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ORIGINAL

Decision No. 57360

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Investigation on the Commission's own motion into the operations, rates, and practices of the SAN DIEGO SHIPPERS' ASSOCIATION, INC., a corporation, WESTERN TERMINAL COMPANY, a corporation, and MILTON HALLEN, an individual.	Case No. 6063

Ivan McWhinney, for Western Terminal Company; A. E. Norrbom, for San Diego Shippers' Association, Inc.; and Milton Hallen, for San Diego Traffic Services, Inc., respondents.
Fred W. Bergen, in propria persona; Virgil B. Windle, for San Diego Forwarding Company; and Al Winner, for Allied Pool, interested parties.
Edward G. Fraser, Jr., and George Cates, for the Commission staff.

O P I N I O N

On February 25, 1958 this Commission ordered, on its own motion, an investigation into the operations and practices of the San Diego Shippers' Association, Western Terminal Company, and Milton Hallen, for the purpose of determining whether these respondents, individually or collectively, may be operating between Los Angeles and San Diego as freight forwarders in violation of Section 220 of the Public Utilities Code and without the certificate of public convenience and necessity required by Section 1010 of said Code.

Public Hearing

A public hearing was held in San Diego on May 23, 1958 before Commissioner Ray E. Untereiner and Examiner James Mastoris, at which time evidence was presented and the matter duly submitted.

The Issue

This case turns exclusively upon the construction and interpretation of the language of the third paragraph of said Section 220 of the Public Utilities Code. If the respondents come within the meaning of the exemptions of said paragraph, then they are not freight forwarders and do not need a certificate of public convenience and necessity under Section 1010 of the Public Utilities Code. On the other hand, if they do not qualify as provided under said paragraph they are freight forwarders under the general provisions of the first paragraph of Section 220, are thus a common carrier under Section 211(a) and require a certificate under Section 1010.

The Statutes

Section 220 provides:

> "'Freight forwarder' means any corporation or person who for compensation undertakes the collection and shipment of property of others, and as consignor or otherwise ships or arranges to ship the property via the line of any common carrier at the tariff rates of such carrier, or who receives such property as consignee thereof.
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> "This section shall not apply to any agricultural or horticultural cooperative organization operating under and by virtue of the laws of this or any other state or the District of Columbia or under federal statute in the performance of its duties for its members, or the agents, individual or corporate, of such organization in the performance of their duties as agents.
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> "This section shall not apply to the operation of a shipper, or a group or association of shippers, in consolidating or distributing freight for themselves or for the members thereof, on a nonprofit basis, for the purpose of securing the benefits of carload, truckload, or other volume rates, or to the operations of a warehouseman or other shippers' agent, in consolidating

or distributing pool cars, whose services and responsibilities to shippers in connection with such operations are confined to the terminal area in which such operations are performed."
(Emphasis added.)

Section 211 reads:

"'Common carrier' includes:

"(a) Every railroad corporation; street railroad corporation; express corporation; freight forwarder; dispatch, sleeping car, dining car, drawing-room car, freight, freight-line, refrigerator, oil, stock, fruit, car loaning, car renting, car loading, and every other car corporation or person operating for compensation within this State.

"(b) Every corporation or person, owning, controlling, operating, or managing any vessel engaged in the transportation of persons or property for compensation between points upon the inland waters of this State or upon the high seas between points within this State, except as provided in Section 212. "Inland waters" as used in this section includes all navigable waters within this State other than the high seas.

"(c) Every "passenger stage corporation" operating within the State.

"(d) Every highway common carrier and every petroleum irregular route carrier operating within this State."

A certificate of public convenience must be secured under Section 1010 which provides:

"No express corporation or freight forwarder shall after August 1, 1933, commence operating between points in this State or extend its operations to or from any point or points in this State not theretofore served by it, unless and until it first secures from the commission, upon formal application therefor, a certificate that public convenience and necessity require such operation. The commission may, with or without hearing, issue such certificate, or refuse to issue it, or issue it for the partial exercise only of the privilege sought, and may attach to its order granting the certificate such terms and conditions as, in its judgment, the public convenience and necessity require. The commission may at any time, for good cause shown and upon notice to the holder of any such certificate, revoke, alter, or amend any such certificate."

Nature of a Freight Forwarder

No analysis of the facts of this case would be complete unless we first describe what a freight forwarder is and how he operates. Ordinarily, such forwarders specialize in the handling of less-than-carload and less-than-truckload freight. They hold themselves out to the general public to provide a complete transportation service, issuing to the shipper a through bill of lading, charging a through rate, and assuming complete common carrier responsibility for the safe carriage and delivery of the commodities.

Ordinarily except for pickup and delivery service within the terminal areas of cities, where they frequently own their own fleets of trucks, freight forwarders do not own or operate physical facilities of transportation. For the physical movement of the goods they utilize the services of other carriers, rail, motor, and water.

The freight forwarders function by gathering shipments from numerous individual shippers, bringing them together at a central point where a forwarder terminal is maintained, consolidating them in carload or truckload lots and moving them in such consolidated lots to the point of destination, and there breaking up the consolidated consignment and distributing the shipments to individual receivers of the freight. Split delivery rules enormously increase the opportunities for consolidation because consolidation becomes possible not only of shipments of various shippers destined to the same point but also of those destined to many different points.

Ordinarily the shipper who uses a freight forwarder pays the forwarder for a complete transportation service and the forwarder, in turn, must make his own arrangements with the underlying carriers. In moving their shipments by rail the freight

forwarders ordinarily pay the railroads their published tariff rates. The railroad rate structure is suitable to this method of operation. There is a well-defined spread between the published carload rates of the railroads, which the forwarders pay, and the less-than-carload rates which forwarders charge their shippers. This spread affords a sufficient margin upon which the forwarder can conduct his operations.

