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ORIGINAL

Decision No. 43829

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.	)	Case No. 4928
GORDON A. SAMUELSON and GILBERT J. MUNSON, copartners, doing business under the firm name and style of CIRCLE FREIGHT LINES, FIRST DOE and SECOND DOE,	)	
Defendants.	)	

Fred N. Bigelow, for Pacific Southwest Railroad Association, complainant.
Frederick W. Mielke, for Delta Lines, Inc., complainant.
Reginald L. Vaughan and John G. Lyons, for Inter-Urban Express Corporation, complainant.
Scott Elder, for Gordon A. Samuelson and Gilbert J. Munson, partners, doing business as Circle Freight 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 Gordon A.Samuelson and Gilbert J. Munson are copartners engaged in business under the firm name of Circle Freight Lines. (1)

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

The complaint as amended alleges that defendant regularly and continuously has been and still is engaged in the business of a highway common carrier, without proper operating authority, between certain San Francisco Bay points, on the one hand, and points in Contra Costa County, on the other hand.(2)

By its answer, as amended, defendant denies that its operations were conducted unlawfully, and it also set up certain affirmative defenses. Complainants moved to strike some of these allegations, essentially on the ground that they were argumentative and that they set forth evidentiary matter as distinguished from ultimate facts. A ruling on the motion was reserved. Although some of these allegations are susceptible to these objections, we believe that, in view of the Commission's liberal rules of pleading, they should be permitted to stand. Accordingly, the motion to strike is denied.

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. The hearing in this matter was postponed, pending completion of the hearing of Circle'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

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(2) Allegedly, the operations in question were conducted between San Francisco, Oakland, Albany, Piedmont, Berkeley, Emeryville and Alameda, on the one hand (which for convenience will be referred to as the Bay Area), and, on the other hand, Orinda, Lafayette, Walnut Creek, Antioch, Martinez, Port Chicago, Brentwood, Oakley, Clayton and Danville (all of which are in Contra Costa County), and intermediate points.

present proceeding.(3)

To establish their allegations, complainants called witnesses representing 47 shippers engaged in business in the Bay Area and at Contra Costa County points.(4) Those situated in the Bay Area were manufacturers or wholesale distributors; those located at other points consisted of retail dealers of various types. In the aggregate, these shippers dealt in a wide variety of commodities. They described the extent to which they had employed defendant for the transportation of their products between the points involved, and related the circumstances under which it had undertaken to provide the service.

One of the partners Gordon A. Samuelson was called by complainants and he also testified voluntarily in support of defendant. He described defendant's operations from their inception, and undertook to explain certain matters to which the shipper witnesses had adverted. In addition, his wife Mrs. Katherine

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(3) In Application No. 28856, Circle sought authority to operate as a highway common carrier between San Francisco and Oakland and certain parts of Albany, Alameda, Berkeley and Piedmont therein specified, on the one hand, and, on the other hand, Walnut Creek, Danville, Saranap, Concord, Pacheco, Port Chicago, Pittsburg, and Clayton, and intermediate points, as well as those situated within one mile laterally on either side of State Highway 21 between Pacheco and Danville. Among the intermediate and lateral points which would be served are Nichols, Pleasant Hills, Galindo, Hookston, Clyde and Bella Vista. Operating authority was also sought within zones surrounding some of the Contra Costa points specified. 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 proceedings was filed December 8, 1947. Hearings commenced June 25, 1948, and were concluded November 23, 1948. The final brief was filed on July 12, 1949.

(4) Of the 47 shipper witnesses produced by complainants, 6 were engaged in business at San Francisco; 15 at Oakland; 6 at Walnut Creek; 1 at Danville; 6 at Concord; 1 at Port Chicago; 8 at Pittsburg; 1 at Bella Vista; 1 at Antioch and 2 at Brentwood.

Samuelson testified on defendant's behalf.

Defendant's Operations, Generally

Before considering the contentions of the respective parties, we shall describe generally the nature of defendant's operations.

In November, 1945, defendant Gilbert J. Munson, who previously had been employed for several years as a driver for various truck operators, purchased the business of Circle Freight Lines from Fred Lowell, then the owner, for $7,000.(5) Both Munson and Samuelson contributed to the purchase price but at the outset, Samuelson did not participate in the business, the permit being originally issued to Munson alone. When Samuelson left the employ of Shell Chemical Company, in January, 1946, both he and Munson received a partnership permit as a highway contract carrier. Since then they have carried on the business together.

