moved for a finding that there will be no possible significant impact on the environment (Rule 17.1 (a)(2)). Its arguments on this point were not challenged by H-10 or staff. The examiner made such ruling during the course of the hearings.

Universal's Conduct

H-10 claims that even if there is a public need for additional service, Universal is not fit to hold a certificate. Its principal point is the fact that Universal continued operations without a certificate after a cease and desist order (D.85656) had been served upon it. H-10 also emphasizes that Universal did not carefully observe the minimum shipment weight provision in its temporary certificate, and that it ignored staff opinions on the necessity for a certificate.

There is no need to analyze these questions in detail. The operations performed after the cease and desist order were conducted to fulfill a prior obligation to a customer. The other matters are of little consequence in comparison with the public benefit Universal has conferred by instituting a new and needed form of service. Universal is not unfit to hold a certificate.

Public Need

As reflected in the findings, we have determined that there is a significant public need for an additional kind of freight service which Universal's barge/crane service can fulfill. If H-10 were to retain its monopoly, this need would not be met. If it were to remain the only vessel carrier, H-10 would merely place a larger vessel in service. While either of H-10's large vessels can carry heavy loads in a single trip, neither has a crane or comparable equipment. It appears that the capability to lift stores and place

them at any point on the receiving ship's deck is at least as important to the public as large freight capacity, and is a service not offered by H-10. Nor does H-10 plan to offer such service.

Since the service is needed and the existing carrier does not provide it, we are left with little choice but to award Universal a permanent certificate to operate its barge/crane combination.

We have not granted Universal unlimited authority to conduct a water taxi service in competition with H-10. As more fully discussed below, Universal has not shown that the existing service is inadequate or unsatisfactory. Neither has it demonstrated that the market is growing fast enough to warrant certificating an additional unrestricted water taxi operation. We are, however, convinced that members of the public should not be inconvenienced by being required to deal with two carriers to obtain a complete range of services. Therefore, if a ship patronizing the barge/crane service also needs water taxi services, Universal will be authorized to perform such services.

Service Issues

Universal attempted to prove that the H-10 was providing inadequate water taxi service. It sponsored the testimony of one witness who appeared in a dual capacity. As an officer of the Los Angeles Steamship Association, he was unable to provide any specific information concerning other members' experience with H-10's service. As an executive of General Steamship Corporation, a ship's agent, he was not able to give any definite information concerning his own employer's experience with H-10. This testimony, is, therefore, valueless. Universal also presented a group of documents signed by persons who might be expected to be familiar with conditions in the harbors and with H-10's service. One large group of persons utilized a form, presumably drafted by applicant. Because the uniformity of the responses, and their vagueness, we will give

no weight to this evidence. There were other responses from persons who used their own words; these were likewise vague and unspecific, and can be given no weight.

None of the shipper testimony presented by Universal would allow us to specify aspects of H-10's which are unsatisfactory. Consumer surveys, if they are to be useful in matters such as this, should be detailed enough to allow us to determine whether the asserted deficiencies are serious enough to justify Commission action. They also should be specific enough so that we can determine whether increased competition, rather than some other response, is the best remedy for any service problems disclosed.

H-10's present fleet consists of seven generally interchangeable vessels. All are constructed of wood--most being fully depreciated or nearly so. All are regularly inspected and certified by the Coast Guard as safe and reliable for passenger service.

Three of the vessels are referred to as combination boats: they have a smaller covered area capable of seating up to 23 passengers. They have a large open area aft, and the capacity to carry up to 5 tons of freight. The other four are passenger boats with full-length covered space for up to 49 passengers. While these vessels could be used to carry freight, they normally carry only passengers and their belongings. Each vessel has its own full-time master who is normally responsible for operating and maintaining his vessel. There are several intermittent employees who are on call. As noted above, H-10 owns two larger vessels.