Thus, such businesses are to be treated, as we construe the law, not as regular commercial shippers, but as agencies of transportation functioning as a public utility, assuming certain definite obligations toward the public they serve, and employing the regular system of common carriers to render the underlying transportation which they obligate themselves to supply.

It should be pointed out that express corporations under Public Utilities Code Section 219 embrace many principles of freight forwarder operations, but differ slightly in that such companies pay the underlying common carrier an amount determined by private contract with special rates between the parties while the freight forwarder pays the tariff rates of the carrier. The express corporation is treated by the carrier not as a shipper but as another carrier; the freight forwarder offers the commodities to be carried as a shipper at the carrier's published rates. Moreover, consolidation of shipments never has been a feature of an express corporation's operation.

But the operations of both a freight forwarder and an express corporation are vitally different from those of a "forwarding"

or "shippers'" agent. The agent merely acts in place of the shippers in placing the shipment in the hands of the line-haul carrier.[1/]

Facts of this Case

Practically all of the evidence was submitted by all parties on a stipulated set of facts. This evidence discloses that we are concerned with three distinct entities, all of which have an operational relationship with each other. Western Terminal Company, hereinafter referred to as Western Terminal, is a California corporation organized, among other things, for the purpose of engaging in the business of operating and maintaining freight terminals by which freight is assembled, consolidated and forwarded by common carrier. Its Articles of Incorporation provide, in part:[2/]

> "(a) To engage in, conduct, and carry on the business of maintaining and operating freight terminals; to receive assemble, consolidate, store, distribute, forward, ship, load, unload and otherwise handle express, parcels, and freight of all kinds and classes; to perform such services in connection with the transportation of freight by rail, motor, water, air, and all other classes of carriers.
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> "(b) To engage in, conduct, and carry on the business of transporting property by motor vehicle, as a common carrier, and under special contract.
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> "(c) To engage in, conduct, and carry on the warehouse business for receiving, storing, shipping, and forwarding of general merchandise and personal property of all kinds and classes, for the general public, and under special contract.
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> "(d) To engage in, conduct, and carry on the business of transportation brokerage and to act as agent for importers, exporters, shippers, merchants, and carriers of all kinds and classes of commodities."

1/ Carley & Hamilton, 41 CRC 327, 336 (1938).

2/ Exhibit No. 12.

During the approximate period from April 1, 1957 to December 31, 1957, this corporation was accepting, assembling and consolidating intrastate shipments of freight at its leased freight terminal, located on the premises of The Atchison, Topeka & Santa Fe Railway in Los Angeles. Said shipments were then being forwarded to San Diego on railroad cars furnished by said Santa Fe Railway, a common carrier. Western Terminal is listed in the yellow section of the 1957 Los Angeles telephone book under the heading "freight forwarder".

San Diego Shippers' Association, hereinafter referred to as the Association, declares itself to be a nonprofit California corporation organized, among other things, in 1951 for the following purposes:[3/]

> "To secure for its members the savings of volume shipping rates, applicable to pool shipments for transportation of merchandise and to facilitate collective action of the members for the purpose of securing safe and expeditious transportation of member shipments at the lowest possible cost; to deal with and engage in the transporting and carrying of supplies, equipment, dry goods, merchandise and articles of property of every kind and nature whatsoever.
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> "That the primary activity in which this corporation is intended to initially engage is the pooling of merchandise shipments for the transportation thereof in order to effect the saving of volume rates applicable to pool shipments for the members of this corporation."

The members of this Association, acting in execution of the above purposes, shipped goods from Los Angeles to San Diego through Western Terminal. The commodities to be shipped were delivered by the shippers via their own local carriers or by Western Transportation Company, a highway common carrier, to Western Terminal, which, in turn, consolidated the various shipments in its dock area rented from

3/ Exhibit No. 1.

Santa Fe. The vast bulk of this freight consisted of small, less-than-carload, general commodities. Western Terminal ordinarily would wait until the weight of the various lots totaled 4,000 pounds, at which time it would load a Santa Fe railroad freight car destined for San Diego. The purpose of consolidating was concedely to take advantage of the split delivery privileges of Santa Fe's tariff. Western Terminal paid the carrier for the carriage to San Diego. Most of the shipments would be in the 10,000 to 20,000 pound bracket. However, the aim of the Association was to make the 20,000 pound rate consistently because of the savings that would accrue with the higher volume.4/

In San Diego, Santa Fe Railway transferred the goods from the rail car to its trucks which, in turn, delivered the merchandise to the various store-door points of destination. Therefore, these respondents, by offering the combined tonnage as a single shipment of which Western Terminal was the consignor, have secured for their shippers the benefit of lower rates than those which would have accrued had each shipper individually offered his goods to the line-haul carrier for transportation. Western Terminal would accept--and this is the crux of the staff's contentions--shipments for consolidation and forwarding, not only from members of the Association but from any shipper or any member of the public whether or not said shipper was a member of the Association. In other words, the consolidator in Los Angeles would receive, consolidate and forward the freight on the common carrier for any shipper who wished to utilize this service. When the 4,000 pound minimum was reached the freight received from the nonmembers of the Association would be joined with the freight received from the members and forwarded on

4/ Exhibits Nos. 5, 7.

the same freight car to San Diego. Shipments would be held at the Los Angeles terminal until the minimum weight was reached. No distinction was made by Western Terminal between the freight of a nonmember and a member. In one month, September 1957, 94 accounts were served by Western Terminal of which only 21 were member consignees; the balance of 73 were outsiders. These shipments totaled 92,192 pounds of freight for members and 95,211 pounds for nonmembers.[5/]

The Association in San Diego neither handles the freight nor bills the customers nor collects from them; all the physical handling of the freight is done by Western Terminal in Los Angeles.[6/] All the actual line-haul transportation is performed by Santa Fe Railway. Western Terminal bills for the entire transportation and collects from shippers individually, members and nonmembers alike, from its office in Los Angeles.

