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ORIGINAL

Decision No. 43828

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Pacific Southwest Railroad Association, Delta Lines, Inc., Inter-Urban Express Corporation, and Merchants Express Corporation, Complainants, vs. Harold A. Stapel, Harland H. Stapel, and Clayton C. Koons, co-partners, doing business under the firm name and style of Stapel Truck Lines, First Doe and Second Doe, Defendants.	Case No. 4927

Fred N. Bigelow, for Pacific Southwest Railroad Association, Complainant.
Frederick W. Mielke, for Delta Lines, Complainant.
Reginald L. Vaughan and John G. Lyons, for Inter-Urban Express Corporation, Complainant.
Douglas Brookman, for Merchants Express Corporation, Complainant.
Spurgeon Avakian, for Harold A. Stapel, Harland H. Stapel and Clayton C. Koons, partners, doing business as Stapel Truck Lines, Defendants.

O P I N I O N

The complainant, Pacific Southwest Railroad Association, is an unincorporated association composed of rail lines operating within this state as common carriers. Complainants, Delta Lines, Inc., Inter-Urban Express Corporation and Merchants Express Corporation, respectively, are highway common carriers serving points involved in this proceeding. Defendants, Harold A. Stapel, Harland H. Stapel and Clayton C. Koons are co-partners, engaged in business under the firm name of Stapel Truck Lines.(1)

(1) For convenience, the defendants above named will be referred to collectively as defendant, or as Stapel. The fictitiously named defendants, First Doe and Second Doe, neither were served with process nor did they appear. Consequently, they will be disregarded.

The complaint alleges that defendant regularly and continuously has been engaged in business as a highway common carrier, without proper operating authority, between San Francisco, Oakland and Emeryville, on the one hand, and certain points in both Alameda and Contra Costa Counties, on the other hand.(2) By its answer, defendant admits that it holds no certificate of public convenience and necessity, issued by the Commission, but denies that its operations were conducted unlawfully.

Public hearings were had before Commissioner Potter and Examiner Austin, at San Francisco, Oakland, Pittsburg and Walnut Creek, following which the matter was submitted on briefs, since filed. Hearing in this matter was deferred, pending completion of the hearing of Stapel's application, initiated prior to the filing of the complaint herein, for a certificate to operate as a highway common carrier between most of the points involved in the present proceeding.(3)

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(2) Allegedly, the operations in question were conducted between the San Francisco Bay points mentioned, on the one hand, (which, for convenience, will be referred to as the Bay Area) and, on the other hand, Orinda, Lafayette, Walnut Creek, Concord, Port Chicago, Pittsburg, Antioch, Oakley, Brentwood, Byron, Clayton, Danville, Alamo and Martinez, in Contra Costa County; Livermore, Pleasanton and Dublin, in Alameda County; and intermediate points.

(3) In Application No. 28649, Stapel sought authority to operate as a highway common carrier between San Francisco, Emeryville and Oakland, on the one hand, and Orinda, Lafayette, Walnut Creek, Alamo, Danville, Concord, Pittsburg, Antioch and intermediate points located on State Highways 24 and 21, on the other hand. Hearings in that proceeding were not concluded until April 13, 1948, when the matter was submitted on briefs, subsequently received. The complaint in the instant proceeding was filed December 8, 1947. Hearings commenced June 23, 1948, and were concluded November 4, 1948. The final brief was filed on April 23, 1949.

To establish their charges, complainants called witnesses representing 74 shippers engaged in business in the Bay Area and at Contra Costa and Alameda points.(4) The testimony of three witnesses was stricken from the record as immaterial. Those situated in the Bay Area were wholesale distributors; with few exceptions, those located at other points were retail dealers of various types. Collectively, these shippers dealt in a wide variety of commodities. They described the extent to which they had used defendant's facilities for the transportation of their products throughout the affected territory, and related the circumstances under which they had employed defendant to provide such a service.

One of the partners, Clayton C. Koons, testified voluntarily on behalf of defendant. He related the history of defendant's operations, described their characteristics, and undertook to explain certain matters developed by the testimony of the shipper-witnesses.

The Issues

The contentions of the respective parties may be briefly stated. Complainants, on the one hand, contend (a) that defendant operated regularly and frequently between the Bay Area and the Contra Costa and Alameda County points mentioned; (b) that in the course of its operations, defendant served a substantial number of shippers who paid the freight charges, although many had not

(4) Of the 74 shipper witnesses produced by complainants, 19 were engaged in business at San Francisco; 15, at Oakland; one, in both San Francisco and Oakland; one, at Orinda; one, at Lafayette; nine, at Walnut Creek; three, at Danville; four, at Concord; two, at Martinez; ten, at Pittsburg; seven, at Antioch; and two, at Brentwood. Two of the three witnesses, whose testimony was stricken, were located at San Francisco, and the other at Oakland.

entered into agreements with defendant covering the performance of the transportation service; (c) that such agreements, in those instances where they had been negotiated, lack the elements essential to their validity; (d) that defendant developed its business largely through the solicitation of shippers for their patronage; and (e) that the service afforded reflects no specialized characteristics.

