ORIGINAL

Decision No. 40330

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Investigation into the operations of M. L. MORRIS, doing business as M. & W. TRUCK LINE.	Case No. 4789

John M. Gregory for Field Division, Transportation Department; Reginald L. Vaughan for M. L. Morris; Scott Elder and McCutchen, Thomas, Matthew, Griffiths & Greene for The River Lines, intervener on behalf of Field Division; Frank Loughran and Fred N. Bigelow for Pacific Southwest Railroad Ass'n., intervener on behalf of Field Division; Harold Frasher for Valley Motor Lines, Inc., and Valley Express Co.

OPINION

This investigation was instituted to determine whether M. L. Morris is conducting an unauthorized highway common carrier service between certain San Francisco Bay points and Sacramento, Stockton, and Lodi; and between Sacramento, Stockton and Lodi.(1)

In 1932 respondent and a partner commenced trucking operations between San Francisco Bay points and Sacramento, Stockton and Lodi, as well as a number of other points. Starting with two pieces of equipment, the partners first hauled furniture and automobile parts and supplies. In 1935, when the Highway Carriers' Act became effec-

(1) "* * * between San Francisco, on the one hand, and Sacramento, Stockton, and Lodi, on the other hand; between Oakland, Emeryville, Berkeley, and Alameda, on the one hand, and Sacramento, Stockton, and Lodi, on the other hand; between Sacramento, on the one hand, and Stockton and Lodi, on the other hand; and between Stockton, on the one hand, and Lodi, on the other hand, as a highway common carrier as defined in Section 2-3/4 of the Public Utilities Act, without possessing a prior right to do so and without first having obtained from the Railroad Commission a certificate of public convenience and necessity authorizing such operation, in violation of Section 50-3/4 of said Act and in violation of the provisions of respondent's permits to operate as a highway contract carrier and as a radial highway common carrier; * * *."

tive, the partners obtained highway contract carrier and radial highway common carrier permits. Additional equipment was added as business increased. Respondent obtained new permits in 1941, after dissolution of the partnership. In 1941, he purchased an interstate operative right as a common carrier by motor vehicle, under which he has transported property, including traffic handled for freight forwarders, between San Francisco, Oakland, Sacramento, Stockton, and Lodi, and other points. At the request of shippers served in connection with the interstate right, respondent undertook the transportation of intrastate shipments for such patrons.

Before Pearl Harbor, respondent had four or five written agreements with shippers, but it was not his practice to enter into written agreements with those for whom he performed transportation service.

Most furniture companies for whom respondent hauled closed down during the war, and Western Auto Supply Company, a large shipper, moved its headquarters to Los Angeles. Respondent acquired many new shippers during the war period.

Office and terminal facilities are maintained at Oakland, Stockton, and Sacramento, respondent's principal office and headquarters being in Oakland. Respondent's operating fleet has more than doubled since acquisition of the interstate right in 1941, and he now has fifteen units of equipment for the furnishing of linehaul and pickup and delivery service.

Service is furnished daily (except Sundays and holidays) between San Francisco and East Bay points and the Sacramento-Stockton area. The principal routes used are U.S. Highway No. 50 and the Borden Highway. Service appears to have been performed expeditiously and to the satisfaction of shippers.

The Field Division conducted a survey of respondent's operations covering the period between November of 1944 and August of 1945. Exhibit 21 is a tabulation specifying shipments transported by respon-

dent between the points involved during seven periods of six consecutive days each during the months indicated, and was designed to reflect a cross-section of the operations. Respondent admitted having carried the shipments there described. During those test periods respondent transported a total of 1,785 shipments, having an aggregate weight of 984 tons, for 474 shippers. Eliminating duplications, 373 individual shippers were served. Details appear below.(2) The Field

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(2) The following table is a recapitulation of the shipments transported during the 42 days included within the seven test periods.

