ds a

Decision No. 58676

ORIGINAL

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Investigation on the Commission's own motion into the operations, rates and practices of GROCERY SHIPPERS, INC.	)))))	Case No. 6138

Frank Loughran, for Grocery Shippers, Inc., respondent.
Edward G. Fraser, Jr., for the Commission staff.

O P I N I O N

This proceeding was instituted upon the Commission's own motion for the purpose of determining whether Grocery Shippers, Inc., a nonprofit corporation, has been, and is now, operating as a freight forwarder without a certificate of public convenience and necessity as required by Section 1010 of the Public Utilities Code.

Public hearings were held before Examiner Jack E. Thompson at San Francisco on October 15 and 16, 1958. The matter was taken under submission January 19, 1959 upon the filing of concurrent briefs.

Section 1010 of the Public Utilities Code provides that no freight forwarder shall after August 1, 1933 commence operations unless and until it first secures from the Commission a certificate of public convenience and necessity.

Section 220 of the Public Utilities Code 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.

"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.

"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 non-profit 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."

The underscored paragraph was added by Statutes 1951, Ch. 830 and will be referred to hereinafter as the 1951 Amendment.

The following facts are undisputed, are supported by the evidence of record, and we find:

1. That Grocery Shippers, Inc., is a nonprofit corporation which undertakes the collection and shipment of property of its members, and as consignor ships the property via the lines of common carriers between points in California at the tariff rates of such carriers for the purpose of securing truckload or other volume rates.

2. That respondent does not hold a certificate of public convenience and necessity from the Commission authorizing operations as a freight forwarder.

3. That respondent has never conducted operations prior to December 2, 1955 which was the date its Articles of Incorporation were filed with the Secretary of State.

4. That following the collection of freight and shipment via a common carrier, respondent invoices the members for payment for services and receives payment from such members for a share of the common carrier charges plus 10 cents per 100 pounds.

5. That after payment of necessary salaries and operating expenses respondent annually returns to the members all money in the cash account at the end of the year, less a sum equal to one month's estimated expenses. This return is based on the weight each member shipped during the time covered.

Compensation

Respondent did not contest, but did not concede that it collects and ships property of others for compensation. It receives payment from its members based upon services performed. Monies in excess of amounts required for operating expenses are refunded on the same basis.

Service for the Public or a Portion Thereof

Paragraph 6 of the Articles of Incorporation provides that the authorized number and qualifications of members, the different classes of members, if any, the property, voting and other rights and privileges of each class of membership, and the liability of each and all classes to dues or assessments and the method of collection thereof may be set forth in the bylaws.

The bylaws adopted on November 23, 1955 provide that the membership of the corporation shall consist of such persons, partnerships and corporations as are elected to membership by a two-thirds vote of the board of directors which consists of three members. They further provide that the bylaws may be amended by "the written vote or written assent of a majority of the regular members, which vote or assent shall be evidenced by endorsing the same upon a written proposal for amendment: By a vote of a majority of a quorum at the annual meeting or at a meeting duly noticed and called for the purpose of amending the By-Laws."

On February 26, 1958, the board of directors adopted a resolution limiting its membership to 85. Grocery Shippers now has a membership of 79 persons, partnerships or corporations. Since December 2, 1955 when the Articles of Incorporation were filed with the Secretary of State eight others, who have since resigned, were admitted to membership. The following shows the years in which the present members were admitted:

1955 (December)	20
1956	23
1957	23
1958 (7 Months)	13

As of October 15, 1958, the last member admitted to membership was admitted July 31, 1958.[1/]

On November 23, 1955, an "initial participation fee for new members" was set at $10. The fee was deferred by vote of the board of directors on January 18, 1956 and initiation fees or initial participation fees are no longer assessed new members.

Candidates for membership are required to file an application. The manager, who was the original secretary of respondent and now holds the title of assistant secretary, receives the application and communicates with the board members by telephone for the purpose of voting upon the admission of the candidate.[2/]

No candidate has ever been refused membership; no one has been expelled, and no one has been asked to retire from membership even though a number of members no longer avail themselves of the consolidating services. Since the inception of the organization, eight members have resigned.

