

ORIGINAL

Decision No. 90513

JUL 3 1979

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application)
of Dynamic Freight Corporation,)
a corporation, to sell, and of)
Executive Freight Lines, a)
corporation, to purchase, a)
certificate of public convenience)
and necessity for the transpor-)
tation of general commodities)
between points in the San Francisco)
Territory, pursuant to Section)
851-853 of the California Public)
Utilities Code.)

Application No. 58193
(Filed July 3, 1978;
amended October 12, 1978)

Michael Leiden, for Executive Freight Lines and
Dynamic Freight Corporation, applicants.
James T. Proctor, Attorney at Law, for Peninsula
Air Delivery, protestant.

O P I N I O N

By this application, Dynamic Freight Corporation (Dynamic) seeks authority to transfer its certificate of public convenience and necessity granted to it in Decision No. 81494 and a coextensive certificate of registration issued by the Interstate Commerce Commission in Docket No. MC-121710 to Executive Freight Lines (Executive), a corporation which is engaged in intrastate commerce within California pursuant to a radial highway common carrier permit.

Peninsula Air Delivery (PAD) protests this application. PAD operates as an intrastate highway common carrier of general commodities within the San Francisco Territory, and other areas, pursuant to a certificate of public convenience and necessity issued to it in Decision No. 87199. PAD also operates as an interstate common carrier of general commodities under a certificate of registration issued by the Interstate Commerce Commission in Docket No. MC-133101 (Sub. No. 4) and as a state-wide permitted intrastate carrier operating under File No. T-95,332.

A duly noticed public hearing was held on November 20, 1978 in San Francisco before Administrative Law Judge Bernard A. Peeters. The matter was submitted on said date subject to the filing of concurrent briefs due January 30, 1979.

The Issues

1. Is Executive fit, willing, and able to assume the obligations of common carriage?
2. Will the sale and transfer of Dynamic's certificate not be adverse to the public interest? ✓

The Evidence

Dynamic's president, Anthony N. Pereira, submitted his prepared testimony as Exhibit 1. Said exhibit deals primarily with explaining the reason why Dynamic wishes to sell its certificate. For some time, Dynamic has contemplated a reorganization program. The intent is to create a holding company, which would be Dynamic with, among other things, a subsidiary trucking operation. This subsidiary trucking operation is Dynamic Trucking Company (DTC), which has already purchased the permits of Dynamic. The operations of DTC are of such a nature that the certificated authority of Dynamic is not required. Basically, DTC will haul freight under contract for International Freight Forwarders, which does not require interstate operating authority, as well as local intrastate movements which can be handled under the permitted authority. Acting upon a request from Executive and after considerable negotiations, an agreement was reached to sell the certificate. Said agreement is attached to the application as Exhibit A. The agreement is dated May 22, 1978 and sets a purchase price of \$5,000 to be paid in two installments of \$2,500 each; the first installment being paid to M. C. Leiden, practitioner for applicants, who shall hold the same in escrow pending the final approval of this transaction by the various regulatory commissions. ✓

Upon receipt of the final approvals, the second payment becomes due and Mr. Leiden is required to turn over the payment made to him in escrow. No other assets are involved in the purchase agreement. No other affirmative evidence was presented by Dynamic.

Exhibit 2 is the prepared testimony of Doug Simmons, vice president of Executive. Mr. Simmons points out that Executive operates as a permitted carrier, transporting shipments in intrastate traffic within the San Francisco Territory. It also handles shipments for an international freight forwarder under a contract within this same area. He pointed out that Executive has received requests to handle shipments to and from the San Francisco and Oakland Airports, but they were unable to handle these shipments because such shipments are in interstate commerce and it would be necessary to have authority from the Interstate Commerce Commission to handle such shipments. Mr. Simmons points out that they desire to purchase Dynamic's certificate and the corresponding registration certificate because business has been growing steadily over the last two years. More requests for service are being received to perform service on a regular basis. It is felt that if this pattern continues Executive would be exceeding the scope of its permitted authority. Present customers have also requested Executive to handle all of their shipments. Executive states it cannot do this because their shipments include not only local transportation but also interstate shipments to the piers and the airports. Executive has no interstate authority.

