

Decision No. 33109

BEFORE THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Investigation
on the Commission's own motion into the
operations, rates, charges, contracts
and practices of J. NELSON KAGARISE and
J. NELSON KAGARISE, doing business as
PUENTE TRUCK & TRANSFER COMPANY and
KEYSTONE EXPRESS COMPANY.

Case No. 4366

In the Matter of the Investigation on
the Commission's own motion into the
operations, rates, charges, contracts
and practices of COOPERATIVE MERCHANTS
OF RIVERSIDE and COOPERATIVE MERCHANTS
OF POMONA VALLEY.

Case No. 4366

In the Matter of the Investigation on
the Commission's own motion into the
operations, rates, charges, contracts
and practices of J. NELSON KAGARISE,
COOPERATIVE MERCHANTS OF RIVERSIDE,
COOPERATIVE MERCHANTS OF POMONA VALLEY,
CHANNEL CITY MERCHANTS ASSOCIATION, and
CALIFORNIA SHIPPERS ASSOCIATION.

Case No. 4477

BERNARD BRENNAN, for J. Nelson Kagarise as an
individual, J. Nelson Kagarise doing business
as Puente Truck & Transfer Company and
J. Nelson Kagarise doing business as Keystone
Express Company.

H. J. BISCHOFF and WALLACE K. DOWNEY, for Certifi-
cated Highway Carriers, Interveners.

EDWARD STERN, for Railway Express Agency, Inc.,
interested party.

W. E. McMILLAN, for Atchison, Topeka & Santa Fe
Railway Company, interested party.

E. L. H. BISSINGER, for Pacific Electric Railway
Company, interested party.

C. G. MUNSON, for Los Angeles Warehousemen's
Association, interested party.

JOHN J. HUFFMAN, for Cooperative Merchants of
Riverside, interested party.

VINCENT D. KENNEDY, for California Retailers Asso-
ciation, interested party.

C. A. HODGMAN, Assistant Traffic Manager, for Harbor Commission, City of San Diego, interested party.

WILLIAM C. KLEBENOW, for Motor Truck Association of Southern California, interested party.

HUGH B. SQUIER, for System San Diego Express, interested party.

F. W. TURCOTTE, for Cooperative Merchants of Riverside and Cooperative Merchants of Pomona Valley (Case 4386), Cooperative Merchants of Riverside, Cooperative Merchants of Pomona Valley, Channel City Merchants Association, and California Shippers Association (Case 4477), Respondents, and as their interests may appear in Case 4266.

G. E. DUFFY, for Atchison, Topeka & Santa Fe Railway Company and Santa Fe Transportation Company, interested parties.

R. E. CRANDALL, for Associated Jobbers & Manufacturers, interested party.

C. H. SMITH, for Davies Warehouse Co., interested party.

W. M. DERTHICK, JR., for Western Manufacturers Trade Association, interested party.

R. F. SHACKELFORD, for Ellis-Klatscher & Co., and Los Angeles Wholesale Institute, interested parties.

BY THE COMMISSION:

O P I N I O N

These proceedings involve an investigation by the Commission upon its own motion into the operations, rates, charges, contracts and practices of J. Nelson Kagarise, an individual, and J. Nelson Kagarise, doing business as Puente Truck & Transfer Co., and Keystone Express Company. They also involve a similar investi-

gation of the following associations: Cooperative Merchants of Riverside; Cooperative Merchants of Pomona Valley; Channel City Merchants Association and California Shippers Association. The purpose of the investigation is to determine whether or not the respondents, individually or collectively are engaged in business as express corporations or freight forwarders, as defined in Sections 2(k) and 2(ka), respectively, of the Public Utilities Act (Statutes 1915, Chapter 91, as amended) without possessing a prior right to do so and without first having obtained from the Commission a certificate of public convenience and necessity authorizing such operations as required by Section 50(f) of said Act; also whether or not Kagarise in acting as agent for the consolidation of shipments was violating certain provisions of his express tariffs and of Sections 17 and 19 of the Public Utilities Act.

Two of the proceedings, namely Cases Nos. 4366 and 4386, were consolidated for hearing and evidence was received therein at public hearings in Los Angeles in January and February, 1939. The matters were then submitted, but because of certain changes in and extensions of the operations, the Commission thereafter set aside the submission and issued its order in Case No. 4477, instituting an investigation de novo into the operations of the same and two additional respondents. A public hearing was subsequently had on a consolidated record at Los Angeles on February 14, 1940, briefs were filed, and thereafter the matters were orally argued before the Commission en banc at San Francisco on April 8, 1940, at which time they were submitted and are now ready for decision.

