Decision No. [redacted]

ORIGINAL

BEFORE THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Petition of CARLEY & HAMILTON, INC., a corporation, for leave to file a tariff as freight forwarder.	Application No. 19362.
VALLEY EXPRESS CO., a corporation, Complainant vs: CARLEY & HAMILTON, INC., a corporation, Defendant.	Case No. 3928.
In the Matter of the Suspension by the Commission on its own motion of Freight Forwarding Tariff No. 2, C. R. C. No. 2 of CARLEY & HAMILTON, INC.	Case No. 3946.

Gwyn H. Baker, for Carley & Hamilton, Inc.

McCutchen, Olney, Mannon & Greene, by Fred W. Mielke, for The River Lines

James J. Broz, for Valley Express Co.

Robert Brennon and William F. Brooks, for The Atchison, Topeka and Santa Fe Railway Co.

BY THE COMMISSION:

OPINION

This opinion follows a further hearing after reopening of Application No. 19362, and a rehearing of Cases Nos. 3928 and 3946. Reconsideration of those matters upon such further hearing and rehearing has led to modification of certain views expressed in the decisions previously rendered herein, and it seems necessary to precede a discussion of the facts and issues with a somewhat extended review of the proceedings up to this point.

In Application No. 19362, filed March 16, 1934, Carley & Hamilton, Inc., a corporation, alleged that continuously since 1901 it or its predecessor had been engaged in San Francisco in local drayage and freight forwarding operations. The applicant sought an order recognizing the conduct of such freight forwarder operations prior to August 1, 1933, and authorizing it, by virtue of such prior operations, to file a tariff as a freight forwarder without obtaining a certificate of public convenience therefor, as provided in Section 50 (f) of the Public Utilities Act.

After hearing, the Commission, on May 28, 1934, by Decision No. 27102, authorized and directed the filing of a tariff subject to certain conditions, including:

"(2) It shall set forth specifically all rates and charges to be made for drayage, marking, stenciling or other incidental services to be performed by applicant.

(3) It shall provide that to the charges referred to in Condition No. 2 shall be added the charge of the carrier over whose line the shipment is forwarded or received as shown by such carrier's tariffs on file with the Commission for the transportation of like kind and quantity of property, except as provided in Condition No. 4 next below.

(4) If shipments are to be transported at rates less than those contemporaneously maintained by the carrier performing the line haul service, such charges shall be specifically shown." (Emphasis supplied)

In purported compliance with that order Carley & Hamilton, Inc. filed its Freight Forwarding Tariff No. 1, C. R. C. No. 1, effective July 17, 1934, containing in addition to certain rules a single item as follows:

"RATES ON SHIPMENTS CONSOLIDATED AND/OR FORWARDED: for drayage, handling, consolidating, forwarding, marking, stenciling or other incidental service performed by Carley & Hamilton, Inc., (except as provided in Rules 10 and 13), 10¢ per cwt. This to be added to the tariff rate of common carriers lawfully on file with the Railroad Commission of the State of California, over whose line shipments are forwarded." (Emphasis supplied)

These rates were made applicable between "San Francisco, California, and California points served by common carriers."

On November 3, 1934, Valley Express Company filed a complaint against Carley & Hamilton, Inc., Case No. 3928, alleging that this tariff was contrary to condition 3 of the order in Decision No. 27102, and also that Carley & Hamilton, Inc. was charging rates less

than those contemporaneously maintained by the carrier performing the line haul service, without showing such lesser rates in the tariff as required by condition 4 of the order. It should be explained here that this came about in part through the practice of consolidating small shipments into larger lots which could be and were shipped at rates lower than could have been obtained had the component parts of the consolidated lots been shipped separately. Thus Carley & Hamilton, Inc. was enabled to charge the shippers of the component parts rates lower than those contemporaneously maintained by the line haul carriers "for the transportation of like kind and quantity of property."