Only four units of equipment were used to supply the service. The five-ton truck purchased from Lowell was augmented in January, 1946, by another truck of the same capacity. In November, 1946, defendant also acquired a ten-ton semi-trailer and a tractor.

Samuelson described the physical operations. Freight picked up during the afternoon, both at San Francisco and Oakland, moves to the terminal at Concord where it is segregated and reloaded for distribution. On the following morning these shipments are delivered at Contra Costa County points. Ordinarily, the service

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(5) The assets acquired from Lowell consisted of one 5-ton Chevrolet truck valued at $3,000, and the good will of the business which was valued at $4,000. At that time there were outstanding agreements between Lowell and 14 shippers, two of whom were situated in San Francisco; six in Oakland; two in Pittsburg; two in Walnut Creek and two in Concord.

is provided by the two five-ton trucks. These are assigned to San Francisco and Oakland, respectively, and they also distribute the traffic.

Primarily this is a family operation. Both Samuelson and Munson (who are related by marriage) act as drivers and perform the pickup and delivery service. They also employ a full time driver and, occasionally, a part time driver. Both Mrs. Samuelson and Mrs. Munson perform the office work.

Defendant could handle more tonnage than that ordinarily offered for transportation. As a rule each of the five-ton trucks moving outbound from San Francisco and Oakland is loaded only to 75 per cent of its capacity. The volume of traffic moving inbound is negligible. The ten-ton semi-trailer is used for standby service; the need for its use arises only on rare occasions.

The nature of the service afforded at the various points involved was disclosed by the record. The evidence shows that when the complaint was filed, and for several months previously, defendant was operating daily between San Francisco and Oakland, on the one hand, and Orinda, Lafayette, Walnut Creek, Concord, Port Chicago, Pittsburg, Antioch, Brentwood, Danville, and Martinez, on the other hand. Alamo, Bella Vista, Oakley, Dublin, Pleasanton, Livermore, Clayton, and Byron were served less often, and with varying degrees of frequency.

It appears, however, that defendant operated a single integrated business unit in transporting property to all points served by it, using the same equipment, personnel, and facilities, and that the service thus performed was of a permanent or indefinitely continuing nature.

There is no evidence of any movement to or from any of the Bay Area points mentioned in the complaint, other than San Francisco

and Oakland.

For the reasons mentioned in our decision this day rendered in the Stapel case,(6) we shall consider the defendant's operations as a whole, and not look upon each pair of termini as a distinct segment of those operations.

The Issues

As in other proceedings of this nature, we are called upon to determine whether defendant has held itself out to serve the public or a portion thereof; that is the primary issue presented for consideration. Specifically, complainants contend (a) that in selecting the shippers whom it would serve, defendant was guided primarily by the quantity of traffic offered for transportation, and by convenience or economy in the performance of its operations; (b) that in the conduct of its operations, defendant disregarded the advice it had received from Commission staff members concerning its carrier status; (c) that defendant was transporting all the traffic that could be handled consistently with good service, considering both the equipment and the personnel available; (d) that shippers were served in the absence of contracts, and also, notwithstanding manifest infirmities in the provisions of such agreements; moreover, the number of shippers served, purportedly under these agreements, was substantial; (e) that the circumstance that an operator had entered into contracts with the shippers whom he served is subordinate to the element of private carriage, which is the real factor determining carrier status; and (f) that specialization of service is the distinguishing characteristic of

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(6) Pacific Southwest R.R. Assn., et al. v. Harold A. Stapel, et al, doing business as Stapel Truck Lines, Case No. 4927.

a private carrier. In reply defendant asserts (a) that defendant had imposed upon itself, in advance, a predetermined limitation upon the scope of its holding out; within this limitation defendant's selection of the shippers whom it served was arbitrary and based upon no fixed rule or classification; and the service, in fact, was supplied only to a limited number of shippers; (b) that defendant's contractual arrangements with its shippers met the Commission's requirements on that subject; (c) that the service performed by defendant was restricted, even by the most technical standards, to the service of its regular accounts; (d) that defendant had ample capacity for twice its ordinary volume of traffic; (e) that defendant had maintained its contract carrier status by imposing limitations of service and avoiding a public holding out which are artificial and unnatural to its type of traffic and operation; and (f) that a holding out to the public, rather than specialization of service, is the test of common carrier status.

Essentially, these contentions involve the limitations which defendant has sought to impose upon its operations; the contractual arrangements into which defendant has entered with its shippers and the service provided thereunder; and the extent to which specialization may be regarded as a test of private carrier status. We shall consider these matters in the order mentioned.