The evidence discloses no basis for consideration of the issue involving operation as an "express corporation" nor of those involving Kagarise's express tariff and Sections 17 and 19 of the Act, and a discussion of those features will not be accorded in this opinion.

The principal issues involved are (1) whether or not the respondents, individually or collectively, are engaged in operations as a "freight forwarder" as that term is defined in Section 2(ka) of the Public Utilities Act, and (2) whether or not they require certificates of public convenience and necessity to so operate, pursuant to Section 50(f) of said Act. ⁽¹⁾

(1) Section 2(ka) reads as follows:

"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.

"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) reads as follows:

"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."

A brief description of the respondents and an outline of their operations as disclosed by the evidence and testimony is essential to a proper understanding of the ultimate facts. J. Nelson Kagarise is the sole owner and operator of the Keystone Express Company and Puente Truck & Transfer Co. The Keystone Express Company operates as an express corporation under an alleged prescriptive right between Los Angeles on the one hand, and points in the territory bounded generally by San Bernardino, Santa Ana, Los Angeles Harbor, Santa Monica and San Fernando, on the other hand. Its main office is located in the City of Los Angeles and it has a tariff on file with the Commission. The Puente Truck & Transfer Co. operates as a city carrier within the City of Los Angeles under a permit from this Commission. The other respondents are, or purport to be, unincorporated associations of shippers. Respondent Kagarise, in addition to his express corporation and city carrier operations, also purports to act as the agent of each of the respondent associations in conducting their respective activities. The inquiry in these proceedings concerns these last-mentioned activities of Kagarise and of the associations.

Their activities are designed to enable consolidations to be made of shipments moving from numerous shippers at Los Angeles consigned to numerous consignees at Riverside, San Bernardino, Pomona, Santa Barbara, San Francisco and points intermediate to Los Angeles and the other named points, and to provide for their shipment in the name of a single consignor over the line of a rail carrier.

It appears from the evidence that the shipping practices observed by respondents are made possible under a so-called "split delivery rule" in the railroad tariff.⁽²⁾ This rule provides in

(2) Pacific Freight Tariff Bureau Tariff No. 255-A, C.R.C. No. 30 of Agent J. P. Haynes, effective August 7, 1939. Item 360 of said tariff contains the "split delivery" rule.

substance that a shipment may consist of several component parts for delivery to one consignee at more than one point of destination, or to more than one consignee at one or more points of destination, subject to the following pertinent conditions:

- (a) The composite shipment (i.e., the aggregate of all the component parts), must be shipped by one consignor at one point of origin.
- (b) The freight charges must be prepaid by the shipper.
- (c) The point of destination of each component part of the aggregate shipment must be located on an authorized route of the carrier operating from point of origin to the most distant point of destination.
- (d) The composite shipment must weigh (or transportation charges must be computed upon a weight of) not less than 4,000 pounds.
- (e) At the time of tender of the shipment, the carrier must issue a single bill of lading for the composite shipment, and must secure from the shipper a manifest or written delivery instructions showing the name of each consignee, the points of destination and the kind and quantity of freight in each component part.

The charges applicable to a composite split delivery shipment are based upon the charge applicable to a single shipment of the same kind and quantity of freight from one point of origin to the highest rated point of destination, plus a small additional charge

for each split delivery service.⁽³⁾ Thus, each component part of the composite shipment receives the benefit of the reduced rate applicable to the aggregate weight of the composite shipment. Each composite shipment, however, must be shipped by one consignor and the function of respondents' operation is to provide the means by which individual shipments from a number of individual shippers may be shipped as though from one consignor to a number of individual consignees. The service is performed only in a northward or eastward direction from Los Angeles. No inbound traffic to Los Angeles is handled.

