

**ORIGINAL**

Decision No. 72647

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of  
DON D'ONOFRIO, an individual, doing  
business as DONOFRIO DRAYAGE-RECORD  
EXPRESS, for a certificate of public  
convenience and necessity to extend  
highway common carrier service.

Application No. 48416  
(Filed April 21, 1966)

Bertram S. Silver, for applicant.

Graham James & Rolph, by Boris H. Lakusta and  
Patrick L. Kelley, for California Cartage  
Company, California Motor Transport Co.,  
Delta Lines, Inc., DiSalvo Trucking Company,  
Garden City Transportation Co., Neilsen  
Freight Lines, Oregon-Nevada-California Fast  
Freight and Southern California Freight Lines,  
Pacific Intermountain Express, Pacific Motor  
Trucking Company, Ringsby-Pacific, Ltd.,  
Shippers Express, T.I.M.E. Motor Freight, Inc.,  
Walkup's Merchants Express, Willig Freight  
Lines, Associated Freight Lines, protestants.

O P I N I O N

Duly noticed public hearings were held before Examiner  
Mooney in San Francisco on July 12 and 13 and August 25 and 26, 1966.  
The matter was submitted upon the filing of applicant's "Reply to  
Motion to Dismiss" on September 15, 1966.

Applicant is a highway common carrier transporting general  
commodities with the usual exceptions within the San Francisco-East  
Bay Cartage Zone<sup>1/</sup> and between San Mateo and San Jose and inter-  
mediate points via U.S. Highways 101 and 101 By-Pass (Exhibits 1 and

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<sup>1/</sup> San Francisco-East Bay Cartage Zone includes generally the terri-  
tory surrounding San Francisco Bay, extending generally from  
San Pablo and Richmond on the north to San Francisco on the west  
to San Mateo on the south to Hayward on the east and to San  
Pablo on the north.

2). The certificates authorizing said transportation were granted by Decision No. 50866 dated December 14, 1954, in Application No. 35128 and Decision No. 53634 dated August 28, 1956, in Application No. 36087. Said certificates are registered with the Interstate Commerce Commission. In addition, applicant has permits to operate as a radial highway common carrier, a highway contract carrier, a city carrier and a household goods carrier.

By the application herein applicant seeks authority to transport as a certificated carrier distilled spirits, alcoholic beverages, liquor, alcoholic liquors, venous liquors, spirits and wines, in intrastate commerce only, between all points and places on the following highways and within twenty miles laterally and radially from all points and places on said highways:

- (a) U.S. Highway 101 between Santa Rosa and Salinas.
- (b) California Highway 1 between San Francisco and Monterey.
- (c) U.S. Highway 80 between San Francisco and Roseville.
- (d) U.S. Highway 50 between San Francisco and Sacramento.
- (e) U.S. Highway 99 between Sacramento and Fresno.
- (f) California Highway 29 between Napa and Vallejo.
- (g) Interstate Highway 680 between Dublin and Vallejo.
- (h) California Highway 24 between Oakland and Walnut Creek.
- (i) State Highway 4 between Pinole and Stockton.
- (j) State Highway 160 between Sacramento and its junction with California Highway 4.

The area proposed to be served encompasses Fresno, Stockton, Sacramento, Roseville, Napa, Vallejo, Santa Rosa, Pacifica, Monterey, Salinas and all intermediate points (Exhibit 3). The area sought to be served would include applicant's present certificated area.

Applicant proposes to provide daily service to the sought area, with the exception of Sundays and holidays. He would establish rates on the same level as those contained in Minimum Rate Tariff No. 2 and other applicable minimum rate tariffs of the Commission and would apply the same rules which are now effective under his tariff.

Applicant commenced trucking operations in 1939 with one piece of equipment as a local drayman in San Francisco. He now has the following equipment: Ten van trucks, one stake truck and three passenger vehicles (Exhibit 6). He has a terminal in San Francisco. His total gross receipts for the year 1965 were \$183,241.57, and his net profit for the year was \$24,989.47 (Exhibit 4). Applicant asserted that his liability insurance exceeds the limits required by the Commission and that he complies with all safety regulations.