Universal criticized H-10's fleet because of its age (the vessels are from 20 to 50 years old). H-10 responded by evidence indicating that wooden vessels are useful practically indefinitely. Universal did not challenge or rebut this testimony. Universal's manager claimed that wooden vessels were not satisfactory for operations in high seas. His testimony was, however, based

on experience with a single wooden vessel; there was no indication that it was comparable to any of H-10's equipment. We cannot find that H-10's vessels are unsatisfactory for water taxi service, with one exception.

H-10 does not have radar on any of its vessels. It is undisputed that a vessel can operate safely in these harbors without radar, and that it is, at best, a supplement to a visual lookout. Nevertheless, lack of radar can impose significant operational limitations in conditions of low visibility. While H-10 has plans to equip a portion of its fleet, H-10 did not explain why this step was not planned until after Universal began operations. We will find that H-10's fleet is unsatisfactory in this one limited respect.

Demand and Competition Issues

Universal asserts that Long Beach or Los Angeles will be selected as the terminal for tankers carrying petroleum from Alaskan fields and that these tankers would require additional water taxi service. We take official notice that a southern California terminal for Alaskan petroleum products has not yet been designated. Even if a terminal were located in these harbors, the tankers would need water taxi service only to the extent that they spend time at anchor. There was no evidence indicating that tankers engaged in this traffic would not be able to berth, nor any indication of how long or how frequently these ships would remain in port. Thus, there is no support for a finding that there will be a requirement for additional quantity of water taxi service. H-10's evidence shows that the number of ships needing water taxi service has remained stable or declined slightly in recent years. Since we have no reliable evidence to indicate any significant change in this trend, we find that demand for water taxi service will not increase significantly, except as stimulated by the availability of barge/crane service.

We will also find that a substantial portion of the barge/crane revenue will be new revenue, i.e., revenue from ships which would conduct storing operations elsewhere if Universal's barge were not available. The remainder will come from freight traffic diverted from H-10. Because of its significantly higher rates, the barge/crane will be used instead of a water taxi only when the new service offers significant advantages in efficiency, economy, or convenience. For example, the usual shipment of a few tons will not be moved at the barge rate of \$120 per hour, when stores boats are available at \$68 per hour^{2/} unless there is a special requirement for use of the crane. Likewise, it is unlikely that a ship's agent will undergo the inconvenience and delay of consolidating several shipments unless the crane is needed or unless there is enough freight to exceed the capacity of a single water taxi.

Much of Universal's water taxi business will be for ships which enter port primarily or solely to patronize the barge/crane. We cannot predict how much additional revenue it will be able to divert from H-10. If the diversion is significant, H-10 will be compelled to reduce its fleet and its payroll.

We should emphasize that such an "injury" is not one which regulation is intended to prevent.^{3/} The monopoly which H-10 enjoyed was achieved by default, rather than as a result of a

^{2/} This is the established rate for Universal's stores boat. The rates established in H-10's last (1973) rate case (D.81792 in A.53863) vary between \$70 and \$80 per hour for comparable service.

^{3/} In D.76436 in A.51342 (1969), H-10 was granted an in lieu certificate restating and expanding its prior operating rights. This decision contained the same monopoly clause which appears just above the findings in this decision. That clause, which is included in all recent transportation certificate decisions, should provide clear warning to the holders of such certificates that the Commission can and will allow competition between regulated carriers whenever competition is not adverse to the public interest.

determination that the monopoly would benefit the public. Even where a monopoly or limited competition has been found to be in the public interest, the first line of defense for the carrier thus benefited, lies not in the hearing room, but in the market place. If H-10 had made an aggressive effort to identify and serve the full range of public needs, a competitor would have found it difficult to gain a foothold in the market, or to demonstrate a need for a competitive service. We reject H-10's contention that it is entitled, as a matter of right, to protection from competitors.

As noted above, we cannot predict how much diversion will occur. Such a finding would require us to speculate on the effectiveness of H-10's response to the competitive conditions resulting from our order. If it does respond by providing better service than Universal, it may be able to minimize the diversion of water taxi traffic. If H-10 were willing and able to serve ships requiring either extra capacity or specialized stores handling, such service would provide double benefits. If H-10 were to provide something like the barge/crane service, it would obtain not only the revenues from the specialized service, but also foreclose Universal from providing any water taxi service which might be needed by those ships.