After the filing of this complaint, but before hearing was held, Carley & Hamilton, Inc. filed its Freight Forwarding Tariff No. 2, C. R. C. No. 2, to become effective December 15, 1934, which was intended to supersede its Freight Forwarding Tariff No. 1, C. R. C. No. 1. This tariff applied "between San Francisco and California points served by common carriers", and provided, in part:

> "Item 1. RATES ON SHIPMENTS CONSOLIDATED AND/OR FORWARDED:
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> For drayage, handling, consolidating, forwarding, marking, stenciling or other incidental service performed by Carley & Hamilton, Inc. (except as provided in Rule 9) 10¢ per cwt.
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> Item 2. Rates making reference to this item apply to shipments of not less than 4,000 pounds received in one day, from one consignor at one point of origin. Such shipments may be consigned to one or more consignees at one or more destinations.
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> Where deliveries are made to more than one consignee or destination, the charge for each component lot shall be at the weight of such component lot and at the rate applicable to the destination of delivery subject to minimum charge of 50 cents.
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> Item 3. Except as otherwise provided herein -- to the charges shown in Item 1 -- there will be added the legal rate and/or published charges on file with the Railroad Commission of the State of California of the line via which the freight is forwarded."

Item 4 was a description of groceries and grocery supplies. Item 5 specified rates for transportation of groceries and grocery supplies as described in Item 4, moving terminal to door, door to terminal and door to door in any quantity lots and lots of not less than 4,000 pounds, 8,000 pounds and 20,000 pounds from San Francisco to Sacramento, Stockton and numerous points in the San Joaquin Valley. Such rates were flagged as subject to Item 2.

Upon the filing of this tariff a protest against its publication was interposed by The River Lines on the ground that Carley & Hamilton, Inc. had not been operating as a freight forwarder between San Francisco, on the one hand, and Stockton and Sacramento, on the other hand, prior to August 1, 1933, and in the absence of a certificate of public convenience and necessity was without any operative right as a freight forwarder between those points. By order dated December 14, 1934, Case No. 3946, the publication of Freight Forwarding Tariff No. 2, C. R. C. No. 2 was suspended pending determination of its legality.

Cases Nos. 3928 and 3946 were heard and submitted on a consolidated record. At the hearing a third proposed tariff (Exhibit 1) was submitted with the explanation that neither Tariff No. 1 nor Tariff No. 2 properly expressed what Carley and Hamilton, Inc. wanted to do. Leave was sought to file this tariff if found to be in compliance with the conditions of Decision No. 27102, and, in the event the Commission found it did not comply with such conditions, the Commission was requested to modify Decision No. 27102 so as to permit its filing. This proposed tariff provided that Carley & Hamilton, Inc. "holds itself out as a forwarding agent only" to

pick up property of all kinds not specifically excepted in the City and County of San Francisco and to forward the same over the lines of any common carrier to points served by such common carrier; also to receive inbound shipments and deliver them locally. It purported to exempt Carley & Hamilton, Inc. from any liability through loss, damage or injury to goods or delay occurring after delivery of such goods to a common carrier for transportation. Item 1 of the proposed tariff provided:

> "Charge for handling, consolidating, forwarding, marking, stenciling and all other services incidental to forwarding performed by Carley & Hamilton, Inc., including drayage from any point within the area in the City and County of San Francisco, described in Rule 1, to depot of common carrier will be, unless otherwise provided herein, 10¢ per 100 pounds."

Item 3 provided:

> "Shipments consolidated and forwarded by Carley & Hamilton, Inc. will be delivered by it to depot of common carrier and will be forwarded via the line of such carrier, subject to the legal rate of such carrier on such shipment in accordance with the tariffs of such carrier, as published and filed with The Railroad Commission of the State of California. The charges of such common carrier accruing for its transportation will be in addition, except as provided in Item 4, to the charges of Carley & Hamilton, Inc., as herein provided."

Item 4 provided:

> "When the tariff of any carrier provides rates on any commodity lower on lots of 4,000 pounds or over, or other minima, to any point or points, than its rate on lots of less than 4,000 pounds, or other minima, of the same commodity to the same point or points, Carley & Hamilton, Inc. will make no charge for its service in consolidating and forwarding freight in any quantity on which such rates are provided.
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> On lots of less than the lowest minimum provided for such freight consolidated and forwarded, Carley & Hamilton, Inc. will absorb a sufficient amount of carrier's charge to allow rate provided by carrier for the lowest minimum to apply on the actual weight of the shipment.

Lots of over the lowest minimum will be subject to the rate of the carrier as published and filed, applicable to the commodity at its actual weight.