As a charge for its services Western Terminal makes a charge of 35 cents per 100 pounds, irrespective of class of commodities loaded, over and above the charges of the rail carrier with a minimum charge of 35 cents per shipment. It retains 25 cents of this amount and forwarded, during part of the period in question, the 10-cent balance to the San Diego Traffic Services, a corporation. The principal stockholder, president, and general manager of San Diego Traffic Services is respondent Mr. Milton Hallen. Mr. Hallen was instrumental in the formation, was an original director, and, during part of the period in question, was also general manager of the Association. This 10-cent per 100 pounds

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5/ Exhibit No. 2.
6/ Physically the most that was done, was to move goods from one side of the loading dock to the other.

payment sent to San Diego Traffic Services was compensation for Mr. Hallen's service to the Association. After Mr. Hallen's contract with the Association terminated this payment was made directly to the Association. Thus, the Association was receiving this payment for shipments made by nonmembers. There was no evidence that refunds were made to the nonmember consignors. The Association was aware of the fact that Western Terminal was consolidating the Association's freight with numerous other shippers but took no action to prevent this.

As of October 1957 there were approximately 40 members of the Association. There was, on occasion, discussion by members of the Association about attempting to bring into the Association the nonmembers who were shipping through Western Terminal but nothing was ever done to consummate this plan. Mr. Hallen would solicit various shippers in the San Diego area inviting them to share the advantages of the Association. Such solicitation, generally by letters, was under his title as general manager of the San Diego Traffic Services and as general manager of the Association. However, it appears that membership was not essential to the utilization of the benefits of the consolidation. In one letter to a San Diego shipper,[7/] Mr. Hallen wrote:

> "....Aside from the addition of your tonnage from Los Angeles area the Association would appreciate your support as an active member since it will be strengthened in its contacts with the regulatory bodies and the carrier bureaus in proportion to the amount of support from shippers and receivers in the community...."

7/ Exhibit No. 7.

In other letters Mr. Hallen stated:[8/]

> "....Membership is recommended though not mandatory for participation in the Los Angeles movement. However, the movement from New York is restricted to members only."

The source of income to the Association came from membership dues, $5 annually and a $10 initiation fee, and the aforementioned 10-cent payment made to it by Western Terminal. Membership was open to any shipper who paid the required fees. It appears that in many cases members who were suspended for nonpayment of dues continued to have their shipments consolidated.

Western Terminal is described on the various shipping documents issued by it and Santa Fe as the shipper of the freight in question moving to San Diego.[9/] Those to whom the freight is destined are indicated collectively as consignees. Said shipping documents are designed to carry out this consolidation purpose. They comprise individual shipping orders and bills of lading, a master bill of lading, and Santa Fe way-bills.

Routing stickers for use in ordering merchandise were frequently made available to the members of the Association who were urged to use them or to instruct the manufacturers by standard routing instructions that shipments from Los Angeles were to be delivered to Western Terminal on shipments originating in Los Angeles.

Western Terminal limits its cargo insurance liability to shipments during the period when the freight is held at its leased dock area in Los Angeles.

Western Terminal maintains a clerk at its terminal facility in Los Angeles for the receipt of property, for assembly and consolidation.

8/ Exhibits Nos. 9, 10.
9/ Exhibits Nos. 13, 14, 15.

The foregoing operations have been continuous and increasing in scope since 1951 with peaks of shipping during seasonal periods and low points during periods of inventory adjustment.

Argument of the Staff

The staff contends that the operations of all the respondents were such that the exemption of the third paragraph of Section 220 of the Public Utilities Code would not apply to them. It is argued that Western Terminal was operating as a freight forwarder in Los Angeles because of its practice of physically consolidating and forwarding freight for all shippers who wished to join in the consolidation regardless of whether they were members of any shippers' association. In effect, it is asserted this respondent was serving the general public. It was undertaking to collect and ship, for compensation, goods belonging to others on the line of a common carrier, Santa Fe, at the published tariff rates of such carrier. It could not qualify under the exemption as a "group or association" of shippers "on a nonprofit basis" because it or its alleged principal, the San Diego Shippers' Association, was not a bona fide association nor was it operated on a nonprofit basis.

Regardless of the avowed purposes of its formation it is further argued that the subsequent activities of Association place it in the position of "aiding and abetting" Western Terminal by encouraging shippers who were not members of the Association to ship freight along with the Association's shipments.[10/] Respondent Hallen is claimed to be within the general provisions of Public

10/ In re Kagarise, 42 CRC 675 (1940): 2112 Public Utilities Code.

Utilities Code Section 220 because of his personal efforts in aiding and assisting the consolidator and the Association in collecting and forwarding freight for those who wish to ship.[11/]

It is the position of the staff that if the activities of the respondents fall within the general definition of a freight forwarder as enunciated in the first paragraph of Section 220 the exemption of the third paragraph cannot apply. In this respect the staff relies on legal precedents from the Interstate Commerce Commission and federal court decisions.

The third paragraph of Section 220 contains language, word for word, which is identical to the language of the exemption found in Section 402(c) of the Interstate Commerce Act (49 USCA 1002(c) 56 Stat. 284).[12/] As a result it is contended that the interpretations placed upon the provisions of the exemption by the federal commission and the federal courts should be given considerable weight in determining the meaning of the section. No case has been decided in California construing this exemption since it was added to Section 220 in 1951.

11/ In re Kagarise, supra, 686-689.

12/ Title 49, Section 1002(c): "The provisions of this chapter shall not be construed to apply (1) to the operations of a shipper, or a group or association of shippers, in consolidating or distributing freight for themselves or for the members thereof, on a nonprofit basis, for the purpose of securing the benefits of carload, truckload or other volume rates, or (2) to the operations of a warehouseman or other shippers' agent, in consolidating or distributing pool cars, whose services and responsibilities to shippers in connection with such operations are confined to the terminal area in which such operations are performed."

