G.H.M.

ORIGINAL

Decision No. 42557

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

PACIFIC SOUTHWEST RAILROAD ASSOCIATION and MERCHANTS EXPRESS CORPORATION, successor to MARIN-SONOMA FAST FREIGHT, Complainants, vs. J. P. NIELSEN, doing business under the firm name and style of NIELSEN FREIGHT LINES, FIRST DOE and SECOND DOE, Defendants.	Case No. 4820

OPINION AND ORDER DENYING REHEARING

In this complaint proceeding against J. P. Nielsen, the Commission, in its Decision No. 42558, found that Nielsen was operating as a highway common carrier without authority between San Francisco, on the one hand, and Novato, Petaluma, Santa Rosa and points intermediate between Novato and Santa Rosa along U.S. Highway No. 101, on the other. The defendant had contended that his operations were those of a highway contract carrier, but the Commission did not agree, and a cease and desist order was made a part of the decision. Nielsen petitioned for rehearing or, in the alternative, for oral argument en banc; the latter was accorded. On July 14, 1949, the respective positions of Nielsen and the complaining parties were fully presented.

Substantial conflicts respecting the facts do not appear. The facts do, however, raise again those differences in legal concepts and interpretations which have over the years eddied in an aura of doubt and have produced a multiplicity of conclusions which have

failed to provide definite guide-posts to determine a carrier's status. The compelling importance of analyzing these concepts and interpretations and of appraising them in the light of all their theoretical and practical implications is well recognized and lies in the knowledge that they concern the very fabric of the motor carrier transportation system in California. The Commission is undertaking here, in the light of present conditions, a comprehensive exposition of the problem. Previously it has examined certain facets, and it has announced certain limited conclusions. While it is probably unrealistic to expect one decision to serve in itself as a full crystallization of the evolution of concepts on the subject, it is hoped that this opinion may serve to draw together many of the untied threads in the pattern of regulation in the trucking field and place upon a surer footing the public understanding of the views which this Commission entertains. Because of the passage of time, the Commission is in a position to survey the problem not only in the light of the many arguments which have been advanced, but in the light of practical experience both before and since the adoption in 1935 of the Highway Carriers' Act and the amendments to the Public Utilities Act.

The basic problem is peculiarly simple to state. It is only a question of defining a highway common carrier and a highway contract carrier in terms precise enough that the division line between them can be readily discerned in the majority of cases upon reasonable examination of the facts. This is not to say that so absolute or mathematical a test can be devised as always to preclude a difference of opinion. It is inherent in our common law that a multitude of shadow-lands exist, and much of our case law is devoted to the solution of particular border-line instances where the nicest of distinctions must be drawn and the most delicate of

factors weighed.

The words with which we are concerned are words found in a statute and, therefore, it is necessary that our inquiry be directed to a determination of what the Legislature meant in using them. We must determine the meaning of "highway common carrier" and "highway contract carrier" in the enactments of 1935, and, incidental thereto, the meaning of "where the service is performed for * * * the public or any portion thereof" as found in the Public Utilities Act, Section 2(dd).

The Public Utilities Act, as amended in 1935 by the addition of Section 2-3/4, defines a "highway common carrier" as a type of "common carrier." While the term "common carrier" is nowhere in the Act directly defined in precise terms, Section 2(dd) indirectly defines it by declaring that the term "public utility" includes every "common carrier," "where the service is performed for * * * the public or any portion thereof." The term "public or any portion thereof" is defined in Section 2(ee) as meaning "the public generally, or any limited portion of the public." It thus seems apparent that under the Public Utilities Act a basic criterion of common carriage, including highway common carriage, is that the service be "performed for" "the public generally, or any limited portion of the public."

Turning to "highway contract carrier," the Highway Carriers' Act has provided since its passage in 1935 a definition by exclusion. Section 1(i) defines a "highway contract carrier" as every highway carrier other than a highway common carrier and other than a radial highway common carrier. Since these two latter categories encompass by definition all common carriers by motor vehicle, and since the basic criterion of a common carrier seems to be, as noted above, that the service be "performed for" "the public generally, or any limited portion of the public," it would appear to follow that,

if the definition of "highway contract carrier" does nothing else, at least it tells us one element which must not be present in highway contract carriage, viz., the performing of service for the public generally or any limited portion of the public.