According to the testimony of witnesses under the "modus operandi" currently observed by the respondents, a shipper in Los Angeles who desires to use any of the services, other than that in the name of Consolidated Merchants of Riverside, brings or arranges to bring his shipment to one of the three Southern Pacific freight stations in that city. The shipment is received by the Southern Pacific Company's agent who receipts for it on a "memorandum" copy of a

- (3) The following example illustrates the application of the split delivery rule: Class rates on individual shipments of various weights and various classes of traffic moving between carrier's depot in Los Angeles and consignees' store door in San Francisco are as follows:

<u>Weight</u>	(Rates in Cents per 100 Pounds)			
	<u>1st</u>	<u>Classes</u> <u>2nd</u>	<u>3rd</u>	<u>4th</u>
Any quantity	95	85	75	65
4,000 lbs. to 10,000 lbs.	68	60½	53½	46
10,000 lbs. to 20,000 lbs.	59	53	47	41½
20,000 lbs. or more	52½	47½	42	37

Assuming that one consignor in Los Angeles desires to make ten shipments of 2,000 pounds each to ten different consignees in San Francisco, he may, under the split delivery rule, consolidate the ten component shipments into one shipment of 20,000 pounds. If the shipments consist of first class commodities, he will then pay a rate of 52½ cents per 100 pounds for 20,000 pounds, instead of 95 cents per 100 pounds on ten individual shipments of 2,000 pounds each. A small additional charge, in this instance 25 cents, would be made for each shipment accorded split delivery service.

standard bill of lading.⁽⁴⁾ The individual shipper, it will be noted, is not given the "original" bill of lading but is given only the "memorandum" copy as a receipt for his goods. Kagarise supplies shippers with copies of Southern Pacific Company "memorandum" bill of lading forms which are rubber stamped with the name of the association which is to appear as the shipper in the blank space provided for the consignor's name at the top of the bill and in the lower left hand corner, or "signature corner." Another rubber stamp notation appears on the face of the bill, reading "Component part of composite shipment consisting of _____." The name of the actual shipper is placed in the lower left hand corner beneath the stamped name of the association. The name and address of the consignee are inserted on the bill in the regular manner, and the customary description and weight of the shipment are inserted. The carrier's agent, in this instance, the Southern Pacific agent at Los Angeles, receipts for the goods by signing in the lower right hand corner, and as stated before, gives the shipper the "memorandum" copy of the bill of lading as a receipt for the goods.⁽⁵⁾

(4) A uniform standard bill of lading has three parts. Normally, the first or "original" bill is signed by shipper and carrier and constitutes the shipping contract. This copy is ordinarily given to the shipper, who sends it to the consignee as authority to take possession of the shipment at destination. The second, or "memorandum" bill of lading is ordinarily given to the shipper and is retained by him as a receipt for the property entrusted to the carrier for transportation. The third copy of "shipping order" is ordinarily retained by the carrier as the initial document or record of the shipment.

(5) Exhibit No. 6-A.

Other shippers desiring to use the service also deliver their shipments to one of the three Southern Pacific stations during the course of the day and receive similar "memorandum" bills of lading as a receipt for their goods. At the end of the day, the shipments and the "memorandum" bills of lading are "bridged" or trucked by the Southern Pacific Company to their main Los Angeles freight station. Respondent Kagarise or his employee calls at the station each day between 5:00 and 6:00 P.M. and is handed the receiving records covering the component shipments received at the three stations during the day, the shipments are counted and checked, the weights are totaled and Kagarise or his employee executes a so-called "master bill of lading" on the standard uniform straight bill of lading form of the Southern Pacific Company showing in the blank spaces provided therein, (1) the date, (2) the name of the association as consignor, (3) "Numerous" as consignee, and (4) "Various" as the destination. For a description of the consolidated shipment, there is inserted a rubber stamp notation reading as follows:

"Composite shipment consisting of _____
pieces merchandise as per manifest
attached. Total weight _____."

This master bill of lading is executed in the regular manner, in triplicate, with the "original," "memorandum" and "shipping order"

copies; the original is attached to the memorandum bills and signed in the lower left-hand corner by Kagarise on behalf of the association as shipper, and the agent for the Southern Pacific Company signs in the lower right-hand corner.⁽⁶⁾ As a matter of convenience, respondent Kagarise also supplies the Southern Pacific Company's agent with a manifest or checking list which shows the name of the actual consignee, the actual destination, the number of pieces, and actual weight of each component part of the composite shipment.⁽⁷⁾ Thereupon the Southern Pacific Company treats the consolidated shipment as one shipment and transports it in accordance with its usual manner of handling split delivery shipments.