Defendant disputes these claims, contending, on the other hand, (a) that its operations extended regularly to a limited number of points only, the remainder having been served irregularly; (b) that the transportation of collect shipments at the consignor's request manifests a holding out to the consignor rather than the consignee; (c) that complainants have sought to exaggerate and inflate the number of shippers whom defendant assertedly had served; (d) that the development of the business was due to shippers' demands, rather than to solicitation on defendant's part; (e) that many offers by suppliers and dealers, within the territory, to utilize the service were rejected by defendant; (f) that notwithstanding any deficiencies which may exist in the transportation agreements between defendant and its shippers, the fact that defendant has entered into such arrangements, as well as the circumstances surrounding their performance, evinces an intent to limit the scope of its operations; and (g) that specialization is not a proper test of private carrier status.

Before considering these conflicting claims, we shall describe generally the nature of defendant's operations.

General Nature of Defendant's Operations

As stated, defendant is a partnership, composed of Harold A. Stapel, Harland H. Stapel and Clayton C. Koons. Koons joined the firm in February, 1946, and immediately assumed control of its affairs. Previously, the Stapels had conducted a small trucking

business at Walnut Creek, which was a local transfer service within that city and its environs.

Following Koons' advent, the scope of defendant's operations was enlarged substantially. In addition to the city carrier and the radial carrier permits which it then held, a contract carrier permit was obtained. At the outset, furniture was hauled occasionally between Walnut Creek and Oakland. In March, 1946, defendant negotiated with Western Auto Supply Company its first contract, covering the transportation of the latter's products from the Bay Area to Walnut Creek and vicinity. Subsequently, defendant extended its service to various merchants at Walnut Creek, for whom it made special pickups in the Bay Area. With rare exceptions, these local dealers had not previously been served by defendant. By August, 1947, the volume of traffic handled had expanded to a point where defendant decided to seek authority to serve this territory as a highway common carrier; and such an application, accordingly, was filed.(5) When the present proceeding was instituted, eight units of equipment were devoted to the operation.

Koons testified that coincidentally with the consummation of arrangements with Western Auto Supply Company as described above, he had called at the Commission's office in San Francisco and discussed the matter with staff members, fully explaining the nature of defendant's operations. Several similar conferences followed, so he stated. Early in 1947, defendant's records were audited by a Commission representative. During these conversations, Koons testified, the limitations under which a contract carrier lawfully might operate were not discussed. Moreover, he stated, no communication relating to the nature of defendant's operations ever had

(5) On August 13, 1947, defendant filed its application (App. No. 28649) for a certificate authorizing the operation of such a service. (See Footnote (3), supra.

been received from the Commission.

We turn now to a consideration of the questions which have been raised by the respective parties.

Complainants assert that defendant's operations were conducted between definite points over regular routes, the service having been provided daily except in minor instances, when it was afforded less frequently. In reply, defendant contends that only a few of the points involved were regularly served, the remainder having been served infrequently. These communities, it is said, are not so situated as to form a unified commercial or industrial area which properly might be considered as a definite point, within the meaning of Section 2-3/4, Public Utilities Act. Moreover, it is claimed, they may not be viewed as intermediate points, located along routes regularly traversed, between points which themselves may be regularly served.

To substantiate their contentions, complainants introduced exhibits specifying the shipments made, during a period of some thirteen months, by twelve Bay Area distributors to their customers at various points. Freight bills covering some of the shipments made by another Bay Area distributor were also received. The details appear below.(6) Other shipper-witnesses referred generally to the distribution of their products throughout the territory in

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(6) Exhibits were submitted by witnesses representing twelve shippers located at San Francisco and Oakland, itemizing the shipments delivered to specified consignees at the points here involved. (Exhibits Nos. 2,3,4,6,7,12,14,15,17,20 and 21.) An exhibit was also received (Exhibit No. 8) comprising copies of bills of lading covering similar shipments handled for another San Francisco distributor. An analysis of these exhibits discloses that during the thirteen-month period, July 1, 1947, to July 31, 1948, inclusive, a total of 3096 shipments was transported by defendant for the shippers mentioned from San Francisco and Oakland, respectively, to these points, as shown in the following tabulation: -- (continued) -

which these points are located, but the frequency of the movement to specific points was not indicated. Obviously, such a showing can be presented accurately only through the medium of detailed statements of the type submitted by complainants. Although these exhibits do not cover the traffic handled by defendant for all of the shippers whom it served, they nevertheless reveal the characteristics of that transported for a fairly representative cross section of these shippers. Koons also described the frequency of the movement to these points.(7)

(6) -- (continued) -

Point of Destination	No. of Shipments Delivered	Average No. of Shipments Per Month	Average No. of Shipments Per Week
Orinda	117	9.	2.04
Lafayette	134	10.3	2.29
Walnut Creek	527	40.54	9.24
Alamo	10	0.77	0.17
Danville	140	10.77	2.45
Concord	456	35.07	8.
Clayton	7	0.54	.012
Pacheco	7	0.54	.012
Martinez	124	9.54	2.17
Port Chicago	49	3.77	.086
Pittsburg	539	41.46	9.45
Antioch	305	23.46	5.35
Oakley	32	2.46	0.56
Knightsen	6	0.46	0.01
Brentwood	37	2.85	0.65
Byron	14	1.08	.025
Pleasanton	163	12.54	2.86
Livermore	429	33.	7.53

(7) Koons testified that in the course of defendant's operations, deliveries were made daily, on the average, at Orinda, Lafayette, Walnut Creek, Concord, Pittsburg and Antioch; two or three times a week at Danville, Alamo and Martinez; twice a week at Livermore and Pleasanton; once or twice a week at Brentwood; once a week at Oakley; once or twice a month at Port Chicago, Byron and Clayton; and once a month at Dublin. At points which were not served daily, the days when deliveries were made varied from one week to another. Operations were not conducted under any regular schedule.