Between	and	No. of days served	No. of shippers served* (Total)	No. of shippers** served (Less duplications)	No. of shipments transported	Total weight of shipments (Pounds)
San Francisco	Stockton	41	72	72	277	393,627
East Bay Points***	Stockton	40	79	58	366	587,993
San Francisco	Sacramento	39	64	57	288	263,073
East Bay Points***	Sacramento	40	92	75	313	285,141
Sacramento	Stockton	41	84	58	248	210,069
San Francisco	Lodi	27	19	16	51	38,270
East Bay Points***	Lodi	32	21	15	54	48,897
Stockton	Lodi	29	26	15	122	107,188
Sacramento	Lodi	32	17	7	66	33,720
	TOTAL		474	373	1,785	1,967,978
						983.9 tons

* Number of shippers served, as shown by Field Division survey.

** Number of shippers served, allowing for duplications in Field Division survey.

*** East Bay Points include Oakland, Emeryville, Berkeley and Alameda.

Division also called twenty-one shipper witnesses, representing twenty firms engaged in business in the territory involved.(3) The testimony of an additional shipper was incorporated in the record by stipulation.

A wide variety of commodities was transported during the survey period.(4) With reference to that period of time, four of the shipper witnesses professed no knowledge of any agreement with respondent for the transportation of their shipments. Two made no reference to any agreement. Eleven shipper witnesses testified that a transportation agreement or understanding had been reached, and four stated that no such understanding existed. Where any transportation agreements or understandings were shown to have existed, they were vague and indefinite regarding the term of existence, points to be served, nature of shipments, rates, and obligations to ship or transport any definite quantity of freight.

Respondent testified that after acquisition of the interstate right in 1941 he did not solicit business, but hauled shipments upon request, and was advised by some prospective shippers that his service had been recommended by certain highway common carriers operating in the territory. Such testimony was corroborated by that of the manager of respondent's Stockton office, and the testimony of many

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(3) Of the twenty firms represented by the shipper witnesses produced by the Field Division, five were engaged in business at San Francisco; three in Oakland; one in Emeryville; eight in Stockton and three in Lodi. Two San Francisco firms also maintained branches or offices at Stockton and Sacramento.

(4) Among the commodities transported were sheet iron, cigarettes, alcoholic liquors, plumbers' goods, construction material, hardware, piece goods, printed matter, new furniture, steel, auto parts, tractor parts, empty beer containers, pipe, canvas, cleaning compound, facial tissues, scaffolding, wire rope, elevator parts, plywood, glue, chemicals, furnace parts, rubber, crockery, glassware, oil, mops, dry paint, copper tubing, radio parts, compressed gas, wine, tobacco, asbestos, shortening, lamp shades, soap, bamboo rakes, paper cartons, foundry material, toys, lumber, rubber hose, clean linen, water heaters, paint, pottery, mattresses, electric generators and parts, fresh fruit, belting, oil drums, tires, and coal.

of the shipper witnesses. Of the shipper witnesses who mentioned the subject, nine stated that they had been directed to respondent by another shipper, by a warehouseman, or by a freight forwarder; one had been referred to respondent by a highway common carrier serving the territory; and one patron had recommended to his consignors that they route their shipments over respondent's line. Two shippers stated that respondent had solicited their business. The testimony of one of these witnesses is somewhat uncertain.

Before September and October of 1945, it was not respondent's practice to enter into written agreements with shippers. However, because of an investigation of respondent's records by the Commission's Field Division, respondent became somewhat apprehensive concerning the legality of his operations, and consulted his attorney. He was advised to cease hauling for those with whom he had no contracts, and to enter into written agreements with customers with whom he did business. Respondent then made a list of those customers for whom he desired to continue hauling, explained to them that he "would not be able to haul for everyone", and would prepare written contracts "with a certain group." After written agreements had been prepared they were taken to the selected customers for signature. Most of these agreements were signed late in October of 1945. In preparing the list mentioned, respondent selected his "heaviest shippers."

