

ORIGINAL

Decision No. 34715

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 )	Case No. 4554
and practices of MUTUAL SHIPPERS )	
ASSOCIATION, a corporation. )	

AUGUST WEYMAN, for Mutual Shippers Association,  
Respondent.

EDWARD STERN, for Railway Express Agency, Inc.,  
Interested Party.

R. D. WEDEKIND, for Southern Pacific Company and  
Pacific Motor Trucking Company, Interested  
Parties.

E. A. MAHER, for Automotive Council of Orange  
County, Interested Party.

CRAEMER, Commissioner:

O P I N I O N

This proceeding, instituted by the Commission upon its own motion, is an inquiry concerning the operations of respondent, Mutual Shippers Association, a corporation, to determine whether it had been engaged in business as a freight forwarder, as defined by Section 2(ka), Public Utilities Act, between Los Angeles and San Francisco, without having secured a certificate of public convenience and necessity or without possessing a "grandfather" operative right, as provided by Section 50(f), authorizing it to do so.

Public hearings were had at Los Angeles on November 8

and 25, 1940 when evidence was offered, the matter submitted, and it is now ready for decision.

At the hearing respondent's operations were described by Wesley B. Staley and Mabel G. Bull, secretary and executive secretary, respectively, of the organization, both of whom were called at the instance of the Commission. No other witness was produced. Mutual Shippers Association, it appears, was organized as a nonprofit corporation, with headquarters in Los Angeles. Its membership purportedly was limited to a definite number. It picks up the freight of its members, all of whom are located in Los Angeles, and tenders this as a single, consolidated shipment to the line-haul carrier for transportation to San Francisco and adjacent points. Through respondent's ability to take advantage of the lower rates per 100 pounds applying to shipments falling within the higher weight brackets, it can effect substantial savings in the transportation charges incurred by its members. Respondent contends that as a nonprofit corporation serving its members exclusively, it may operate in this fashion without thereby becoming a freight forwarder. This is the fundamental question presented for determination. No claim is made that it possesses any certificate or "grandfather" operative right. And the record is convincing that it does not possess any such right.

Respondent was organized under Section 593 et seq, Civil Code, as a nonprofit corporation, with headquarters in Los Angeles. The articles of incorporation filed during December, 1939, define its purposes and powers, and specify its general corporate structure. It may engage, among other things, in promoting "\*\*\*\*\* the economical transportation and disposition of the goods and products

(1) of its members\*\*\*\*\*" Its business shall be conducted without  
(2) profit. Membership, of which there shall be but one class, is open to any citizen. Control is vested in a board of governors comprising three members who shall hold office for a term of three years. Vacancies shall be filled by a majority of the remaining members. The authorized number of members, membership dues, voting rights and other rights and privileges, and the selection of successors to the original board, are matters to be regulated by the bylaws.

The details of the corporate organization appear in the bylaws. Members of the board of governors shall be elected every third year. The governors shall appoint from among their number a president and a secretary. The board may delegate authority in the manner and to the extent deemed necessary or desirable. Meetings of the members shall be called and held as directed by the

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(1) By Section 2, Articles of Incorporation, which specify the purposes for which the corporation was organized, respondent is authorized

"To promote and foster trade and commerce within the State of California and with other States; to promote and foster the economical transportation and distribution of the goods and products of its members, and in all respects to seek to reduce the cost of marketing and distribute the articles of manufacture and commerce of its members and thereby promote the general welfare; to represent its members in all matters pertaining to the economical and efficient transportation and distribution of their goods and to that end do all things which may be lawful, necessary and desirable\*\*\*\*\*"

(2) Section 2, supra, following the foregoing specification of purposes directs that this shall be done

"\*\*\*all without profit; that said corporation is a mutual non-profit corporation which does not contemplate pecuniary gain or profit to the members thereof and is organized pursuant to the provisions of Division 1, Part 4, Title 12, Article 1, [Sections 593-605e/ of the Civil Code of California."

governors, and the board shall meet subject to the call of the president or any two members. Applications for membership must be approved by the membership committee, a function to be exercised by the board ex officio. Affirmative action by a majority is sufficient. Following enrollment in the membership book, a member is entitled to exercise the rights and privileges of the association. The total authorized number of members is limited to 100. Exemption from personal liability for the debts and obligations of the association is accorded members of both the association and the board. Neither the articles nor the bylaws authorize an assessment to be levied. Dues are \$1.00 per year, payable in advance. It is provided that the bylaws may be amended by the members or by unanimous vote of the board.