The questions thus presented require us to determine whether the defendant is a "highway common carrier" within the meaning of Section 2-3/4 of the Public Utilities Act. The portions of this section relevant to the present problem are as follows:

> "(a) The term 'highway common carrier' . . . means every . . . person . . . operating . . . any auto truck . . . used in the business of transportation of property as a common carrier . . . between fixed termini or over a regular route . . .
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> "(b) The words 'between fixed termini or over a regular route' . . . mean the termini or route between or over which any highway common carrier usually or ordinarily operates any auto truck . . . even though there may be departures from said termini or route, whether such departures be periodic or irregular."

WHETHER DEFENDANT OPERATED BETWEEN "FIXED TERMINI" OR OVER "REGULAR ROUTE."

If the points set out in footnote 6 above are found on a map, it will be seen that they are situated in a rough square bounded on the west by San Francisco Bay, on the south by Pleasanton and Livermore, on the east by Knightsen, Brentwood, and Byron, and on the north by Suisun Bay. The communities in this area are isolated one from another and cannot be said to be parts of any natural geographic or economic unit. They can be reached by various combinations of highways. To some of these points daily service was rendered and a large number of shipments transported during the period of time covered by the evidence. To other points the service was less frequent, and the volume of traffic transported was less, in varying degrees.

The phrase "usually or ordinarily," as used in the language of the statute quoted above, does not admit of any precise content and is difficult to apply to a situation like that involved here

where there are numerous termini, each one being served with a different degree of frequency from that of the others.

We believe that, in such cases, to consider the carrier's operations in segments, with each pair of termini representing a distinct segment, leads to impractical and arbitrary results, and that a more reasonable approach is to consider the operations as a whole.

Here it appears that a single, integrated business unit was operated by the defendant in serving all the points disclosed by the evidence. The same equipment, personnel, and terminal facilities were employed, and shipping documents were issued in the same form, and in the same manner, for transportation to all the points served. To some of these points, such as Walnut Creek, Concord, Pittsburg, and Antioch, the defendant rendered daily service in transporting a substantial number of shipments. The service appears to be permanent or indefinitely continuing in nature, and not transient or casual in the sense of being limited by a particular season or by a particular job. In our opinion it may be fairly said that the defendant "usually or ordinarily" operates between the Bay Area and these points, and that they may be regarded as "fixed termini" within the meaning of the quoted statute. As to the other points, we see no reasonable method by which they can be accorded different treatment. We believe that for us to examine each of these other points in turn and the degree of frequency with which each is served, and then to draw a line somewhere with a finding that points on one side of that line are "usually or ordinarily" served while those on the other side are not, would be arbitrary and unreasonable.

There is some difficulty involved in ascertaining any points to be "fixed termini" when frequency of service and number of shipments transported are used as criteria. And the problem is not to be easily resolved, in cases like the present, by recourse to the phrase "regular route," the application of which involves difficulties comparable to those encountered in the application of the phrase "fixed termini."

In administering the present statute, however, we believe we are justified in holding that where, as here, the evidence shows operations by a common carrier on a daily basis between any two or more points, or over any definable route, being conducted on such a scale, or in such a manner, as to exhibit a permanent or indefinitely continuing nature, such points are "fixed termini" within the meaning of the statute. And where the carrier serves other points, or traverses other routes, as a common carrier, making use of the same personnel, equipment, and facilities for all his operations, then the entire service is unlawful in the absence of a certificate of public convenience and necessity.

We do not imply that service less often than daily will produce a different result, but we do not have to decide that question here.

It follows from what has been said that service to each of the points set out in footnote (6) above is unlawful in the absence of a certificate of public convenience and necessity.

WHETHER DEFENDANT IS A "COMMON CARRIER" - EXTENT OF DEFENDANT'S "HOLDING OUT"

Number of Persons to Whom Service Was Held Out.

One of the factors to be considered in determining the extent of a carrier's "holding out" of his services is the number of different persons to whom the service is held out. In the present case complainants assert that defendant has served a substantial number of shippers. In determining the number served, they contend that the party paying the transportation charges should be viewed as the shipper, whether he may be the consignor or the consignee, and whether or not he may have entered into an agreement with the carrier.

In reply, defendant asserts that complainants have so interwoven the testimony relating to all of the points involved as to make it appear that defendant was operating over a single route or entirely between two well-defined areas, thus presenting a distorted notion of the number of shippers served. It also contends that the transportation of collect shipments, at the consignor's request, manifests a holding out to the consignor rather than the consignee.

In view of what we have said we think it proper to consider the service rendered by the defendant at all the points involved in determining the scope of his holding out.