The foregoing interpretation of the statutory language finds an analogy in the common law distinction between common and private carriage and there is, indeed, substantial evidence that the Legislature intended to carry over such distinction into the statutory law. That the same obligation to serve the public generally or a portion thereof which was required for common carriage at common law was contemplated for common carriage, including highway common carriage, under the statute seems undisputed. The term "common carrier" had been given the same content as at common law long before 1935, in the enactment in 1872 of Civil Code Sections 2168 and 2169.(1) Furthermore, the legislative history surrounding the passage of the 1935 amendments to the Public Utilities Act and the definitions set forth in those amendments reveal no suggestion of a contemplated or intended change in the meaning of the term. That the limited type of operation classified as private carriage at common law was contemplated for highway contract carriage under the Highway Carriers' Act seems hardly less certain. It had become established usage prior to 1935 to refer to contract carriage as synonymous with private carriage. Re Hirons (1928), 32 C.R.C. 48; People v. Duntley (1932), 217 Cal. 150; George v. Commission (1933), 219 Cal. 451. Furthermore, the legislative history surrounding the 1935 enactments indicates that

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(1) Civil Code, Section 2168, provides: "Everyone who offers to the public to carry persons, property, or messages, excepting only telegraphic messages, is a common carrier of whatever he thus offers to carry."

Civil Code, Section 2169, provides: "A common carrier must, if able to do so, accept and carry whatever is offered to him, at a reasonable time and place, of a kind that he undertakes or is accustomed to carry."

the Legislature was given to understand and did understand that the terms were synonymous.(2) Finally, the decisions dealing with the problem since 1935 have uniformly stated the terms to be of like effect. Rampone v. Leonardini (1936), 39 C.R.C. 562; Re Doss (1938), 41 C.R.C. 359; Re Maloney (1946), 46 C.R.C. 673; Re Morris (1947), 47 Cal. P.U.C. 267. It may be noted in passing, too, that the Commission just after the enactment of the 1935 legislation issued for public distribution a printed document, entitled "Description of Classes of Carriers and Operations which may Lawfully be Conducted under the Various Types of Authority," in which a highway contract carrier was interpreted to be one operating as a private carrier.

We are not unmindful of the proposition advanced that the very ease with which contract permits may be obtained indicates a legislative intent to make the scope of contract carriage broader than private carriage. Nor have we failed to consider the argument that, because statutory regulation of contract carriers came long after statutory regulation of common carriers in California, the Legislature intended a definition of contract carriage broader than that of private carriage. Nor are we unaware of the argument that the very existence of thousands of trucking operators today, whose claim to the right to operate rests in the possession of a contract permit, militates against a narrow construction of the scope of contract

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(2) See Assembly Journal, 51st Session, 1935, Vol. 2, page 3025, et seq., in which is printed a transcript of testimony by Mr. Warren K. Brown, now Director of Transportation for the Commission, before the Assembly Committee on Public Utilities on April 26, 1935. Mr. Brown, directing his remarks at the proposed legislation subsequently passed at the 1935 session, said (p. 3026):

> "There are three classes: certificated carriers operating under Chapter 213 as common carriers, operating between fixed termini or over regular routes; the second class, the so-called contract carriers who operate as private carriers under contract; the third class, radial highway common carriers, which operates not between fixed termini but operates within a certain defined area or radius." (Emphasis added.)

carriage. Nor do we ignore the suggestion that the transportation system in California needs a type of contract operation in the nature of a public calling. But all of these views, we believe, are responsive more to a desire to rectify inadequacies in our statutes or to justify existing conditions than they are to a desire to analyze without bias what the Legislature said.