Since charges on split delivery shipments must be prepaid by the consignor, Kagarise receives, in due course, a freight bill from Southern Pacific Company calling for payment of charges upon the composite shipment. A copy of such freight bill was not offered in evidence, but Kagarise testified that the Southern Pacific Company issues a statement of the charges for the composite shipment and a separate prepaid freight bill for each component part of the composite shipment, this being made necessary due to the various weights, classification and destination of the component shipments, and is in accordance with the carrier's usual accounting practices.

Kagarise pays the freight charges by his personal check drawn upon funds in his personal bank account. Thereafter, Kagarise bills

(6) Exhibit No. 7-A. The "original" bill of lading and the "memorandum" copy are given to Kagarise as the shippers' agent. This is the first instance in which the Southern Pacific Company tenders an "original" bill of lading for the property it has received at the three freight stations during the day.

(7) Exhibit No. 8-A.

each shipper separately for each component shipment on a form designated as a "summary" and "statement."⁽⁸⁾ The part used as a "summary" shows the charge which would have been incurred by the shipper had the shipment moved separately as an individual lot; the actual charge for the transportation of the lot as a component part of the composite shipment, that being the amount taken from the carrier's freight bill; the difference between the two amounts and the "saving" or one-half of the difference. That part of the form used as a "statement" shows the total amount payable to Kagarise for the services he performs in consolidating the shipments. This amount is made up of the carrier's actual charge upon the component shipment (which reimburses Kagarise for the proportionate freight charge payments advanced to the Southern Pacific Company) plus the other one-half of the "difference" which constitutes Kagarise's compensation.⁽⁹⁾

Separate operations are conducted in the names of the several associations, each to a different territory. The methods and practices followed are the same in each, except that shipments of Cooperative Merchants of Riverside are made via The Atchison, Topeka and Santa Fe Railway Company and Pacific Electric Railway on alternate

(8) Exhibit No. 9-A.

(9) For shipments moving "freight charges collect" slightly different arrangements have been worked out, so that receivers of shipments at destination points may utilize the respondents' service by instructing the consignors how to present shipments for transportation, and to facilitate the reimbursement and compensation which Kagarise receives for his services. Such forms are used mainly for services rendered by the Riverside, Pomona, and Channel City Merchants Associations, as in those instances the freight charges are usually paid by the receivers of the freight, although Kagarise advances the payment of the charges to the carrier as provided in the split-delivery rule. The receivers (or consignees) then reimburse Kagarise.

weeks. To avoid confusion therefrom shippers using the service to the territory served in the name of that association deliver their shipments to Kagarise at his warehouse instead of to the carriers, and Kagarise there tenders the consolidated shipments to the carriers at one time.

Each of these operations, except that in the name of California Shippers Association, is a direct outgrowth of a service which Kagarise rendered or proposed to render for individual receivers of freight in Riverside, Pomona, and Santa Barbara by separate consolidations in Los Angeles of such receiver's particular shipments. In each instance, in order to effect greater savings by accumulating a greater aggregate weight than the shipments of a single receiver would amount to, other receivers were told of the plan of operation and half a dozen or so met with Kagarise who fully explained the plan to them. One of the number was selected in each case to sign, in the name of the "association," an agreement with Kagarise whereby the latter was to purportedly act as agent of the "association," to make out bills of lading and to ship the freight in its name. No articles of association, constitution, by-laws, or other agreement specifying the nature or purposes of the association or the rights and obligations of the membership have ever been made or executed in the case of either the Cooperative Merchants of Pomona Valley or the Channel City Merchants Association. The agency contract in the name of Cooperative Merchants of Riverside was signed on July 1, 1938, but no articles of association were entered into until December 28, 1938, shortly after the institution of Case No. 4366 and shortly before the institution of Case No. 4386.

The California Shippers Association was organized on December 19, 1939, by seven shippers interested in traffic moving between Los Angeles and San Francisco and intermediate points who adopted by-laws and appointed Kagarise agent of the association. The by-laws of the California Shippers Association provide in part that:

"This Association is formed primarily for the express purpose of enabling the various members, through its agent but in the name of the Association, to consolidate their various less-than-carload shipments with the less-than-carload shipments of other members and thereby to enable the members to reduce their transportation costs on said less-than-carload shipments so moving from, to and between points within the State of California..."(10)

and that

"Membership in the Association shall be confined to shippers of goods, wares and merchandise from, to and between points within the State of California." (11)

The agency agreement designates the association as the "shippers" and Kagarise as the "agent" thereof and recites that the latter

"...agrees to furnish the shippers with warehouse and dock space at...Los Angeles...and to act as the agent of the shippers in accumulating shipments at said warehouse, or at the depots or sub-depots of common carriers. Said agents further agrees that upon the accumulation of the shipments to route said shipments as shippers' agent over a common carrier to be selected by the shippers."