The general policy of the board of directors regarding qualifications of candidates for membership is: (1) that they have goods stored in De Pue Warehouse; (2) that they sell to the grocery trade; (3) that they be financially responsible so that there is little chance that charges will not be paid promptly, and (4) that they have a reasonable volume of merchandise moving.

Application forms were sent to persons requesting them, or were sent to possible candidates upon the request of a member. They were not sent unless there was a request from some source.

1/ The Commission's order instituting this investigation was issued June 24, 1958 and was served upon respondent July 2, 1958.

2/ The bylaws provide that the application shall be referred to the board of directors and election shall be by two-thirds vote of the board which may be taken by mail, telegraph or telephone.

The members of respondent are domiciled in twenty states and include several food brokers. A substantial number of the members are accounts of the food brokers. For example, one of the original directors, and possibly the person most instrumental in the organization of the association, is Irwin Gibbs. At the time of the organization of respondent, Gibbs was a partner of Soule, Gibbs and Boyer, food brokers and manufacturers agents. Some of the brokerage accounts that Gibbs was instrumental in bringing into the association are Ace Sales Corporation, Fiesta Fine Foods, Ideal Trading Company and Riverbrand Rice Mills. Soule, Gibbs and Boyer was one of the members that resigned. Gibbs Brokerage Co. was admitted to membership at the same time the former company resigned.

The respondent claims to be serving only members who have been selected because of specific qualifications. The first of the qualifications is that the candidate store goods in De Pue Warehouse. Actually, the record shows that unless a person has the goods to be consolidated stored in De Pue Warehouse, there would be no point in him becoming a member of the association. Witness Gibbs testified:

> "There would be no saving if you stored merchandise at another warehouse and then had to haul it out over to De Pue and pay an in-and-out charge and everything that goes with it. So it would be useless unless you stored your merchandise at De Pue. There is no advantage of being in the pool."

The assistant secretary, when asked about a member who was not a storer of goods at De Pue Warehouse, testified:

> "I think they made one shipment and found it didn't work....it didn't result in savings and there has not been a subsequent shipment, but they have never canceled from membership."

The above appears to be a practical requirement for membership rather than a qualification.

Another qualification stated is that the candidate sell to the grocery trade. The evidence shows that what is actually meant

is that the candidate ship commodities of the type and character usually moving to grocery houses. There is good reason for this qualification. The commodities falling within the general description of groceries bear carload rates and carload ratings based upon minimum carload weights of 20,000 pounds and 30,000 pounds. The mixed shipment rule of the common carriers provides that when two or more commodities are included in the same shipment and separate weights thereof are furnished or obtained, charges will be computed at the separate rates applicable to such commodities in straight shipments of the combined weight of the mixed shipment. The minimum weight shall be the highest provided for any of the rates used in computing the charges.[3/] It is obvious that the inclusion of small lots of commodities subject to minimum weights of 40,000 pounds would, in most instances, be detrimental to the members shipping groceries rather than beneficial.

The third qualification is that the candidate be financially responsible. Common carriers require customers to pay freight charges in advance, except where the shipper is financially responsible and has a good credit reputation. The nature of the operation of respondent prevents it from collecting its charges in advance.

There is no evidence conclusively showing that respondent has solicited new members. There is a listing in the September 1957 edition of the San Francisco Telephone Directory of Grocery Shippers, Inc., in the yellow classified section under the caption "Freight Forwarding". Respondent's manager testified that the listing was made by the telephone company without his knowledge, direction or acquiescence. Exhibit No. 22 is a copy of a letter from the manager to The Pacific Telephone and Telegraph Company stating that it had made a mistake in making that listing and directing it, in the future, to include Grocery Shippers, Inc., only in the alphabetical listing

3/ Item 90, Minimum Rate Tariff No. 2.

and not in any classified listing, whatsoever. Exhibit No. 14 is a circular entitled "Information Concerning Grocery Shippers, Inc." It sets forth the scope and nature of respondent's operations and its organization. There is no evidence showing that the circular was distributed other than to members. We find that respondent does not hold itself out to nor does it serve the public or any portion thereof within the meaning and intent of the Public Utilities Code.

Are Services Performed Only for Members?

