

**ORIGINAL**Decision No. 66109

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application  
of E. J. McSWEENEY, Agent, for  
authority to amend Item 185 of  
E. J. McSweeney, Agent, Local and  
Joint Freight and Express Tariff  
No. 1, Cal. P.U.C. No. 1, for  
authority to amend tariff rules  
governing tender of split-delivery  
shipments.

Application No. 44752  
Filed September 4, 1962;  
amended October 3, 1962.

California Trucking Associations,  
Inc.,

Complainant,

vs.

Pacific Southcoast Freight Bureau,  
Agent,

Defendant.

Case No. 7454  
Filed October 3, 1962

In the Matter of the Investigation  
into the rates, rules, regulations,  
charges, allowances and practices  
of all common carriers, highway  
carriers and city carriers, relat-  
ing to the transportation of any  
and all commodities between and  
within all points and places in the  
State of California (including, but  
not limited to, transportation for  
which rates are provided in Minimum  
Rate Tariff No. 2).

Case No. 5432  
Order Setting Hearing  
dated July 24, 1962.

John MacDonald Smith and Eugene J. McSweeney,  
for Pacific Motor Trucking Company and  
Pacific Motor Transport Company; Anthony J.  
Konicki, for Pacific Motor Trucking Company,  
applicants in Application No. 44752 and  
respondents in Case No. 5432.

Marshall W. Vorkink, for defendant in Case No. 7454.  
Frank D. Francis and W. Harney Wilson, for  
defendant in Case No. 7454, respondent rail-  
road companies in Case No. 5432, and inter-  
ested parties in Application No. 44752.

Arlo D. Poe, J. C. Kaspar and James Quintrall,  
for California Trucking Association, prot-  
estant in Application No. 44752, complainant  
in Case No. 7454 and interested party in  
Case No. 5432.

Harry W. Leiser, for Western Transportation  
Company, respondent in Case No. 5432.

R. E. Dempster and Morton S. Colgrove, for  
Traffic Managers Conference of California;  
C. A. Bordelon, for Los Angeles Chamber of  
Commerce; Morton S. Colgrove, for Potlatch  
Forests, Inc.; and L. Richard Bloomer, for  
California Retailers Association, interested  
parties in Application No. 44752 and in  
Case No. 5432.

Carl B. Blaubach, for the Commission staff.

#### O P I N I O N

These matters deal with the progressive tender of split delivery shipments. "Progressive tender", as used herein, means the tender of the components of a split delivery shipment by a shipper to a carrier at various times over a specified period. By Application No. 44752, E. J. McSweeney, tariff agent, seeks authority on behalf of Pacific Motor Trucking Company and Pacific Motor Transport Company to establish a rule which would permit said carriers to receive for transportation split delivery shipments which are progressively tendered at their terminals. In Case No. 7454 California Trucking Association assails as unlawful a similar rule published by Pacific Southcoast Freight Bureau on behalf of various common carriers by railroad. The

Order Setting Hearing of July 24, 1962, in Case No. 5432 was initiated by the Commission for the purpose of determining whether the minimum rate provisions which are set forth in the Commission's Minimum Rate Tariff No. 2 should be modified to provide for the progressive tender of split delivery shipments. At present they do not.

Public hearings on these several matters were held on a consolidated record before Examiner Abernathy at Los Angeles on October 15, 1962, and on January 7, 1963. The matters were taken under submission upon the receipt of a late-filed exhibit on January 21, 1963. An examiner's report has been issued. Exceptions thereto have been filed on behalf of Pacific Motor Trucking Company and Pacific Motor Transport Company. A reply to the exceptions has been filed by California Trucking Association. The matters are ready for decision.

As may be noted from the examiner's report, a copy of which is attached hereto as Appendix A, the examiner recommends that Application No. 44752 be denied; that the progressive tender rule which has been published by Pacific Southcoast Freight Bureau on behalf of various rail carriers be limited in application to circumstances in which related lease arrangements involving portions of the carriers' terminals are published in the carriers' tariffs, and that the Order Setting Hearing, dated July 24, 1962, in Case No. 5432 be dismissed.