Common Carrier Status

Universal has not expressly conceded that its operations were, and will be, those of a common carrier. We have adopted Findings 11 and 14 and Conclusion 1 to foreclose any future controversy on this point.

Findings

1. There is a public need for a vessel common carrier service in Los Angeles and Long Beach Harbors which can transport over 10 tons in a single trip from shore to anchorage and deposit at least a single pallet load on a ship's deck without assistance from the ship's facilities or crew.

2. The specialized unloading capability described in Finding 1 is especially useful for new tankers which normally do not have extensive facilities for lifting or placing solid freight.

3. A ship which requires the service described in Finding 1 which is obtainable only from one particular carrier, should not have to patronize a competitive common carrier for water taxi service.

4. The availability of barge/crane service will divert substantial freight traffic from H-10's water taxi service, but only in situations where water taxi transportation is less convenient, more expensive, or where specialized unloading capabilities are required.

5. The proposed rates for Universal's barge and crane are high enough to deter its use for freight shipments which could be handled by H-10's vessels.

6. The demand for water taxi service in the harbor will not increase, except to the extent that the ships described in Finding 7 require water taxi service. Both carriers will compete for any additional water taxi traffic.

7. The availability of barge/crane capability will cause substantial numbers of ships to enter the harbors primarily or solely to receive stores. If the service offered by the barge/crane were not available, these ships would receive stores at other harbors.

8. H-10 has two large vessels capable of carrying over 10 tons of freight in a single movement; neither has specialized facilities for unloading freight. Neither is in service at the present time.

9. H-10 would prefer to handle large shipments of stores by utilizing one of the vessels described in Finding 8. If Universal's application is granted, H-10 does not plan to put either vessel in service. It will then handle large shipments by multiple trips of its smaller vessels.

10. H-10's management does not believe that the service described in Finding 1 is useful or economical. If required to provide such service, H-10 would charter a crane barge not designed for handling stores. Unless specifically ordered to provide such service, H-10 will not do so.

11. Universal has held itself out to ship's agents to provide personnel and freight transportation at specified uniform rates to and from ships at anchor in Los Angeles/Long Beach Harbors. This occurred while Universal had no certificate and continued until April 18, 1976. Ship's agents, as a class, normally contract for all water transportation of personnel and ship's stores to and from anchored vessels. No other persons or firms are likely to select carriers or make agreements for such services.

12. D.85656 ordered Universal to cease operating as a common carrier by vessel. This order was personally served Universal on April 8, 1976. Universal had the ability to comply with said order on April 8, 1976.

13. D.85701 was issued on April 16, 1976; it continued the cease and desist order in effect, except that it authorized operations of Universal's tug and barge combination for shipments in excess of 15 tons.

14. Universal continued to provide common carrier barge and crane service until April 12, 1976. It continued to provide common carrier personnel launch service until April 18, 1976.

15. Universal's operations in contravention of statute and order were minor in nature.

16. Universal aggressively sought and fulfilled a public need not served by the existing carrier. This benefit to the public outweighs the modest importance of the violations of law which occurred.

17. Universal is fit to hold a certificate.

18. H-10's fleet cannot be found to be inadequate, except that no vessel has been equipped with radar.

19. H-10's service cannot be found to be inadequate.

20. It can be seen with certainty that there is no possibility that the activity in question may have a significant effect on the environment.

21. Public convenience and necessity require the granting of the certificate to operate its barge/crane and a water taxi service only for ships patronizing the barge/crane during a single stay in port. A minimum tonnage requirement is not necessary.

We conclude that:

1. The barge and water taxi operations conducted by Universal until April 18, 1976 were those of a common carrier by vessel. It is immaterial whether Universal demands that each shipper sign a contract for transportation services. All such operations were conducted in violation of Section 1007 of the Public Utilities Code.