Because the exemptions are identical in language it is argued that the intent of the California Legislature was probably similar to Congress's interest in enacting Section 402(c). The federal statute was enacted in 1942. The contention is made that this third paragraph should be construed not as a true exemption but rather as a clarifying provision in order that the definition of a freight forwarder cannot by construction be held to cover those persons or associations which are basically nonprofit associations of shippers or pool car operators as those entities normally operate. Congress so interpreted this exemption (House Report 1172, 77th Congress, 1st Session, pages 6 and 7) and the Interstate Commerce Commission followed this construction in Barre Granite Ass'n., Inc., 265 ICC Reports 637, (1949). Thus, it is alleged that where the activities of any individual or association are not limited to the normal operations of a shippers' agent or association but, instead, reflect all the essential characteristics of a freight forwarder as defined in the first paragraph of Section 220 such individuals or associations should be regulated as a freight forwarder regardless of what they call themselves. The staff contends that the evidence shows that Western Terminal was operating as a freight forwarder and that the other respondents come within Commission jurisdiction because they were aiding and abetting such operations.

Position of Respondents

Respondents contend that the evidence produced at the hearing falls short of establishing that they are operating as freight forwarders within the meaning of Section 220. They argue that the burden of proving that the exemption does not apply is upon the staff and such burden has not been met with the evidence presented.

The position of the staff that the exemption is but a clarifying provision of the general definition is challenged upon the ground that an interpretation of the language of the exemption is also consistent with that of a complete exemption from regulation. Basically, respondent Western Terminal's position is that it qualifies under both alternative exemptions provided in the third paragraph of Section 220. It states it is an agent for a group of shippers consolidating freight for themselves on a nonprofit basis for the purpose of securing the benefits of volume rates and that in the alternative it is also exempt because it is a shippers' agent who consolidates pool cars and whose services and responsibilities to such shippers are confined to the Los Angeles terminal area in which these operations are performed. It predicates its construction of the exemption upon the legislative use of the word "or" in the language of the third paragraph. It states that the use of the disjunctive between "group" and "association" indicates that the Legislature meant to include a "group of shippers" as well as an "association of shippers" and that there is nothing in the language that requires that the group of shippers be organized, associated or connected with each other. The word "or" following the word "themselves" supports this theory for it indicates someone else other than a "member" of an association was meant to be included. The second alternative applies as well because the word "shippers" is not confined to a single shipper, because the consolidation operation fits into a "pool car" definition and because "services" and "responsibilities" to shippers clearly refer to the physical "terminal area" in Los Angeles. No showing has been made that any "service" or "responsibility" occurred outside the Los Angeles area.

The other respondents argue that because they did not participate in the physical handling of the freight they do not come within the meaning of the general definition of a freight forwarder. Moreover, they concur in the contentions of Western Terminal in its interpretation of the exemption. Besides, Mr. Hallen states that as he is no longer connected with the Association a cease and desist order against him would be of no practical effect.

The respondents further argue that the case of In re Kagarise, supra, relied upon by the staff is no longer applicable because the third paragraph of Section 220 was enacted in 1951, eleven years after the case was decided. It is alleged that it is apparent the California Legislature intended to exclude the group of shippers held to be freight forwarders in that case by enacting the Section 220 exemption. Western Terminal and the San Diego Shippers' Association frankly admit their operations have been conducted with the bona fide understanding that they were taking advantage of the specific provisions of the exemption. No cases were adduced by the respondents in support of their interpretation. Believing themselves exempt none of the respondents filed an application for a certificate under Section 1010 of the Public Utilities Code.

Discussion of Law and Conclusions

As previously indicated this is a case of first impression interpreting the third paragraph of Section 220 since it was enacted in 1951. To resolve correctly the legal problems of the transportation innovation in question and to apply properly the appropriate precedents is difficult. Such difficulty is further complicated by the necessity of attempting to reconcile and give meaning to the statutory words in order to arrive at the probable intent of the

Legislature. Our determination will turn on a blend of the principles of statutory construction, precedent from other jurisdictions, and an analysis of the legislative purposes behind the enactment.

We cannot agree with the respondents that the burden is upon the staff to prove that the operations do not come within the exemption of the statute. On the contrary, the reverse is true. The burden is on the party claiming the exemption to prove that he comes within it.

> "....One claiming an exemption from a general statute has the burden of proving that he comes within the exemption."
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> Norwood v Judd (1949) 93 CA(2) 276

This, we believe, is especially significant where the evidence establishes that the operations in question fall within the definition of the general statute. Moreover, such exemptions or exceptions from the general statute are to be strictly construed against the party urging that they are applicable. (National City v Fritz, 33 Cal(2) 635; Riggs v District Retirement Board of Los Angeles City Schools, 21 Cal(2) 382; Merchants Nat Bank of Los Angeles v Continental Nat Bank of Los Angeles, 98 CA 523; 19 Opinions of Attorney General 165; Sutherland (3rd Ed) Stat. Construction Sec. 4933.) Accordingly, we must analyze the evidence produced by the respondents in light of this rule.

Congress's expression that the exemption is but a clarifying provision is of assistance, of course, in our evaluation of the California exemption but in view of the fact that the California

Legislature has not expressed a similar declaration such expression cannot precisely control the determination by this Commission. However, we cannot disregard the general proposition in this State that the purpose of such an exemption is to create merely an exception to the preceding principal provision of the statute with the result that the principal part so modified remains intact excepting as it may be thus qualified. (McAlpine v Baumgartner (1937) 10 Cal(2) 298, 301.) Moreover, when a state act is patterned after the legislation of the federal government, there is a strong presumption of intent to adopt the construction as well as the language of the federal statute. (Rihn v Franchise Tax Bd. (1955) 131 CA 2 356.) In light of such rule and the fact that the exemption is similar in both statutes, decisions by the Interstate Commerce Commission and the federal courts interpreting the language of the exemption are a persuasive guide in our determination of the respondents' operations. The fact that operations cross state lines in one case and not in the other should not distinguish the two.