Respondent now has written agreements with fifty-seven shippers, of which twelve are located in Stockton, nine in Lodi, fifteen in Sacramento, eight in San Francisco, twelve in Oakland, and one in Berkeley. In all essential respects these agreements are identical. They vary only in the names of the parties, commodity descriptions, tonnage approximations, and points involved. The agreements contemplate transportation of a wide variety of commodities.(5)

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(5) Among the commodities mentioned in the agreements are the follow-

Exhibit 1 reads as follows:

"AGREEMENT

THIS AGREEMENT, made and entered into on this 30th day of October, 1945, by and between M. L. MORRIS dba M & W TRUCK LINE, of Oakland, California, hereinafter called Carrier, and KYLE & CO., INC. of Stockton, California, hereinafter called Shipper,

WITNESSETH:

For and in consideration of the mutual promises and covenants hereinafter contained, it is hereby agreed between the parties hereto as follows:

I.

Shipper agrees that Carrier, a Highway Contract Carrier, shall transport, and Carrier agrees to transport, all less than truckload shipments of steel, welding equipment and grinders approximating five tons per month, between Stockton and Lodi, Sacramento, Oakland, Alameda, Berkeley, Emeryville and San Francisco at the rates now, or which may hereafter be, prescribed by the Railroad Commission of the State of California as minimum for Highway Contract Carriers as contained in any Highway Carrier's Tariff issued, or which may be hereafter issued, by said Commission.

It is contemplated under this agreement that all of the above described property which Shipper may have occasion to have transported in less than truckload quantities between said points shall be transported by Carrier subject to the condition that if Carrier is unable on a particular day to accommodate a shipment tendered to him by Shipper the latter may use other means of transportation for that shipment.

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(5) Cont'd.

ing:

Steel, welding equipment and grinders; tire molding machinery and equipment, including parts thereof and supplies therefor; steel, pipe, machinery, drills, grinders and rubber belting; steel and furnaces; automotive parts and machinery; plumbing supplies and appliances, pipe, lava, valves, water heaters, stoves, refrigerators and floor furnaces; steel, castings and machinery; liquor, cigarettes, tobacco and candy; bolts, tool steel, dies and taps; automobile and truck parts, equipment and supplies; springs, batteries, tires, tubes, and brake lining; rubber belting, hose, and other articles manufactured from rubber; plywood and glue; butchers', dairy and refrigeration supplies; furniture, rugs, glassware, and miscellaneous store supplies and materials; generators, motors and pumps; chemicals, soaps, insecticides and fertilizers; machined gears and forgings; agricultural implements and parts; tire recapping materials; lubricating oils, refrigerating equipment, foundry chemicals and supplies; cleaning and scouring compounds; paint, plumbing supplies and appliances; general merchandise; sheet metal and plumbing supplies; fresh fruits and vegetables; boots, shoes and other articles of footwear; oil and roofing paper; and chemicals, chemical compounds and miscellaneous supplies.

II.

Carrier agrees that such property shall be transported by him from origin to destination within a reasonable time.

III.

This agreement is to continue in force and effect for a period of one year from the date hereof but may be cancelled by either party upon giving thirty (30) days written notice to the other.

IV.

Carrier agrees, at his sole cost and expense, to protect the property of Shipper by adequate insurance coverage against theft, fire and disaster of all kinds. At Shipper's request, Carrier agrees that he will furnish copies of all insurance policies issued in this connection.

IN WITNESS WHEREOF the parties hereto have executed this agreement on the day and year first above written."

Of the twenty firms represented by the shipper witnesses who testified, it appeared that all but four had entered into written agreements with respondent, at the latter's request. There has been no change in the nature of the transportation service rendered to shippers who have signed such agreements. Respondent testified that since October of 1945 he has confined his service to those with whom he has entered into written agreements, and has instructed his employees accordingly. He also testified that since October of 1945 he has rejected many shipments offered by firms which have not entered into a written agreement. Respondent's Stockton manager testified that freight offered by approximately seventy-three firms had been refused between November of 1945 and February of 1946, both inclusive. Only two of the shipper witnesses, who represented firms located at Stockton, testified on this subject. Neither had entered into a written agreement with respondent. One testified that shipments had been rejected. The other testified that, pursuant to an oral arrangement with respondent and after October of 1945, respondent had accepted for transportation shipments upon which the wit-

ness' firm had paid the freight charges. This was contradicted by respondent's Stockton manager, who testified that shipments offered by that concern had been rejected.