There is some dispute between the parties concerning the number of persons who had entered into agreements with defendant for the transportation of their products. The evidence shows that, of the shippers whose representatives were called as witnesses, a total of 44 had joined with defendant in the consummation of such agreements, whether written or oral. There is no proof that any shipper, identified in the record but not produced as a witness, had entered

into such an agreement. Of the 44 shippers mentioned, some 23 were located at San Francisco and Oakland, and the remainder, at various Contra Costa County points.(8) The sufficiency and validity of these agreements will be considered presently.

The payment of the transportation charges was the subject of searching inquiry on complainant's part. This extended to the relationship between defendant and the party paying the charges, whether contractual or otherwise, and whether he had acted as the consignor or the consignee of shipments which defendant had transported. With respect to some of the shipper-witnesses, this showing was quite definite and specific; the testimony of others, however, was vague and uncertain.

Excluding those who had presented exhibits describing their shipments specifically, twenty shipper-witnesses were called at San

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(8) The distribution of the shipper-witnesses who had entered into transportation agreements with defendant, as well as those shipper-witnesses who had not done so, is shown by the following tabulation:

Location of Shipper	No. of Contract Shippers	No. of Non-Contract Shippers	No Evidence Whether Contract Exists	Total No. of Shippers	Nature of Contract, Writ.	Oral
San Francisco	11	5	1	17	4	7
Oakland	12	2	2	16	6	6
Sub total	23	7	3	33	10	13
Orinda	1	0	0	1	0	1
Lafayette	0	1	0	1	0	0
Walnut Creek	6	3	0	9	0	6
Danville	3	0	0	3	0	3
Concord	2	1	1	4	0	2
Martinez	0	2	0	2	0	0
Pittsburg	5	3	2	10	0	5
Antioch	4	3	0	7	1	3
Brentwood	0	2	0	2	0	0
Sub total	21	15	3	39	1	20
Grand Total	44	22	6	72	11	33

Francisco and Oakland hearings. They represented firms located in those cities which were engaged in the wholesale distribution of their products. During the thirteen-month period mentioned above, they had employed defendant's facilities for the transportation of their shipments throughout the territory involved. Most of them supplied all of these points; some reached only a few. Their shipments moved frequently, regularly, and in substantial volume.

Among the Bay Area distributors, no uniform practice was observed regarding the payment of transportation charges. Of the group of twenty shippers mentioned above, fifteen had entered into agreements with defendant for the transportation of their products; two had not done so; and the record does not disclose the status, in this respect, of the remaining three.

The shipments of ten of the fifteen contract-consignors (9) mentioned, it was shown, moved prepaid; (10) those of two such shippers moved both prepaid and collect; and those of three moved collect. The five contract-consignors last referred to regularly had made collect shipments to a substantial number of consignees at Contra Costa points. (11)

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

(10) With one exception, these witnesses testified that all, or all save a very minor share, of their shipments had moved prepaid. One stated that the charges on 90 per cent of his shipments were prepaid, and those on the remaining ten per cent were collected from the consignees.

(11) The five contract-consignors mentioned above, it was shown, had shipped collect to 46 consignees, distributed throughout the territory as follows: Orinda, 1; Lafayette, 5; Walnut Creek, 8; Danville, 1; Concord, 7; Martinez, 10; Pittsburg, 2; Antioch, 2; Pleasanton, 4; and Livermore, 6. None of these consignees (all of whom were named specifically) was called as a witness. The record does not disclose whether any of them had entered into an agreement with defendant for the transportation of his shipments.

Of two non-contract consignors at San Francisco, one had made collect shipments, and the other, both prepaid and collect shipments, to a few consignees.(12) Of the three concerns whose contractual status was not shown, one either had made shipments, or received return shipments, on which it paid the charges; and another had made collect shipments to consignees whose status was not disclosed.(13) The testimony of a third shipper, falling within this group, was stricken because it obviously rested on hearsay.

As stated, thirteen San Francisco and Oakland distributors submitted exhibits specifically describing their shipments. Of these, it was shown two contract consignors had prepaid the charges upon all of their shipments. The remaining eleven distributors had

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(12) One non-contract consignor at San Francisco had shipped collect to various consignees, as follows: Orinda, 1; Lafayette, 2; Walnut Creek, 4; Danville, 2; Pittsburg, 2; and Antioch, 1. With one exception (a contract-consignee at Walnut Creek), none of these consignees was called as a witness, nor does the record disclose whether any of them had entered into an agreement with defendant. Another contract consignor at San Francisco had made both prepaid and collect shipments to four consignees, as follows: Walnut Creek, 2; Concord, 1; and Pittsburg, 1. None of these consignees testified, nor was it shown whether any had entered into an agreement with defendant.