This item will apply only in connection with commodities moving under tariffs of carriers which provide for pick-up and delivery service."

By Decision No. 28252, dated September 30, 1935, the Commission held that the third proposed tariff permitted the transportation of shipments at charges less than those the shipper would incur in shipping like kind and quantity of property over the line of the common carrier performing the haul, without specifically publishing such rates as required by Decision No. 27102. It was found that no good cause was shown why that decision should be amended and denied the request for modification. It was further found that Carley & Hamilton, Inc. had not been operating as a freight forwarder between San Francisco, on the one hand, and Sacramento and Stockton, on the other, on or prior to August 1, 1933, and Carley & Hamilton, Inc. was ordered to cease and desist assessing and collecting charges lower than those contemporaneously maintained by the common carrier performing the line haul for the same transportation of like kind and quantity of property unless and until such charges were specifically shown as required in condition 4 of Decision No. 27102; that Tariff No. 2 be cancelled and that Carley & Hamilton, Inc. file with the Commission in lieu of Tariff No. 1, a tariff fully in compliance with the terms of Decision No. 27102.

More than ten days prior to the effective date of Decision No. 28252 Carley & Hamilton, Inc. filed a petition for rehearing, or for modification of the decision without rehearing, on the ground that the order required it involuntarily to engage in business as an express corporation as defined in the Public Utilities Act. On November 18, 1935, the Commission made its order granting rehearing in Cases Nos. 3928 and 3946, and reopened Application No. 19362 for further hearing. The rehearing and further hearing on all

three matters were held on a combined record and the matters resubmitted. The petition for rehearing stayed the effectiveness of Decision No. 28252 and of the order therein cancelling Tariff No. 2, C. R. C. No. 2. The suspension of this tariff expired October 13, 1935, whereupon it became effective.

Reference at this point to the provisions of law involved will aid in clarifying discussion of the issues. Sections 2 (ka) and 50 (f) were added to the Public Utilities Act by Chapter 784, Statutes of 1933. Section 2 (ka) provides:

> "Any person, firm or corporation who for compensation undertakes the collection and shipment of property of others, and as consignor or otherwise ships or arranges to ship the same via the line of any common carrier at the tariff rates of such carrier and/or acting as consignee of same receives such property, is a 'freight forwarder' within the meaning of this act and a common carrier as herein defined.
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> This paragraph shall not apply to any agricultural or horticultural cooperative organization operating under and by virtue of the laws of the State of California or of any other State or the District of Columbia or under Federal Statute in the performance of its duties for its members, or the agents, individual or corporate, of such organization in the performance of their duties as such agents."

Section 50 (f) provides:

> "No express corporation or freight forwarder shall after August 1, 1933, commence operating between points in this State or extend its operations to or from any point or points in this State not theretofore served by it, unless and until it shall first secure from the Railroad Commission, upon formal application therefor, a certificate that public convenience and necessity require such operation. Any express corporation or freight forwarder having between May 1, 1933, and the effective date of this act, commenced operations or extended its service as aforesaid, shall

> have ninety (90) days after the effective date of this act to file with the Railroad Commission a formal application for a certificate of public convenience and necessity for such service. The Railroad Commission shall have power, with or without hearing, to issue such certificate, or to refuse to issue the same, or to issue it for the partial exercise only of the privilege sought, and may attach to its order granting such certificate such terms and conditions as, in its judgment, the public convenience and necessity require. The Railroad Commission may at any time, for good cause shown and upon notice to the holder of any such certificate, revoke, alter, or amend any such certificate."

The "express corporation" referred to in Section 50 (f) is that described in Section 2 (k), an original provision of the Public Utilities Act at the time of its enactment in 1911, which provides:

> "The term 'express corporation,' when used in this Act, includes every corporation or person, their lessees, trustees, receivers or trustees appointed by any court whatsoever, engaged in or transacting the business of transporting any freight, merchandise or other property for compensation on the line of any common carrier or stage or auto stage line within this State."

Section 2 (l) of the Public Utilities Act defines the term "common carrier" and includes express corporations. The section is unchanged in this respect since originally enacted. Chapter 784, Statutes of 1933, adding Sections 2 (ka) and 50 (f), also amended Section 2 (l) by adding freight forwarders to the defination of "common carrier".