Exhibit D to the application shows that Executive was operating 16 pieces of equipment. By its amendment to the application on October 12, 1978, said exhibit was corrected to show that Executive operates only five vehicles. Mr. Simmons states that if their business increases they would add to this list of vehicles by leasing equipment rather than purchasing, and by employing subhaulers.

Exhibit B to the application contains the financial statements of Executive. The statement of income and expense for the period ended March 31, 1978 shows a net profit of \$2,488. There is no indication what period of time this statement covers. The balance sheet, which is as of March 31, 1978, shows current assets of \$30,230, current liabilities of \$25,094 for a current ratio of 1.2. The largest items in each of the categories consist of accounts receivable and accounts payable. The stockholders equity is shown as \$6,451 consisting of \$4,451 of retained earnings. No other affirmative evidence was offered by Executive.

Protestant's case was put in through PAD's executive vice president which consisted of his prepared testimony received as Exhibit 5. In essence PAD's witness stated that there have been numerous additional carriers certificated into the area in which PAD operates and that the certificate which Executive seeks to purchase literally duplicates the area which PAD serves and therefore would be adding further competition. In addition to protesting the additional competition, the witness pointed out certain inconsistencies in the application. Initially, Executive showed that it was operating 16 vehicles, in Exhibit D of the application. PAD realized that Executive did not operate or have all of this equipment as a result of its daily operations and observations. Exhibit D-1, the amended vehicle list, shows a total of five vehicles, three of which are vans, the fourth and the fifth are power units. Because of this limited amount of equipment it is the witness's opinion that Executive intends to restrict its operations to a limited class of shippers such as those who require airport and pier pickups and deliveries. The limited amount of equipment is simply insufficient to conduct general commodity common carrier operations without having to refuse many shipper requests according to PAD's witness. Therefore, it appears to PAD's witness that Executive has no intent to serve all the shippers in the

area but rather intends to transport only pier and airport traffic. The witness refers to a letter dated July 12, 1978 addressed to Adelpic Cargo Enterprises by Executive (Exhibit 3) which states that Executive has a fleet of equipment consisting of "Econolines, bobtails, trailers, tractors, and a roller-bed trailer for air freight containers." Yet, by virtue of the information set forth in Exhibit D-1, it appears that Executive has embarked upon a sales program which intentionally misstates its abilities and equipment. It is pointed out further by PAD's witness that from the testimony of Mr. Pereira (Exhibit 1) Executive will be purchasing the authority from Dynamic but Dynamic will retain the shippers previously served under said authority. Therefore, if Executive does not obtain the traffic of the shippers previously served by Dynamic, Executive will have paid \$5,000 for rights which produce no revenues. To offset this, Executive, of necessity, will have to obtain new shippers which in turn will harm the existing carriers utilized by such shippers. It is PAD's witness's opinion that only \$4,924 cash on hand is insufficient working cash to institute common carrier operations. Reliance is placed on our Decision No. 88967 by PAD wherein we stated that an applicant for a permit must have at least 45 days operating cash in order to be fit to receive a permit. It is his opinion that an applicant seeking common carrier authority, whether through transfer or application for new authority, should have to demonstrate financial strength in excess of the requirements applicable to the issuance of permits. Lastly, the witness points out that Executive's facility consists of a small office and a small single door storage area. It is his opinion that such limited facilities are totally inadequate for common carrier general commodity operations.

Discussion

This Commission has long held that in order for a proposed transfer of a certificate of public convenience and necessity to be approved the applicant must demonstrate that he is fit, willing, and able to assume the burdens and obligations of a common carrier. More specifically, the acquiring carrier must demonstrate that it has sufficient experience, financial ability,^{1/} and facilities to continue the level of service previously performed by the selling carrier. (Pacific Greyhound Lines (1952) 52 CPUC; City Transfer (1945) 46 CRC 5; C. M. Clarke (1922) 21 CRC 505.) In addition to the above requirements the applicant must show that the transfer is not adverse to the public interest. (R. L. Mohr (Advance Electronics) (1969) 69 CPUC 275; LaFrentz (1966) 65 CPUC 368.)