Applicant testified that he was requested by Lewis Westco, a shipper of alcoholic liquors and related commodities, located in San Francisco, to file this application. He stated that he has served Lewis Westco since 1946, and that the amount of business he receives from this shipper has steadily increased to a point where it now accounts for approximately 50 percent of his gross income. He testified that his gross income from the Lewis Westco account in July 1965 was \$8,389.69 and that for the month of July 1966 it increased to \$15,142.60. The witness asserted that he picks up shipments from Lewis Westco on the average of twice a day and sometimes more often and that he is called upon from time to time to handle emergency rush shipments for that account. He stated that he also handles interstate shipments of bonded liquors from the San Francisco docks to Lewis Westco's plant or to warehouses

for it under his interstate authority. Applicant testified that he performs a personalized type of service for Lewis Westco. He explained that his drivers know Lewis Westco's customers and are familiar with their preferences regarding delivery, as for example, at which door delivery is to be made and where the merchandise is to be placed. Applicant stated that alcoholic liquors are high-rated commodities and are desirable to transport.

Applicant testified that prior to September 1965, all of the transportation he performed for Lewis Westco was within his present certificated area only; that subsequent to that date, he has also been hauling for Lewis Westco into the sought extended area; and that the amount of freight received for transportation beyond his present certificated area is increasing. He explained that practically all of the shipments he handles for Lewis Westco are split delivery shipments; that under his present operating authority, he cannot handle multiple deliveries to both his present certificated area and the sought additional area as a single split delivery shipment but must handle the deliveries to each area as a separate split delivery shipment. Exhibit 7 lists eight typical shipments with multiple deliveries both within and beyond applicant's present certificated area that were tendered to him by Lewis Westco during September and November 1965 and February 1966. The exhibit shows that in each instance the deliveries within the present certificated area and the deliveries beyond were rated separately and that the total charge for this transportation would have been \$148.42 less if in each case the transportation to both areas could have been rated as a single split delivery shipment.

Applicant asserted that the service he has been performing for Lewis Westco into the proposed area is increasing in frequency

and is approaching a common carrier type of service. He testified that he has been serving the Roseville, Sacramento, Lodi, Stockton, Davis, Woodland, Winters and Tracy areas and various intermediate points between said areas and San Francisco for Lewis Westco approximately three times per week, the Contra Costa area at least three times per week and the Napa and Marin County area daily.

Exhibit 8 shows that applicant made the following number of separate deliveries for Lewis Westco in the Stockton, Sacramento, Marin and Contra Costa areas during the months of October 1965 and May and June 1966:

<u>Area</u>	<u>Number of Separate Deliveries</u>		
	<u>Oct. 1965</u>	<u>May 1966</u>	<u>June 1966</u>
Stockton	6	28	14
Sacramento	38	40	49
Marin	86	79	99
Contra Costa	54	35	46

The witness explained that in Exhibit 8 he listed each separate delivery to the areas shown irrespective of whether it represented a component part of a split delivery shipment or a single shipment. He stated that generally liquor shipments vary in frequency depending on the time of year. He testified that in March liquor shipments are slow because merchants wish to reduce their inventories when the property tax is assessed; that the number of shipments pick up immediately thereafter; and that the volume of shipments reaches a peak during November and December.

Applicant stated that he has not as yet handled any transportation for Lewis Westco south of Manteca or San Jose or south of Pacifica along State Highway 1. He explained that Lewis Westco is in the process of expanding its operations into the

A. 48416 ds

Fresno and the Salinas-Monterey area and other surrounding areas and will require service to said areas.

Applicant testified that since March 1966, Casella Trucking, a permitted carrier, has been handling the Lewis Westco shipments previously handled by him; that Casella can handle this transportation as single split delivery shipments; that he has been performing the actual transportation as a subhauler for Casella; that this arrangement is not satisfactory either to the shipper who wishes to deal directly with applicant or to applicant because he receives less revenue as a subhauler; that Lewis Westco has agreed to this arrangement only until the application has been acted upon by the Commission; that if the sought extension is not granted, he will lose the Lewis Westco account; and that if this result should occur, it would have a disastrous effect on applicant's financial position.