(13) A San Francisco firm, whose contractual status was not shown, had received return shipments, on which it paid the charges, from dealers of similar status, two of whom were located at Concord, and one, at Pittsburg. It also had received such shipments from one contract-consignee, at Walnut Creek; and had made prepaid shipments to a consignee at Pittsburg, whose contractual relationship was not shown. An Oakland firm, of similar status, had made collect shipments to consignees within the same category, as follows: Concord, 1; Martinez, 1; Pittsburg, 2; Antioch, 1; and Livermore, 1.

shipped collect, or both prepaid and collect.(14) During the period covered by these exhibits, their shipments moved regularly and frequently throughout the territory affected, and were distributed to a substantial number of consignees.(15)

The showing regarding the payment of charges by the local dealers, at Contra Costa and Alameda County points, was less definite than that concerning the Bay Area distributors. Twenty-one contract consignees testified that their shipments generally had moved collect; a few, however, stated they had received some prepaid shipments. As to the non-contract consignees, the shipments of nine had moved collect, and those of three had moved prepaid. Two consignees, whose contractual status does not appear, had received collect shipments. With respect to the two groups last mentioned, the record does not indicate, in all instances, whether the Bay Area

(14) Of the 11 distributors mentioned, three (including one contract-consignor and two non-contract-consignors) had made collect shipments only; five (including three contract-consignors and two non-contract-consignors) had made both prepaid and collect shipments, which were indicated as such by the exhibits; and three (including two contract-consignors and one non-contract-consignor) had made both prepaid and collect shipments which were not so identified by the exhibits.

(15) The statements submitted by these thirteen San Francisco and Oakland distributors specified the shipments they had made during a thirteen-month period, as indicated in Footnote (6), supra. Some of these exhibits also covered shipments moving during the few months immediately preceding or following this period. The eleven distributors mentioned (including all of those detailed exhibits, with the exception of two contract-consignors whose freight moved prepaid) shipped to a substantial number of consignees throughout the affected territory. The maximum number served was shown to be as follows: At Orinda, 2; Lafayette, 7; Walnut Creek, 31; Danville, 6; Concord, 20; Martinez, 13; Pittsburg, 30; Antioch, 21; Pleasanton, 17; Livermore, 30; Alamo, 2; and Pacheco, 2. The exhibits disclose that several distributors served a few local dealers in common; to this extent, there was some duplication among the consignees named. In the foregoing enumeration of the consignees served, there has been excluded any consignee listed who may have entered into an agreement with defendant. None of them was called as a witness, nor does the record show whether any had entered into an agreement with defendant.

shippers had negotiated contracts with defendant.

Thus, both collect and prepaid shipments were made by contract and non-contract consignors alike, as well as by consignors whose contractual status was not shown. These moved to consignees whose contractual relationship with defendant also was not shown. Many of these consignees were not produced as witnesses. Under the circumstances, it is clear that on numerous occasions the transportation charges were paid and borne by someone who had not entered into an agreement with defendant, or whose status in this respect was not established by the record.

It thus appears that the number of persons served by defendant is substantial. It comprises most of the distributors located at San Francisco and Oakland whose representatives were called as witnesses. At least 25 of them fall within this category. And allowing for duplications, approximately 180 consignees, situated at Alameda and Contra Costa County points, were served by the defendant. They are distributed generally throughout this territory.

Complainants urge that the large number of persons served by defendant, with whom no agreement for transportation existed, manifests a holding out to serve the public. For example, they point to the many instances where collect shipments were received by non-contract consignees from contract consignors. Defendant, on the other hand, contends that in determining to whom the service has been held out, the test must be who made the arrangements with the carrier, not who paid the freight charges. In most instances, it is said, the consignors, rather than the consignees, selected the carrier, regardless of whether the shipment may have moved prepaid or collect.

In a previous decision, which dealt with this subject, we said:

> "The record is convincing that respondent did not limit his service to shippers, whether consignors or consignees, with whom he had entered into contracts governing the transportation of the freight. As stated, he has transported from consignors holding contracts shipments upon which the charges were paid by consignees with whom he had entered into no contracts; and he also has transported from non-contract consignors prepaid shipments destined to consignees holding contracts. In the absence of any showing to the contrary, the party paying the transportation charges, whether consignor or consignee, is presumptively the owner of the freight and, as such, is entitled to control the mode of transportation. [Citing: Civil Code, Section 1739, Rules 4 and 5]. In short, the consignor must be deemed the owner of prepaid shipments until delivery to the buyer; on the other hand, title to collect shipments passes to the buyer upon delivery to the carrier. Consequently, the consignor, in delivering collect shipments to the carrier, acts as the consignee's agent. [Citing: Re Hirons (1928) 32 CRC 48, 52]. In the absence of a special agreement, neither of them is entitled to control the transportation of the freight, where the other has borne the transportation charges."(16)

The material portions of Rules 4 and 5 of Civil Code Section 1739, which are provisions of the Uniform Sales Act, are as follows:

> "Rule 4 . . . . (1) Where there is a contract to sell unascertained or future goods by description, and goods of that description and in a deliverable state are unconditionally appropriated to the contract . . . . the property in the goods thereupon passes to the buyer . . .
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> "(2) . . . . Where, in pursuance of a contract to sell, the seller delivers the goods . . . to a carrier . . . (whether named by the buyer or not) for the purpose of transmission to . . . the buyer, he is presumed to have unconditionally appropriated the goods to the contract, except . . .
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> "Rule 5 . . . If the contract to sell requires the seller . . . to pay the freight . . . to the buyer . . . the property does not pass until the goods have been delivered to the buyer . . ."

In the Maloney case these rules were used as a foundation for the conclusion that the number of different persons who paid freight

(16) Re Maloney (1946) 46 CRC 673, 680, 681

charges was presumptively the number to whom the carrier held out his services. The logic for this conclusion was that under the Uniform Sales Act the freightpayer is presumptively the owner; as owner, the freightpayer is entitled to select the carrier; therefore, if the consignee is the freightpayer and the consignor delivers the goods to the carrier, the consignor is the agent of the consignee in delivering to the carrier, and thus, in effect, the carrier has held himself out to the consignee.