Although the exemption in the federal statute is similar to the third paragraph of Section 220, the general definition of a freight forwarder in Section 402(a)(5) of the Interstate Commerce Act is different from the definition under Section 220. Express provisions as to the holding out to the public, break-bulk operations, and assumption of responsibility for the transportation of the consolidated property from point of receipt to point of destination are not found in the California statute although the provisions of Section 211(a) of the Public Utilities Code combined with the Section 220 definition give a meaning which is analogous to the federal statute. However, many of the Interstate Commerce Commission authorities cited by the staff are predicated on an interpretation of the particular requirements of the general definition. For example,

the federal commission appears to hold that a forwarder will not be regulated if it fails to fall within all the requirements of Section 402(a)(5), although it also does not appear to fall within the exemption of Section 402(c). (In re Kagarise (1946) 260 ICC 745, 747.)

Examining particularly the first exemption under the third paragraph of Section 220 we cannot agree that the language must be construed, because of the location of the word "or", to read that a "group of....shippers" means any indiscriminate number of shippers who may wish to ship freight. If we understand the respondents' position the word "group" means that any shipper who wishes to have his freight consolidated becomes a member of the "group" by having his shipment placed on the assembly dock with the freight of others. He need not have any connection or relationship with the other shippers; his only "qualification" need be that he is a "shipper". In fact he need not have any qualification at all; any number of shippers more than one would be a "group". The very definition of the word "group", however, does violence to such a construction. "Group" is defined as:

> (1) "An assemblage of persons or things regarded as a unit because of their comparative segregation from others....
>
> (2) "An assemblage of objects in a certain order or relation, or having some resemblance or common characteristic." 13/

We construe "group" to mean that the members thereof must have some correlation or relationship to each other; there must be some connection in content or method of alliance by the members with

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13/ Webster's New International Dictionary (2nd Edition)
State v Balsley, 48 NW(2) 287
Beeson v Marsh, 34 NW(2) 279.

each other. Furthermore, there must be some limitation in size; if there is no limitation there is no group. The group must consist of a classification by which a certain number is distinguished from the remainder of the classification. Otherwise, the whole public could be included. The mere desire to ship in a manner to enjoy the benefits of volume rates is not the bond between the various and assorted group of merchants who are shipping to San Diego. We cannot necessarily agree with the staff that there must be some organization between the members; they may still be a group even though they have no orderly form or arrangement. Our construction is supplemented by the doctrine of "noscitur a sociis" as applied to this statute which requires that the meaning of such a doubtful word can be ascertained from the words and phrases which surround it. (In re Loring's Estate, 29 Cal(2) 423; Vilardo v Sacramento County, 54 CA 2 413; Sutherland, Stat. Interpretation Sec. 4908.) The location in the sentence of the associated words, in our opinion, indicates that the Legislature intended to exempt those shippers who had a common relationship with each other even though they were not members of a formal association. The word "association" following the word "or" coupled with the words "for the members thereof" following the word "themselves" indicates that the preceding words cover the informal combination, the loose alliance. In other words they cover something akin to, but not like, the association. To accept the respondents' interpretation would mean any member of the public could qualify. We cannot agree to such a construction nor do we think the Legislature ever intended such a meaning. The Supreme Court of the United States in U.S. v Pacific Coast Wholesalers Ass'n (1950), 338 U.S. 689 in construing this exemption in

the Interstate Commerce Act appears to follow the construction we place on this language. It says at page 691:

> "....it is clear that the nature of the relationship between the members and the group was thought to be determinative."

It should also be noticed that the word "group" is used as being synonymous with "association".

The phrase "on a nonprofit basis" found in this exemption must be analyzed in terms of the relationship between "nonprofit" "compensation" and "savings". The meaning of the word "profit" varies with its context. Broadly stated, it is the excess of what is obtained over the cost of obtaining it. "Nonprofit" likewise varies depending on its context. One view states that as applied to cooperatives "nonprofit" means that such association is not designed primarily to pay dividends on invested capital.[14/] Another says that the element of "nonprofit" in a statute describing cooperatives was intended by the Legislature to mean that all profit goes to its members rather than to investors.[15/] However, we must distinguish "profit" to the association from "savings" to the individual members. We cannot agree with the staff that the "savings" realized by members of the Association constitute "profit".[16/] In the sense that they result in "savings" to its members, all of the Association's operations are for profit.[17/] But the third paragraph of Section 220 specifically sanctions an association's obtaining for its members "the benefits /savings/ of carload....rates"; therefore

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14/ Greene County Rural Elec. Co-op v Nelson, 12 NW(2) 886.
15/ White Mtn Power Co. 71 A(2) 496.
16/ Pac. Coast Wholesalers Ass'n v U.S. (1949) 81 F.Supp. 991, 996.
17/ Mutual Shippers Association (1941) 43 CRC 786, 791-2
Investigation Commodities, LA to Chicago (1954) 293 ICC 578
5 Cal Jur(2) Sec 5, p 452

it seems logical that if the Association's operations were limited to obtaining for its members the benefits of carload rates on their own freight, such would be excluded from the concept of "profit" as the term "nonprofit" is used in that section. In other words, a reduction in freight costs is not a profit. Such an operation amounts to a participation in the benefits of volume rates and not a distribution of profits. A "revolving fund" which may be used for working capital and later refunded to the members ordinarily would not be a profit. (Pac. Coast Wholesalers (1945) 265 ICC 134, 137.)