Applying the above law to the facts of this case it is clear that the applicants have failed to sustain their burden of proof. Said burden and the specific issues were clearly set forth during the prehearing conference held on September 15, 1978. In spite of this, applicants have seen fit to submit as their case in chief a mere total of seven pages of prepared testimony (Exhibits 1 and 2). Said testimony does not show the extent of Dynamic's past operations under the certificate nor how Executive would maintain the level of service previously performed by Dynamic. Said testimony is devoted exclusively to explanations of why Dynamic wishes to sell and Executive wishes to buy. It is totally devoid of any credible testimony directed toward showing that the proposed transfer would be in the public interest, or that Executive has the financial ability to conduct a common carrier operation.

^{1/} Protestant's reliance upon Decision No. 88967 is misplaced. Decision No. 88967, which established a 45-day working capital requirement for permit applicants, has no application to the present proceeding in which certificated authority is at issue. The Commission has established no specific uniform standards of financial ability for acquisition of common carrier certificates and did not do so by implication in Decision No. 88967.

Cross-examination of applicants' witnesses brought out evidence that would indicate the public interest would be adversely affected if the transfer of the certificate were authorized, such as: Mr. Simmons, the executive vice president of Executive, is the sole day-to-day employee of Executive and functions as the vice president, general manager, dispatcher, sales agent, and rate clerk; he also does the day-to-day bookkeeping and maintenance work. Yet, Mr. Simmons' transportation experience prior to becoming the vice president of Executive on July 1, 1978 is limited to driving. Mr. Simmons demonstrated a total lack of understanding of the distinction between a PUC permit and a PUC certificate and demonstrated a lack of awareness of important Commission regulations such as General Order No. 130; he is totally unfamiliar with the rates which he intends to charge should Dynamic's certificate be obtained; nor was he familiar with information concerning Executive which is on file with the Commission or even the scope of the Commission's jurisdiction. Mr. Simmons was not aware of whether the potential purchase of Dynamic's certificate is "a good deal or a bad deal" nor does he know the obligations which will be imposed upon Executive should it become a certificated carrier. ~~He appeared to be nothing more than a~~ SS
~~pupper~~

The only other person involved with Executive, in a management position, is its president, Mr. Silva, who did not appear at the hearing and whose transportation experience, if any, is unknown even to Mr. Simmons. According to Mr. Simmons, Mr. Silva apparently is a full-time teacher and his involvement with Executive is limited to status check calls every few weeks. With such inexperienced personnel operating Executive it is difficult to see how the transferring of a certificate of public convenience and necessity to Executive would be in the public interest.

The record shows that Dynamic, operating under the certificate sought to be transferred, required one full-time person to dispatch, another person operating full-time to bill the shipments, and a third person in the office in addition to a sales force. The record does not disclose the volume of traffic involved. Under Executive's operation Mr. Simmons would do all the jobs for which Dynamic required at least three employees in order to conduct common carrier operations. In addition to the personnel required, Dynamic in rendering its common carrier service utilized three bobtails, two tractors, two 27-foot trailers, two 40-foot trailers, and an unspecified number of Econolines; all of said equipment was owned by Dynamic. On the other hand, Executive's equipment consists of one leased bobtail and one leased tractor, and three vans.

The record also shows that approximately 25 shippers served by Dynamic in the past cannot be served by Dynamic in the future should its certificate be transferred. Mr. Simmons admitted that should Executive acquire Dynamic's certificate, he does not anticipate serving any of the shippers previously served by Dynamic. He anticipates serving a whole new group of shippers. Thus, it is apparent that if the certificate is transferred there will be a disruption in the existing service being provided to the shipping public.

Another element to be considered in the granting of authority to transfer a certificate of public convenience and necessity argued by PAD is that under an arrangement such as just described, i.e., Executive having to develop its common carrier customers from the customers of other carriers, will result in a loss of business to existing carriers and a potential reduction in the ability of existing carriers to serve their present customers. We understand how PAD feels being faced with a potential loss of customers. However, we must point out that when PAD obtained its operating authority it was put on notice of the following:

"...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 the 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." (Emphasis added.)

Therefore, PAD's argument with respect to competition is not entitled to serious consideration.