Express corporations, as common carriers, have always been required to file tariffs with the Commission and have been subject to all the other regulations of the Public Utilities Act applicable to common carriers. Until the enactment of Chapter 784 in 1933, however, there was no requirement that certificates of public convenience be obtained before operations as express corporations were commenced. By that act express corporations and freight forwarders were placed under identical regulations with respect to the obtaining of certificates, the filing of tariffs and all other requirements.

Carley & Hamilton, Inc., which for convenience we will hereinafter refer to as applicant, takes the position that the provisions of Sections 2 (ka) and 50 (f) describe and apply only to one who functions as a forwarding agent by receiving goods from a shipper and, as his agent, shipping them to destination via the line of a common carrier, assuming and incurring no obligation with respect to the shipment after its safe and proper delivery to the common carrier. This, applicant points out, is a normal function and customary service of city draymen, all of whom, it is insisted, have been designated as freight forwarders by Section 2 (ka) and thereby subjected to regulation under the Public Utilities Act. Further, applicant contends that if these provisions are not so interpreted, and if they are applied to one who does more than this and who undertakes transportation and delivery of the shipments, there would be no distinction between a freight forwarder and an express corporation. As to its actual operations, applicant contends that they are now and always have been simply those of a forwarding agent and that this is clearly indicated by the provisions

of its third proposed tariff above referred to. Therefore, applicant claims, the order of the Commission in Decision No. 27102 and Decision No. 28252 requiring applicant to publish rates to destinations beyond San Francisco compels it to assume a responsibility for the transportation of the shipments to such destinations and thus involuntarily to become an express corporation contrary to its constitutional rights. We are unable to concur with applicant in these contentions.

Applicant's interpretation of Section 2 (ka) fails to give proper weight to the fact that a freight forwarder as defined in Section 2 (ka) is therein expressly declared to be a common carrier, and that Section 2 (l) also includes freight forwarders within the definition of a common carrier. A forwarding agent such as applicant claims to be and to which applicant seeks to make the statutory provisions applicable is not in fact a carrier at all with respect to its forwarding activities, though it may perform local draying as a carrier incidental to the forwarding, and it cannot be made a carrier in its forwarding activities by more legislative declaration. It is not to be supposed that the Legislature intended to accomplish this impossibility in enacting Chapter 784. Neither does it appear that the chapter was intended to be applicable only to the incidental local drayage of a forwarding agent, for that would result in excluding both forwarding agents who perform no draying and draymen who do no forwarding. If either or both draymen or forwarding agents were intended to be included, it

is not reasonable to suppose that any discrimination would be based on such a distinction. Moreover, if construed as applicable to draymen, the Public Utilities Act provisions would be irreconcilably conflicting with the later provisions of the City Carriers' Act (Statutes of 1935, Chapter 312) providing a wholly different type of regulation of city draymen. As repeals by implication are to be avoided if possible, Sections 2 (ka) and 50 (f) should not be construed as applicable to drayage operations if any other interpretation can be reached.

It is apparent, therefore, that Section 2 (ka) was intended to refer to and describe one who, by virtue of his undertaking apart from mere local draying, is a common carrier. This is further confirmed by the provisions of Section 50 (f) which provides that no express corporation or freight forwarder shall commence operating "between points in this State or extend its operations to or from any point or points in this State not heretofore served by it" without first obtaining a certificate of public convenience and necessity. Plainly neither a local drayman nor a forwarding agent, whose function is merely to ship or receive goods as an agent of the owner, is operating "between points in this State" even when the forwarding agent performs local drayage at point of origin or point of destination or both. Their operations are entirely intrastation, at the one point or the several points, as the case may be; not interstation, or between the points, as Section 50 (f) contemplates. Section 50 (f), moreover, expressly applies to express corporations and freight forwarders equally, and the character of express corporations as carriers operating "between points in this State" is well understood by all. It is clear, therefore, that the freight forwarder under Sections 2 (ka) and 50 (f), like the express corporation must undertake a responsibility as a carrier for the transportation of the shipments "between points in

this State" on the line or via the line of a common carrier.