The evidence also dealt with the payment of freight charges upon the traffic transported. Thirteen firms receiving shipments over respondent's line, none of which had entered into written agreements with respondent, were specified by the latter's Stockton manager, who testified that two were no longer served. Five received prepaid shipments moving from consignors who had entered into written agreements with respondent, and one had offered shipments under the arrangement which he formerly had with respondent.

Shipper witnesses also referred to the payment of charges. Four shippers, who had entered into written agreements with respondent, testified that they had made shipments which were billed collect.(6) One such shipper had received prepaid shipments(7); and two had received shipments moving either collect or prepaid.(8) Of the four shippers who had not executed written agreements with respondent, one, located at Stockton, ships collect to unspecified consignees; one, at

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(6) One Stockton firm makes both prepaid and collect shipments over respondent's line. In neither case was the consignee identified. A San Francisco firm ships both collect and prepaid. Collect shipments move to two consignees at Lodi who do not have written agreements with respondent, and to five specified like consignees at Stockton. An Oakland firm makes both collect and prepaid shipments to Stockton, Sacramento and Lodi. The record is silent regarding the number or identity of the consignees of collect shipments. Still another Oakland firm ships both collect and prepaid to a consignee who has a written agreement, to an unidentified shipyard at Stockton, and to unidentified municipalities.

(7) A Stockton firm receives prepaid shipments from unidentified consignors situated in the Bay area. The record does not show whether the latter had entered into transportation agreements with respondent.

(8) One Stockton firm receives both collect and prepaid shipments from various consignors located at San Francisco, Oakland, Berkeley and Emeryville. The record is silent as to their identity. Assertedly, he controls the routing of these shipments. Another Stockton firm receives prepaid shipments from two consignors at Oakland who have entered into written agreements with respondent, from one specified consignor at San Francisco who has not entered into a written agreement with respondent, and from "several others" who were not named.

Stockton, ships prepaid to unidentified consignees; one, at San Francisco, ships prepaid to a contract consignee[9] at Stockton; one, at Stockton, receives collect shipments from a specified non-contract consignor at Berkeley; one, at Stockton, receives collect shipments from a specified non-contract consignor at Oakland, and also receives shipments, the nature of which was not shown, from a specified non-contract consignor at San Francisco; and one, at Stockton, receives prepaid shipments from a contract-consignor at Oakland.

Witnesses representing twelve shippers testified that the charges accruing upon tonnage transported by respondent had been paid in accordance with the terms of the agreements in which they respectively had joined. Seven of them stated that shipments which they had offered for transportation moved prepaid; another asserted that freight was consigned only to branch offices and moved either prepaid or collect; and three testified that shipments moved prepaid but in some instances the charges had been rebilled to the consignees. It was not shown, however, that respondent was aware of these arrangements. Shipments received by four contract-consignees, it appears, had moved collect.

The issue to be determined is whether respondent's operations are those of a "highway common carrier" within the meaning of the Public Utilities Act, or of a "highway contract carrier" within the meaning of the Highway Carriers' Act. (State. 1935, ch. 223, as amended.)

A "highway common carrier", subject to regulation under the Public Utilities Act, is defined as one who operates vehicles "used in the business of transportation of property as a common carrier for

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(9) The terms "contract-consignor" and "contract-consignee" indicate that the consignor or the consignee, as the case may be, had entered into a written agreement with respondent. The terms "non-contract consignor" and "non-contract consignee" indicate, on the other hand, that neither had entered into such an agreement.

compensation over any public highway in this State between fixed termini or over a regular route, * * *." (P.U.A., sec. 2-3/4(a).) The phrase "between fixed termini or over a regular route" means "the termini or route between or over which any highway common carrier usually or ordinarily operates . . ., even though there may be departures from said termini or route, whether such departures be periodic or irregular." (Sec. 2-3/4(b).) A common carrier is one who serves "the public generally, or any limited portion of the public."(10)

The Highway Carriers' Act, under which highway contract carriers are subjected to a more limited degree of regulation, does not indicate specifically the type of highway carrier operation intended by the Legislature to be embraced within the term "highway contract carrier." That term is one of a number of descriptive statutory terms relating to different types of highway carriers. It is defined merely as a carrier which is not covered by the definitions of any other of those descriptive phrases.