Limitations Imposed on Service

Defendant sought advice from authoritative sources concerning the nature of its operations, and endeavored to act in conformity with the suggestions received. At the outset, Samuelson consulted with Commission staff members and subsequently both he

and Mrs. Samuelson participated in similar conferences. During the initial discussion, Samuelson described the character of defendant's operations and was advised, so he testified, to limit the service, preferably to a maximum of some 20 shippers. Later Samuelson consulted his attorney at Concord, who questioned the soundness of the staff's suggestions, stating that in his judgment such a limitation would be improper. There was some correspondence between defendant's attorney and the Commission's legal department regarding this matter. After considering these conflicting opinions, defendant decided to limit the number of those served to about 30 shippers.

The record shows that throughout the course of its operations defendant has adhered very closely to this limitation. As stated, it served a total of 14 shippers when Munson acquired the line in November, 1945. By November, 1946, this had reached 28 shippers, and 33 in September, 1947. By October it had dropped to 32. During this period, service had been extended to 47 shippers in the aggregate, and withdrawn from 15 shippers.(7) The 32 shippers

(7) The number of shippers served between November, 1945, and December, 1947, as well as the number of shippers dropped during this period, appears in the following tabulation:

1945	No. of Shippers Served	No. of Shippers Dropped
November	14	
1946		
January	16	
March	21	
June	24	
August	26	
September		2
October	25	1
November	28	
December	26	3
1947		
January	28	2
March	30	2
May	28	1
June		1
July		1
August	31	
September	33	
October	32	2

served in December, 1947, when the complaint was filed, were distributed generally throughout the affected territory.(8)

The Bay Area shippers were substantial concerns, some of them being of the first rank. About three-fourths of the traffic comprised electrical supplies, drugs and liquors in equal proportions. The remainder consisted of various other commodities.

Defendant, it was shown, has rejected the business tendered by many prospective shippers which sought to utilize its facilities. The traffic supplied by some of these concerns would have been substantial in volume; that offered by others would have been small or even inconsequential. Many of these firms, it was stated, had offered to enter into contracts with defendant. Samuelson specified several firms whose business had been rejected; in addition, he stated, there were many others whose offers had been refused.(9) There is no proof of any solicitation, on defendant's part; Samuelson testified that defendant never had engaged in this practice.

The parties are not in accord as to the reasons underlying the refusal of these shipments. Complainants assert that service was withheld because the tonnage offered was both small in volume and would move infrequently; and because defendant already was handling all the traffic that could be accommodated by the

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(8) Of the 32 shippers served on December 8, 1947, nine were situated in San Francisco; 15 at Oakland; two at Walnut Creek; three at Concord; two at Pittsburg and one at Brentwood.

(9) Samuelson specified some 36 firms whose proffered tonnage had been refused. Of these, eight were situated in Oakland; three in Lafayette; one in Walnut Creek; one in Danville; 14 at Concord; two at Port Chicago; six at Pittsburg and one at Antioch.

available equipment and personnel. Defendant, on the contrary, asserts that the shippers served were selected upon an arbitrary basis, having in mind both convenience and economy of operation, as well as a sufficient volume of tonnage to insure a profit. Had it not undertaken voluntarily to impose upon itself a limitation of the number of shippers served, defendant could have accommodated a much larger number with the existing facilities, it is claimed.

The record is convincing, we believe, that from the outset, defendant decided to limit the number of shippers whom it would serve. This conclusion was motivated, no doubt, by the advice proffered both by staff members of the Commission and by defendant's attorney. For many months the number of shippers served did not exceed thirty, and has not grown much beyond that point. We are satisfied that this limitation was adopted in good faith; it may not be considered as a device designed to evade the appropriate regulation of defendant's operations. However, it is equally clear that as some shippers dropped out, others were selected to replace them, in order to maintain at a constant level the total number of shippers served.

Because of this limitation upon the number served, defendant carefully selected its customers. Admittedly, it accepted only those offering a substantial volume of tonnage, moving regularly. In determining whether a shipper would be served, defendant also considered both economy and convenience of operation, especially in providing the pickup service. In short, it accepted only those shippers who would "fit in" to its operations. Defendant's motives in so doing are readily understandable. In view of the limited number of shippers that could be served, it

chose those whose business was considered profitable; all others were rigidly excluded.