2. Universal was continuously in contempt of the Commission from April 8, 1976 until April 18, 1976.

3. This proceeding is not subject to the California Environmental Quality Act and our Rule 17.1.

4. The relief request in the complaint should be denied. The application should be granted in part and denied in part as set forth in Appendix A.

Universal 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 right. 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.

O R D E R

IT IS ORDERED that:

1. A certificate of public convenience and necessity is granted to Universal Marine Corporation, a corporation, authorizing it to operate as a common carrier by vessel, as defined in Sections 211(b) and 238 of the Public Utilities Code, between the points and over the routes set forth in Appendix A of this decision.

2. In providing service pursuant to the authority granted by this order, applicant shall comply with the following service regulations. Failure so to do may result in a cancellation of the authority.

- (a) Within thirty days after the effective date of this order, applicant shall file a written acceptance of the certificate granted. Applicant is placed on notice that if it accepts the certificate it will be required, among other things, to comply with the insurance requirements of the Commission's General Order No. 111-Series.
- (b) Within one hundred twenty days after the effective date of this order, applicant shall establish the authorized service and file tariffs and timetables, in triplicate, in the Commission's office.
- (c) The tariff and timetable filings shall be made effective not earlier than ten days after the effective date of this order on not less than ten days' notice to the Commission and the public, and the effective date of the tariff and timetable filings shall be concurrent with the establishment of the authorized service.
- (d) The tariff and timetable filings made pursuant to this order shall comply with the regulations governing the construction and filing of tariffs and timetables set forth in the Commission's General Orders Nos. 87-Series and 117-Series.


- (e) Applicant 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 March 31 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.

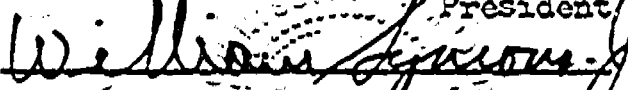
3. The relief requested in Case No. 10076 is denied.


4. The interim certificate of public convenience and necessity granted by Decision No. 85701 and the cease and desist order issued by Decision No. 85656 are revoked effective concurrently with the effective date of the tariff and timetable filings required by paragraph 2.

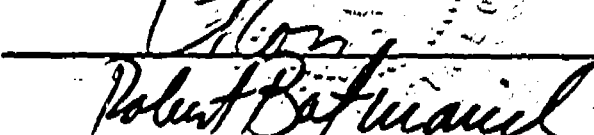
The effective date of this order shall be twenty days after the date hereof.

Dated at San Francisco, California, this 7th
day of DECEMBER, 1976.



President






Commissioners

VP

Appendix A

UNIVERSAL MARINE CORPORATION

Original Title Page

CERTIFICATE
OF
PUBLIC CONVENIENCE AND NECESSITY
TO OPERATE AS A VESSEL COMMON CARRIER

Showing vessel common carrier operative rights, restrictions, limitations, exceptions and privileges applicable thereto.

All changes and amendments as authorized by the Public Utilities Commission of the State of California will be made as revised pages or added original pages.

Issued under authority of Decision No. 86732
dated DEC 7 - 1976, of the Public Utilities Commission
of the State of California, in Application No. 56366.

SECTION 1. GENERAL AUTHORIZATIONS, RESTRICTIONS, LIMITATIONS
AND SPECIFICATIONS.

Universal Marine Corporation, by the certificate of public convenience and necessity granted by the decision noted in the margin, is authorized to operate as a vessel common carrier to transport freight on barges equipped with cranes and to provide a water taxi service transporting passengers and their baggage between vessels at anchor and shore points in Long Beach and Los Angeles Harbors, subject to the following conditions:

- (1) Water taxi service will be offered only to and from ships during a single stay in port when the vessel(s) also receive(s) freight transported on applicant's barges equipped with cranes.
- (2) No vessel shall be operated unless it has met all applicable safety requirements, including those of the United States Coast Guard.

Issued by California Public Utilities Commission.

By Decision No. 86732, Application No. 56366.