In their exceptions to the examiner's report, Pacific Motor Trucking Company and Pacific Motor Transport Company attack the examiner's conclusions that under the progressive tender rule which is proposed in Application No. 44752 said carriers would engage in freight consolidation services that are contrary to the provisions of the Commission's Minimum Rate Tariff No. 2. The examiner's conclusions in this respect stem from the fact that under the proposed rule the carriers would permit their terminals to be used by shippers for the consolidation of shipments and would make no charge for the space used. Exceptors assert that in furnishing free terminal space they would be providing the shippers no more space than they now provide in the ordinary course of receiving shipments for transportation. They further assert that even though it should be concluded that they are participating with the shippers in the consolidation of shipments that fact of itself is not sufficient to bar the authorization of the proposed rule, and that the rule should be authorized for the operating economies that the carriers would realize thereunder.

In replying to these exceptions, the California Trucking Association supports denial of the application on the grounds that the proposed rule is the same essentially as one which was disapproved in an earlier proceeding involving these same applicants (Decision No. 64013, dated July 24, 1962); that under the rule the carriers would be participating in freight consolidation services; that such consolidation services are reason enough for condemnation of the rule; that the rule would

unduly prefer shipper associations; that the rule is not designed for use by the public; and that the rule is not justified by assumed economies.

The evidence in this matter, the examiner's report, the exceptions to the report and the reply to the exceptions have all been considered. Regarding the progressive tender rule which is sought in Application No. 44752, we find that said rule should not be authorized. Notwithstanding the assertions of Pacific Motor Trucking Company and of Pacific Motor Transport Company that the establishment of the rule would not involve said carriers in prohibited freight consolidation services, we cannot agree that such would be the case. We find that the providing of free terminal space for the consolidation of shipments is sufficient to bring the carriers within the scope of the prohibitions.<sup>1</sup> We find, furthermore, that in providing free terminal space to various of their shippers, the carriers would be granting preferential treatment to said shippers, since in practical effect they would be refunding or remitting a portion of their rates for transportation services which they otherwise provide said shippers. The granting of preferential treatment and the refunding or remission of rates are

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<sup>1</sup> As heretofore indicated, Minimum Rate Tariff No. 2 prohibits the consolidation of shipments by a carrier.

"Each shipment shall be rated separately. Shipments shall not be consolidated or combined by a carrier."  
(Item No. 60)

A similar prohibition is set forth in applicant carriers' own tariff -- Tariff No. 255-G, Item No. 365, Pacific Southcoast Freight Bureau, agent.

specifically prohibited by Section 494 of the Public Utilities Code.<sup>2</sup> That the carriers would be able to achieve certain operating economies under their proposed rule does not justify the authorization of a rule that would provide for unlawful operations.

The issue to be decided in Case No. 7454 is whether the progressive tender rule therein involved is unlawful because it does not specify the terms under which the carriers lease space on their terminals to shippers for consolidating the shipments handled under the rule. This rule, it may be noted, differs from that proposed in Application No. 44752 in that the operation of the former is based in part upon the shippers' leasing of the terminal space used, whereas the necessary terminal space would be provided by the carriers without charge in the latter instance. We have previously concluded that in instances in which the operation of a progressive tender rule is contingent upon a shipper's leasing a portion of the carrier's terminal, the tariff requirements of Sections 486 and 487 of the Public Utilities Code are not met unless the terms of the lease, as well as the progressive tender rule, are published in the carrier's tariff (Decision No. 64013 dated July 24, 1962). In conformity with these conclusions, we

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<sup>2</sup> "No common carrier shall charge, demand, collect, or receive a different compensation for the transportation of persons or property, or for any service in connection therewith, than the applicable rates, fares and charges specified in its schedules filed and in effect at the time, nor shall any such carrier refund or remit in any manner or by any device any portion of the rates, fares, or charges so specified, except upon order of the commission as provided in this part, nor extend to any corporation or person any privilege or facility in the transportation of passengers or property except such as are regularly and uniformly extended to all corporations and persons."

Section 494, Public Utilities Code

find that the progressive tender rule which has been published by Pacific Southcoast Freight Bureau in Freight Tariff No. 255-G, Item No. 1100 series, Note A of Paragraph (f) of said Item, is and will be unlawful to the extent that it does not set forth the terms upon which portions of the carriers' terminals are leased to shippers for the purposes of the rule. The operation of the rule will be limited to only those instances in which the terms of the leases are set forth in the carriers' tariffs.