Defendant readily could have accommodated additional shippers with its existing facilities. The load factor of each of its five-ton trucks did not exceed 75 per cent, on the average, and the ten-ton semi-trailer was seldom used. However, because of the fluctuations normally encountered in the volume of traffic, the number of such additional shippers would be difficult to determine. Moreover, any marked increase might well require the employment of another driver, thus entailing additional expense.

Contractual Arrangements between Defendant and the Shippers

We agree with the parties that the existence, or non-existence, of contracts between a carrier and its shippers, governing their relations and prescribing the conditions under which the transportation service would be performed, is not necessarily determinative of private carrier status. If there is a sufficient showing of a holding out to serve the public, one may be a common carrier notwithstanding the fact that he has entered into such arrangements. However, this is a factor - and an important one at that - to be considered in determining the nature of the carrier's undertaking. In a proper setting, the presence of such contracts may indicate a purpose to restrict the scope of his operations.

At the outset, defendant's contractual relationship with its shippers was somewhat nebulous. When Munson acquired the line in November, 1945, he was advised by Lowell that contracts had been negotiated with the 14 shippers then served. Of these, some four

or five were claimed to be in writing and the rest were oral. Lowell never turned over to defendant the written agreements nor did he supply detailed information concerning the terms of the oral agreements. Defendant, therefore, had very little information as to the nature of these arrangements. Samuelson testified, however, that he assumed defendant would be entitled to transport the greater part of their tonnage.

During the discussions had with staff members, to which we have adverted, this subject was considered. At the initial conference, Samuelson was advised that oral agreements with the shippers would be acceptable. Although the essential provisions of such agreements were not then discussed, this matter was considered in detail during later conferences.

At first, these agreements were oral in form; many months elapsed before defendant undertook to reduce them to writing. In so doing, it was stated, defendant relied upon the advice received from staff members. However, upon further consideration, defendant decided to enter into written agreements with its shippers. Two forms were adopted for this purpose, one designed for city suppliers and the other for local dealers situated at Contra Costa County points. The former obligated the shipper to supply all traffic of a certain type; while the latter bound him only to offer a prescribed minimum tonnage each month. The period during which the contract would remain in effect was specified.(10) Agreements of this nature were entered into with some 13 shippers.

Soon after filing its application for a certificate, defendant, on advice of its counsel, adopted another form of

(10). The agreement provided that it would remain in force for a term of 90 days from date. Unless terminated by either party, through written notice given at least one week prior to the expiration of such period, the agreement would be deemed successively renewed for additional periods of 90 days each.

agreement. This was more comprehensive than the written forms previously used. It obligated the shipper to offer, and the carrier to transport, all shipments of designated commodities moving between specified points; it indicated the rates to be charged, i.e., the minimum rates and charges prescribed by the Commission; it specified the term during which the contract would remain in effect (a definite period being prescribed as to each shipper); it defined the carrier's liability for loss of or damage to any shipment; and it set forth other provisions relating to the performance of the service. A stereotyped form was used containing blanks for information individual to each shipper.(11) This form was submitted by defendant to all of its shippers with the request that they sign the agreement. All but three of the shippers entered into written contracts of this nature.(12)

Defendant, it was shown, has rigidly insisted upon the shippers' observance of the terms of their agreements, particularly those relating to the quantity of freight to be offered for transportation. Because of the limited number of shippers served, it was stated, defendant realized that it could not operate profitably unless the terms of these agreements were fulfilled. On several

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(11) Spaces were left blank in the form for the date, the shipper's name and address, the general nature of the commodities to be transported, the points between which the service would be provided, and the date when the agreement would terminate.

(12) Three shippers refused to sign a written agreement with defendant. However, Samuelson testified, they entered into oral agreements identical in terms with the form which was presented, filling in the blanks orally. A San Francisco supplier refused to obligate itself to deliver to defendant all shipments consigned to Contra Costa points, and the form was modified accordingly. However, Samuelson stated, it was understood that this shipper nevertheless would tender all such shipments to defendant.

occasions, the record shows, defendant has terminated agreements because of the shipper's failure to supply the required tonnage.

Defendant has considered itself obligated to collect the freight charges from the shipper with whom it had entered into contractual relations. In practice, it actually has done so, with a few minor exceptions - some seven shipments altogether - which were conceded to be immaterial. Thus, under its agreements with Bay Area distributors, defendant has collected its charges from them alone and has refused to accept collect shipments. On the other hand, under its agreements with retail dealers situated at Contra Costa points, defendant has handled collect shipments only and has rejected prepaid shipments. Some of the traffic which was refused, Samuelson stated, was attractive from the standpoint both of volume of tonnage and of revenue. Samuelson's testimony concerning defendant's practice in this regard was corroborated by that of many shipper witnesses.