Regardless of whatever arguments may be advanced today against the wisdom of our existing legislation and regardless of the many practical difficulties which have arisen in its administration and enforcement, we do not believe there is a satisfactory alternative to the conclusion that our present statutes contemplate a distinction analogous to, and corresponding with, that at common law. It may be that there is a place in our transportation system for one denominated a "contract" carrier even though engaged in a public calling, but we do not perceive statutory authority for creating such a class. Therefore, we reiterate our remarks in the Morris decision, supra, where we said at page 274: "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."

The foregoing conclusions constitute the first step in formulating what we conceive to be proper definitions and establish that the determination whether a carrier is highway common or highway contract depends upon whether or not "the service is performed for * * * the public or any portion thereof." The second step involves inquiring into the content and meaning of those words: "Where the service is performed for * * * the public or any portion thereof," it being understood, as expressed in Section 2(ee) of the Public Utilities Act, that "public or any portion thereof" means "the public generally, or any limited portion of the public." The words have long been con-

sidered essentially a paraphrasing of the concept in the common law relating to common carriers, of a holding-out or offering to serve the public or a portion thereof, and it is only consistent with our foregoing remarks that we construe them in that light.(3)

Prior decisions of the Commission have undertaken in general terms to define the offering or holding-out. In Re Hirons, supra, we said that a holding-out exists "if the particular service rendered by a carrier is offered to all those members of the public who can use that particular service." (P. 51.) Again, in Re Maloney, supra, we said: "A common carrier undertakes to transport property for hire, for those who may choose to employ him; within the limits of his facilities, the service is available to all who can use it. This offer may extend to the public as a whole, or it may be confined to those falling within a particular class." (P. 680.)

If the holding-out depended merely upon the subjective intent of the carrier, little difficulty would be encountered. The words of the carrier would normally, in the absence of deception, suffice to determine his status. The test is in fact, however, an objective one: "holding out to the public generally or a portion thereof" is a term of art and if certain factual conditions exist, it follows as a matter of law that the carrier is holding himself out to serve the public or a portion thereof even though he denies it and even though he has in fact refused service to certain persons asking for it. Having once assumed the status of one thus holding himself out, it would be the duty of the carrier, provided he had the requisite certificated or other authority and notwithstanding any subjective intent to keep within the private carrier field, to serve all within the scope of his undertaking, and a refusal to do so would con-

(3) Defendant himself apparently concedes the correctness of such construction. See Transcript, page 843, in which defendant's counsel states that the proper test of common carriage is the common law test, "that is, is the carrier holding itself out to serve the public generally or a substantial portion thereof?"

stitute a violation of his common carrier obligation.

In applying the objective test, common-sense criteria are, of course, to be employed. It is a question of deciding whether in the light of all the physical manifestations of the carrier's operations and all the surrounding circumstances, including his subjective intent (which may or may not be consistent with the physical aspects of the operations) it is reasonable as a matter of law to declare him to have assumed the responsibilities and obligations of common carriage, and to be operating in violation of law in the absence of the requisite authorization. In that connection we are led to make certain obvious primary inquiries: we ask for how many patrons the carrier has in fact provided service; we ask what kind of service the carrier has provided; and we ask what, if any, contractual arrangements the carrier has made with his shippers beyond the usual shipper-carrier contract of carriage. Ancillary to these inquiries are a host of related factual considerations which vary with every case. To illustrate, we list here some of the questions which would be pertinent under each of the three primary inquiries alluded to. All of such questions should be considered and weighed in relationship to each other in the ultimate conclusion:

I. Number of patrons for whom the carrier has in fact provided service.

1. What is the number?

2. What relationship does the number bear to the potential number which could be served? Has the carrier refused service, and, if so, to how many, and why?

3. Does the number represent all or only a portion of the shippers falling within a definable segment of the public?

4. Has the number remained fairly constant over a period; if not, what is the cause?

5. What continuity is there in the identity of shippers reflected in the number over a period?

6. How has the number been acquired; what representations has the carrier made to shippers or prospective shippers; has there been advertising or solicitation, and, if so, what is its character?

II. Kind of service which has been provided.

1. What is the character of equipment used; is it standard or possessed of unusual features?

2. What is the nature of the commodities transported in so far as handling requirements are concerned; are the commodities perishable or of unusual value, or contaminating to other lading, or dangerous or delicate, or of unusual bulk or weight or configuration; are they the kinds of commodities normally carried by common carriers?