The distinction between the express corporation and the freight forwarder is plainly apparent from Section 2 (ka). It does not concern the nature of the relation between the shipper, on the one hand, and the express corporation or freight forwarder, on the other, which as just stated is that of shipper and carrier; but it has to do with the relationship between the express corporation and freight forwarder, on the one hand, and the underlying common carrier, on the other. Ordinarily, express corporations deal with their underlying carriers under private contracts by which the underlying carriers agree to handle the express corporations' traffic at special rates and not at the tariff rates. The express corporation is dealt with not as a shipper but as another carrier. Prior to 1933, however, some express corporations employed the underlying carriers without special contracts and in the capacity of a shipper tendering freight for transportation at the underlying carrier's tariff rates. Such express corporations, too, were required to file their tariffs. (Investigation of Frost Fast Freight, 31 C. R. C. 668) Section 2 (ka) gave recognition in the law to this distinction and designated as freight forwarders those who, having assumed a carrier's undertaking with shippers, accomplish the transportation through the underlying carrier by tendering it the goods as a shipper and at its tariff rates, and not as another carrier under special contract.

The distinction thus first recognized in the Public Utilities Act by the enactment of Section 2 (ka), is one which has long existed in fact. An express company originally was one which provided an expedited transportation service over the lines of another carrier, with a messenger to assure safe keeping of the goods. Consolidation of shipments is not and never has been a feature of express companies operation. The principal value of the freight forwarder's service, however, is its ability to handle small shipments at rates lower than the shipper himself could obtain from the underlying carrier, achieved by the freight forwarder consolidating many such small shipments into a larger lot which it ships at the relatively lower tariff rates of the underlying carrier applicable in connection with larger quantities. Both such operations are wholly different in nature and character from that of the mere forwarding agent, which applicant claims to be, in that the latter mere ly acts in the shippers' stead to place the shipment in the hands of a carrier for transportation.

In view of this conclusion as to the type of operation described in Section 2 (ka) it is clear that the tariffs which such freight forwarders are required to publish must specify rates for their transportation service between the points in California where they operate. Therefore, the order in Decisions Nos. 27102 and 28252, was proper in requiring applicant to file and publish such a tariff and should not be modified in that respect, provided applicant has shown itself to be operating as a freight forwarder on and prior to the effe ctive date of Sections 2 (ka) and 50 (f). This is the question which must now be addressed.

With respect to applicant's prior operations the evidence fully supports applicant's contention that it assumed no responsibility for the shipments after delivery to the line haul carrier and that it acted purely as a shipper's agent to forward the goods. Until some time subsequent to August 1, 1953, all of applicant's operations here involved were those of an ordinary drayman and forwarding agent, and consisted of picking up shipments, hauling them to depots and docks and, as agent for the shippers, making out and signing bills of lading and shipping the goods for transportation by the line haul carriers. Also, applicant as consignee's agent received shipments at carriers' terminals and performed the local deliveries thereof.

When applicant picked up the shipments from the shippers or their warehouses receipts or hand tags were issued or signed. The bills of lading made out by applicant at the depots were on the standard railroad form, sometimes supplied by the carriers, but more often on forms provided by applicant with its name printed thereon. The latter forms stated that the shipment was "received ***** from Carley & Hamilton, Inc. ***** forwarding agents for _____" the consignor, whose name was inserted in the blank last indicated. The name of the carrier transporting the shipment was inserted in the proper blank as the carrier issuing the bill of lading. Applicant obtained from the shippers and filed with each carrier a power of attorney on printed forms supplied by the carrier to act as the shippers' agent to receive their shipments, to make shipments for them and to execute bills of lading in their

place and stead. Applicant received no compensation other than its cartage charge for this service, and its cartage charge was the same whether or not it made out bills of lading and forwarded the shipments. Of course, when applicant acting as shipper's agent advanced the carriers' tariff charges in prepayment of the shipment, as it often did, such advances were added as such to applicant's charges for its draying service.

Thus it is clear that on and prior to the effective date of Section 2 (ka) applicant was not operating as a freight forwarder as defined therein, but only as a drayman and as forwarding and receiving agent. Applicant is, therefore, without any prior right as a freight forwarder and is not entitled to file a tariff as such in the absence of a certificate of public convenience and necessity. Since the enactment of the City Carriers' Act draying operations of this nature are now purely those of a city carrier and are subject to the minimum rates for city carrier service established by the Commission pursuant to that act.