The Order Setting Hearing dated July 24, 1962, in Case No. 5432, was initiated for the purpose of determining whether the circumstances which have prompted the progressive tender rules heretofore discussed impel the establishment of a progressive tender rule in Minimum Rate Tariff No. 2. We find that they do not. The phase of Case No. 5432 which was initiated by said Order Setting Hearing will be terminated.

O R D E R

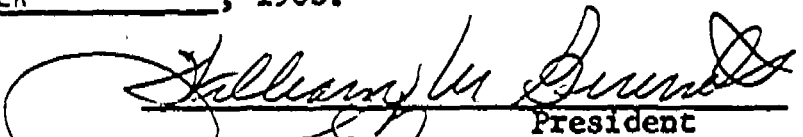
IT IS ORDERED that:

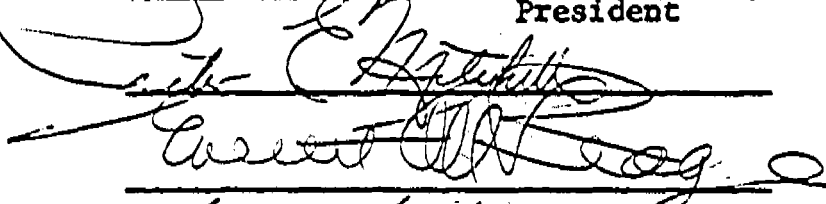
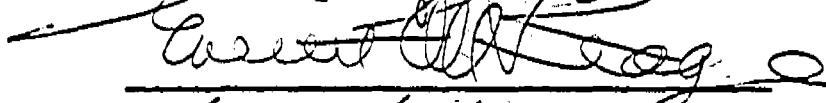
1. Application No. 44752 be, and it hereby is, denied.
2. Pacific Southcoast Freight Bureau, defendant in Case No. 7454, be, and it hereby is, ordered to amend the rule which is set forth in Note A, Paragraph (f) of Item 1100 series of its Freight Tariff No. 255-G,
  - a. To include in said rule, or to make said rule subject to other provisions of said tariff which specify, the terms of the lease of that portion of the carrier's freight warehouse platform used by the shipper for the receipt and handling of the shipments tendered to the carrier under said rule; and

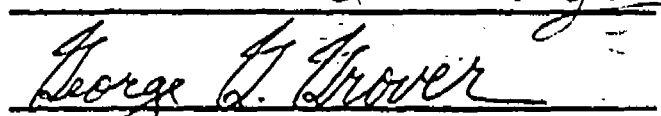
- b. To limit the application of the rule to instances in which the terms of the lease of the carrier platform facilities involved have first been published in Freight Tariff No. 255-G.
3. The tariff amendments which are required by the above Paragraph No. 2 of this Order may be made effective not earlier than the tenth day after the effective date of this order, on not less than ten days' notice to the Commission and to the public, and shall be made effective not later than ninety days after the effective date of this order.
4. The phase of Case No. 5432 which was initiated by the Order Setting Hearing dated July 24, 1962, be, and it hereby is, terminated.
5. The Secretary of the Commission is directed to cause personal service of this Opinion and Order to be made upon the parties hereto and the effective date of this order shall be twenty days after the date hereof.

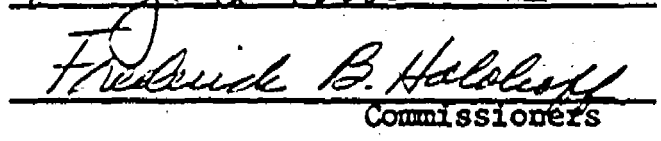
Dated at San Francisco, California, this

1st day of OCTOBER, 1963.

  
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President

  
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Commissioners



APPENDIX A

Consisting of the

Proposed Report of Examiner C. S. Abernathy

on the

Matters Covered by the Above-Numbered Decision

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of  
E. J. McSweeney, Agent, for author-  
ity to amend Item 185 of E. J.  
McSweeney, Agent, Local and Joint  
Freight and Express Tariff No. 1,  
Cal. P.U.C. No. 1, for authority  
to amend tariff rules governing  
tender of split delivery shipments.