3. What variety or absence of variety is there in the commodities transported?

4. What duties devolve upon drivers or attendants; are they the same as or different from those normally encountered in common carriage; if the latter, do they entail unusual training or other-than-usual endowments or skills; does the owner of the business perform all or part of the driving?

5. What handling of commodities is provided; does it include unusual skill or caution in packing or loading and unloading, unusual safety measures such as low speed in transit, unusual care in disposition at terminals; what is the nature of accessorial service, if any?

6. What scheduling is there of service; is there a regular scheduling corresponding to that ordinarily provided in common carriage; does the operation supply on-call service; if so, is on-call service provided whenever the shipper demands it?

7. What charges are made for service; do they correspond to those made by common carriers; are the charges uniform or do they vary with each shipper?

8. Does the carrier interchange or undertake joint operations with other carriers?

9. Do the carrier's trucks display the names of the shippers, or do they display the carrier's name, telephone number or other information?

III. Contractual arrangements.

1. Has the carrier entered into any contractual arrangements beyond the usual common carrier contract of carriage for individual shipments?

2. If so, are they in writing?

3. What is the number of such contracts; has the number remained fairly constant over a period, or has it fluctuated?

4. Are the contracts lacking in consideration or illusory?

5. If contracts exist, do the parties adhere to their terms?

6. What circumstances motivated entering into contracts; is there evidence of an effort to subject to contract all service formerly performed in the absence of a contract; is there evidence that contracts were entered into to meet peculiar needs of particular shippers?

7. Are the contracts in stereotyped form or do they make provision for unusual needs of each respective shipper, as, for instance, with respect to equipment, handling, scheduling, charges?

8. Are there contracts with all or only a portion of the shippers served?

9. If oral contracts are claimed, are they enforceable as binding contracts against either party; what are their terms; are their terms adhered to; who initiated them?

10. What continuity is there in the identity of shippers with whom the carrier has contracts; is there evidence that, while the total number of contracts remains roughly constant, there is considerable turn-over in contracting shippers?

These and other questions of similar tenor all have a bearing in determining the presence or absence of a holding-out in the technical sense with which we are concerned. Failure to consider any one aspect or portion of the composite picture, it must be emphasized, can only invite misconception and erroneous conclusion. Much harmful thinking has arisen from seizing upon a single factor, or group of factors, in a given situation as wholly controlling. The decisions themselves are in a measure to blame, for their language has often been susceptible of such interpretation.

The crucial problem is, of course, to determine, once all aspects of the composite picture have been marshalled together, what

weight to accord each of them. The technique must be to place on one side of the scale all those factors which it is contended indicate an absence of limitation or restrictiveness upon the carrier's service, and on the other side of the scale all those factors which it is contended indicate a limitation or restrictiveness of one type or another. That having been done, each factor must be weighed, first for its intrinsic significance, and then in its relationship to the whole.

Without some degree of restrictiveness in the carrier's service, there can be no contract carriage. It would be desirable if we were able to state categorically what quantum of restrictiveness is required, but the answer varies with the factual circumstances of each case, and it is possible to set down only one or two general guideposts. We believe that the quantum of restrictiveness must be substantial and considerable. We believe that contract carriage, because of its essentially private quality, can obtain only in relatively few instances. Conversely, we believe that the "holding-out" of common carriage is readily attained.

The restrictiveness of which we speak may consist in the number of shippers served, or it may consist in physical attributes of the operation, attributes having an unusual character differing from that normally encountered in common carriage, or it may consist in a combination of both.