It would follow therefore that if the association permitted nonmembers to consolidate and ship freight in these operations, the resultant "savings" obtained from the nonmembers' consolidation would amount to a true "profit" to the association. In other words, the association would be operating for hire. We cannot conceive that the Legislature intended that the handling of nonmembers' shipments at a "saving" to the association members would be within the terms "on a nonprofit basis" as used in the section. We think it reasonable that the freight forwarder, on the one hand, and the shipper association, on the other, are distinguished by the fact, among other things, that the one is engaged in this business "for profit" whereas the other conducts this activity "on a nonprofit basis". The legislative history of the federal statute supports such a construction[18/] and it seems reasonable the California Legislature had the same interpretation in mind. The forwarder definition in the first paragraph of Section 220 contains the word "compensation" rather than "for profit" but it is clear that the Legislature

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18/ 87 Congressional Record 8217.

contemplated that the regulated forwarder would be operating for profit which would be controlled by the Commission. Otherwise, there would be no reason for distinguishing shippers' associations as being of a nonprofit character, that is--operations not for compensation or for hire. In view of the foregoing the respondents operated for compensation and thus for profit when they permitted members of the public to join their operations. The income from the freight charges of the nonmembers along with the 35-cent per 100 pound additional charge constituted more than "savings". There was no evidence that any part of said 35 cents was refunded to a shipper. Western Terminal, whether it is to be treated as an agent or a member, profited from the "spread" or "margin" between the carload and less-than-carload rates on nonmember shipments. In addition the 25-cent per 100 pound compensation which it retained is likewise a profit. The Association received a profit over and above its carload savings when it received the 10-cent per 100 pound charge made to nonmembers. Mr. Hallen likewise so profited when he was receiving the 10-cent charge.[19/] It is apparent the respondents' profit is in direct proportion to the quantity of transportation which the nonmember shippers purchase. There was no showing that the expenses of consolidation exceeded the revenue.

The respondents' second contention is that if they fail to qualify under the first exemption of the third paragraph of Section 220 they are nevertheless exempt under the "shippers' agent"

19/ See:
Judson-Sheldon Corp (1945) 260 ICC 473, 475
Consolidated Flower Shipments v CAB (1954) 213 F(2) 814 (9th Cir)
RTC Terminal (1949) 265 ICC 527
Vendors Consolidating Co (1951) 285 ICC 66
Hopke Application (1950) 265 ICC 726, also 285 ICC 61, 63,64
ABC Freight Forwarder (1953) 285 ICC 276, 280, 282.

language of the second portion of the paragraph. The term "shippers' agent" has changed over the years depending on how it was applied. Bunge in his treatise, Law of Drayman, Freight Forwarders, Warehouseman, said (page 112) that shippers' agents were often referred to as freight forwarders; however, later cases used the term as being synonymous with "forwarding agent". Most of the cases distinguishing freight forwarders and shippers' agent turn on the question of legal liability for the transportation; the majority of cases from the Interstate Commerce Commission discuss the distinction based on the "assumption of responsibility" clause of the Section 402(a)(5) definition. "Shippers'" or "forwarding" agents are described as those who transport goods from the door of the consignor to the depot of the line-haul carrier. They do not necessarily consolidate the individual consignments into carload lots and their duties, as agent of the shippers, go no further than procuring transportation by carrier and handling the details of shipment. They charge fees for their services, which the shippers pay in addition to the freight charges of the carrier utilized. They are legally liable for their own negligence but do not assume the responsibility for the complete transportation to the point of destination. In other words, they incur no obligation with respect to the freight after its safe and proper delivery to the common carrier. As agent for the shippers they make out and sign bills of lading; they receive no compensation other than their cartage charge for this service.[20/] However, when the operations reach a point

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20/ Valley Express v Carley & Hamilton, supra, 337, 338, 343
Chicago Etc. R. Co v Acme Freight (1948) 336 U.S. 465, 484
Merchant Etc. Ass'n v Kellogg E&D Co (1946) 28 Cal(2) 594, 598
Heath v Judson Freight Forwarding Co (1920) 47 CA 426.

where the agent in effect undertakes to provide the complete transportation from point of origin to point of destination, then said agent is no longer a "shippers' agent". Therefore, our analysis will be predicated on the distinctions between a "shippers' agent" and a freight forwarder from the viewpoint whether particular operations constitute a "complete transportation" service which will call for assumption of responsibility for the transportation of the freight to point of destination.

When the shippers' agent expands his methods and practices so that he pays the entire transportation charge to destination; where the bills of lading used show the so-called agent as consignor, where the agent bills the shipper for the entire transportation at the complete transportation rate, said agent impliedly assumes responsibility for the transportation of shipments to destination and thereby assumes freight forwarder status. Any attempt to limit such liability for the shipments after delivery to the line-haul carrier would be of doubtful validity in face of the Civil Code provisions (Section 2174) that the obligations of a common carrier cannot be limited by general notice on his part, but may be altered only by special contract.[21/]

In view of the foregoing, it does not appear that the respondents, and particularly Western Terminal, were shippers' agents. The shippers paid for the entire transportation from Western Terminal's dock to the store-door delivery point in San Diego. In some

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21/ Valley Express v Carley & Hamilton, supra, 341-3
Chicago Etc. R. Co v Acme Freight, supra, 485
Kettenhofen v Globe Transfer 127 Pac 295
Judson-Sheldon Corp, supra, 473, 477
Howard Terminal (1946) 260 ICC 773, 778
Vendors Consolidating Co. (1950) 265 ICC 719; also 285 ICC 66
See: 87 Congressional Record 8217.

cases the shippers paid for a door-to-door delivery whenever they used Western Transportation Company in Los Angeles for pickup service from their plants. Said company had the same officers as Western Terminal. One of the directors of Western Terminal is also a copartner of Western Transportation Company. The manager of Western Terminal was manager of Western Transportation. The office of both companies is at the same location.[22] The master bills of lading and way-bills showed on their faces that Western Terminal was consignor in Los Angeles and that the freight was destined for San Diego.[23] Evidence at the hearing disclosed that the respondents billed the shippers for the entire transportation at the complete transportation rate. The fact that cargo insurance was carried for injury or damage while the freight was on Western Terminal's docks in Los Angeles is not controlling if the aforementioned operations are present. An attempt to disavow liability or any other form of disclaimer would have little effect if the consignors looked to Western Terminal for the whole transportation.[24]

Therefore, in light of the fact that activities of the respondents were not limited to the normal operations of a shippers' agent but, instead, reflect all the essential characteristics set out above they are to be considered and are to be regulated as forwarders notwithstanding that they refer to themselves as "shippers' agents".[25] Moreover, the concluding language of the statute

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22/ Application No. 36495 filed Nov. 15, 1954 (Exhibit F).