In December 1956, checks totaling $108.57 were issued by respondent to twelve firms which were not members of the association. The respondent's records show that these remittances were part of the split of excess monies in the revolving fund at the close of the 1956 fiscal period. The checks were not mailed to the payees, but to four food brokers who are members of respondent. The respondent's records show that the refunds were part of the balance of the revolving fund to be refunded on the weight of shipments tendered by the brokers. The checks were made payable to the brokers' principals directly at the specific request of the several brokers. It is contended by the staff that the service was performed for nonmembers and as a result thereof, the association, or the members made a profit. San Diego Shippers Assn, Cal PUC Decision 57360 (Sept. 23, 1958) in Case No. 6063, was cited. The facts here are different from those in the case cited. There, nonmembers tendered shipments to the association and paid the freight charges, none of which were refunded. Here, members tendered freight to the association, paid the charges assessed, and refund was made to nonmembers at the members' requests. A creditor may make an assignment of his claim against a debtor. At most, the facts could be construed as a bypassing by individual members of formal membership requirements on behalf of nonmembers. There is no indication that the management of the association was culpable in any regard. We find that respondent performs services only for its members.

Are Operations Conducted on a Nonprofit Basis?

The fact that respondent is organized as a nonprofit corporation is not conclusive that it is operating on a nonprofit basis. In

a broad sense, it may be said that the manager, two clerical employees, De Pue Warehouse and the members of the association all profit in one way or another from the operations. The record leaves no doubt that the respondent is dominated and controlled by members having places of business in San Francisco and that whatever benefits are derived by the manager in the form of fees, by the clerical employees in the form of wages, and by De Pue Warehouse in the form of additional warehouse business are at the pleasure of the board of directors. In the circumstances the benefits mentioned above are not profits in the context of the term "nonprofit" as used in Section 220.

To determine whether operations are conducted on a non-profit basis we must examine respondent's fiscal practices. The association incurs a number of expenses in its operations, including transportation freight charges from common carriers, rent, wages to clerical employees, fee to the traffic consultant who supervises and manages the operation, franchise tax, office equipment and supplies. The transportation charges assessed by the common carriers are at their tariff rates and shipments are usually rated as single mixed shipments with split deliveries.

Respondent has a schedule of rates which it assesses its members. The rate is composed of three factors and is determined by applying the appropriate class rate as set forth in Minimum Rate Tariff No. 2 for the minimum weight bracket applicable to the actual weight of the composite pool, adding thereto an incremental rate for split delivery based upon the weight of the individual component shipment and ten cents per one hundred pounds. The first two factors are designed to cover the charges assessed by the common carrier and the ten cents per one hundred pounds is calculated to cover the other costs of operating Grocery Shippers, Inc.

The total charges collected from the members for an individual pool seldom equal the freight charges of the common carrier plus 10 cents per 100 pounds for several reasons. The common carrier

tariffs provide that when lower charges result from the application of lower rates at higher minimum weights such lower rates are applicable. In other words, in instances where the total weight tendered is 29,000 pounds it is probable that the common carriers' charges based upon 30,000 pounds at the carload rate for that weight would be lower than the charges on 29,000 pounds at the rate for 29,000 pounds. The respondent, in order to avoid the complexities of dividing 1,000 pounds of phantom weight among the participants in the pool, assesses the higher rate at the actual weight so that in such instances the respondent's charges on a pool would exceed the carriers' freight charges plus 10 cents per one hundred pounds. Another reason is that the total charges assessed any member on a particular lot of freight may not exceed the charges that the member might have incurred by shipping other than via respondent. A third reason is that while the carriers' charges for split deliveries are in the form of specific charges for various specific weight brackets, respondent's charges for split deliveries are in the form of rates in cents per one hundred pounds.

The charges assessed the members are placed in a "revolving fund" which is provided for in the Articles of Incorporation. Actually, this "revolving fund" is the treasury or sole fund of the corporation in that all receipts go into the fund and all disbursements are made from it. At the end of each year, after allowances have been made for accounts payable and a contingency of one month's expenses, the funds in the revolving fund are divided among the members, prorated according to the total weight shipped by each member during the year.