As to restrictiveness in the number of shippers served, we believe that such element can, even in the absence of restrictive factors in the physical attributes of the operation, be sufficient to categorize the carrier as a contract carrier, but we believe this to be true only where the number of such shippers is extremely limited (without reference to potential patronage or population figures), where the circumstances indicate a stability in the identity of

C. 4820

R. E. M.

such shippers, where the operation has been, or is likely to be, maintained on substantially the same plane over a period, and where the subjective intent is consistent with such restrictiveness of service. Inasmuch as the restrictiveness we are here discussing presupposes an absence of restrictiveness in the physical attributes of the operation (as such attributes are hereinafter defined) and inasmuch as the element of restrictiveness must, as we have stated, be substantial and considerable in the realm of contract carriage, the carrier runs the risk of crossing the line unless he adamantly adheres to an extremely limited number. We believe that such number must be low enough to allow a close identification or relationship of the carrier with the shipper's business or operation. It has been suggested that the number would depend to some extent upon its relation to the total potential or available number of shippers, and, therefore, would rise in direct proportion to increases in the latter. We cannot subscribe to such a view, for it ignores the essentially private quality of contract carriage. The question must be, as we have stated, whether the number is small enough to enable the carrier to maintain close identification or relationship with the shipper's business or operation. The only circumstance in which the potential or available number of shippers would be significant would be where such number is roughly the same or only slightly higher than the number in fact served, and then only to point toward lack of restrictiveness in the operation.

As to restrictiveness in the physical attributes of the operation, we have indicated in the list of questions above, under the heading "Kind of service which has been provided," the sort of out-of-the-ordinary features which we have in mind. We alluded to the

character of the vehicular equipment, the nature of the commodities as requiring other than usual treatment, the duties and qualifications of drivers, the requirements of handling, and, finally, the requirements of scheduling. Here again, to achieve the considerable degree of restrictiveness required for contract carriage, it would be necessary to find considerable and substantial departures, in one or more of the respects noted, from the sort of operations normally conducted by common carriers. Our inquiry would be directed to determining whether the carrier is rendering other than usual physical services and is supplying the peculiar needs of particular shippers. Mere efficiencies or conveniences or courtesies of service would not suffice. Furthermore, while the number of shippers would not have to be held to the low figure required where the restrictiveness lies solely in the number of shippers, there is danger again that service to too large a group would destroy the private character of the operation.

We have outlined in the foregoing analysis the views which we believe should guide our efforts in determining the status of a carrier as highway common or highway contract. Before undertaking an application of those views to the particular facts at issue in this proceeding, it may be well to advert to certain matters related to the general problem.

We have diligently avoided the use of the word "specialization" or the phrase "specialization test." While such language is not unfamiliar in our own decisions, including our prior decision in this proceeding, and while we are not out of sympathy in general with the observations expressed in two important Interstate Commerce Commission decisions on the subject of common and private carriage (Craig (1941), 31 MCC 705, and Midwest Transfer Co. of Ill., et al. (1949), No. MC-C-907), in which "specialization" is described as

the sine qua non of contract carriage, we believe that such word fails to indicate satisfactorily the concept for which it is used. We would prefer to use the word "restrictiveness" as more accurately indicating the requirement in contract carriage. "Specialization" is too apt, we believe, to be construed to refer only to unusual physical attributes of an operation and not as well to the element of number of shippers.

It may be well here to comment upon a misconception which has been given expression from time to time: it is said that the test of common carriage is whether the carrier is holding itself out to serve the public or any limited part thereof, not whether there is an absence of "specialization." The inference is that there are two separate tests of common carriage, and that such tests are antithetic. Enough has been said in our foregoing analysis to make plain that such is not the fact. The test of common carriage is, indeed, a holding-out, but the primary factor in the definition of such holding-out is the presence or absence of what we would prefer to call restrictiveness.

We do not regard our conclusions as inconsistent with the underlying theory of our prior decisions, though admittedly the latter, by their failure to spell out a comprehensive picture, have on occasion been subject to misconstruction. The case of Rampone v. Leonardini, supra, rendered shortly after the 1935 legislation, contains language ambiguous in some respects and readily misinterpreted, but we construe the facts in that case to have revealed the type of contract carriage alluded to above where the sole element of restrictiveness lies in the number of shippers. Whether such number would allow the same conclusion in another case would, as we have outlined, depend upon certain other factors as indicated hereinabove.