(10) Exhibit No. 14-A, Section 8.

(11) Exhibit No. 14-A, Section 4.

Other pertinent portions of said agreement are as follows:

"The shippers' name is to appear on all common carrier bills of lading as consignor."

"All shipments shall be forwarded daily except on specific instruction to the agent to the contrary."

"The shippers...agree to compensate the agent for his services...a sum equal to fifty per cent of the difference between the rate which would have been required to be paid if each component part of the accumulated shipments was shipped as an individual shipment, and the actual rate paid the common carrier on the accumulated shipments. Said compensation shall be paid weekly during the week following the week in which the service was rendered."

"The agent further agrees that in the event of loss of or damage to any component part of said accumulated shipments while in the shippers' Los Angeles warehouse awaiting delivery to the common carrier designated, he will adjust the loss of or damage to said goods, wares or merchandise with the owner thereof promptly...."

"The agent agrees to follow the directions issued to him by the shippers from time to time and to report to shippers' chairman regularly of his activities and he agrees to incur no liability not specifically authorized by this agent...."

The agency agreement with the California Shippers Association is similar in phraseology and plan to the other agency agreements. Such differences as exist were made necessary mainly by reason of amendment to the rail carriers' split-delivery rule subsequent to the execution of the first three agency agreements and before the date of the agreement with the California Shippers Association.

Respondents acknowledge the desire and intention to extend the service as widely as possible among shippers and receivers of less than carload shipments in the territories served. Active solicitation of new shippers is regularly conducted by respondent Kagarise. Three traffic solicitors are employed, one at San Francisco, one in the San Joaquin Valley and one at Los Angeles. These solicitors are selected and employed by Kagarise and are paid by him on a flat monthly basis. Those who are so located that they may conveniently do so, solicit not only for the California Shippers Association but also for the other three associations. Kagarise, personally, solicits patronage throughout the territory involved. Advertisements or "announcements" of the service have been circulated among shippers, traffic managers, shipping clerks, and sales departments. The evidence shows that a shipper may become a member by manifesting an "interest" in the plan or by tendering a shipment for transportation in the manner provided by the association. Kagarise assertedly lists the names of all new "members" and supplies the list to an officer of the California Shippers Association periodically, but otherwise there is no evidence that the associations have rolls of their memberships.

Under the terms of the agency agreement Kagarise has procured and maintains a standard form of cargo insurance policy covering shipments during the period when they may be in his warehouse. Workmen's compensation insurance and employees' liability insurance are also procured for the three employee-solicitors and premiums on the policies are paid for by Kagarise. In addition, the latter, together with the president and secretary of the California Shippers Association has filed a "Joint Bond" in the amount of \$1,000 with the Southern Pacific Company to guarantee the prepayment of freight charges due from the associations on shipments consolidated at the main Los Angeles freight station of that carrier.

Kagarise maintains an office in Los Angeles. Both his name and the name of the California Shippers Association appear in the Los Angeles telephone directory. Kagarise paid for the latter insertions and he personally bears the expenses of his business office as agent

for the associations.

Respondents contend that the foregoing evidence falls short of establishing that the associations or Kagarise, who they insist is the associations' agent, are operating as freight forwarders within the meaning of Sections 2(ka) and 50(f). They point out that no physical act of transportation is performed by either Kagarise or the associations and they assert that there is no evidence that they assume any undertaking or responsibility as a common carrier for the transportation of the shipments between points in California. This, they argue, is essential before one may be held to be a freight forwarder inasmuch as Section 2(ka), after defining a freight forwarder, declares that such an operator is a "common carrier as defined herein" and inasmuch as Section 50(f) prohibits a freight forwarder, in the absence of a certificate of public convenience and necessity, only from "operating between points in this state." The Commission, they urge, has expressly so held in Application of Carley & Hamilton, Inc., 41 C.R.C. 327, and Application of Carley & Hamilton, Inc., 42 C.R.C. 515.