The Commission's staff takes the following position. The goods shipped by respondent do not take the same rating, some are first class while others have lower ratings, yet the refund or

reimbursement of excess earnings is based on a uniform rate in cents per one hundred pounds of the weight shipped regardless of classification. Therefore, those members shipping commodities rated as first class save more money per each one hundred pounds sent than members shipping goods having lower ratings. It is contended that some receive a much greater saving than others and if some receive more benefit than others, the element of excess gain indicates that some members have a greater financial interest than the remainder. This, it is said, is repellent to the theory of a nonprofit operation, as an association cannot truly be nonprofit unless the gain to each member is equal.

After careful consideration of the argument presented by the staff, we conclude that the gain or savings of the members are not always equal, but, because they are not identical, does not mean that there is a profit. The fact is that if each component part of the pool were shipped separately via the common carrier, there would be as many rates assessed as there are classes of freight in the pool and minimum weight brackets covered by the weights of the component parts. It would be extremely difficult to apportion the savings from pooling equally and yet equitably. First of all, it would have to be determined whether the "equal savings" should be in dollars or in terms of dollars per one hundred pounds. Certainly, fairness would indicate that it should be the latter. The only manner in which the savings in terms of cents per one hundred pounds could be distributed equally would be to total the charges that would be applicable to the individual shipments if shipped separately, subtract the charges assessed on the composite shipment from that total, divide the remainder by the total weight to arrive at a total savings per one hundred pounds, then multiply the factor so determined by the weight of the individual shipments and subtract the results so obtained from the freight charges that would be applicable to the individual components shipped separately. This would produce a pro rata share of

the freight charges to be borne by each component. After all of this has been done, one wonders whether the result would be equitable in that all commodities do not take the same carload weights. Where several shippers have pooled freight rated as fifth class, minimum carload weight 30,000 pounds, sufficient to produce a composite weight of 30,000 pounds, a contribution of 1,000 pounds of fifth class freight, minimum weight 36,000 pounds, will not help the pool, but, in fact, if combined with the other freight would result in higher freight charges for the other members. Also, where components are small shipments, the charge applicable under the common carrier tariffs may be in the form of a minimum charge. This circumstance presents a problem in dividing the savings equally and yet equitably.

The line-haul charges of the common carrier are based upon the classification ratings of the articles shipped. The respondent assesses its members for this portion of the cost at the ratings of the articles in each component part in like manner. Included in the common carrier charges are split delivery charges which are based upon the weights of the component parts regardless of classification rating. While the charges assessed by the respondent for the split delivery cost are in the form of rates, those rates are based upon the weights of the component parts and do not give effect to classification rating. With the few exceptions noted above, and except for the 10 cent rate, the charges assessed by respondent are close to the actual charges assessed by the common carrier. The exceptions are made necessary by the very nature of the pooling of freight and sharing of cost together with the form of transportation rates assessed by common carriers. It is notable that no one knows in advance of the consolidation of freight into a pool what the cost of a particular component will be; it depends upon the amount of tonnage and the make-up of the pool as a whole. It is probable that there will

be a variation in the charges assessed on the same kind and quantity of freight with each pool. It is possible, because split delivery rules provide that the rate assessed shall be applicable to the furthest point on the split delivery route, that the share of the transportation charges of a component part together with the 10 cents per one hundred pounds will exceed the regular common carrier rate. Obviously, a group of shippers who decide to pool freight, not knowing what each will contribute, would desire to set up some provision which would prevent their paying more than would be assessed if the freight had not been pooled.

We come now to the ten cent rate which is added to the share of the common carriers' charges. As stated above, there are overhead expenses in the maintenance of the corporation that must be paid. In a nonprofit corporation, the members share its expenses of operation. It may be done by assessment of dues, assessment of charges based upon use of facilities or services or in any manner suitable to the membership. Here the costs are shared based upon the amount of freight in pounds tendered for transportation by the member. Assuming for the moment that at the end of each year, each member were assessed an amount based upon the aggregate weight of the shipments in order to offset the cost of maintaining the corporation, and during the year each member paid its share of the freight charges of the pools in which it participated directly to the common carrier, the association would have no income and the corporation, as such, could have no profit. The expenses incurred by the corporation, however, cannot be deferred until the end of the year. The operation of the association requires working capital. This is obtained by the ten cent rate added to the share of the common carriers' charges. The amount collected in excess of the expenses actually incurred is refunded on the same basis as the fund was collected.

Upon consideration of all of the facts we find that respondent is consolidating freight on a nonprofit basis as that term is used in Section 220.