One more consideration should have our attention before we consider the operations of defendant, viz., the matter of contracts. It is in the very nature of contract carriage that something beyond the usual common carrier contract of carriage for individual shipments should be involved. If the element of restrictiveness consists solely in the number of shippers, then it would appear that the contracts entered into by the carrier must at least be binding contracts between the carrier and shipper revealing sufficient consideration, and subjecting either party to liability in damages in case of breach, and be specific as to commodities, amounts to be transported, points to be served, and period of effectiveness. If the element of restrictiveness consists at least in part in out-of-the-ordinary physical services to meet the peculiar needs of particular shippers, the contracts for such services should reflect that fact, containing, in addition to the items noted, a spelling out of the unusual services to be provided. Oral contracts should be no less binding or specific in their terms than written contracts. Because of the difficulty of proving them, they are rarely a suitable medium for contract carriage and must be considered with misgiving in the absence of convincing proof of their terms.

It has become a common practice in recent years for carriers having no certificated rights but fearing themselves to have crossed the line into common carriage, to provide themselves with goodly numbers of stereotyped contracts with all, or a portion of their shippers. They have hoped thereby to escape the denomination of common carrier. It is hardly necessary to repeat at this date, especially in the light of our comments above, that the mere holding of contracts does not determine, or necessarily influence a determination of, status. Re Morris, supra. The acquisition of such contracts often constitutes a vain act and may produce the implica-

tion of subterfuge. Southern Calif. Frt. Lines, et al. v. Thorkildsen (1947), 47 Cal. P.U.C. 287.

It may be well at this juncture to point to a curious anomaly to which can be ascribed in some measure the prevalence of great numbers of trucking operations which are conducted ostensibly as contract carriage but which are in fact probably highway common carriage: it is easy to acquire a contract carrier permit but often difficult, because of the essentially private nature of contract carriage, to stay within its bounds; and, by the same token, it has been difficult to acquire a highway common carrier certificate, but easy - sometimes all too easy in the eyes of the carrier - to assume the status of a highway common carrier without authority. Until such time as the Legislature undertakes to place appropriate restrictions upon the issuance of highway contract carrier permits, the dilemma in which many carriers are today finding themselves will continue to present a danger.(4) It is the ease itself with which a carrier may acquire a contract permit which does him an injustice by acting as a lure to him to enter the trucking business and by lulling him into a false notion regarding the scope of the right he has acquired. So far as the Commission's part in alleviating the hardship in the absence of statutory changes is concerned, a clear and unequivocal recognition of the extremely limited scope of contract carriage and an execution of its announced policy of continuing liberality in the issuance of certificates of public convenience and necessity should do some good. If we face squarely the conception of the difference between common and contract carriage which we have set forth in our opinion above and thereby recognize the narrow limits within which

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(4) See Re All Carriers of Property for Compensation, Decision No. 42646, Case No. 4823, (March 22, 1949), in which the Commission discussed the problem and set forth proposed remedial legislation.

contract carriage is restricted, much will be accomplished in answering the charge that a carrier does not know what he has done wrongfully or what he or others may rightfully do in the future.

We are now ready to examine the facts here before us. We believe that they have been set forth accurately and comprehensively in our prior decision and defendant has not pointed to substantial error in that respect. Furthermore, while that decision did not undertake the intensive examination of principles we have here presented, the treatment in that decision reflects acceptance of such principles.

Applying the technique described in our discussion above, we shall list, on the one hand, those factors which it is contended indicate an absence of limitation or restrictiveness in the defendant's service and, on the other, those which it is contended indicate a limitation or restrictiveness of one type or another. These lists are not intended in themselves to constitute findings of fact. Such findings were made in our prior decision, and we do not here depart from them. The lists are in the nature of arguments or contentions by counsel for the respective positions indicated:

I. <u>Factors which it is contended indicate absence of limitation or restrictiveness</u>.

1. As many as 60 oral contracts during the war period.

2. Curtailment following the war to 36 written contracts.

3. Curtailment by denying service to those shippers in general who were the smaller and less important shippers. Curtailment not based upon confinement to out-of-the-ordinary service for particular shippers.