The assistant vice president of Lewis Westco testified in support of the application. He explained that Lewis Westco buys alcoholic liquors and similar commodities in bulk or unlabeled bottles which are warehoused under its name and that as orders are received, it bottles and labels said commodities for its customers. He explained that, among other duties, he supervises all transportation activities for his company. The witness stated that Lewis Westco has been using applicant's service since 1946; that applicant transports incoming shipments from the piers and bonded warehouses and outgoing shipments to customers; that applicant will pick up once or twice a day on weekdays and more frequently during the holiday season (October to December) when Lewis Westco's business increases; that applicant will have four to five trucks at Lewis Westco's loading dock by 8:00 a.m. each weekday; that it will also make Saturday pickups and emergency pickups when requested; that

A. 48416 ds

freight picked up by 8:00 a.m. is delivered the same day; that if it is picked up later, it will generally not be delivered until the next day if the distance is beyond 50 or 60 miles; that most of Lewis Westco's shipments involve multiple deliveries and generally range in weight from 5,000 to 20,000 pounds with some weighing up to 30,000 pounds; that during the busy season, it will have from 75 to 150 orders to be delivered daily; and that frequent and prompt pickups are important because Lewis Westco has limited dock space.

The shipper witness testified that prior to the fall of 1965, Lewis Westco did not, with any degree of regularity, utilize applicant's service beyond his present certificated area and had used various other carriers, including some of protestants, into the sought extended area. He stated that the other carriers were taking two or three days to make deliveries to points in the proposed area and accorded an impersonalized service; that Lewis Westco competes with other similar wholesalers who have their own equipment and can give same-day delivery; that this placed Lewis Westco at a competitive disadvantage; and that for this reason, Lewis Westco commenced using applicant's service into the sought area in the fall of 1965. The witness testified that he prefers applicant's service for the following reasons: Applicant performs a personalized, expedited service for Lewis Westco; there is very little turnover with applicant's employees; applicant's drivers know Lewis Westco's customers and their preferences regarding delivery and establish good public relations for Lewis Westco; it is like having his own fleet of trucks. He stated, however, that Lewis Westco had looked into the feasibility of obtaining its own equipment because of the problem of rating multiple deliveries to points within both applicant's present area and the sought area.

A. 48416 ds

He explained that Lewis Westco does not wish to enter the trucking field and will not do so if the application is granted. The witness stated that by rating multiple deliveries into applicant's present area and the sought area as single split delivery shipments, Lewis Westco saves approximately \$500 per month in transportation costs. As to the present arrangement between Casella Trucking and applicant, he asserted that this is not desirable because Lewis Westco does not desire having another carrier knowledgeable of its customer lists and does not wish to deal with an additional carrier if claims should arise.

The assistant vice president testified that Lewis Westco's customers include chain stores, drugstores, super markets and other retail liquor outlets; that Lewis Westco has little business as yet in the areas between San Jose and Salinas, Pacifica and Monterey, Stockton and Fresno and Novato and Santa Rosa; that major chains which Lewis Westco does business with have stores in these areas, and Lewis Westco now has salesmen in said areas to develop a market for its products; that although Lewis Westco has not as yet used applicant's service into the areas it is developing, it will do so if the application is granted. The witness testified as follows regarding the frequency with which Lewis Westco is now using applicant's service under the Casella arrangement to other areas and points within the proposed area: Daily to many points in Contra Costa County and southern Marin County; two or three or more times per week to the Sacramento, Roseville, Lodi, and Stockton areas and to many intermediate points between said areas and San Francisco; less frequently to Sonoma and Santa Rosa. He stated that Lewis Westco has many customers located in communities that are located within twenty miles of the main highways in the sought



extended area. He pointed out that Lewis Westco uses applicant's service daily within his present certificated area.

Two of the protestants presented both oral and documentary evidence and eight additional protestants presented testimony. The protestant carriers each have from over 65 to approximately 5,000 pieces of equipment. All have authority to transport alcoholic liquors and related commodities. Four have authority to serve all of the area applicant now serves and proposes to serve, five have authority to serve most of said area, and the remaining one cannot serve the area located within fifty miles of San Francisco. The majority of the ten protestants have common carrier authority to serve most of the State. All have interstate rights that are coextensive with their intrastate authority.

All of the ten protestants purport to provide overnight service between San Francisco and some or all of the points proposed to be served by applicant. Same-day service on truckload shipments throughout the proposed area and on less-than-truckload shipments to points along certain regular routes in the San Francisco Bay area is offered by some of the protestants. Several stated that a common carrier service for a single shipper and a single commodity throughout the proposed area is impractical and uneconomical. All of the protestants solicit traffic, including alcoholic liquors and related commodities, for points they serve in the sought area. Some have staffs of salesmen and elaborate advertising brochures.