Subsequent to August 1, 1933, however, certain changes occurred in applicant's methods and practices which materially affected it's status as hereinabove described.

These changes were inspired by certain changes in the tariffs and rates of rail and certain truck carriers brought about by competition of unregulated trucks. Until shortly prior to 1933, most of the carriers' any-quantity rates generally applied on all shipments of less-than-carload quantity. While the tariffs of some carriers specified quantity rates based on lower minima, lower rates than the any-quantity rates were available from many carriers only on carload lots in the neighborhood of 36,000 pounds. Under these conditions opportunity for effecting savings to shippers by consolidating small lots to be shipped as a carload shipment was relatively limited, due to the difficulty of obtaining enough small shipments to make up a carload. Unregulated competition, however, led to the introduction by many large carriers, even prior to 1933, of quantity rates based usually on minima of 4,000, 8,000 and 20,000 pounds, respectively. While this increased the opportunities for consolidation, the evidence shows that prior to August 1, 1933, applicant engaged in no consolidation of shipments between San Francisco and Sacramento and Stockton, and it does not appear from the record that prior to that date any consolidations of any consequence were made to any other points.

The introduction of quantity rates based on the lower minima was closely followed by another inovation in carriers' tariffs, the so-called "split delivery rule." Such a rule was first published by Valley Express Company between San Francisco and San Joaquin Valley points, effective December 7, 1931. The rule was not adopted by the rail carriers, however, until September, 1934, when split delivery rules were published by the Atchison, Topeka and

Santa Fe Railway, Pacific Motor Transport Company and the Western Pacific Railroad. The Valley Express Company's rule provided (Valley Express Co. Local Express Tariff No. 1 - B, C. R. C. No. 3, Original page 18 and Fifth Revised page 18):

> "Note 1. Rates making reference hereto apply to shipments of not less than 4,000 pounds received on any one day from one consignor at one point of origin. Such shipments may be consigned to one or more consignees at one or more destinations.
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> Where deliveries are requested to be made to more than one consignee or destination the charge for each component lot shall be at the weight of such component lot and the rate applicable to the destination of delivery. The minimum charge for each such delivery shall be 50¢."

The provision in the rail tariffs was similar with the following added paragraph:

> "Freight charges must be prepaid. Each component lot must be covered by an individual bill of lading but as a condition precedent to the application of the rates herein authorized the shipper must prepare and submit to the carrier, when tendering freight under these rates, a manifest or distribution sheet showing the name of the consignee, the points of destination and the number of packages for each component lot."

The introduction of the split delivery rules enormously increased the opportunities for consolidation, even over those afforded under the reduced quantity rates; for now consolidation became possible not only of shipments of various shippers destined to the same point, but also of those destined to dozens of different points. Upon the establishment of split delivery rates by the rail

carriers in 1934, applicant commenced to utilize them by engaging in such consolidations.

In effecting the consolidations applicant, when receiving the shipments from the owners, sometimes signs receipts, hand tags or warehouse delivery orders, as before. Applicant's traffic manager testified that on other occasions shippers provide applicant with "shipping instructions" when the shipments are received, and he offered a sample of one as an exhibit. This document is an Atichison, Topeka and Santa Fe Railway bill of lading, showing Carley & Hamilton, Inc. as the shipper and the actual consignee at destination as consignee. The signature in the blank provided for the carrier's signature, peculiarly, is "Carley & Hamilton, Inc., agent, per (its truck driver)". As a document supplied applicant by the shipper at the time of the pick up, this document, if actually used, appears to be wholly meaningless. More significant, however, is an original document received in evidence which was actually used in connection with one of the shipments at the time of its receipt from the shipper. It is a standard form railroad bill of lading supplied by the shipper at San Francisco with the shipper's name printed thereon as such. The document shows Carley & Hamilton, Inc. as the carrier, is consigned to the consignee at Sacramento, and is signed as carrier by "Carley & Hamilton, Inc., agent per (its driver)".

When the shipments have been picked up on one or another of the forms indicated, bills of lading are made out in purported compliance with the line haul carriers' split delivery rules. As

above stated, these rules require a separate bill of lading for each component lot and a manifest or distribution sheet showing the various consignees and destinations. The bills of lading used are applicant's standard railroad forms, and each shows the consignor as "Carley & Hamilton, Inc. * * * forwarding agents for (the shipper from which applicant received the goods)." The manifest supplied in accordance with the split delivery rule shows both the various shippers, the various consignees, the number of packages in each lot, the commodity (described as "merchandise") and the weight of each lot.