California Trucking Associations, Inc.

vs. Complainant

Pacific Southcoast Freight Bureau,  
Agent,

Defendant

In the Matter of the Investigation  
into the rates, rules, regulations,  
charges, allowances and practices  
of all common carriers, highway  
carriers and city carriers, relating  
to the transportation of any and all  
commodities between and within all  
points and places in the State of  
California (including, but not  
limited to, transportation for  
which rates are provided in Minimum  
Rate Tariff No. 2).

Application No. 44752

Filed September 4, 1962;  
amended October 3, 1962.

Case No. 7454

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Case No. 5432

Order Setting Hearing  
dated July 24, 1962.

John MacDonald Smith and Eugene J. McSweeney,  
for Pacific Motor Trucking Company and  
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road companies in Case No. 5432, and interested  
parties in Application No. 44752.

Arlo D. Poe, J. C. Kaspar and James Quintrall,  
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protestant in Application No. 44752, com-  
plainant in Case No. 7454 and interested  
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Harry W. Leiser, for Western Transportation  
Company, respondent in Case No. 5432.

R. E. Dempster and Morton S. Colgrove, for  
Traffic Managers Conference of California,  
interested party in Application No. 44752  
and in Case No. 5432.

V. A. Bordelon, for Los Angeles Chamber of  
Commerce, interested party in Application  
No. 44752 and in Case No. 5432.

Morton S. Colgrove, for Potlatch Forests, Inc.,  
interested party in Application No. 44752  
and in Case No. 5432.

L. Richard Bloomer, for California Retailers  
Association, interested party in Application  
No. 44752 and in Case No. 5432.

Carl B. Blaubach, for the Transportation Division  
of the Commission's staff.

PROPOSED REPORT OF EXAMINER C. S. ABERNATHY

These matters deal with the progressive tender of split delivery shipments. "Progressive tender", as used herein, means the tender of the components of a split delivery shipment by a shipper to a carrier at various times over a specified period. By Application No. 44752, E. J. McSweeney, tariff agent, seeks authority on behalf of Pacific Motor Trucking Company and Pacific Motor Transport Company to establish a rule which would permit said carriers to receive for transportation split delivery shipments which are progressively tendered at their terminals. In Case No. 7454 California Trucking Associations, Inc., assails as

unlawful a similar rule published by Pacific Southcoast Freight Bureau on behalf of various common carriers by railroad. The Order Setting Hearing of July 24, 1962, in Case No. 5432 was initiated by the Commission for the purpose of determining whether the minimum rate provisions which are set forth in the Commission's Minimum Rate Tariff No. 2 should be modified to provide for the progressive tender of split delivery shipments. At present they do not.

Public hearings on these several matters were held on a consolidated record before Examiner Abernathy at Los Angeles on October 15, 1962, and on January 7, 1963. The matters were taken under submission upon the receipt of a late-filed exhibit on January 21, 1963. At the close of the hearings the California Trucking Associations petitioned for the issuance of an examiner's report. In response to this request the Commission has directed that such a report be issued.

The establishment of the progressive tender rule which E. J. McSweeney seeks in his Application No. 44752 assertedly would enable Pacific Motor Trucking Company and Pacific Motor Transport Company to achieve substantial efficiencies and economies in the handling of the split delivery shipments of one of their principal shippers. The evidence which was submitted in this respect is to the effect that under the present tariff rules that govern said carriers' operations the time of tender of the split delivery shipments involved coincides with the carriers' peak handling activity in connection with the receipt and dispatch of other freight. The carriers anticipate that the establishment of

a rule permitting the progressive tender of split delivery shipments will tend to shift the tender of such shipments to the off-peak freight handling periods, thereby permitting a reduction in present labor requirements during the peak periods and a more efficient usage of labor during the off-peak periods.