The Highway Carriers' Act first defines a "highway carrier" as one which transports property "for compensation or hire as a business over any public highway", with certain exceptions which are not pertinent here. (Sec. 1(f).) Next, a "highway common carrier" is defined as a "highway carrier operating as a common carrier subject to regulation as such by the Railroad Commission under the Public

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(10) The term "common carrier", in addition to the definition given elsewhere in the Public Utilities Act, includes every "highway common carrier." (Sec. 2-3/4(c).) The term "public utility" includes "every common carrier * * * where the service is performed for or the commodity delivered to the public or any portion thereof." (Sec. 2(dd).) The phrase "public or any portion thereof" means "the public generally, or any limited portion of the public * * * for which the service is performed * * *, and whenever any common carrier * * * performs a service or delivers a commodity to the public or any portion thereof for which any compensation or payment whatsoever is received, such common carrier * * * is hereby declared to be a public utility subject to the jurisdiction, control and regulation of the commission and the provisions of this act." (Sec. 2(ff).)

Utilities Act * * *." (Sec. 1(g).) The term "radial highway common carrier" is then defined as "every highway carrier operating as a common carrier not heretofore subject to regulation as such by the Railroad Commission under the Public Utilities Act * * *."[11] (Sec. 1(h).) Finally, Section 1(i) of the 1935 statute reads as follows:

> "The term 'highway contract carrier' when used in this act means every highway carrier other than a highway common carrier as defined in subsection (g) and every radial highway common carrier as defined in subsection (h)."

In determining status, consideration of legal principles distinguishing common carriage and private carriage appears to be an appropriate and relevant guide. As noted in Re Hirons (1928), 32 C.R.C. 48, carriers have always been classified in law as public and private, their duties and liabilities being distinct. And no hard and fast rule has been devised for determining whether one transporting persons or property falls within one class or the other. The Highway Carriers' Act of 1935 did not create a third general class of carrier, but recognized that the theretofore unregulated private carrier for hire should be subjected to some degree of regulation. Before 1935, numerous respondents or defendants in status proceedings urged the existence of verbal or written contracts as evidence of private carrier status, and gradually the term "contract carrier" came into usage as a synonym for private carrier.

Enactment of the Highway Carriers' Act was preceded by a general Commission investigation of freight transportation conditions in

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(11) In Re Ben Moore (1925), 27 C.R.C. 388, a divided Commission dismissed an application for a common carrier certificate for lack of jurisdiction. The majority opinion held that a proposed on-call operation between any points in the general territory within a radius of 75 miles from Sanger would not be operation "between fixed termini or over a regular route" within the meaning of the then effective Auto Stage and Truck Transportation Act. Such an operator became known as a "radial operator" and is the "radial highway common carrier" mentioned in the Highway Carriers' Act of 1935.

California. (Re Transportation, 38 C.R C. 83.) In explanation of the terms there used, the opinion stated as follows:

> "For the sake of clarity and accuracy it should be stated here that the term 'Uncertificated Trucks' includes the private carrier for hire, also called the 'Contract Carrier,' who has not dedicated his service to the public, and the so-called 'Wildcat Truck' operator who poses as a private or contract carrier for hire but is really operating as a common carrier, and also carriers not for hire or the shipper-owned truck." (Emphasis added; 38 C.R.C. at 85.)