Most of the ten protestants stated that they had transported alcoholic liquors and related commodities for Lewis Westco in the past. Several stated that they had difficulties with the shipper because it would not mark packages in accordance with the requirements of the National Motor Freight Classification, to which common carriers are a party, and would not pay the applicable accessorial charges when its customers required the carriers'

drivers to place the merchandise they delivered on shelves. A few who now perform some transportation for Lewis Westco asserted that they were not aware of any problems with this shipper regarding the proper marking of packages or shelving of merchandise.

All of the ten protestants presented evidence to show that they have adequate equipment to handle the present and any foreseeable increase in the public need for transportation of the commodities in issue throughout the area applicant proposes to serve. Their reasons for protesting the application are as follows: Liquor is a desirable commodity to transport and is lucrative; there is more than a sufficient number of common carriers within the proposed area to handle all available traffic; they have equipment operating in this region at much less than full capacity; another carrier is not required in the zone applied for; if another carrier is granted a certificate for this area, it would create more competition, further dilute the amount of traffic available for the existing common carriers and result in loss of revenue for them.

A member of the law firm representing the protesting carriers reviewed all of applicant's freight bills for the months of October 1965 and May and June 1966 covering the transportation of liquor to points outside of his present certificated area. Based on the documents he reviewed, he prepared a summary (Exhibit 15) listing for each of the three months the point most frequently served in five of the counties located within the proposed area, the most frequently served and also the next most frequently served point in five of the counties and all points served in three of the counties. The summary shows the number of days a particular point was served during the month but does not indicate the number of individual shipments or deliveries that were made on said days.

The witness testified that during the three-month review period the only liquor shipper served by applicant was Lewis Westco. Applicant asserted that numerous additional points were served during the review period in addition to those listed in the summary.

A written "Motion to Dismiss" was filed by the attorney for protestants at the conclusion of the hearings. The motion asserted that the desire of a single shipper alone for the lowest possible rates does not sustain the burden of proving public convenience and necessity; that the concept of certification is a holding out to the public generally and not merely to a single shipper; that applicant sought a general commodity certificate in the same general area in 1961 but was granted only the area between Saratoga and Los Gatos (Decision No. 62518 dated September 5, 1961 in Application No. 42980, unreported) which he did not accept; that if the instant application is granted, it is apparent that applicant's next step would be to have the certificate amended to cover general commodities which he was unsuccessful in obtaining in the aforementioned proceeding; and that the evidence does not support the granting of the sought extension. The motion listed three alternatives available to applicant. The first is to work out a joint rate arrangement with another carrier who is certificated in the sought area and interlining shipments with split deliveries in applicant's present area and the extended area with said carrier. The other two alternatives both would require applicant to abandon that portion of his present certificate which relates to liquor. It is suggested that he could then serve Lewis Westco throughout both areas as a contract carrier or as a permitted carrier if frequency of movement did not prohibit use of a radial permit.

Applicant's "Reply to the Motion to Dismiss" asserted that testimony of a single shipper is sufficient to support a certificate of public convenience and necessity; that the shipper did not express merely a desire for applicant's service in the proposed area but listed numerous reasons supporting the application; that if the application is not granted, Lewis Westco will obtain its own equipment and protestants would not obtain this account under any circumstances; that the Commission has on numerous occasions considered rates as one of the factors in determining public convenience and necessity; that if the application is granted, D'Onofrio will hold himself out to all shippers of alcoholic beverages but certainly is in no position to "raid" protestants' accounts as evidenced by applicant's gross revenue of under \$200,000 for the year 1965 which is negligible when compared with that of protestants which ranged from over one and one-half million dollars to over 41 million dollars for the like period; that applicant can economically perform service to the sought area since he would use the same unit of equipment for pickup, linehaul and delivery, whereas protestants would require three units of equipment to perform the same service; that the record does not support the allegation by several protestants that Lewis Westco is not marking shipments in accordance with tariff requirements and not paying accessorial charges for shelving merchandise if such service is requested; that the frequency with which applicant serves the routes in the proposed area clearly establishes that his service in said area is close to, if not in fact, that of a highway common carrier; and that the alternatives to certification suggested by counsel for protestants are unworkable because interlining with another common carrier would unduly delay the shipments and if

applicant were to give up his certificate for liquor in his present area, he would lose his interstate rights in said area which he must have to transport the inbound interstate and foreign shipments he is now handling for Lewis Westco and in addition he could not transport liquor shipments for other accounts which he does from time to time.