The progressive tender rule which Agent McSweeney seeks to establish is as follows:

(Applies only on shipments tendered to Pacific Motor Trucking Company or Pacific Motor Transport Company at carrier's terminal by shipper or his agent, who shall not be an employee of carrier, who must prepare the shipping instructions for each component, and must remain at carrier's terminal from the time of tender of the first component until the last component of the shipment has been tendered to carrier. Carrier shall receive the tendered components only at its convenience until the written delivery instructions covering the entire split delivery shipment are received). A carrier shall accept on written instructions from the shipper, component parts of a split delivery shipment to be progressively received and handled during any one calendar day, prior to being furnished with manifest or written delivery instructions covering the entire split delivery shipment. In such event shipments shall not be considered as tendered and no rating or billing in connection therewith shall be done by carrier until after the shipper has signified to carrier that shipment is complete by furnishing manifest or written delivery instructions covering the entire split delivery shipment. Such document must be furnished to carrier before the end of its regular business day and no additions thereto may be made after its receipt by carrier who will then issue master bill of lading covering the complete split delivery shipment. In event shipper does not submit manifest or written delivery instructions before the end of the business day, each component part shall be considered as a separate shipment and carrier shall issue bills of lading accordingly.

This rule is similar to one which Agent McSweeney sought to have authorized in an earlier proceeding but which was disapproved (Decision No. 64013, dated July 24, 1962, in Application No. 44205). Under the earlier rule, the progressive tender of shipments would be permitted only with respect to split delivery shipments received and handled over a portion of the carrier's terminal leased by a shipper. In passing upon this rule the Commission pointed out in its decision that the carriers were not proposing to publish the terms upon which they would lease portions of their terminals; that in effect they were undertaking to subject their public utility services to private agreements, and that such a course was closed to them by law, inasmuch as Sections 486 and 487 of the Public Utilities Code require the publication of all rates, fares, classifications and rules that enter into the determination of a carrier's charges.

Under the rule which Agent McSweeney now proposes, there is no requirement that the shipper lease a portion of carrier's terminal. Hence, the tariff publishing requirement with respect to the leasing provisions is avoided. The carriers now propose to provide without charge to the shipper such terminal space as is necessary for the holding and handling of components of progressively tendered split delivery shipments until said components are accepted by the carriers for transportation. The only requisite in this connection is that the shipper must maintain an employee or agent at the carrier's terminal (a) to receive the freight to be transported as it is brought to the terminal for

shipment, (b) to consolidate the various lots of freight into split delivery shipments, (c) to prepare necessary shipping documents, (d) and to act as custodian of the freight until it is accepted by the carrier.

Although the rule which Agent McSweeney now seeks to have authorized is not subject to the tariff publication infirmities of the rule which he previously proposed in Application No. 44205, it should not be authorized for reasons stemming from the freight consolidation services that would be performed at the carrier's terminal involved. Ostensibly, these services would be performed by the shipper's employee or agent stationed at said terminal. However, it is evident that applicant carriers, Pacific Motor Trucking Company and Pacific Motor Transport Company, would also be parties to the freight consolidation services, since they propose to provide without charge the terminal space that would be used by the shipper's employee or agent in the performance of said services. Minimum Rate Tariff No. 2, Item No. 60, specifically prohibits the consolidation or combining of shipments by a carrier. The participation of Pacific Motor Trucking Company and Pacific Motor Transport Company in the consolidation services that would be provided by the shipper's employee or agent under the proposed rule is such as to bring said services under the prohibitions of Item No. 60. Application No. 44752 should be denied.

The circumstances which gave rise to the complaint of California Trucking Associations, Inc., against Pacific Southcoast

Freight Bureau in Case No. 7454 are as follows: By Petition No. 137 filed February 4, 1959, in Case No. 5432, Pacific Southcoast Freight Bureau sought authority on behalf of the Southern Pacific Company and other common carriers by railroad to establish a tariff rule providing for the progressive receipt of split delivery shipments over a leased portion of the freight warehouse platform of the carrier involved. The sought authority was granted by Decision No. 58730 dated July 7, 1959. Similar authority was sought by Agent McSweeney in Application No. 44205, but was denied by Decision No. 64013, dated July 24, 1962. As indicated hereinbefore, Decision No. 64013 turned on the fact that the carriers did not propose to file as part of their tariff the terms under which they would lease space on their freight house platforms for shippers' use in connection with the progressive receipt of shipments. In its complaint in Case No. 7454 the California Trucking Associations, Inc., assails the progressive tender rule published by Pacific Southcoast Freight Bureau as being unlawful for the reason that the rule does not set forth the carrier's terms for the leasing of the portions of their terminals used for progressive tender purposes.<sup>1</sup>

Responding to the complaint, the Pacific Southcoast Freight Bureau stated that at the present time the progressive tender rule is being applied only at a terminal of the Southern

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<sup>1</sup> The question of whether the terms of the leases should be published as a tariff item did not arise at the hearing on the petition of Pacific Southcoast Freight Bureau.