Although there is language and reasoning in those opinions which seems to support this interpretation, we are satisfied that Sections 2(ka) and 50(f) do not include as an element in the definition of a freight forwarder the assumption of any responsibility for the property or for its transportation after it has been shipped on the line of the common carrier. Section 2(ka) clearly and unequivocally sets forth the elements which go to make up a freight forwarder as: (1) a person, firm, or corporation (2) who for compensation (3) undertakes the collection and shipment of property (4) of others, and

(5) as consignor or otherwise ships or arranges to ship the same via the line of any common carrier (6) at the tariff rates of such carrier, and/or (alternatively) acting as consignee of same receives such property. The definition contains no requirement that there be any further undertaking with respect to or responsibility for the transportation of the shipments as a common carrier or otherwise; and in view of the detail contained in the definition it is reasonable to assume that were it intended it would be expressly stated or at least clearly implied. The added declaration that such a person, firm, or corporation is also a "common carrier as herein defined" carries no such implication. It was obviously included in the section in order to make it plain that "freight forwarders" are subject to the pertinent provisions of the Public Utilities Act applying to common carriers.

It is to be noted also that Section 2(ka) declares a freight forwarder to be a common carrier "as herein [in the Public Utilities Act] defined." Section 2(1) of the Act defines a common carrier as including, in addition to every railroad corporation, street railroad corporation, express corporation and freight forwarder, every "dispatch, sleeping car, dining car, drawing room car, freight, freight line, refrigerator, oil, stock, fruit, car-loaning, car-renting, carloading, and every other car corporation or person . . . operating for compensation within this state." It is well known that such car companies assume no obligation as carriers or otherwise for the transportation of any property but merely rent cars to others. Yet it has never been doubted that they might nevertheless properly be required to charge just and reasonable rates, to refrain from unreasonable discrimination and to comply with the other applicable provisions

of the Public Utilities Act. The effect of designating freight forwarders as "common carriers" is no more than that.

Section 50(f), in requiring a freight forwarder to obtain a certificate before commencing to operate "between points in this state" has reference merely to the points between which the freight forwarder "ships or arranges to ship [property of others] via the line of a common carrier" and the points from which and at which the freight forwarder "acting as consignee . . . receives such property," as described in Section 2(ka).

We conclude, therefore, that all the tests of a freight forwarder are expressly set forth in Section 2(ka), except that by reason of Section 2(l) and 2(dd) it is implied that the service described in Section 2(ka) must be "performed for . . . the public or any portion thereof." It is not necessary to show, in addition to the elements therein set forth, that such an operator assumes a common carrier's or any responsibility for the shipments after they have been dispatched on the line of the common carrier, since no such requirement is expressly stated therein or can reasonably be implied therefrom.

This conclusion, it should be noted, in no manner affects the results reached in either of the Carley & Hamilton decisions. It is clear that without regard to the existence of any assumption of responsibility by the applicant therein for the transportation of property, no freight forwarder operations were conducted by it prior to the effective date of Section 50(f), but that such operations were conducted thereafter. Moreover, we believe it in general to be true, as indicated in those opinions, that an undertaking to transport is an incident of freight forwarder status. We believe that, despite respondents' insistence to the contrary, upon analysis, such an undertaking might be found to be necessarily implied here. But it may not always be an incident of ^afreight forwarder's operation and under the statute it should

never be sought as a controlling test of the existence of such status.

We think the evidence shows that the services here involved are not being operated by Kagarise as agent for the associations, but as a principal and on his own behalf, aided and abetted by the associations and that these services are squarely within the definition of a freight forwarder.

At the outset it may be questioned whether two of the "associations" have any existence except in name. The so-called Co-operative Merchants of Pomona Valley and Channel City Merchants Association, having no constitution, articles, by-laws or other agreements of association, nothing to identify any group or membership, and nothing to define the purposes of association or the rights, privileges and obligations of membership, appear to be mere names used by Kagarise in dispatching the shipments of whatever shippers and receivers happen to be using the services on a particular day. If any rights and duties arise out of the agency contracts in the names of these associations, it would seem that they must exist only between Kagarise and the respective signers personally.

But even assuming that all the associations are bona fide organizations, it is evident that the services are operated by Kagarise alone for the shippers and receivers individually. Every act performed in connection with the services is performed by Kagarise or employees hired and paid by him. The associations do not contribute to a single step in the operation. Without them Kagarise, in his own or any other name, could perform precisely the same service in just the same way and effect the same savings to the shippers.