Corporate meetings have not been held regularly. Aside from the organization meeting, attended only by members of the board, the association's attorney and the executive secretary, no meeting of the members has ever been held. The board of governors has met occasionally, but appears to have functioned chiefly in its capacity as a membership committee.

Before the association was organized, preliminary conferences were had between those interested in the promotion of the plan. The proposal was also discussed informally with individual shippers.

During the first year of operations, the membership grew steadily. Commencing with seven members in December, 1939, the organization reached a total of 39 in October, 1940. These

have joined at regular intervals. (3) All but the original group were recommended by one or more of the existing members. A prospective member would be interviewed by one of the membership committee-men to determine his desirability from the standpoint of the nature of the commodity to be transported or the accessibility of his place of business. Each new member executed an instrument authorizing the association to act as his agent for the shipment of goods entrusted to it, and obligating him to pay promptly all freight charges incurred by the association for his account. Respondent concedes it would accept as a member any responsible shipper whose freight would be unobjectionable in character. Mr. Staley stated, however, that when the complement of 100 members had been filled no more would be accepted.

Respondent, it appears, has served no one other than its members. In every instance, requests by non-members for the transportation of their products have been rejected. Collect shipments are not accepted.

Subject to the direction of the board of governors, Mrs. Mabel G. Bull, the executive secretary, has acted as general

(3) The accretions to the membership appear in the following tabulation, which indicates the number who joined during the months shown:

Original members	7
January, 1940	3
February "	3
March "	4
April "	3
May "	11
June "	11
July "	5
August "	8
September "	4
Total	<u>39</u>

manager. By a written agreement executed by the association and Mrs. Bull, December 5, 1939, she was employed for the term of one year, with an option on her part to extend the employment for ten successive years. The contract clothed her with "full and complete charge and direction of all of the business and affairs" of the association under the general supervision of the board. At her discretion, but at her own cost, she could "\*\*\*\*\*hire and discharge from time to time such assistants and other employees as she might deem necessary for the proper and efficient performance of her duties." She was required to keep accurate accounts, and was charged with the duty of collecting all membership dues and all expenses incurred by the association in the performance of any service to its members. As compensation for her services Mrs. Bull would receive \$250.00 per month "and such additional sums [as would] cover expenses incurred and compensate her for the value of the services rendered."<sup>(4)</sup>

Pursuant to this agreement, Mrs. Bull has conducted the affairs of the association from its inception. She has run the office, kept the books, handled all monies, maintained a tariff file, and leased the trucks used to perform the pickup service. From her personal funds she has advanced the freight charges assessed by the line-haul carrier and has paid the rental of the pickup trucks. The charges paid to the association by its members have been insufficient to reimburse Mrs. Bull for

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(4) Mrs. Bull testified, however, that she expected to receive no compensation in excess of \$250.00 per month

(5)  
these advances and cover her compensation.

The association performs for its members a pickup service for which no direct charge is made. This is accomplished through the medium of two trucks leased by the association for that purpose. (6) Under a separate arrangement, the drivers are furnished by the lessor at its expense. Respondent, it was shown, holds no permits under the Highway Carriers' Act or the City Carriers' Act.

The primary objective of the association is to consolidate its members' shipments. All freight received from members during the day is consolidated by the association and tendered to the line-haul carrier as a single shipment. Under this arrangement the association appears as the consignor, and those to whom the freight is destined are indicated collectively as consignees, the shipment moving under the tariff split-delivery rules. The rate applicable to the combined total weight is assessed.

The shipping documents are designed to carry out this purpose. They comprise individual shipping orders and bills of lading,

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- (5) During a period of 10 months, January to October, 1940, Mrs. Bull received a total of \$3,952.88. If her salary of \$2,500.00 were deducted, the balance of \$1,452.88 would be insufficient to cover the line-haul freight charges she had advanced. Since these transportation charges already had been incurred, she was obliged to forego a substantial part of her salary. Mrs. Bull believed the business would soon increase to a point where she could realize her compensation.
- (6) By two written agreements, dated May 18, and July 10, 1940, respectively, the association leased from Dublin Truck Co. two trucks to be used within the city of Los Angeles, at a stipulated rental. Subject to the right of either party to cancel upon thirty (30) days' notice to the other, each lease would endure for the term of one year.

a master bill of lading, an invoice or manifest, and individual freight bills.