In billing the shipper for its services, applicant presents a document showing the date, the description and the weight of the shipment, the points of origin and destination (San Francisco to Fresno, for example), and the rate and charge for the through service to destination. On the face of the document is boldly printed: "This is a freight bill. Please remit promptly."

On shipments of 4,000 pounds or less applicant charges the shipper, the party from whom the shipment is received, the line haul carrier's 4,000 pound rate, thus saving him the difference between that rate and the higher any-quantity rate. By consolidating such shipments into lots of 8,000 pounds or more, applicant profits

to the extent of the difference between the charges at the 4,000 pound rate and those at the lower 8,000 or 20,000 pound rate, which applicant is charged by the line haul carrier. On shipments of 8,000 pounds or more, applicant charges the shippers the line haul carrier's rate for the shipment as received by applicant. Applicant's advantage in securing and consolidating such shipments is that it enables applicant to make up the larger minima at the lower rates provided therefor, and so to increase applicant's profit on the less than 4,000 pound shipments. On shipments of less than 4,000 pounds which applicant is unable to consolidate to meet the 4,000 pound minimum, the shipper nevertheless receives the 4,000 pound rate and applicant absorbs the loss.

One other point requires notice. Applicant delivers the consolidated shipments to the line haul carrier at the latter's terminal but ships them at the carrier's door-to-door rates. In addition to the compensation above mentioned realized through the consolidations, applicant receives compensation for the door-to-terminal drayage from the line haul carrier, either through an association of draymen functioning as certain line haul carriers' pick-up agency or, when shipping by other carriers, through the allowance from door-to-door rates provided by such carriers' tariffs for terminal deliveries performed by the shippers or their agents. Such compensation or allowance is sometimes sufficient to cover or even yield a profit above the loss absorbed by applicant when, through inability to consolidate, it pays the line haul carrier more than it charges the shipper.

The foregoing facts present two important features. The first is that they lead to the conclusion that in conducting these consolidating activities applicant has become and functions as a freight forwarder within the meaning of Section 2 (ka), and requires a certificate of public convenience and necessity which it does not possess. The second is that, whether as freight forwarder or a shipper's agent, applicant appears to be obtaining split delivery rates from the line haul carriers to which it is not entitled under their tariffs. From either or both standpoints, therefore, applicant's activities above described are objectionable.

As indicating that applicant has become a freight forwarder and, in effecting consolidations, is undertaking a responsibility to shippers for performance of the line haul, it is to be observed that when shipments are consolidated applicant's rates and charges are no longer merely for draying to the depots. Now his charges are for the entire transportation to destination. This is plainly evident from the Freight Forwarding Tariff No. 2 now in effect (but which applicant claims does not properly describe its activities) where point to point rates are expressly quoted. It is equally true of the third proposed tariff, though there it is more adroitly stated; for Items 3 and 4 provide in effect that charges for applicant's service on shipments consolidated and shipped via a common carrier will be "subject to the legal rate of such common carrier on such shipment," but that when the tariff of any carrier provides rates on any commodity for lots of 4,000 pounds or over, or other minima, less than the any-quantity rates, no charge willbe

made for consolidating and forwarding, regardless of the quantity shipped, and that on lots smaller than the lowest minimum the common carrier's rate for that minimum will be applied and the difference absorbed by applicant. In other words, applicant guarantees transportation of the shipments at the common carrier's rate for that minimum, regardless of quantity.

The freight bills now used by applicant go further to prove its charges are not merely for draying and forwarding. As indicated by the sample freight bill introduced in evidence, applicant now bills the shippers for the entire door-to-door transportation service from origin to ultimate destination. Equally significant is the fact that applicant, when receiving shipments for consolidating or forwarding, issues to the shippers bills of lading to destination in its own name as carrier.

Thus we see that applicant contracts and assumes responsibility for the transportation of the shipments to destination, either expressly through issuance of the bill of lading just mentioned, or impliedly through the quotation of rates for the entire transportation; and that applicant acknowledges the perofrmance by it of such through transportation service by billing the shipper therefor. It follows that applicant, by virtue of its undertaking, is a common carrier and a freight forwarder with respect to this part of its operations.