Pacific Company at Los Angeles. It offered to file as part of the applicable tariff provisions the terms of the lease at this terminal.<sup>2</sup>

In view of the holdings reached in Decision No. 64013, it must be concluded that the progressive tender rule which was filed by Pacific Southcoast Freight Bureau on behalf of various common carriers by railroad does not meet the tariff requirements of Sections 486 and 487 of the Public Utilities Code and is unlawful to the extent that (a) it does not set forth, or (b) it is not subject to a rule that sets forth, the terms which govern the carriers' leasing of their terminal properties for the receipt of progressively tendered split delivery shipments under said progressive tender rule. In those instances in which the carriers have leased portions of their terminals for the purposes of operating under said rule, the carriers should forthwith amend their tariffs to show the terms of the leases involved. The operation of the progressive tender rule should be limited to only those instances in which the terms of the leases entered into for the purposes of the rule are set forth in the carriers' tariffs.

With respect to Case No. 5432 (Order Setting Hearing dated July 24, 1962) evidence was submitted on behalf of the rail carriers and the shipper that have been operating under the progressive tender rule authorized by Decision No. 58730. In general, the carriers and the shipper undertook to show that they have realized efficiencies and economies from the progressive

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<sup>2</sup> The lease was subsequently received for the record as exhibit No. 4.

tender of split delivery shipments. No one, however, advocated that any change be made in Minimum Rate Tariff No. 2 to incorporate therein a progressive tender rule for general application by highway carriers throughout the state. In the absence of specific recommendations in this regard, supported by substantial evidence to show the need for a progressive tender rule in Minimum Rate Tariff No. 2, such a rule should not be included in the tariff.

Recommended Findings

Upon the basis of the evidence and argument received in this matter, the examiner recommends that the Commission find as follows:

In Application No. 44752

- a. That under the progressive tender rule proposed in this application the carriers would engage in the consolidation of shipments contrary to the prohibitions contained in Item No. 60 series of Minimum Rate Tariff No. 2;
- b. The showing in this matter does not justify the authorization of such a departure from said prohibitions against the consolidation of shipments by carriers;

In Case No. 7454

The progressive tender rule published by Pacific Southcoast Freight Bureau, Agent, in its Freight Tariff No. 255-G pursuant to authority granted by Decision No. 58730 -- said rule being set forth in Note A, Paragraph (f) of Item No. 1100 series of said tariff -- is unlawful to the extent that (a) it does not set forth, or (b) it is not subject to a rule that sets forth, the terms which govern the carriers' leasing of their terminal properties for the receipt of progressively tendered split delivery shipments under said rule;

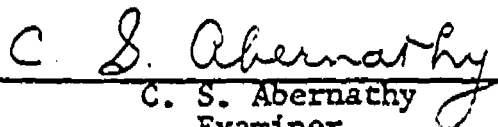
In Case No. 5432, Order Setting Hearing of July 24, 1962

No present and sufficient need has been shown for the amendment of Minimum Rate Tariff No. 2 to include a rule providing for the progressive tender of split delivery shipments.

Recommended Order

It is recommended that the Commission order that:

1. The authority sought by E. J. McSweeney, Agent, in Application No. 44752 be denied.
2. Those carriers on whose behalf Pacific Southcoast Freight Bureau, Agent, has published the progressive tender rule which is set forth in Note A, Paragraph (f) of Item 1100 series of Pacific Southcoast Freight Bureau Freight Tariff No. 255-G be required:
  - a. To amend said rule to set forth therein, or to make it subject to other provisions of said tariff which specify, the terms that govern the carriers' leasing of their terminal properties for the receipt of progressively tendered split delivery shipments under said progressive tender rule.
  - b. To limit the application of the rule to only those instances in which the terms of the leases which are entered into for the purposes of the rule are set forth in the carriers' tariff or tariffs.
3. The phase of Case No. 5432 which was initiated by the Order Setting Hearing dated July 24, 1962, be terminated.

  
C. S. Abernathy  
Examiner

Los Angeles, California  
April 3, 1963