The solicitors employed by Kagarise do not confine their activities, to the interests of any one of the associations, but solicit for all. All the expenses of the services are borne by

Kagarise personally. The bank account used is Kagarise's personal account and all deposits therein are and remain his personal funds. The rail carriers' freight charges are all paid by Kagarise out of this account without authorization or provision therefor in any of the contracts, articles, or by-laws, and without any provision for reimbursement by the associations.

All statements for his compensation are rendered by Kagarise to the shippers and receivers individually for services performed for them individually, and none are rendered to the associations as for services performed for them. There are in fact no services performed for the associations, for neither the associations nor the members thereof as a group have any common interest in the shipments or in their transportation. The shipments are separately and individually owned by the respective shippers or receivers. Each one alone desires the transportation and Kagarise serves each one individually. This is reflected by the manner in which Kagarise is compensated, which is not strictly in accordance with the agency agreements. He is not paid by any of the shippers or receivers or by the associations "a sum equal to 50% of the (total) difference" between the aggregate cost of shipping the week's shipments separately and the cost thereof when shipped in consolidation; nor do any of the shippers or receivers pay him a proportion, based on the entire number of members, of such sum as though in satisfaction of a joint liability. They pay him instead a sum which represents the private benefit each one personally received from the service, and every such payment includes an amount to cover the freight charges advanced by Kagarise for such shipper or receiver which, as has been said, is entirely unprovided for in

any of the agency contracts.

The agency agreements require Kagarise to maintain cargo insurance, workmen's compensation insurance, and employer's liability policies covering the associations, but none of such policies do so. They insure Kagarise alone, merely describing him as an agent.

There is no trace of evidence of any agreement or undertaking between the shippers or receivers as individual members and any of the associations as a group with respect to the performance of any service whatever by the association for the several shippers or receivers, such as would be necessary if the services were actually operated by the associations through the agency of Kagarise.

Such circumstances, as well as the manner above described in which these services originated and developed, combine to convince us that Kagarise is the principal in the services, dealing as such directly with such members of the public as desire to patronize him, that his agency for the associations is purely fictional, and that the only function served by the associations, so far as any of them are entitled to recognition as existing organizations, is to aid Kagarise in carrying on the services by giving them the color of cooperative enterprises and providing them with inoffensive names to render the services more attractive and to cloak Kagarise's true status and relation thereto.

The service being rendered is plainly of the type and character intended to be covered by Sections 2(k) and 50(f) and every element included in the definition of a freight forwarder is present, and this would be true whether Kagarise or the associations were found to be the principal in conducting the operation.

The existence of compensation is unquestioned. An undertaking for the collection and shipment of property of others is the essential feature of the service and that undertaking is fulfilled. To "collect" is "to gather into one body; to assemble."¹² In the operation of the service the component parts which eventually make up the consolidated split delivery shipments are separately delivered to the Southern Pacific Company under separate memorandum bills of lading or, in the case of Cooperative Merchants of Riverside, they are separately delivered to Kagarise. These lots must be "collected" or assembled or gathered into one body in order to properly receive the split delivery rate accorded the consolidated shipments. This collection Kagarise performs, physically in the case of Cooperative Merchants of Riverside, and constructively in the case of the other services by assembling the memorandum bills which represent the separate shipments and combining them under the master bill as a single consolidated shipping document representing a consolidated split delivery shipment. Kagarise then "ships and arranges to ship the same via the line of (a) common carrier at the tariff rates of such carrier."

The service is "performed for . . . the public or any portion thereof." We have already mentioned the regular and systematic solicitation of patronage, the circulation of advertising and announcements, the acknowledged purpose and desire to extend the service to the public to the widest possible extent, and the substantially unqualified availability of the service to all who may desire to use it.

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Webster's New International Dictionary, Second Edition, 1939.

The service is operated "between points in this state." These points include virtually all points on the line of the Southern Pacific Company between Los Angeles, on the one hand, and San Francisco, Santa Barbara, and Pomona, on the other hand, and points on the lines of the Santa Fe and Pacific Electric points in the vicinity of Riverside. These points are specifically set forth in the announcements circulated by respondent⁽¹³⁾ as the points between which the service was being or was to be rendered.

Respondent Kagarise will be ordered to cease and desist from the operation of these services unless and until he shall obtain a certificate of public convenience and necessity to operate as a freight forwarder, and the respondent associations will be ordered to cease and desist from aiding and abetting respondent Kagarise therein.