23/ Exhibit No. 13.

24/ Judson-Sheldon Corp, supra, 477-78
RTC Terminal, supra, 530, 531
Lifschultz v U.S. (1956) 144, F. Supp. 606, 611
Inv. of Transportation Systems (1932) 38 CRC 81, 91.

25/ Universal Transcontinental Corp (1945) 260 ICC 521-3
Hopke Freight Forwarder Application, supra, 730
RTC Terminal (1949) 265 ICC 641, 642, 643
Vendors Consolidating Co. (1951) 285 ICC 66, 69.

"services and responsibilities to shippers in connection with such operations are confined to the terminal area in which such operations are performed" has been construed to mean that when the consolidator or association's service is held out to and performed for the general public it assumes the burdens incident thereto and such burdens include "responsibilities" among which is responsibility to the shipper for complete transportation of the property to point of destination.[26/] This "responsibility" in this case doesn't end when freight is loaded into Santa Fe's cars in Los Angeles; it extends to San Diego and is thus out of the "terminal area" of Los Angeles. In other words, that segment of the haul occurring outside Los Angeles is all part of the total forwarder operation. Moreover, the Association's solicitation of nonmembers in San Diego results in a "service" to San Diego members because of the benefits received from nonmember participation.

Many of the shippers' associations and cooperatives of the type with which we are here concerned were formed during and after World War II for the purpose of enabling small businessmen to compete with the larger producers, manufacturers and retailers who possessed definite business advantages because of their size. These small businessmen banded together for the purpose of buying cooperatively. However salutary or necessary this purpose may have been we do not believe the California Legislature in enacting these exemptions ever intended such associations to compete with the

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26/ Universal Transcontinental Corp, supra, 523
RTC Terminal, supra, 531
Parcel Warehouse Inc. (1955) 285 ICC 697, 701
Vendors Consolidating Co., supra, 69
Hopke Application, supra, 731
Howard Terminal, supra, 779
Lifschultz v U.S., supra, 612.

regulated industry. It seems reasonable the Legislature intended to benefit bona fide shippers' associations which performed their services for their own members alone. It seems unlikely the Legislature intended, as the respondents claim, that the language of the exemption should be interpreted to mean that there is nothing to prohibit service for hire to the general public. It is not reasonable to assume the Legislature intended to set up a parallel classification of freight forwarders who would be free from regulation. Why would any shipper then utilize the services of a regulated forwarder when he could gain the many advantages by shipping with the association? On the other hand, what would prevent the shippers' association from discriminating against or preferring certain customers? What would prevent these organizations from refusing to serve particular shippers? From charging exorbitant rates? Would tariff rates have to be published? If the construction is to be placed upon the exemption as contended by the respondents, associations could be organized in competition with regulated forwarders until the whole State would be saturated with them. Obviously there would be nothing under these circumstances to prevent farmers, merchants, manufacturers--in fact, industries and businesses of practically every type--from organizing similar "associations". Public regulation would become a sham and delusion. Regulated forwarders would not last long in such an atmosphere. Section 220 would become a mere scrap of paper.[27/]

27/ Natural Gas Service Co v Serv-Yu Co-operative (1950) 219 Pac(2) 324
McMurray Transp. Serv. v Buchardi et al (1937) 40 CRC 403
ABC Freight Forwarder, supra, 281
So. Pac. v Stanbrough (1932) 37 CRC 766, 771

Furthermore, if the Legislature intended to establish shippers' associations which could serve the general public to operate alongside freight forwarders which were under government regulation there would be substantial doubt as to the constitutionality of such a statute. Such legislation would appear to be an arbitrary and unreasonable classification denying equal protection of the laws in violation of the California Constitution and the fourteenth amendment to the United States Constitution. Both freight forwarders would be serving the public, one under regulation, the other free from it with no discernible difference as to operations, methods or practices.[28] We do not think the Legislature intended such a possible consequence. Moreover, it is clear the Legislature presumes nothing unconstitutional[29] and that its enactments will be given a reasonable interpretation.[30]

There remains for consideration the question of whether the respondents dedicated their transportation facilities to public use within the meaning of Sections 220 and 211(a). Such dedication will not be presumed without facts showing an unequivocal intention to so dedicate.[31] However, such intention need not be by an express holding out; it may be inferred from the acts and conduct of the operators of the business.[32] If the business serves the public,

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28/ Parlett Co-op v Tidewater Lines, 165 A. 313
No. Shore F & F Co v No. Shore Businessmen's Trucking Ass'n, 263 NW 98
McMurray Transp. Serv. v Buchardi et al, supra, 409-10
Alabama Power v Cullman et al 174 So. 866.

29/ Kaiser Land & Fruit Co v Curry, 155 Cal 638.

30/ Alameda County v Kuchel, 32 Cal(2) 193 (1948).

31/ Allen v Railroad Comm. 179 Cal 68.