By way of illustration, we shall trace the steps followed in handling the traffic originating on a single day, which may be regarded as the unit of shipment adopted by respondent. For convenience, we shall regard these activities as passing through three stages, viz., the collection of the traffic by the association from its members, the tender of this traffic as a single shipment by the association to the line-haul carrier, and the billing rendered by the line-haul carrier to the association. They will be considered in that order.

On a given date the association receives from one or more of its members shipping orders and bills of lading covering their respective shipments, the freight intended for each customer being covered by a separate bill. Here, the association appears as the carrier, the member as the consignor, and the purchaser as the consignee. The date, the description of the commodity and the total weight appear, but the rate and the freight charges are not shown. The association retains the shipping order but delivers the bill of lading to the member, after having receipted thereon for the freight.

The freight so received is tendered as a single shipment to the line-haul carrier at Los Angeles. This traffic, it appears, is handled exclusively by California Motor Express, Ltd. an express corporation, (referred to, for brevity, as California Motor ), operating over an underlying highway common carrier between Los Angeles and San Francisco. The various items are entered on a master bill of lading naming the association as consignor and specifying the consignee as "various

c/o Calif. Mtr. Exp. Co., S.F." This bill bears an identifying number. Upon it, California Motor receipts for the freight. The commodity and the weight are specified, but not the rate or the freight charges. Accompanying the master bill is a manifest, termed a "distribution sheet," which indicates the names of the members whose freight is comprehended within the combined shipment and, in connection with the name of each member, there appears the names of the consignees together with a specific description of the traffic each should receive. Here, the commodities and the weight are shown but not the rate or the freight charges. The association prepays the transportation charges assessed by California Motor upon the entire shipment.

On the day following the tender of a specific shipment, the association receives from California Motor a copy of the master bill of lading upon which the rate and the freight charges appear, in addition to the commodity and the weight. Accompanying this are two copies each of freight bills covering separately every individual shipment, each of which refers to the distinguishing number shown on the master bill, specifies the association as consignor (the name of the member being inserted immediately beneath), and designates the receiver of that portion of the shipment as the consignee. A notation also appears that it is part of a split-delivery shipment.

The rates and charges shown in the master bill of lading differ from those indicated in the individual freight bills which accompany it. On the master bill appear the rates applicable to shipments of a weight equal to that of the combined tonnage of the freight tendered the line-haul carrier on

that day, this rate being assessed against each item. Since the total weight of the consolidated shipments would fluctuate, they would alternate between different weight brackets, and hence the rate per 100 pounds would vary from day to day. The individual freight bills, however, specify the rates that would have applied had the freight offered the association by each member been dealt with as a distinct shipment, and the transportation charges have been computed accordingly. The rates per 100 pounds applying to shipments falling within the higher weight brackets, as shown by the line-haul carrier's published tariff, are considerably lower than those applying to shipments embraced within the lower weight brackets. The charges specified in the master bill are those actually paid the line-haul carrier by the association.

Thus the association, by offering the combined tonnage of its members as a single shipment of which it is the consignor, has secured for them the benefit of lower rates per 100 pounds than those that would have accrued had each member individually offered his goods to the line-haul carrier for transportation. As a result their freight charges have been substantially reduced. Without the intervention of the association, such a saving could not have been effected. The tariff split-delivery rules have facilitated the accomplishment of this plan, since they permit the distribution of a single shipment among several consignees.

Since its organization, the association has handled its members' traffic in accordance with this plan. Shipments have

moved daily, excepting Sundays and holidays. The shipping documents covering shipments tendered by the association to California Motor, and transported by that carrier during a six day period in October, 1940, were received in evidence. These, it appears, may be regarded as typical; they illustrate the method employed.

The savings thus accomplished are passed on by the association to its members, not in the form of cash payments or dividends, but rather through reductions in the transportation charges applicable to their individual shipments. Their total outlay for this purpose is less than it otherwise would have been. For its services the association makes a charge against its members amounting to 20 percent of the saving effected on consolidated shipments weighing 20,000 pounds or more, and 15 percent of the saving realized upon consolidated shipments weighing from 4,000 to 20,000 pounds. In addition it receives the annual membership dues of \$1.00 per member. From the proceeds, the association defrays its expenses, comprising the salary of the executive secretary and the sums she has advanced. In essence, the members realize certain savings in their transportation charges, less the cost incurred for the operation of the mechanism set up to accomplish this purpose.