We have consistently held that in order to authorize the transfer of operating rights we must be convinced that the transferee is financially sound. (Atomic Express (1958) 56 CPUC 182; Pacific Greyhound Lines (1952) 52 CPUC 2; Hills Transportation Co. (1951) 50 CPUC 637; City Transfer and Storage Co. (1945) 46 CPUC 5; C. M. Clarke (1922) 21 CRC 505.) The evidence is conflicting with respect to whether or not the transferee is financially sound, since the financial information concerning Executive (Exhibit B to the application) differs substantially from the financial data presented at the hearing. Under cross-examination Executive's witness testified as follows with respect to Executive's financial position:

"Q. Are you familiar with the Exhibit B that was attached to that application, the financial information pertaining to Executive Freight Lines?

"A. Yes, I am.

"Q. Do you recall a figure of \$20,654 listed as accounts receivable?

"A. Okay. I have a revised statement, and I do not have the statement which you have.

"Q. You have a revised statement?

"A. I have a revised statement.

"Q. Revised as of what date?

"A. As of July 31.

"Q. 1978?

"A. Yes sir.

"Q. Does that information differ substantially from the information that was submitted with the application on June 29, 1978?

"A. Yes, it is.

"Q. Would you agree, then, that the financial information attached to the application is inaccurate as of the date the application was filed?

"A. Yes."

It was indicated that Executive had updated financial information available at the hearing but, for whatever reason, neglected to introduce it into evidence. We find it difficult to place any credence in applicants' witnesses in view of the following exchange between the ALJ and a witness for Executive:

"ALJ Peeters: On that basis, then, had not PAD brought it to your attention that there was an error there, those Exhibits would not have been changed and the Commission would have been relying upon erroneous information to grant a certificate; is that correct?

"The Witness: Yes sir."

Applicants admitted that they took little or no real care to insure that their application was as true and as accurate as they stated it to be, under oath. The integrity of Executive's conduct with the public is placed into question by the admission that Executive prepared and distributed misleading advertisements concerning its equipment and which indicated that effective July 1, 1978 Executive would have the requisite type of authority to serve the shippers solicited (Exhibit 3). The record is replete with examples of inconsistencies and contradictory and misleading statements made by applicants' witnesses.

In view of the record made we are constrained to point out that this is not the first time that Michael C. Leiden has filed an application with this Commission, permitted it to go to hearing, and failed to adduce sufficient evidence to warrant the granting of the application.^{2/} We stated in Decision No. 88356 that we cannot, and will not, condone such cavalier and disrespectful conduct in presenting a case before us. We must reiterate this admonition with the caveat that if Mr. Leiden should file another application with us and present the evidence at a hearing in the same manner as he has in this case and in Application No. 57156, we shall have to bar him from further practice before this Commission for violation of our Rule 1 (Code of Ethics) of the Rules of Practice and Procedure.

Findings of Fact

1. Dynamic presented no evidence to support a finding that the transfer of its certificate to Executive would not be adverse to the public interest.
2. Dynamic presented no evidence which would show the type and volume of traffic it handles under its certificate.
3. Dynamic intends to continue servicing its present shippers.
4. Executive presented no evidence to support a finding that the transfer of Dynamic's certificate to it would not be adverse to the public interest.
5. If Dynamic's certificate is transferred to Executive, Executive stated that it will not perform common carriage service for those customers of Dynamic which were served under the common carrier operating authority.
6. There is insufficient evidence in the record to make a finding that Executive has the financial ability to successfully carry on the common carrier operation.

^{2/} See Decision No. 88356 dated January 17, 1978 in Application No. 57156, wherein we found, among other things, that the applicant failed to carry its burden of proof and that its exhibits were unreliable and therefore granted a motion to dismiss the application.

7. Dynamic's common carrier customers would be required to find a new carrier to meet their shipping requirements if the sought for transfer is authorized.

8. Applicants' evidence is generally unreliable.

Conclusions of Law

1. The transfer of Dynamic's certificate of public convenience and necessity to Executive would be adverse to the public interest.

2. The application should be denied.

ORDER

IT IS ORDERED that the application is denied.

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

Dated at San Francisco, California, this 3rd day of JULY, 1979.

John E. Bay
President

Joseph J. Sturgeon

Robert D. Lusk

Charles J. DeWitt

Samuel M. Galt
Commissioners