Findings and Conclusions

Based upon the evidence, we find as a fact that respondent Grocery Shippers, Inc., is not now nor has it been operating as a freight forwarder within the meaning and intent of Section 220 of the Public Utilities Code or any other provision of law. We further find that respondent has brought itself clearly within the provisions of the 1951 amendment to Section 220 of said Code. If respondent may be said not to have brought itself within the exemption contained in the 1951 amendment, we are at a loss to know how such exemption may be availed of. Having found that respondent is not a freight forwarder within the meaning of Section 220 of the Public Utilities Code, it follows that respondent does not require a certificate of public convenience and necessity as required by Section 1010 of that Code.

While it is true that any claimed exemption from the reach of a comprehensive regulatory statute must be strictly construed, it is also true that such exemption must be given effect if the plain language of the statute prescribes such exemption, even though the exemption tends to defeat the overall purpose of the statute. It is the province of the Legislature so to legislate, and it is the duty of the regulatory body to give effect to such legislation.

Doubtless, exemptions make administration of a regulatory statute more difficult, but that is no concern of the regulatory body. Exemption from a regulatory statute should not be nullified by strained construction or impermissible interpretation, it matters not how laudable the end sought may be. Unlawful means cannot result in a lawful end.

While not conceding that, absent the 1951 amendment to Section 220, respondent would be a freight forwarder subject to the jurisdiction of this Commission, should such be the case the fact is that the 1951 amendment exempts such a freight forwarder from regulation.

A regulatory body must ever keep in mind that regulatory authority granted, always, may be taken away by exemption from or repeal of the regulatory statute.

O R D E R

Based upon the foregoing findings and conclusions, IT IS ORDERED that the above-entitled investigation be and the same is hereby discontinued.

The effective date of this order shall be twenty days after the date hereof.

Dated at San Francisco, California, this 29th day of June, 1959.

Pete E. Mitchell
President

Theodore H. Jenner

Everett C. McKeage

Commissioners

I dissent from foregoing order and will file dissenting opinion at a later date.
Matthew J. Dooley

I concur in the dissent,
C. Lyn Fox

DR

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Investigation on the Commission's own motion into the operations, rates, and practices of GROCERY SHIPPERS, INC., a corporation.	))))	Case No. 6138

DISSENTING OPINION

I dissent from the Commission opinion in the above-captioned case.

Primarily, it is to be clearly understood that the power of the Legislature to exempt certain groups or individuals from regulation, providing that the classification of each is reasonable and not arbitrary, is clearly recognized. We are concerned here, not with the power of the Legislature, but only with the legislative intent.

Section 220 of the Public Utilities Code is encompassed within Division 1, Part 1, Chapter 1, of the said Code. Chapter 1 sets forth the definition of various entities. Section 220 of said Code defines a freight forwarder in the first paragraph thereof. The second and third paragraphs thereof specifically state that the Section (that is, the definition set out in the first paragraph) shall not apply to certain groups or individuals specifically designated. There is no definition, however, given to the excepted individuals or groups mentioned in the second and third paragraphs of said section. The Section is limited, as indicated, to the definition of a freight forwarder. The purpose of the exemption is clear. It is to exclude from the definition those mentioned in paragraphs 2 and 3. The question then necessarily arises as to whether or not the Legislature intended to exclude those entities mentioned in said second and third paragraphs of said Section, including, of course, a bona fide non-profit shipper association, from

any regulation whatsoever. If it were not for the second paragraph of said Section 220, I would be inclined to support the staff's contention that the third paragraph of said Section is merely a clarification of the first paragraph thereof. However, the nature and general character of an agricultural or horticultural cooperative organization operated under and by virtue of the laws of this state, or of any other state, has been clearly established and, therefore, the exclusion of such organizations from the definition of a freight forwarder, obviously, was not for the purpose of clarifying the definition of such freight forwarder set forth in the first paragraph of Section 220, but must be deemed to be an absolute exclusion. By a parity of reasoning, since the same exclusionary language, to wit, "this section shall not apply to" in the third paragraph of said Section, is precisly the same as that which applies to the exclusion of any agricultural or horticultural cooperative organization, the necessary conclusion follows that the same legislative intent which applied to the second paragraph of said Section must apply with equal force to the third paragraph of said Section, since the same exclusionary language is used. In the circumstances, therefore, it appears that the Legislature intended to exclude, among others, from the operation of said Section 220 as set forth in the third paragraph thereof, a bona fide non-profit association. It appears, therefore, that corrective legislation should be enacted so as clearly to separate the activities of a non-profit shippers' association from those of a freight forwarder as defined in the first paragraph of Section 220. Such legislation should, at least, set forth a definition of precisely what is a non-profit shippers' association. This conclusion is reached in view of the high plane which the Legislature has given to the status of a freight forwarder, to wit: that it is a common carrier, that a certificate of public convenience and necessity is required by it, and that it must file tariffs. All of these