In the light of the facts shown, must respondent be considered a freight forwarder?

By Section 2 (ka), Public Utilities Act, one is deemed a freight forwarder,

"\*\*\*\*\* 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 \*\*\*\*\*"

Clearly, respondent collects the property of others for shipment, and ships the same as consignor over the line of a common carrier at its tariff rates. <sup>(7)</sup> This it does for compensation. <sup>(8)</sup> But does it meet the test, imported into this section by implication, <sup>(9)</sup> that the service must be "performed for "\*\*\*\*the public or any portion thereof"?

Respondent has undertaken to restrict its service to its members, the number of whom it has endeavored to definitely limit. Its bylaws provide that the total authorized number of members shall be limited to 100, and the present membership of 39 is well within that maximum.

In the consideration of this issue we are not bound by mere form. We may look to respondent's conduct, and to all the surrounding circumstances to determine whether this limitation is real and substantial, or whether it is but a mere sham -- a device set up to circumvent the operation of the carrier's tariffs.

The record is convincing that the purported limitation is illusory. Those who dominate respondents' policy are willing to accept as a member any responsible shipper, whose commodities are suitable and whose plant is not so situated as to render the operation uneconomical, provided the total does not exceed the established maximum. But this maximum may be changed.

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(7) Re J. Nelson Kagarise, 42 C.R.C. 675, 684

(8) McMurray Transportation Service, Ltd. v Buchardi, 40 C.R.C. 403, 407, 409

(9) Sections 2(1) and 2 (-4), Public Utilities Act; Re J. Nelson Kagarise, supra, at pp. 685, 686

at any time by the mere vote of the members of the board of governors, who are clothed with power to amend the bylaws, and it is in the bylaws alone that this restriction appears. (10)

Thus, when membership may press against the established limitation, the situation may be relieved by a mere vote of the board. Moreover, respondent's members have been carefully guarded against personal liability for the debts of the association should the venture prove a failure. No assessment may be levied. And the association has even abdicated its functions, these having been subcontracted to its executive secretary, who, under her agreement with respondent, has undertaken to perform its essential duties and obligations and to advance the costs of such operations.

It is clear from this record that respondent's operations are those of a freight forwarder. Accordingly, it will be required to discontinue them.

Upon consideration of the evidence, it is hereby found as a fact:

That respondent, Mutual Shippers Association, a corporation, has, subsequent to August 1, 1933, commenced and now is operating as a freight forwarder, as defined by Section 2 (ka), Public Utilities Act, and as a common carrier as defined in the Public Utilities Act, for compensation, undertaking the collection and shipment of property of others and, as consignor, shipping and arranging to ship the same via

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(10) This limitation is found only in the bylaws. It was not embedded in the articles of incorporation, which are more difficult to amend. And the board of governors, by unanimous vote, may amend the bylaws at any time.

the line of a common carrier, to wit: California Motor Express, Ltd., at the tariff rates of said carrier between points in this state, to wit, from Los Angeles to San Francisco; that said service was and is performed for the public, or such portion thereof as can and chooses to utilize the same; and that said respondent, has not secured from the Railroad Commission and does not hold a certificate that public convenience and necessity require such operation.

O R D E R

A public hearing having been had in the above entitled proceeding, evidence having been received, the matter having been duly submitted, and the Commission now being fully advised:

IT IS ORDERED, that respondent, Mutual Shippers Association, a corporation, 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 it shall first secure from the Railroad Commission a certificate that public convenience and necessity require the same.

The Secretary of the Railroad Commission is directed to cause personal service of a certified copy of this decision to be made upon said respondent, Mutual Shippers Association.

The effective date of this order shall be twenty (20) days after the date of service thereof upon respondent.

The foregoing opinion and order are hereby approved  
and ordered filed as the opinion and order of the Railroad  
Commission of the State of California

Dated at Los Angeles, California, this 29<sup>th</sup> day  
of October, 1941

[Signature]  
Ray L. Rice  
Justus F. Calver  
Francis D. Hayward  
Richard L. Baker