

ORIGINAL

Decision No. 81417

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Investigation on the Commission's
own motion into the operations and
practices of Bay Area-Los Angeles
Express, Inc., a corporation.

Case No. 9275
(Filed September 28, 1971)

ORDER DENYING REHEARING
AND FURTHER HEARING, AND
MODIFYING DECISION NO. 80759

A petition for rehearing and reconsideration of Decision No. 80759 and for further hearing having been filed by BAY AREA-LOS ANGELES EXPRESS, INC., respondent, the Commission, having considered each and every allegation thereof, is of the opinion that no good cause for rehearing or further hearing has been made to appear, but that good cause has been shown for modification of said decision.

While it is clear that respondent offers daily service between the points contained in Exhibits 19 and 20, which describe the Los Angeles and San Francisco-East Bay areas, merely offering such service does not establish those points as fixed termini.

While the Commission believes the term "terminus" has a flexible meaning, which could in the appropriate case mean a geographical area larger or smaller than a "city", we believe that a definition of terminus which, under the facts of this case, would encompass a multi-county area, is not appropriate. Our opinion in Investigation of Fleetlines, Inc., 52 CPUC 298 (1952) sets forth this view, and nothing expressed in our opinion in Albert S. Fitz-Gerald, dba Fitz-Gerald Bros., Dec. No. 59788, dated March 15, 1960, Case No. 6196 (unreported), should be read in conflict with this view. In this case, it would be appropriate to limit the definition of terminus to a given "city", in view of the dedication of respondent's property to serve specific cities.

While in an appropriate case, a truck terminal may be a terminus, it does not appear that respondent's terminals, located in Vernon and San Francisco, are anything more than intermediate handling and transfer points. In general, 'termini' are the origin point and destination point of a carrier's responsibility for the transportation of a given shipment.

Petitioner characterizes its operation as a radial highway common carrier service between areas rather than between fixed termini. A radial highway common carrier operation is not conducted between areas, but within an area described in a carrier's operating authority. How a carrier conducts this operation is not material so long as the carrier's service between any two termini does not reach a point of regularity giving rise to a finding that the termini are 'fixed'.

In this case, respondent offers daily service between the cities listed in his points lists. Although it has not been established that respondent has actually served each and every city named in the two points list, such an offer, coupled logically with the intent to make good the offer, should make an experienced carrier such as BALAX aware that a highway common carrier certificate would be needed to carry out that intent.

Exhibits 5, 6 and 7 clearly establish that respondent not only offers, but provides daily service between the cities of San Francisco and Los Angeles and these termini should be considered 'fixed termini'. Moreover, respondent's operations between the cities of Los Angeles and Oakland are between "fixed termini" as shown in Exhibit 8.

While Exhibits 10, 11, 12, 13, 14 and 15 indicate that respondent's operations to and from the city of Exeter involve a particular and limited number of customers, the evidence adduced at hearing does not establish that respondent performs these operations under contract. At the same time, respondent's operations

between the cities of Exeter and San Francisco and between Exeter and Los Angeles are sufficiently frequent and regular and therefore between "fixed termini".

Exhibits 9, 16 and 17, on the other hand, along with the evidence adduced to sponsor them, do not establish all of the points contained therein to be "fixed termini".

IT IS THEREFORE ORDERED that rehearing of Decision No. 80759 and further hearing of said decision is hereby denied, but Decision No. 80759 shall be modified to read as follows:

"By its order dated September 28, 1971, the Commission instituted an investigation on its own motion into the operations and practices of Bay Area Los-Angeles Express, Inc., a corporation (BALAX), for the purpose of determining whether respondent has operated or is operating as a highway common carrier between fixed termini or over regular routes between San Francisco and Los Angeles and between other points within the State of California without first having obtained a certificate of public convenience and necessity as required by Section 1063 of the Public Utilities Code.

"Public hearing was held before Examiner Mooney in San Francisco on January 11, 12, 13 and 14, 1972. The matter was submitted upon the filing of briefs which have been received.