4. Substantially the same kind of service provided under the 36 contracts as had been provided before.

5. The 36 written contracts were in general in stereotyped form, with no setting forth of out-of-the-ordinary requirements for particular shippers. Contracts set forth commodities to be transported, points of origin and destination, compensation to

be paid - all elements which apply equally in the usual common carrier contract for an individual shipment. Contracts did set forth duration, cancellation and contingency clauses, but these matters do not go to providing out-of-the-ordinary service.

6. Most of the 36 contracts were entered into at, roughly, the same time - the early part of 1947. The contracts were initiated by the carrier, were not responsive to shippers' requests to enter into contracts for their particular needs.

7. There were written contracts with many of the shippers served prior to the time when the 36 contracts were entered into, but their terms were not shown in evidence except as to three. Of these three, all could be cancelled on short notice and one was illusory, being indefinite as to tonnage.

8. Equipment - five units available for daily service, all of standard type.

9. Six employees. No evidence that defendant or any employees provided in the service particular skills or qualifications beyond those normally required for common carriage.

10. Service between San Francisco and the Novato-Santa Rosa territory daily except Saturdays, Sundays and holidays.

11. Commodities show both variety and absence of need for handling beyond that provided by common carriers: eggs, containers, electric supplies and appliances, hardware and hardware supplies, paint and paint supplies, plumbing supplies, building supplies, cheese and its products, cleaning compounds and supplies, coffee and tea, farm equipment and supplies, furnaces and heaters, groceries, sheet metal products, including Venetian blind supplies, soap and wallpaper.

12. Instances where service was performed in the absence of contract (other than the usual common carrier type for the particular shipment) either with the consignor or consignee.

13. Evidence that service was performed under at least one oral contract in addition to the 36 written contracts.

14. Carrier performs common carrier service interstate between the same areas here involved. Five per cent of such interstate shippers are identical with shippers served intrastate.

15. Terminals maintained in San Francisco and Petaluma.

16. Interchange at San Francisco with connecting carriers, Western Truck Lines, Ltd., and Chas. P. Hart Transportation Company, for traffic originating in Southern California and destined for the Marin-Sonoma area. No contract between the defendant and the original consignor. No out-of-the-ordinary features in connection with the movement shown.

II. Factors which it is contended indicate limitation or restrictiveness.

1. In the ten-year period 1931-1941, the greatest number of shippers was 6 to 10 and defendant had written contracts with all of them.

2. Expansion during the war resulted from requirements of the Office of Defense Transportation.

3. Subsequent to the war, service was curtailed to 36 contracts for the express purpose of being within the bounds of contract carriage.

4. Service now performed only pursuant to written contracts with shippers; earlier deviations were against the carrier's wishes; the carrier's wishes now strictly enforced.

5. Most of the shippers have been served by defendant several years; cancellations are rare.

6. Five complete units are available for service but only three are ordinarily used.

7. Both defendant and his wife actively participate in running the business.

8. Commodities: southbound, largely eggs; northbound, preponderance of certain commodities related in character, viz., electrical supplies and appliances, hardware and hardware supplies, paint and paint supplies, and plumbing supplies.

9. The 36 written contracts designate defendant as a contract carrier.

10. The 36 contracts all show sufficient consideration and with four exceptions (where a minimum tonnage is stated) contemplate that defendant handle all of shipper's tonnage.

11. There were written contracts antedating the 36.

12. Since curtailment of operation after the war, defendant has not solicited at all.

13. Shipments tendered by non-contracting shippers rejected on many occasions.

14. Evidence that the terms of the 36 contracts have been abided by.

15. Interchange of shipments is only with carriers operating under contract carrier permits. The connecting carrier pays defendant for his services.

16. Defendant provides expeditious service with fast pickups and same-day distribution and delivery.

17. Infrequent occurence of damage to shipments.

18. Prompt adjustment of loss and damage claims.

19. Unloading performed at a place convenient to consignee.

20. In general, a service superior to that afforded by other carriers.

21. Ninety-five per cent of defendant's interstate common carrier shippers are different parties from those served between the points here involved.