32/ Edwards Associates v Railroad Comm. 196 Cal 62.

or a limited portion thereof, such dedication occurs. And a service is public where the product and services are available to the public generally and indiscriminately, within the limits of facilities possessed by the business. However, where the business or service is operated and maintained for the exclusive benefit of the members of a cooperative association there is no such service to the public. (Thayer v Calif. Dev Co. 164 Cal 117; People v Orange County Farmers & Merchants Assn, 56 CA 205; 98 ALR 226.)

The facts of this case clearly indicate that the respondents' activities fall within the general test of a freight forwarder under Section 220 and thereby within the purview of the Public Utilities Act. They consolidated and shipped the property of their members and the general public for compensation and as a shipper shipped and arranged to ship said property over the line of a common carrier at the latter's tariff rates. The whole operation was such that the service was held out to all shippers in the Los Angeles and San Diego areas who may choose to use it without any limitations that could be ascertained. Members in good standing, members who were delinquent in their dues, members who didn't pay any dues and nonmembers all enjoyed these services. In our opinion there was a dedication to public use. (Hopke Freight Forwarder Application, supra, 730; Natural Gas Service v Serv-Yu Co-operative, supra, 328-9; Nolan v Public Utilities Commission, 41 Cal(2) 392; Landis v Railroad Comm. (1934) 220 Cal 470, 474; ABC Freight Forwarders, supra, 280, affirmed in 125 F. Supp. 926; Davis v People (1926) 79 Colo. 642; Judson-Sheldon Corp, supra, 477; Howard Terminal, supra, 778; Inv. of Western Manufacturers Trade Association, (1941) 43 CRC 795-9; In re Kagarise, supra; 132 ALR 1495; see also:

Inv. of Carriers & Nonprofit Associations (1957) 55 PUC 380, 383.) Western Terminal was not a member of the Association, was incorporated and operated for profit[33] and, as indicated, forwarded for all. Even assuming it is a bona fide shippers' association the Association permitted nonmembers to ship through Western Terminal. Mr. Hallen as manager advised, encouraged and assisted nonmembers to participate; such activity constituted "aiding and abetting" the principal respondent. The fact that his compensation went to the San Diego Traffic Services is immaterial; he, as we have seen, controlled this corporation.[34] In addition the solicitation for new shippers by the Association and Mr. Hallen was active and regularly conducted. There was personal solicitation as well as the aforementioned letters and announcements of the service which were circulated among shippers, traffic managers and shipping clerks.[35] Furthermore, it is generally considered that persons or concerns who publish their business telephone numbers in either the business, classified or alphabetical telephone directories invite the public to use such telephones for the purpose of transacting or discussing the business of the concern over such business telephones.[36] Although such solicitation is not, by itself, determinative it does have persuasive probative value when added to the other facts.

33/ See: Nat. Gas Serv. v Serv-Yu Co-operative, supra, 326.

34/ ABC Freight Forwarders, supra, affirmed 125 F. Supp. 926 and 348 U.S. 967; Kagarise, supra, 689.

35/ Parcel Warehouse, supra, 699.
Universal Transp. Corp, supra, 523
Kagarise, supra, 688
Nat. Gas Service v Serv-Yu Co-operative, 327
Vendors Consolidating Co., supra, 720, 724.

36/ Parcel Warehouse, supra, 699.

The fact that the respondents served only that portion of the general public wishing to ship to San Diego does not limit their status. Justice Holmes speaking for the United States Supreme Court in Terminal Taxicab v Kutz (1916) 241 U.S. 252, answers such an argument by saying:

> "No carrier serves all the public. His customers are limited by place, requirements, ability to pay, and other facts....the public does not mean everybody all the time..." 37/

Accordingly, we look to the character and not the form of the activities in question and to the acts of the parties and not their purposes or declarations. It is our opinion that the respondents have failed to prove that they come within the exemption in question.

We find and conclude, therefore, that Western Terminal was and is operating as a freight forwarder, as defined by the Public Utilities Code, without the certificate of public convenience and necessity required under Section 1010 of the Code and that the San Diego Shippers' Association and Mr. Milton Hallen aided and abetted said company in carrying on said enterprise. Respondent Western Terminal will be ordered to cease and desist from the operation of this service unless and until it shall obtain a certificate of public convenience and necessity to operate as a freight forwarder. As it appears that said Association is presently aiding and abetting said Western Terminal it also will be ordered to cease and desist from such operations. In view of the fact that Mr. Hallen is no

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37/ See also: Coml. Com. v Public Utilities Commission (1958) 50 AC 448, 459
Natural Gas Service v Serv-Yu Co-operative, supra, 327
Piercely v Public Service Comm. 73 Pa. Super. 212, 214
Inv. of Hirons (1928) 32 CRC 48, 51.

longer employed by or under contract to the Association a cease and desist order against him would amount to a useless act and accordingly will not be issued.

An order of the Commission directing that an operation cease and desist is in its legal effect the same as an injunction by a court. Contempt of the Commission arises when there is a violation of such order. The California Constitution and the Public Utilities Act vest the Commission with power and authority to punish for contempt in the same manner and to the same extent as courts of record.

O R D E R

Public hearing having been held in the above entitled matter, the matter being duly submitted and the Commission now being fully advised,

IT IS HEREBY ORDERED:

(1) That respondent, Western Terminal Company, shall cease and desist from engaging directly or indirectly, or by any subterfuge or device, in any or all of said operations as a freight forwarder unless and until it shall first secure from this Commission a certificate that public convenience and necessity require the same.

(2) That respondent, San Diego Shippers' Association shall cease and desist from aiding and abetting said respondent Western Terminal Company, directly or indirectly, or by any subterfuge or device, in engaging in any or all of said operations as a freight

forwarder unless and until said Western Terminal Company shall first secure from this Commission a certificate that public convenience and necessity require the same.

The Secretary of the Commission is directed to cause personal service of a certified copy of this decision to be made upon said respondents.

This order shall become effective twenty days from and after the date of such service.

Dated at San Francisco, California, this 23rd day of September, 1958.

President

Commissioners