This conclusion has been seriously challenged, and we believe it is desirable to re-examine it in some detail, having in mind the question of its soundness in an inquiry into the extent of a carrier's holding out of his services.

It is obvious that in every case in which transportation occurs, two persons are benefited by the carrier, viz., the consignor and the consignee (except where one person is both consignor and consignee). In a sense, therefore, the carrier performs a service for two persons, by virtue of which alone it might be argued that he held out his services to both. In our opinion, however, that is not the common understanding in the transportation industry. We believe that a carrier may properly be regarded as having held out his services at least to the person who engaged him, and our inquiry should be whether there are others who may be presumed to be within the scope of the holding out.

As already indicated, the logic of the presumption expressed in the Maloney case rests upon the premise that the consignee of collect shipments is the owner of the goods, and that, therefore, he has the right to select the carrier. Such a conclusion, however, seems to us fallacious, because the consignee does not become the owner until delivery to the carrier, at which time the carrier has already been selected. Nor can any holding out to the consignee be

predicated upon any agency of the consignor. For the reason already given, such agency cannot be presumed from the consignee's ownership; nor can it be presumed from any obligation of the consignee to pay the freight charges, since such an obligation arises, in the absence of special agreement, only by virtue of the consignee's acceptance of the goods. (Civil Code Section 2138.)[17] Until such acceptance, only the consignor is liable. (Civil Code Section 2137.)[18] And when the acceptance by the consignee occurs, the carrier's services have been concluded, so that it would be unreasonable to base any holding out to the consignee upon his acceptance of the goods.

It would be possible, of course, for the consignor to agree specially with the consignee that the latter should have the right to select the carrier, or without any such agreement or legal right in the consignee, the consignor, for business reasons, might accede to the consignee's request that the goods be delivered to a particular carrier. In either event, however, the selection of the carrier by the consignee does not rest upon any legal right arising by virtue of his paying the freight charges.

In the case of collect shipments, however, the carrier expects to receive payment for his services from the consignee, and it is probable that he will in fact thus be paid, the exceptions being the unusual cases where the consignee refuses to accept delivery. We

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(17) "§2138. CONSIGNEE, WHEN LIABLE. The consignee of freight is liable for the freightage, if he accepts the freight with notice of the intention of the consignor that he should pay it."

(18) "§2137. CONSIGNOR, WHEN LIABLE FOR FREIGHTAGE. The consignor of freight is presumed to be liable for the freightage, but if the contract between him and the carrier provides that the consignee shall pay it, and the carrier allows the consignee to take the freight, he cannot afterward recover the freightage from the consignor."

think this expectation and probability of payment by the consignee serve as a proper basis for the presumption that a carrier, in transporting collect shipments, is holding out his services to the consignee as well as to the party who engaged him, if that is not the consignee.

In the case of prepaid shipments, the consignor, under the provisions of the Uniform Sales Act above set out, is presumptively the owner. The principle of the Maloney case then raises the further presumption that he therefore has the legal right to select the carrier, plus the further presumption that he therefore is the person to whom the carrier has held out his services. It would seem more appropriate, however, to say that in most cases of prepaid shipments, the consignor's selection of the carrier follows from his possession, rather than ownership, of the goods, under circumstances in which no one else has a superior right to select the carrier.

Such possession, followed by such consignor's selecting and engaging a carrier, justifies the conclusion that the carrier responding to such request for service is holding himself out to such consignor. We think this is a sounder basis for this conclusion than any presumption of ownership by such consignor.

If the evidence shows, however, that the consignee, or some one other than the consignor, engaged the carrier's services with the understanding that the shipment would move prepaid, we again have a situation where two persons are within the scope of the carrier's holding out, viz., the party who engaged him and the party from whom he expected his pay.

We conclude, therefore, that the carrier has held out his services to the party who engaged them. If it appears, however, that their arrangements contemplated that another party would pay the freight charges, then the latter is presumed to be also within

the scope of the carrier's holding out.

In applying this principle to the facts in the present case, it appears that at least 44 different persons had entered into transportation agreements with defendant and had thereby engaged his services. In addition, these persons were involved in numerous transactions with other persons who paid the freight charges. The number of such persons in the latter group is difficult to fix precisely. Our previous analysis of the evidence indicates, however, that there were at least 46 such persons. In accordance with the principle described above, we believe the defendant has held out his services to at least 90 different persons.

Contracts with Shippers

Complainants contend that the agreements between defendant and the shippers were lacking in certain necessary requirements. Defendant concedes that in some respects these agreements were not specific, but contends, nevertheless, that all the essential points were considered during the discussions had with the shippers. In determining defendant's carrier status, it is claimed, the conduct of the parties is more significant than the terms of the agreements, standing alone.

At the suggestions of the traffic manager of a San Francisco distributor, so Koons testified, defendant adopted the form used as the prototype for all the written contracts subsequently negotiated with the shippers. Some eleven shippers joined in such agreements. This form omitted certain provisions commonly found in agreements of this nature. It specified the points between which the service would be performed, the commodities to be transported, and the rates to be assessed. However, neither the term during which the agreement would remain effective nor the volume of tonnage to be offered was indicated.