Introduction

"Oral and documentary evidence was presented by an Associate Transportation Representative of the Commission staff and by the president of Container Freight Corporation (Container) and Hills Transportation Co., a corporation (HTC). Other than three exhibits presented on behalf of respondent and one exhibit presented on behalf of five common carriers who were interested parties herein (Delta, et al.), no additional evidence was presented.^{1/} Briefs were filed by the staff, by HTC and Container, and by respondent.

^{1/} The five common carriers are Delta Lines, Inc., DiSalvo Trucking Co., System 99, Pacific Motor Trucking Co. and Ted Peters Trucking Co.

"Interim Decision No. 79702, dated February 8, 1972, in the instant proceeding, denied a Petition for a Proposed Report and a Motion to Strike Certain Staff Exhibits filed by respondent and a Petition for an Interim Order filed by Container and HTC.

"It is the position of the Commission staff and also of Container, HTC, and Delta, et al., that respondent has been illegally operating as a highway common carrier without having obtained the required certificate of public convenience and necessity. Respondent is of the opinion that the evidence developed on the record herein does not support such a finding.

Background

"HTC, a highway common carrier with both intrastate and interstate operating authority between the San Francisco Territory and Los Angeles Basin Territory and between various other California points, was owned by E. A. Hills, Sr. On November 2, 1968, E. A. Hills, Sr. sold the corporate stock of HTC to Container. On November 2, 1968, E. A. Hills, Jr., who had been with HTC since 1959 and an executive thereof since 1965, remained as an executive of HTC after the sale until July 1, 1970, when he resigned. Since then S. Nash has been president of both Container and HTC.

"On July 7, 1970, respondent applied to the Commission for a highway contract carrier permit which was issued on July 13, 1970. Respondent commenced its motor carrier operations on July 17, 1970. E. A. Hills, Jr. is the president of respondent and together with his four daughters owns all of its stock. A. G. McGiboney is the vice-president and F. Hills is the secretary. A radial highway common carrier permit was obtained by respondent on August 23, 1971.

"As an executive of HTC, one of the duties of E. A. Hills, Jr. was to solicit and contact customers. When he resigned from HTC he immediately called various shippers, some of whom had done business with HTC and others who had not, to obtain their reaction as to whether there would be business available for him if he started his own truck line.

"Subsequent to the issuance of the Order of Investigation, respondent on November 22, 1971, filed Application No. 53009 wherein it requested a certificate of public convenience and necessity to operate as a highway common carrier. Its request to have the application consolidated with the investigation was denied by the Commission. Respondent stated in its brief that the reason for filing the application was to protect its interests and substantial business investments as well as its desire to be in total compliance with the rules and regulations of the Commission and the Public Utilities Code. It asserted, however, that this was done despite its own conclusion, based upon an analysis of its operations, that the services it performs are those of a contract carrier and not a highway common carrier. On March 24, 1972, Progressive Transportation Company filed Application No. 53235 for authority to transfer its highway common carrier certificate between the Los Angeles Basin and San Francisco Territories to respondent. Application No. 53009 has been dismissed. Application No. 53235 is pending.

"At the time of the staff investigations referred to hereinafter, respondent had terminals in San Francisco and Los Angeles. It had 21 employees, and it operated three bobtail trucks, six tractors, 19 semi-trailers and five dollies. Its gross operating revenue for the five quarters ending with the third quarter of 1971 were as follows:

| <u>Quarter</u> | <u>Gross Op. Rev.</u> |
|----------------|-----------------------|
| 3rd - 1970 | \$126,562 |
| 4th - 1970 | 193,548 |
| 1st - 1971 | 213,086 |
| 2nd - 1971 | 241,525 |
| 3rd - 1971 | 276,302 |

Staff

"A staff representative testified and presented 31 exhibits. He testified that he made two separate investigations of respondent's operations at its place of business in San Francisco. The first

investigation was made during September, 1970 and covered the period July 17 to August 31, 1970. The second was made during June, July and August, 1971 and covered four different weeks in 1971: the first week of February, the second week of March, the third week of April, and the fourth week of May.