In one of the first status proceedings after adoption of the Highway Carriers' Act, the Commission stated that "'highway carriers' are of two general classes; first 'common carrier', secondly 'contract carriers' (private carriers). Likewise, there are two kinds of 'common carriers', first 'highway common carriers', and secondly 'radial highway common carriers'." (Emphasis added; Rampone v. Leonardini (1936), 39 C.R.C. 562, 565.)[12]

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(12) The Rampone decision also attempted to distinguish the terms "highway common carrier" and "highway contract carrier", as follows:

"A 'highway common carrier' is distinguished as one who dedicates and holds out his transportation services generally to the public, or a substantial portion thereof, for compensation, for the transportation of some certain variety or varieties of freight, at rates filed with the Commission, and who usually or ordinarily operates between fixed termini or over a regular route." (39 C.R.C. at 566.)

"A 'highway contract carrier' is distinguished as one who does not dedicate and hold out his transportation services generally to the public, or a substantial portion thereof, but who is employed by a selected and limited group of shippers, as a private carrier for an agreed compensation, to the exclusion of all others, by a mutually binding contract, entered into and performed in good faith, for an agreed term, and which contract mutually binds the carrier to transport and the shipper to supply a specific category of freight, and which contract is definite as to the following:

1. The time involved in the performance of the contract;
2. The route and/or termini and/or area involved in the performance of the contract;
3. The kind of commodity or commodities involved in the contract;
4. The tonnage to be hauled.
5. The compensation to be paid and received."

(39 C.R.C. at 567-8; emphasis added.)

The Rampone decision dismissed a complaint alleging common carrier status. It may be noted that defendant there hauled for ten shippers under one verbal and nine written agreements providing that he "should transport all of a certain crop of perishable products that were to be moved on behalf of each of said shippers from a specifically designated area, to specific termini, for a specific period of time." (39 C.R.C. 565.)

Re Doss (1938), 41 C.R.C. 359, involved the status of an unsuccessful applicant for a certificate, who thereupon prepared and presented to his shippers for signature a form of written contract, advising them that he had to have contracts to operate lawfully. There were nineteen contracts in substantially the same form. In soliciting contracts Doss intended to limit himself to a few, and declined to enter into contracts with some shippers "because he thought he had too many contracts." Significantly, Doss hauled "for the big firms", while the certificated highway common carrier between the points involved hauled for individuals. Doss also served shippers with whom he had no contracts, believing that he could legally handle these shipments under his permit as a radial highway common carrier, although his operations were almost wholly between certain specific points.(13)

In the Doss case, the Commission held that the operation was that of a highway common carrier from its inception, and was continued in substantially the same manner by Doss, who had entered into written

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(13) Under section 4 of the Highway Carriers' Act, a carrier may not operate as a "radial highway common carrier" transporting the same commodities as he transports as a "highway contract carrier" between the same points. (Re Shippers, Inc., 41 C.R.C. 543, 551) It is not unusual for a truck operator to engage in more than one of three types of trucking ("highway common carrier", "radial highway common carrier", and "highway contract carrier"), nor is it unlawful "so long as such operator does not transport the same commodities between the same points in more than one of said three types of truck operations." (Rampone v. Leonardini, 39 C.R.C. 562, 569. See also Re Willis, 42 C.R.C. 408, 423.)

contracts with the regular shippers and receivers when denied a certificate, in order to give the operation the color of a private carrier service. The stereotyped form of contract used by Doss negatived the existence of any attempt on his part to meet any peculiar or special need of his patrons, if any such needs existed. The decision stated in part as follows:

> "Respondent appears to believe, however, that if he holds written contracts with all his patrons he may thereby avoid common carrier status and remain within the category of a contract carrier. This is not necessarily true. The essential test of a common carrier is a public holding-out or offer of service. Such a holding-out may exist even when written contracts are made with all shippers or receivers served. It is normally encountered where, as here, the nature of the traffic and the needs of the shippers involve none of the special, unique or individualized service which is the natural field of the contract or private carrier, and the same or similar service could as well be rendered by an avowed common carrier. Any limitation of service or withholding of public holding-out under such conditions is usually artificial and unnatural to that type of traffic and operation. Moreover, from a practical standpoint, it is difficult to maintain if the operation is to succeed financially. But in the absence of such limitation of service or withholding of public dedication, the essential common carrier nature of the operation is not altered or successfully disguised by the use of any written contracts, whatever may be their form." (41 C.R.C. at 363.)