Certain of the practices of the Southern Pacific Company in connection with the operation of the services, particularly with reference to the handling of the various shipments delivered to it under memorandum bills of lading and "bridging" the shipments from its substations to its main freight station before the issuance of bills of lading, appear to be subject to question and possibly to criticism. They are not in issue herein, however, and therefore have not been discussed but should be made the subject of a formal investigation by the Commission.

An order of the Commission directing that an operation cease and desist is in its effect not unlike an injunction by a court. A violation of such order constitutes contempt of the Commission. The California Constitution and the Public Utilities

(13) Exhibits Nos. 1A, 2A, and 3A.

Act vest the Commission with power and authority to punish for contempt in the same manner and to the same extent as courts of record. In the event the party is adjudged guilty of contempt, a fine may be imposed in the amount of \$500, or he may be imprisoned for five days, or both. C.C.P. Section 1218; Motor Freight Terminal Co. v. Bray, 37 C.R.C. 244; re Ball & Hayes, 37 C.R.C. 407; Wermuth v. Stanner, 36 C.R.C. 458; Pioneer Express Co. v. Keller 33 C.R.C. 571.

Upon consideration of the evidence herein, we hereby find:

(1) That respondent J. Nelson Kagarise has, subsequent to August 1, 1933, commenced and now is operating as a freight forwarder as that term is defined in Section 2 (ka) of the Public Utilities Act, and a common carrier as defined in the Public Utilities Act, for compensation, undertaking the collection and shipment of property of others and, as consignor and otherwise, shipping and arranging to ship the same via the lines of common carriers at the tariff rates of such carriers between points in this State, to wit, from Los Angeles to San Francisco and intermediate points, Santa Barbara and intermediate points, Pomona and intermediate points, and Riverside and San Bernardino and intermediate points; that said service is performed for the public, or such portion thereof as can and chooses to utilize the same; and that said respondent, J. Nelson Kagarise, has not secured from the Railroad Commission and does not hold a certificate that public convenience and necessity requires such operation.

(2) That respondent, Cooperative Merchants of Riverside, procured, aided, and abetted and is now aiding and abetting the operation of said service by said respondent J. Nelson Kagarise from Los Angeles to Riverside and San Bernardino and intermediate points.

(3) That respondent, Cooperative Merchants of Pomona Valley, procured, aided, and abetted and is now aiding and abetting the operation of said service by said respondent, J. Nelson Kagarise, from Los Angeles to Pomona and intermediate points.

(4) That respondent, Channel City Merchants Association, procured, aided, and abetted and is now aiding and abetting the operation of said service by said respondent, J. Nelson Kagarise, from Los Angeles to Santa Barbara and intermediate points.

(5) That respondent, California Shippers Association, procured, aided, and abetted and is now aiding and abetting the operation of said service by said respondent, J. Nelson Kagarise, from Los Angeles to San Francisco and intermediate points.

O R D E R

Public hearing having been held in the above-entitled matters, evidence having been received, briefs filed and considered, and oral argument had before the Commission en banc, the matters being duly submitted, and the Commission now being fully advised,

IT IS HEREBY ORDERED;

1. That said respondent, J. Nelson Kagarise, shall cease and desist from engaging, directly or indirectly, or by any subterfuge or device, in any or all of said operations as a freight forwarder unless and until he shall first secure from the Railroad Commission a certificate that public convenience and necessity require the same.

2. That said respondents, Cooperative Merchants of Riverside, Cooperative Merchants of Pomona Valley, Channel City Merchants Association, and California Shippers Association, and each of them, shall cease and desist from aiding and abetting said respondent, J. Nelson Kagarise, directly or indirectly, or by any subterfuge or device, in engaging in any or all of said operations as a freight forwarder unless and until he shall first secure from the Railroad Commission a certificate that public convenience and necessity require the same.

IT IS HEREBY FURTHER ORDERED that for all other purposes these proceedings be and they are hereby discontinued.

IT IS HEREBY FURTHER ORDERED that this order shall become effective twenty (20) days from and after the date hereof.

Dated at San Francisco, California, this 21st day of May, 1940.

Ray & Alley
James P. Dwyer
Ralph W. Hefner
M. H. H. H.
Justus F. Craven
COMMISSIONERS