requisites were deemed apparently essential in the public interest. It does not seem probable that the Legislature intended that a non-profit shippers' association, without any definition being given thereto, and carrying on operations strikingly similar to those of a freight forwarder, should be beyond the reach of any regulation, supervision, interference, let or hindrance of any kind whatsoever! Having provided such stringent requirements before a freight forwarder may commence operations, it seems reasonable that the Legislature, if the matter were called to its attention, would precribe some reasonable lines of separation between the operations of such a non-profit association and a freight forwarder so that the line of demarcation between the two would be reasonably visible.

In the circumstances as are presented by the instant case, I must concur with the majority opinion in respect to the construction placed upon Section 220 of the Public Utilities Code. My dissent, however, is predicated upon the record as I view it in this case, that the respondent, Grocery Shippers, Inc., is not a bona fide non-profit shippers' association.

An examination of the record in the instant case indicates to me that the respondent is a mere shell and not a bona fide shippers' association as contemplated by the provisions of the third paragraph of Section 220 of the Public Utilities Code.

The Articles of Incorporation and the Bylaws of respondent are perfunctory. The Articles contain the barest conventional legal requirements of any non-profit association, such as a club, fraternal organization, or other similar non-profit association. The same observation may be made in respect to the Bylaws. There is no specific requirement in the Articles nor in the Bylaws for the qualification of members, nor of the proprietary interest of the members. There is nothing in the Bylaws nor in the Articles, providing that the members shall store their goods at the DePue Warehouse. Although

the Articles of Incorporation provide that each member shall be entitled to one vote, yet even the conventional voting by proxy has been eliminated, in that the representative of a member, whether individual, partnership or corporation, shall be sufficient evidence in and of itself of authority of such representative to cast the vote of the member. This is tantamount to permitting non-members to vote for members, and certainly is not in consonance with the legally accepted practices of membership voting in a bona fide non-profit association. There is no provision in the Articles nor in the Bylaws requiring that a member must be engaged in the grocery trade or shipping grocery articles in order to become qualified for membership. This is a qualification which has been set up by the three-member Board of Directors. Moreover, there is no limitation of either the Articles or the Bylaws of respondent limiting its membership either as to place of residence or business, or as to number. In this connection, the records show that the membership have their respective places of business over three thousand miles apart. While the Bylaws do give the power to the Board to determine the qualification of members, they do not give the power to limit the number of members. The membership is apparently open to the world! This non-restrictiveness as to membership certainly indicates a holding out to all who may be interested.

Moreover, the Board of Directors meet, as it were, through telephonic communcations! and discuss and appraise the qualifications of an applicant for membership and vote upon the same. What Minute Record is kept of such telephonic meetings has escaped the record in this case.

The respondent passes on what it specifically states to be its "profits," in some instances, to non-members. It has admittedly made remittances payable to non-members for members' share of the

"profits" of respondent. This has been accomplished by sending the remittances to members, payable to non-members. Then respondent has sought, by obviously specious rationale, to treat this situation as a debtor-and-creditor relation between the non-member and the member, although there was no assignment of the share of the profits of the member to the non-member. The obvious flaw in such reasoning, if it may be called such, is that no assignment was established in the record in this matter. The legal situation was asserted, and the conclusion postulated without evidence to support the assertion. The bald fact is that the remittance checks were made out to non-members and not mailed to the payees, but mailed to four food brokers, members of respondent. These members, it is claimed, apparently sent the remittance checks to the non-members. If the rationale of the respondent should be accepted, then the question arises as to why the remittance checks were actually sent to the members although payable to non-members. In my opinion, this indicates participation in the profits of respondent association by non-members.