Perhaps general usage, followed by legislative acceptance of the term "contract", in describing a private carrier, has contributed to the prevailing uncertainty concerning status. Such usage fosters an assumption, apparently held by many carriers and shippers, that the existence or nonexistence of "contracts" may be the decisive factor, regardless of the number of shippers served or the circumstances surrounding a particular operation. Yet contracts, express or implied, are an incident to almost every form of transportation for a compensation.

Although the number of shippers served may have a bearing on whether a carrier is a private carrier or a common carrier, it is

doubtful that mere number can be made the conclusive test of status. The statute does not so provide, and we are not aware of any legal principle which requires application of that test as the sole determining factor. Perhaps the Commission could attempt to achieve certainty by establishing a rigid formula to the effect that a carrier who hauls for more than a specified number of shippers, by that fact alone becomes a common carrier. But such action by the Commission would be in the nature of legislation, rather than regulation. Moreover, it may be argued that such an edict by the Commission, or legislation to the same effect, might well contain serious constitutional infirmities, in that it might convert a lawful private carrier, against his will, into a common carrier by mere legislative command. On the other hand, it must be recognized that no carrier serves all the public, and the public does not mean everybody all the time. And it is a matter of general knowledge in the field of highway transportation that many carriers holding permits serve a substantial number of shippers. Were their status to be questioned and tested by the legal distinctions between private and common carriage, which distinctions we believe to be just as applicable now as before 1935, it may well be that many of such "permitted" carriers would be held to be operating as highway common carriers.

What constitutes a particular individual a common carrier must be determined from the evidence presented in each case as it arises, in light of the legal distinctions between private and common carriage.

The record in this proceeding shows that respondent is regularly transporting property, as a common carrier for compensation, over the public highways between fixed termini and over regular routes, serving a substantial portion of the public, and is operating as a highway common carrier within the meaning of the Public Utilities Act, notwithstanding the attempt to change that status by reducing the num-

ber of shippers served and by entering into written agreements with his "heaviest shippers" between the points involved.

O R D E R

Public hearing having been had before Examiner Austin, and based upon the record herein and upon the findings contained in the foregoing opinion, IT IS FURTHER FOUND AS A FACT that M. L. Morris is operating as a highway common carrier within the meaning of Section 2-3/4 of the Public Utilities Act,

(a) between San Francisco, Oakland, Emeryville, Berkeley and Alameda, on the one hand, and Sacramento, Stockton and Lodi, on the other hand;

(b) between Sacramento, on the one hand, and Stockton and Lodi, on the other hand; and

(c) between Stockton and Lodi;

without possessing a prior operative right therefor, and without first having obtained a certificate of public convenience and necessity authorizing such operation, in violation of Section 50-3/4 of said statute, and

IT IS ORDERED that M. L. Morris cease and desist such highway common carrier operation unless and until he shall have obtained a certificate of public convenience and necessity therefor.

The Secretary is directed to cause a certified copy of this order to be personally served upon said M. L. Morris, and this order shall become effective on the twentieth day after the date of such service.

Dated, San Francisco, California, this 27th day of May, 1947.

Commissioners

Commissioner Rowell, dissenting in part:

I feel compelled to comment separately upon the foregoing decision. Although the result here reached is not without precedent, to my mind this case indicates plainly that the time has arrived for the Commission to take an entirely different approach to the administration of the provisions of the several statutes giving it authority to regulate highway carriers. Wartime conditions and controls in this industry have served to make the regulatory problem more difficult today, demanding complete reconsideration of the principles applied and of the procedure followed.

This proceeding points to the futility and the inequity of attempting to follow the legalistic approach of the past. It leads to interminable hearings, but without tangible results. As here, it results only in a direction to a single carrier to cease either all or some part of his existing operations, yet he is not told what he has done wrongfully or what he or others rightfully may do in the future.