Upon consideration of the evidence, the Commission finds that:

1. Applicant is an individual, doing business as Donofrio Drayage-Record Express, and has radial highway common carrier and highway contract carrier permits issued by this Commission for the statewide transportation of general commodities and also city carrier and household goods carrier permits. In addition, he has a certificate of public convenience and necessity issued by this Commission and coextensive authority from the Interstate Commerce Commission authorizing him to operate as a highway common carrier of property with the usual exceptions in intrastate, interstate and foreign commerce within the San Francisco-East Bay Cartage Zone and between San Mateo and San Jose and intermediate points via U.S. Highways 101 and 101 By-Pass.
2. Applicant has conducted highway common carrier operations since 1955 within the San Francisco-East Bay Cartage Zone and since 1956 in the extended area to San Jose. Outside said certificated area applicant holds highway permit authority.
3. Applicant has transported alcoholic liquors and related commodities for Lewis Westco, a wholesale liquor distributor, since 1946. Between the effective dates of his certificate and the extension thereof referred to in Findings 1 and 2 and September 1965, applicant transported said commodities on a daily basis in intrastate,

interstate and foreign commerce within his certificated area only. The interstate or foreign commerce included shipments from the terminals of interstate or foreign carriers located within applicant's present certificated area to warehouses for Lewis Westco within said area or to Lewis Westco's place of business in San Francisco. The intrastate commerce included shipments from Lewis Westco's place of business to its customers located within said certificated area.

4. The majority of the deliveries handled by applicant for Lewis Westco are split delivery shipments.

5. Commencing with September 1965, applicant has been delivering shipments of alcoholic liquors and related commodities for Lewis Westco into the extended area sought herein. Applicant in performing said transportation was unable to handle multiple deliveries to points both within his present certificated area and the proposed area as a single split delivery shipment. By rating the transportation to each area as a separate split delivery shipment, increased transportation costs to Lewis Westco resulted.

6. Since March 1966, Casella Trucking, a permitted carrier, has been handling all deliveries for Lewis Westco previously handled by applicant. Casella Trucking can handle multiple deliveries to points both within and beyond applicant's present certificated area as a single split delivery shipment. Applicant has subhailed all of the Lewis Westco transportation for Casella Trucking.

7. The subhaul arrangement referred to in Finding 6 is not satisfactory to either applicant or Lewis Westco. Under said arrangement, applicant receives less revenue than if he were the prime carrier, and Lewis Westco does not wish to reveal its

customer lists to an additional carrier or be required to deal with a carrier other than applicant if claims should occur.

8. Applicant, as a prime carrier prior to March 1966 and as a subhauler for Casella Trucking subsequent to said date, has been providing intrastate service for Lewis Westco from San Francisco to the Roseville, Sacramento, Lodi, Stockton, Davis, Woodland, Winters and Tracy areas and various intermediate points between said areas and San Francisco approximately three times per week, to the Contra Costa area at least three times per week and to the Napa and Marin County area daily. Applicant's service to said areas for Lewis Westco increases during holiday seasons.

9. Applicant has not as yet performed any service for Lewis Westco south of Manteca or San Jose or south of Pacifica along State Highway 1. Lewis Westco has only a small amount of business in said areas and has been using other certificated carriers to them. It now has salesmen in said areas to develop accounts there.

10. The amount of Lewis Westco freight being transported by applicant is increasing, and the revenue from said freight accounts for 50 percent of applicant's for-hire income.

11. The witness from Lewis Westco who appeared for applicant desires that applicant be authorized to render the service he seeks authority to perform. The witness indicated that applicant provides a personalized, expedited service which Lewis Westco does not obtain from other carriers. The witness was familiar with some of the other certificated carriers that operate in the sought area but was not familiar with all carriers serving said area.

12. The record does not establish that Lewis Westco is now tendering shipments improperly marked to highway common carriers or that its customers are now requiring carriers to shelve merchandise without paying applicable accessorial charges.

13. If the application is granted, Lewis Westco will utilize applicant as a prime carrier both within his present certificated area and the sought area. If the application is not granted, Lewis Westco will discontinue the Casella Trucking arrangements. Lewis Westco is unwilling to use applicant's service if the application is denied because of the increased freight costs that result from rating split deliveries to points within applicant's present certificated area and the proposed area as separate shipments. It is Lewis Westco's intent to obtain proprietary equipment and perform its own transportation if the application is denied and not to give any of its traffic within applicant's present and proposed areas to any of the protestants or any other carriers.