The showing regarding the oral agreements was vague and inconclusive. The shippers failed to describe precisely the nature of their terms and provisions. Some testified the arrangement contemplated that defendant would haul all shipments received from their suppliers. A few stated it was understood they would continue to employ defendant so long as its service was satisfactory. One testified he considered himself obligated to give defendant reasonable notice of termination of the agreement; others stated they felt free to discontinue the service at any time. Several shippers said they regarded themselves at liberty to use other carriers, if they so desired. Whether any other provisions were considered is not disclosed by the record.

There was some variance among the shippers in the manner of their use of defendant's facilities. It would be inaccurate to characterize this as the measure of their performance of any agreements in which they may have joined, since the latter were so indefinite that it cannot be ascertained whether the shippers' conduct squared with the terms of these arrangements. For example, only a few had employed defendant exclusively; a substantial number, however, also had used other carriers.

The written agreements into which defendant had entered lack certain essential requirements. The form adopted specified neither the term of the contract nor the quantity of freight to be supplied and carried. In the absence of such provisions, the agreement might be cancelled overnight by either party, without any excuse or even at his mere whim. Moreover, the shipper might offer any quantity of freight that would suit his convenience, or none whatsoever if he were so disposed.

The so-called oral agreements constitute no more than mere vague understandings, which imposed no definite obligation upon

either carrier or shipper. The evidence does not disclose any course of conduct, generally observed by the parties, which might throw any light on these arrangements.

The fact that defendant had entered into contracts with its shippers, so the former asserts, together with the circumstances surrounding their performance, evinces an intention, on the carrier's part, to limit the scope of its operations. This is true, it is claimed, notwithstanding any infirmities that might exist in these agreements. The negotiation of such agreements, though defective in form, may under some circumstances disclose the carrier's purpose to circumscribe its operations. This would not be true, however, where the carrier is willing to enter into contracts with a large number of shippers who might offer a substantial volume of tonnage for transportation. And the manner of performance of these agreements might indicate that neither party seriously considered or accepted them as binding obligations. Such appears to have been the case here.

Solicitation of Traffic

At the outset, the business was developed to some extent through solicitation of traffic in the manner characteristic of common carriers, but this practice no longer is followed. During 1946, and until September 1947, defendant engaged in some solicitation, Koons testified, but this was discontinued when the application for a certificate was filed. He estimated that between 10 and 15 per cent of defendant's customers were thus obtained.

The testimony of the shipper-witnesses tended to corroborate that of Koons. Some distributors stated they originally had employed defendant because of requests received from their customers; and several local dealers said they had done so at the request

of their suppliers. Some shippers, on their own initiative, had requested that the service be provided. Only a very few, it was shown, had been attracted as the result of defendant's solicitation. About half the witnesses called did not refer to this subject.

Defendant has rejected traffic offered by a substantial number of shippers. Koons testified that defendant had refused to serve some 35 suppliers in the Bay Area, as well as several carloading companies. To handle their tonnage, he said, from five to eight line-haul trucks would have been required, in addition to the equipment used to accommodate the shippers then served. The business refused would have increased the volume of traffic fourfold. Rather than accept this tonnage, it was stated, defendant decided to seek operating authority as a highway common carrier.

It is clear, therefore, that defendant actively solicited traffic during the early stages of development, and that the business was to some extent built up by this means. However, it no longer undertakes to do so. Moreover, a substantial volume of tonnage has been rejected.

Restrictiveness of Defendant's Operations

Complainants contend that no element of specialization is reflected by the manner of defendant's operations or the characteristics of its service; on the contrary, it is claimed, these elements are similar to those inherent in the operations and service of the common carriers in the field. Moreover, complainants assert, the absence of specialization is revealed by the stereotyped form of agreement used, which is not designed to accommodate the varying requirements of the several shippers.

These claims are disputed by defendant. It contends that no comparison should be made between the method of operation and the

type of service provided by defendant, on the one hand, and those afforded by the existing common carriers, on the other hand, since evidence of this nature was excluded at complainant's instance. In view of that ruling, it would be manifestly unfair to consider these matters now, they assert. Defendant also contends that specialization is not a proper test of private-carrier status; this may be considered only to the extent that it may be relevant to the primary issue presented for determination, viz., whether defendant had held itself out to serve the public or some portion thereof.

It is true that, on complainants' objection, evidence concerning the nature of the service provided by the existing carriers was excluded. On several occasions defendant was prevented from inquiring into the details of complaints, voiced by shipper-witnesses, concerning the adequacy of the service performed by these carriers. The evidence thus rejected might, in some respects, have afforded a comparison between the nature and the characteristics of the service provided by these carriers, on the one hand, and that afforded by defendant, on the other hand. This ruling was proper, we believe, since evidence of this character is not germane to the issues raised in this proceeding. However, under the circumstances, complainants are in no position to take advantage of the absence of such a showing.

The ultimate test of private carrier status, defendant urges, is the nature of the holding out to the public. Matters such as the supplying of unusual types of equipment, operation at unusual hours, performance of unusual extra services, and coordination of the service with the shipper's business, are merely evidentiary, it is claimed. Each should be considered and accorded due weight in arriving at a determination of the ultimate issue, specified above; none, it is said, may be substituted for that issue itself, as the

primary question to be answered.