Complainants contend that regardless of who pays the charges, both consignors and consignees must be considered in determining the number of shippers served. They refer to instances, disclosed by the record, where prepaid shipments received from contract shippers, situated in the Bay Area, were distributed to many local dealers located at Contra Costa County points. Not only the consignors, but the consignees as well, were served by the carrier, it is claimed. This point was raised in the Stapel case,(13) this day decided. Following our ruling in that decision, we

(13) Pacific Southwest R.R. Assn., et al, vs. Harold A. Stapel, et al, doing business as Stapel Truck Lines, Case No. 4927, supra.

hold that the carrier has held out his services to the party who engaged him. In the case before us, the persons who engaged the defendant also paid the freight charges, and so there are no others who can be presumed to be within the scope of defendant's holding out of his services.

Specialization as Test of Private Carrier Status

The parties disagree concerning the extent to which "specialization" may be regarded as a necessary element of private carrier status. Complainants assert that this characteristic is an indispensable ingredient - a claim which defendant disputes.(14)

A specialized service, complainants contend, is one which, by its very nature, is not performed for, or held out to, the general shipping public. This, assertedly, distinguishes it from the service offered by a common carrier. Such a service, it is said, is necessarily limited by the character of its specialization, whether in regard to the type of equipment used, the commodities carried, the special training of personnel for handling commodities, the times or places at which service is required, or in other respects which differentiate it from that supplied by an avowed common carrier. Inherently, it is said, such a service would require a contractual relationship between the carrier and the shippers whom it serves.

Defendant, on the other hand, contends that "specialization" is not a distinguishing characteristic of a private carrier, nor

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(14) In fact, defendant conceded that its case rests upon the claim of limitation of service; there is no contention that a specialized service was provided.

a basis for differentiating a private carrier from a common carrier. The essential distinction between a common and a private carrier, it is said, lies in the nature of the offer of service. The common carrier may offer a specialized service to the public generally, while the private carrier may afford an unspecialized service to selected patrons, to the exclusion of the public generally.

In our recent decision on rehearing in the Nielsen case,(15) we pointed out that the characteristic of restrictiveness is an indispensable element of contract carrier service. This, it was stated, 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 that 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. This ruling, we believe, sufficiently answers the contentions of the respective parties; no further elaboration is necessary.

We shall consider, presently, the extent to which these elements of restrictiveness have been shown to inhere in the service provided by defendant.

Conclusions

From our consideration of the record, we arrive at the

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(15) Pacific Southwest R.R. Assn. vs. J. P. Nielsen, doing business as Nielsen Freight Lines, Case No. 4820, Decision No. 43557, dated November 22, 1949.

following conclusions:

During the course of its operations, defendant operated daily between San Francisco and Oakland, on the one hand, and Orinda, Lafayette, Walnut Creek, Concord, Port Chicago, Pittsburg, Antioch, Brentwood, Danville, and Martinez, on the other hand. Alamo, Bella Vista, Oakley, Dublin, Pleasanton, Livermore, Clayton, and Byron were served less often and with varying degrees of frequency. No service was afforded to or from any of the Bay Area points mentioned in the complaint, other than San Francisco and Oakland. To all points reached, service was furnished by the same personnel, equipment, and facilities. The service is of a permanent or indefinitely continuing nature.

From the standpoint of the physical attributes of defendant's operation, there are no elements of restrictiveness which would indicate an intention to limit the scope of its operations. There is nothing unusual about the character of equipment used; the commodities transported present no unusual features, being those normally handled by common carriers; the drivers perform no unusual duties which differ from those ordinarily provided by the employees of common carriers, nor have they undergone any special course of training; no services are afforded in the handling of commodities which differ from those usually supplied by common carriers; the operation closely resembles the scheduled service performed by a common carrier; and the rates observed are uniform in their application among the shippers. Clearly, in none of these respects is there any substantial departure from the kind of operation normally supplied by a common carrier.

We shall now consider whether any element of restrictiveness is disclosed by the number of shippers served.

As stated in our decision on rehearing in the Nielsen case, supra, one may be deemed a contract carrier, in the absence of restrictive factors in the physical attributes of the operation,

> "....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 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."