The issue raised by the Commission's investigation, as it is stated in the opinion, is whether Morris is a "highway common carrier" as defined in the Public Utilities Act, or a "highway contract carrier" as defined in the Highway Carriers' Act. The opinion says that Morris must be considered a public or common carrier, not a private carrier. This conclusion appears almost axiomatic. In fact, the record does not indicate that Morris claims to be a private carrier in a purely legal sense. I doubt that any but a very few of the so-called permitted carriers are such. The opinion then finds that he is operating between certain fixed termini; hence he needs a certificate of public convenience and necessity as required by the Public Utilities Act. The order says that he must "cease and desist such highway common carrier operations."

I think it is time the Commission inquires just why it is so important to determine whether the operations of such a carrier fall under one statute or

another. Morris holds permits issued by the Commission to serve both as a "highway contract carrier" and as a "radial highway common carrier", and also possesses a "city carrier" permit. The opinion refers at length to his so-called contract operations, but not the others. But the Commission says to him, in effect, that neither the contract permit nor the radial permit heretofore issued authorizes him to operate as a common carrier in the manner he has, so he must cease until he obtains a certificate under another statute. Yet, neither of those permits issued him designates just what he might do thereunder; the statute does not tell him; nor does the Commission now indicate just what he may or may not do within the compass of those operative rights.

Referring specifically to the contract permit which Morris holds, the Commission now says that a permit of that class mentioned in the Highway Carriers' Act must be construed to apply only to those transportation services which are considered, under common law principles, to be purely private undertakings. I cannot believe that this is a necessary construction, and it only adds to the difficulty of administering this and the other regulatory acts. When enacting this law in 1935, the Legislature could not have intended that the Commission should issue permits in large number to a class of operators called "contract" carriers with the understanding that these would be deemed purely private carriers, thus largely removing a great body of operators from that field of regulation permissible over public carriers only. I believe that there is a distinct place in our transportation system, and in our law, for one who may be denominated a "contract" carrier, even though he be engaged in a public calling, provided this term be defined and applied to one undertaking a specialized service under a type of contract differing widely from the usual shipper-carrier agreement.

The Commission's authority to regulate motor truck transportation is now derived from all three of these legislative acts. It cannot be said that one was intended to have superior force to the others. The Commission should hesitate to force the great body of existing carriers upon our highways into that particular

category covered by the Public Utilities Act alone. Certainly such a policy will fail unless the Commission is willing to depart drastically from the precedents, both substantive and procedural, established over the years in the administration of that Act.

There are now outstanding over 16,000 permits issued under the Highway Carriers' Act, about 2,500 of these for "contract" operations and over 13,600 for "radial" operations. More than 5,000 hold "city carrier" permits. There are but 227 trucking concerns operating under authority of certificates issued in accordance with the Public Utilities Act. Even these, in major part (78 percent), have also been issued permits to operate either as contract or radial carriers, or both. It is evident, therefore, by their preponderance in number today, and also in the volume of business done, the non-certificated carriers have been permitted to dominate the field.

The State's transportation economy justifies a large highway fleet. It must be flexible enough to care for the heavy movement of seasonal commodities. The objective of regulation should be to obtain from each operator the maximum of efficiency within the particular sphere he elects and is permitted to occupy. But this cannot be done unless the Commission discards most of the traditional distinctions between one class and another.

I am confident that within the four corners of these statutes there is found ample administrative and rule-making power to adequately regulate all types of highway carrier operations. The approach to the problem must be a practical one. Classifications covering general types of truck operations can be established in the light of known transportation needs. Then complete rules must be declared by which the need for particular operations within those classes can be tested. In this way only can it be made known to each carrier what rights and duties are inherent in the type of authority granted to him. In this way only can regulation be made both effective and fair. The kind of decision here issued contributes nothing toward either efficient operation or really effective regulation.

Ira H. Rowell

IRA H. ROWELL
Commissioner.