In our recent decision on rehearing in the Nielsen case, (19) we pointed out that the characteristic of restrictiveness is an indispensable element of contract carrier service. This, it was said, might relate to the number of shippers served, or to the physical attributes of the operation (having reference particularly to those of an unusual character, differing from those normally encountered in common carriage), or to a combination of both. The term "specialization," we said, does not adequately express this concept, since it might well be limited to unusual physical attributes of an operation.

The record does not indicate that defendant's operation differs in any material respect from that afforded by the carriers in the field. No showing was made that it exhibits any unusual physical characteristics not normally found in common carrier operation.

Conclusions

The record, we believe, amply warrants the following conclusions and we hereby find -

(1) Defendant's operations between the points served manifest a permanent or indefinitely continuing nature. Operations between some of these points were on a daily basis. Service to others was less frequent but rendered by the same equipment, personnel, and facilities.

(2) In the conduct of these operations, defendant has held out his services to a large number of persons who were widely dis-

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(19) Pacific Southwest R.R. Assn. v. J. P. Nielsen, dba Nielsen Freight Lines, Case No. 4820 (Dec. No. 43557, dated Nov. 22, 1949).

tributed among the points served.

(3) Written agreements were consummated between defendant and some of these persons, comprising, for the most part, distributors situated in the Bay Area. Since they lacked certain essential requirements, these agreements are indefinite and uncertain. The showing regarding the negotiation of oral agreements is vague and unconvincing; moreover, the terms of these agreements were not clearly established. Similarly, the evidence concerning the performance of these understandings is indefinite and vague. It is clear, however, that defendant's service was not confined to those with whom it had entered into arrangements of this nature.

(4) Although the business originally was built up to some extent through solicitation of shippers, that practice has been discontinued. The traffic offered by a substantial number of shippers has been rejected.

(5) Between the points where defendant has operated, it has undertaken to serve the public generally. There are no elements of restrictiveness which would manifest a limitation of the scope of defendant's holding out of his services.

In a decision this day rendered in Application No. 28649, a certificate was granted to defendant authorizing the operation of a highway common carrier service between San Francisco, Emeryville, and Oakland, on the one hand, and Orinda, Lafayette, Walnut Creek, Danville, and Concord, and points intermediate thereto on State Highways Nos. 24 and 21, on the other hand. Accordingly, the order herein will contain a proviso permitting operations under such certificate.

Upon full consideration of the evidence, we accordingly find that the defendants, Harold A. Stapel, Harland H. Stapel, and Clayton C. Koons, co-partners, doing business under the firm name and

style of Stapel Truck Lines, have operated and are still operating auto trucks used in the business of transporting property as a highway common carrier (as defined by Section 2-3/4 of the Public Utilities Act), for compensation, over the public highways of the State of California, between fixed termini, to-wit: Between San Francisco and Oakland, on the one hand, and Orinda, Lafayette, Walnut Creek, Alamo, Danville, Concord, Clayton, Pacheco, Martinez, Port Chicago, Pittsburg, Antioch, Oakley, Knightsen, Brentwood, Byron, Pleasanton, and Livermore, California, on the other hand. That said defendants have conducted such operations without possessing a prior operative right therefor, and without having first obtained from the Public Utilities Commission a certificate of public convenience and necessity authorizing such operation, in violation of Section 50-3/4 of said Act.

O R D E R

The above-entitled proceeding being at issue, a public hearing having been held therein, evidence having been received, the matter having been duly submitted, and the Commission being fully advised:

IT IS ORDERED:

(1) That defendants, Harold A. Stapel, Harland H. Stapel, and Clayton C. Koons; co-partners, doing business under the firm name and style of Stapel Truck Lines, be and they are hereby directed and required to cease and desist from operating, directly or indirectly, or by any subterfuge or device, any auto truck as a highway common carrier (as defined by Section 2-3/4 of the Public Utilities Act),

for compensation, over the public highways of the State of California, between fixed termini, to-wit: Between San Francisco and Oakland, on the one hand, and Orinda, Lafayette, Walnut Creek, Alamo, Danville, Concord, Clayton, Pacheco, Martinez, Port Chicago, Pittsburg, Antioch, Oakley, Knightsen, Brentwood, Byron, Pleasanton, and Livermore, California, on the other hand, unless and until said defendants, and each of them, shall have obtained from the Public Utilities Commission a certificate of Public convenience and necessity therefor; provided, however, that nothing contained herein shall require the defendants to cease and desist from any operation authorized in Application No. 28649 and conducted after acceptance by the defendants of any certificate granted therein.

(2) That in all other respects the relief sought by the complaint herein is hereby denied.

The Secretary is directed to cause a certified copy of this order to be personally served upon each of said defendants, Harold A. Stapel, Harland H. Stapel, and Clayton C. Koons.

With respect to each of said defendants, this order shall become effective on the twentieth day after the date of such service upon said defendants, respectively.

Dated at San Francisco, California, this 14th day of February, 1950.

R. J. Prichard
Justus F. Craemer
Dwight L. Fennell
Harold P. Huls
Leonard Potter
Commissioners