Applicant's status as a common carrier, thus established by the very nature of its undertaking, cannot be altered by declarations such as the third proposed tariff contains, that applicant holds itself out "as a forwarding agent only". The attempt made in the tariffs to limit applicant's liability for the shipments after delivery to the underlying carrier is of doubtful effectiveness in view of the Civil Code provisions (Sections 2174, 2176) that the obligations of a common carrier cannot be limited by general notice on his part, but may be altered only by special contract.

But irrespective of applicant's status as a common carrier or as a shipper's agent, it is gravely doubtful that applicant is bringing itself within the line haul carrier's split delivery rules and is being properly accorded the split delivery rates. The split delivery rules apply only to shipments received "from one consignor at one point of origin". The so-called consolidated shipments, made up of lots received from more than one shipper, appear not to be received from one consignor at one point of origin, and it is not necessary to go behind the underlying carriers' bills of lading to ascertain that they are not; for the bills of lading on the various component lots, made out by applicant pursuant to the split delivery rules, show on their face that they are not from the same consignor, but are from different consignors utilizing the same agent. The case is therefore to be distinguished from those where a consignor's agency for others is undisclosed on the face of the line haul carrier's bill of lading, and the carrier is not permitted to look

behind the bill of lading to the ownership of the goods.(1) Furthermore, in many cases applicant presents the shipments to the line haul carriers as door-to-door shipments and receives compensation from them for the door-to-depot movement as the carriers' pick-up agent. In such cases, therefore, the carriers must be deemed to receive the shipments when applicant receives them, and from the shippers from whom applicant receives them. When there is more than one such shipper at more than one point of origin, the line haul carrier does not receive the so-called component parts from one consignor at one point of origin as is required for the application of split delivery rates.

Moreover, if we should accept applicant's contention that he acts merely as the shipper's agent to dray the shipments to the depots and forward them via the line haul carriers, it would seem that the shipments should properly be shown on the carriers' bills of lading as originating at their terminals, and it is questionable that applicant is acting consistently with his obligations to the shippers as their agent in shipping the goods as door-to-door movements by the carriers and accepting compensation from them as their agent also.

It is sufficient to say in conclusion that applicant's consolidating practices are filled with inconsistencies and abuses and are to be condemned.

In view of the finding that applicant possesses no prior right as a freight forwarder, Application No. 19362 should be denied and applicant's Freight Forwarding Tariff No. 2, C. R. C. No. 2 should be ordered cancelled. Case No. 3928 becomes moot and should be dismissed.

(1) For example, California Commercial Association vs. Wells Fargo & Co., 14 I. C. C. 422.

ORDER

Further hearing having been held in Application No. 19326 and rehearing having been held in Cases Nos. 3928 and 3946, evidence having been received and the matters re-submitted, and the Commission now being fully advised,

IT IS HEREBY FOUND that applicant Carley & Hamilton, Inc. was not, on and prior to August 1, 1933, operating between points in this state as a freight forwarder, for compensation undertaking the collection and shipment of property of others and as consignor or otherwise shipping or arranging to ship the same via the line of any common carrier at the tariff rates of such carrier and/or acting as consignee of same, receiving such property, as a common carrier; that applicant Carley & Hamilton, Inc., possesses no prior operative right or certificate of public convenience and necessity to operate as a freight forwarder, as defined in Section 2 (ka) of the Public Utilities Act; and that publication and filing by applicant Carley & Hamilton, Inc. of its Freight Forwarding Tariff No. 2, C. R. C. No. 2 is without authority.

IT IS HEREBY ORDERED:

(a) That Decision No. 27102 in Application No. 19362 and Decision No. 28252 in Case No. 3928 and Case No. 3946 be and each of them is hereby annulled and set aside;

(b) That Application No. 19362 be and it is hereby denied;

(c) That Case No. 3928 be and it is hereby dismissed;

(d) That Freight Forwarding Tariff No. 2, C. R. C. No. 2 of Carley & Hamilton, Inc. be and it is hereby cancelled and annulled.

Dated at San Francisco, California, this 9th day of May, 1938.

COMMISSIONERS.