Furthermore, the members of respondent store their commodities in the DePue Warehouse in San Francisco. When shipments of the members' commodities are to be made, the respondent pools them and ships them in order to take advantage of carload rates. When the freight pool is made up, the record clearly indicates that it includes commodities of first class combined with commodities of the various other accepted classifications of freight. Thus, when the freight is pooled and shipped by respondent as a mixed shipment carload lot, there are various classes of freight in the pool, some of which have a first-class rating and some of which have a lower-class rating. When and as "profits" develop from the pooling of the freight of the members through the utilization of carload lot shipments, then the savings resulting therefrom are distributed to the different shipper members on the basis of the total tonnage shipped for a given period

by each member in the ratio that the individual member's tonnage bears to the over-all total tonnage shipped by respondent for such period. In short, the "profit" fund is disbursed on a pro rata basis measured by the total weight of the commodities shipped. It is to be especially noted that this pro rata distribution is not based upon the particular shipments of each member, but only on the total weight of the shipments of each member, irrespective of the class rating into which the whole or part of a shipment may fall. In other words, all class ratings of individual items are ignored and the items are lumped together and treated solely on a weight or tonnage basis. Thus, in the division of the "profits," the shipper of a commodity having a first-class rating enjoys a greater benefit than one who ships commodities having a fourth-class rating, and this would be true where one member has a greater number of first-class shipments than another, and where the pool has an equal if not greater tonnage of lower-class ratings than first-class ratings. This being so, the member shipper of the first-class ratings receives a greater share of the "profit" then he otherwise would enjoy if each particular shipment were rated according to its class. The division of the fund arising from the savings achieved by the pooling of all freight, irrespective of class, in order to obtain the carload rate should be determined and disbursed on the precise class rating of each shipment so that a shipper member then would receive only the exact saving resulting from the pooling and shipment thereof through respondent.

The majority opinion attempts by a process of ratiocination to justify the practices of respondent predicated upon certain practical considerations. While I am fully in sympathy with the practical considerations posed by the majority opinion, yet we are here dealing with a legal situation, and the activities of respondent must conform to certain legal principles, and practical considerations should have no influence in deviating from such principles. Moreover,

the very essence of a non-profit association is that the members do not enjoy any profits therefrom. In my opinion, the method used by respondent in dividing the profits or alleged fund is a distribution of profits to the members who have first-class shipments, and therefore such members receive more than they would if the respondent were operated strictly as a non-profit association. In the circumstances, it cannot be said that the respondent is a non-profit association.

I have used the term "profit" with respect to the distribution of the alleged surplus fund of respondent throughout this opinion advisedly, since respondent, by its own specific admission, has utilized this term. On the fourth page of Exhibit 8, admitted in evidence in this case, which Exhibit shows the distribution of the fund, the column of figures showing the pro rata distribution is headed "Pro Rata Profit," then follows percentage of total tonnage. This caption, to wit, "Pro Rata Profit," utilized by respondent, is clear and incontrovertible. It indicates, beyond peradventure of doubt, the precise nature of the distribution of the so-called fund.

In my opinion, the analysis of the entire set-up of respondent leads to the inescapable conclusion that respondent is not a true and legal non-profit association, but is a mere shell.

The net result of the decision of the majority is to afford an open invitation to every warehouseman in the State of California to set up, directly or indirectly, a so-called non-profit shipper association of the same character, tenor and effect as respondent, and thus have such group entirely exempt from any control or regulation whatsoever by this Commission. If this conclusion be so, and in my opinion it follows inevitably from the majority decision, then we will have the anomalous situation of a dubious non-profit shippers' association competing with a freight forwarder without any of the

regulations of this Commission imposed upon a freight forwarder. Such a result does not appear to be in the public interest.

Dated at San Francisco, California, this 14th day of July, 1959.

Matthew J. Dooley
MATTHEW J. DOOLEY, Commissioner

I concur in the foregoing dissenting opinion.

C. Lyn Fox
C. LYN FOX, Commissioner

Certified as a True Copy
Vael Coleman
ASST. SECRETARY, PUBLIC UTILITIES COMMISSION
STATE OF CALIFORNIA