14. If the application is granted, applicant will hold himself out to transport alcoholic beverages and related commodities in the sought area for the public generally. However, the record does not establish that applicant is now transporting alcoholic liquors and related commodities for shippers other than Lewis Westco within his present certificated area or within the proposed area in either intrastate or interstate or foreign commerce.

15. All of the protesting carriers serve in intrastate, interstate and foreign commerce. Several serve all of the proposed extended area, and the balance serve most of said area. All have authority to transport alcoholic beverages and related commodities.


16. Protestants cross-examined applicant's witnesses, were allowed by applicant to review his transportation records for the months of October 1965 and May and June 1966, presented evidence on their own behalf and filed a written "Motion to Dismiss".

17. If applicant were to abandon the portion of his certificate authorizing the transportation of alcoholic liquors



and related commodities within his present area, he would thereby lose his interstate and foreign rights to transport said commodities within his current area. Applicant regularly transports said commodities from the terminals of interstate and foreign carriers for Lewis Westco to the shipper's place of business and to warehouses for it which, according to the evidence, are all located within the San Francisco Commercial Zone. In this connection, Section 203(b)(8) of the Interstate Commerce Act provides, in part, as follows:

"...nor, unless and to the extent that the Commission shall from time to time find that such application is necessary to carry out the national transportation policy declared in this Act, shall the provisions of this part, except the provisions of section 204 relative to qualifications and maximum hours of service of employees and safety of operation or standards of equipment apply to: (8) the transportation of... property in interstate or foreign commerce wholly within a municipality or between contiguous municipalities or within a zone adjacent to and commercially a part of any such municipality or municipalities, except when such transportation is under a common control, management, or arrangement for a continuous carriage or shipment to or from a point without such municipality, municipalities, or zone. ...."

There is nothing in the record herein which would indicate that any of the interstate or foreign commerce performed by applicant for Lewis Westco is under common control, management, or arrangement for a continuous carriage or shipment from a point beyond the San Francisco Commercial Zone. 

18. Applicant has failed to establish on this record that public convenience and necessity require that applicant render the service proposed herein or any part thereof as a highway common carrier.

A. 48416 ds \*

The Commission concludes that the application should be denied.

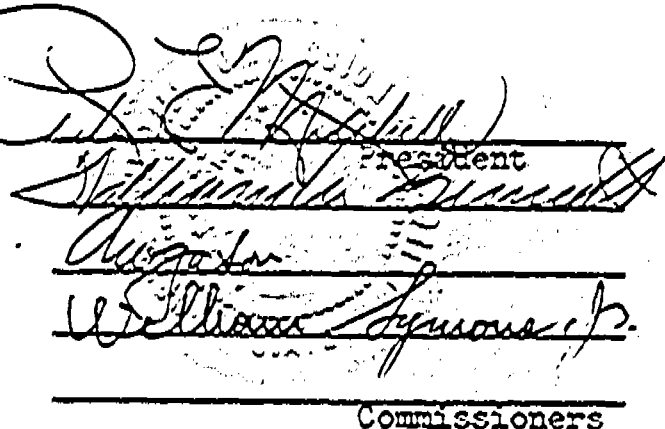
Based on a review of the entire record, it appears that the type of service applicant is performing for Lewis Westco could be performed under highway contract authority, which the applicant possesses, if alcoholic liquors and related commodities were deleted from his current certificate. Applicant could then transport multiple deliveries of said commodities for Lewis Westco to both areas in question as a single split delivery shipment, and, as pointed out in Finding 17, since the interstate and foreign transportation handled by applicant for Lewis Westco is entirely within the San Francisco Commercial Zone and is not under common control, management, or arrangement for a through movement from a point beyond this zone, he does not require interstate authority to transport this traffic. Atlanta Bonded Warehouse, Inc. Common Carrier Application 91 MCC 104. However, since applicant has not requested that alcoholic liquors and related commodities be deleted from his current certificate, no finding has been made herein as to whether the evidence of record would justify such action.

O R D E R

IT IS ORDERED that Application No. 48416 is denied.

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

Dated at SAN FRANCISCO, California, this 27<sup>th</sup>  
day of JUNE, 1967.

  
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Commissioners

Commissioner Fred P. Morrissey, being necessarily absent, did not participate in the disposition of this proceeding.