The number of shippers served, we said, must be low enough "... to allow a close identification or relationship of the carrier with the shipper's business or operation". The potential or available number of shippers would be significant only

> "....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."

Let us examine the record, in the light of these pronouncements. We shall consider the factors disclosing restrictiveness, as well as those indicating the contrary.

During the course of its operations, defendant has undertaken to limit the number of shippers whom it would serve. For some months this stood at thirty, or thereabouts; when the complaint was filed, some thirty-two shippers were served. As shippers dropped out, for any reason, they were replaced by others; thus, the total was maintained at a fairly constant level. Altogether, some 47 shippers were served. These shippers were chosen by defendant with a view to the volume of tonnage offered for transportation, to prospective revenue, and to convenience and economy of operation. Defendant could have served additional shippers with the equipment and the personnel available.

Defendant has not engaged directly in the solicitation of business. Moreover, the traffic offered by a substantial number of responsible shippers has been rejected.

Defendant has entered into written agreements with all of its shippers, excepting three (with whom oral contracts to the same effect were consummated), which specify the terms under which the transportation service would be performed. The written agreements are definite and certain; they are not lacking in consideration; and they impose mutual obligations upon the parties. They are stereotyped in form; the only blank spaces provided are those relating to the date, the name and address of the shipper, the commodities to be transported, the points to be served, and the period of duration. No provision is made for unusual needs of the shippers, respectively, particularly with regard to equipment, handling, scheduling or charges.

Uniformly, defendant has collected its transportation charges from shippers who themselves had executed agreements of this character, either as consignors or as consignees. In only a few instances, so infrequent that they were conceded by complainants to be immaterial, were the charges paid by some one not a party to such an agreement.

Defendant has exacted from the shippers a substantial compliance with the terms of the agreements in which they have joined; throughout the course of its operations, this policy has been followed consistently. On several occasions, agreements have been terminated, at defendant's instance, because of non-performance on the part of the shippers. Generally, this has been due to the

shipper's failure to observe the requirements concerning the quantity of tonnage to be offered for transportation.

The facts recited, when weighed and considered, reveal a lack of substantial restrictiveness, in defendant's operation, sufficient to stamp it as that of a private carrier. As stated, this is true from the viewpoint of the physical attributes of the operation.

In our judgment, this is also true from the standpoint of the number of shippers served. The circumstance that defendant has chosen its shippers and has endeavored to curtail their number; that it has not developed the business by solicitation, and has refused proffered tonnage; that it has space in its equipment to serve additional shippers; that it has viewed seriously the shippers' obligations under their contracts, cancelling such agreements when the shippers have failed to observe their provisions - all of these militate in defendant's favor. On the other side of the scales, there must be considered defendant's willingness, whenever shippers drop out, to fill the ranks with new ones; the stereotyped form used in consummating agreements with the shippers; and the extension of service to shippers who had no individual or specialized requirements for the transportation of their products. Viewed against the background of the surrounding facts and circumstances, the number of shippers served by defendant, now aggregating some thirty-two, is too large, we believe, to permit lawful operation as a private carrier.

In a decision this day rendered, in Application No. 28856, a certificate was granted to defendant authorizing the operation of

a highway common carrier service between San Francisco, Oakland, and certain parts of Albany, Alameda, Berkeley, and Piedmont, on the one hand, and, on the other hand, Walnut Creek, Danville, Saranap, Concord, Pacheco, and Clayton, as well as certain intermediate points and points situated within defined zones. 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, Gilbert J. Munson and Gordon A. Samuelson, co-partners, doing business under the firm name and style of Circle Freight 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, Danville, Dublin, Pleasanton, Livermore, Concord, Port Chicago, Martinez, Pittsburg, Antioch, Oakley, Brentwood, Byron, Clayton, Bella Vista, and Alamo, on the other hand; that said defendants have conducted such operations without possessing a prior operative right therefor, and without first having 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 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, Gilbert J. Munson and Gordon A. Samuelson, co-partners, doing business under the firm name and style of Circle Freight 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, California, on the one hand, and Orinda, Lafayette, Walnut Creek, Danville, Dublin, Pleasanton, Livermore, Concord, Port Chicago, Martinez, Pittsburg, Antioch, Oakley, Brentwood, Byron, Clayton, Bella Vista, and Alamo, 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. 28856 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, Gilbert J. Munson and Gordon A. Samuelson.

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.

P. E. Mahoney

Justus F. Craemer

Leo M. Friedman

Harold P. Huls

Kenneth H. Potter

Commissioners