Turning now to a weighing of the factors above set out, we note that defendant has outstanding 36 written contracts with shippers. We have no hesitancy in saying that we consider the number 36 toc large, in the absence of substantial restrictiveness in the physical attributes of the operation, to permit a conclusion of contract carriage. We believe this to be true despite the carrier's sincere efforts to restrict himself to a number he has considered, upon advice of counsel, to be within the realm of contract carriage. Having concluded that 36 contracts is too large a number where there are no elements of restrictiveness in the physical attributes, defendant's contentions directed toward showing restrictiveness in the number of shippers have no significance. Thus, it becomes unimportant that only three out of five available units of equipment are used, that there is no solicitation, and that many prospective shippers have been turned away.

Our next inquiry must be whether defendant's operations do pos-

sess any physical attributes which are over and beyond those usually or normally supplied by common carriers. We note that defendant's contracts do not spell out any unusual features for particular shippers; that standard equipment is used; that no unusual qualifications or skills are required of drivers or employees; that service is performed regularly except for Saturdays, Sundays and holidays just as is often the case with common carriers; that, while there is a preponderance of certain commodities transported, a considerable variety exists, and that none of such commodities requires handling beyond that offered by common carriage. On the other side of the scale, we are referred to the fact that in defendant's contracts he designates himself as a contract carrier. Obviously, this is of little significance quite aside from its self-serving character. If it is indicative of the defendant's subjective intent, that factor, as we have pointed out, falls in the face of physical operations clearly inconsistent with such intent. Again, we are referred to the fact that defendant and his wife both actively participate in the business. This factor might have significance in some circumstances where it is shown that the carrier-owner provides extraordinary supervision over, or attention to, individual needs of shippers, which could not be rendered by common carriers. Conceding that defendant and his wife have provided a highly satisfactory, even an excellent, service, it would appear to be basically in the category of able management. Again, we are referred to the fact that the terms of the contracts have been abided by. But this factor does not point to providing service having unusual physical attributes. Finally, we are referred to the fact that defendant provides expeditious service with fast pickups and same-day distribution and delivery, that damage to shipments occurs infrequently, that loss and damage claims are adjusted promptly, that unloading is performed at a

place convenient to the consignee, that, in general, a superior service is provided. All of these factors, while pointing toward restrictiveness, do so only in the most limited way, it would seem, and go more to efficiency than restrictiveness.

It does not appear necessary to give more than passing mention to other items enumerated in the two lists of factors set forth above. Even if all of defendant's other contentions were to be given the construction he contends for - that defendant was within the bounds of contract carriage from 1931 to 1941, that the directives of the Office of Defense Transportation afforded sufficient excuse for departures during the war, that no service is now performed except under the 36 contracts, that the existence of prior contracts, the stability in the identity of shippers, the predominance of certain commodities in the operation, and the binding character of the 36 contracts, all weigh in defendant's favor, that interchanges with other carriers do not militate against a construction of contract carriage, and that the smallness of the ratio of identity in defendant's intrastate and interstate shippers is a favorable circumstance in support of defendant's position -, we think there is an essential lack of substantial restrictiveness in number of shippers served, in physical attributes of the operation, and in a combination of both. Accordingly, we find that Nielsen's operations do constitute a performing of service to the public generally, or a limited portion of the public, within the meaning of the Public Utilities Act and, therefore, constitute him a highway common carrier, as defined by Section 2-3/4 of that Act. We do not look upon his as a border-line case, but, on the contrary, one where, in the light of the construction we place upon the ap-

plicable statutes, no other conclusion would be proper.

O R D E R

In view of the foregoing, and good cause appearing,

IT IS ORDERED that the petition for rehearing filed by defendant in this proceeding be and the same is hereby denied.

IT IS FURTHER ORDERED that the effective date of Decision No. 42558 shall be concurrent with the effective date of the decision in Application No. 29105.

The Secretary is directed to cause a certified copy of this order to be served personally upon said defendant, J. P. Nielsen.

Dated, San Francisco, California, this 22nd day of November, 1949.

R. J. Mitchell
Justus F. Craemer
Eugene J. Bacon
Harold P. Huls
Leonard Potter
Commissioners