"The representative testified that during each of the two investigations he reviewed the freight bills issued by respondent for all of the transportation performed during the particular review period. He stated that he transcribed the following information from each freight bill onto worksheets: the number and date, the name of the consignor and consignee, the origin and destination, the commodity and weight shipped, and the party paying the freight charges. He also indicated on his worksheets for each shipment whether respondent had said that there was a written or oral contract with the shipper covering the transportation, or that the shipment was a subhaul.

"The witness testified as follows regarding the initial investigation in September, 1970: This was a preliminary survey to determine the status of respondent's operations; based on its results, it was the staff's opinion that respondent was operating as a highway common carrier; respondent was informed of this determination at a conference held at the staff's office in San Francisco on February 19, 1971 and was also advised thereat that a follow-up survey would be made in 90 days and that if it appeared to the staff that respondent was continuing to so operate, it would be recommended to the Commission that an order of investigation be issued. A letter from the staff confirming the conference was sent to respondent on March 9, 1971.

"The representative introduced in evidence 14 shipment frequency studies based on the freight bill summaries he had prepared during the two investigations. The first, Exhibit 1, is a list of all shippers served by respondent and the number of shipments received from each during the two periods. The totals

for the first period (July 17 to August 31, 1970) and the second period (the first, second, third and fourth weeks of February, March, April and May, 1971, respectively) are as follows:

| | <u>1st Period</u> | <u>2nd Period</u> |
|------------------|-------------------|-------------------|
| No. of Shippers* | 107 | 218 |
| No. of Shipments | 1,636 | 1,528 |

*Note: In those instances where the company shipped from more than one location, it has been listed as a separate shipper from each location in Exhibit 1. In all, the total number of separate companies shown in the exhibit as making shipments during the first and second periods were 95 and 206, respectively.

" The witness explained that he indicated on Exhibit 1 in connection with each shipper listed thereon whether respondent had informed him that the transportation for the particular shipper was performed pursuant to a written or oral contract or was subhaul transportation for another carrier. According to this information, the transportation for 67 of the shippers listed for the second period was asserted by respondent to have been subhaul transportation; 17 of the shippers had written contracts during the first period; and the balance had oral contracts.

" The remaining 13 shipment frequency studies (Exhibits 5 through 17) relate to the second period of investigation (the four weeks in 1971) and show the frequency with which respondent transported shipments from, to, and between certain points.

Following is a summary of the information shown in the exhibits:

" Between San Francisco and Los Angeles:

Respondent transported a total of 240 direct shipments with 190 southbound and 50 northbound; 44 separate parties engaged respondent's services for this transportation; service southbound was on each of the 20 days surveyed and northbound was on 18 of the days; the weight of the shipments varied from 9 to 41,800 pounds.

Between Oakland and Los Angeles: Respondent transported a total of 22 shipments between these points with service on 13 of the days surveyed; 13 separate parties engaged respondent's services for this transportation; the weight of the shipments ranged from 53 to 26,000 pounds.

Between Points in the San Francisco Area and Los Angeles Area: Respondent transported 555 shipments between these areas and 143 shipments from or to intermediate points; over 60 separate parties engaged respondent's services for this transportation; service was performed on most days surveyed; the weight of the shipments ranged from 12 to 152,697 pounds.

Between Exeter, on the one hand, and San Francisco and Los Angeles, on the other hand: Respondent transported 303 shipments between Exeter and San Francisco and 121 shipments between Los Angeles and Exeter; with the exception of service from Los Angeles to Exeter which was on 8 of the 20 days surveyed, service was on each of the days studied; all of the transportation from Exeter was for a printing company and this accounted for the bulk of the transportation; all shipments to Exeter were delivered to the same company, and in all but one instance, the company, or its offices in San Francisco or Los Angeles, engaged respondent's services; the shipments ranged from 6 to 15,415 pounds. ✓

"Magazine Movements from Los Angeles and San Jose: A regular movement of magazines is shown on one or two days of each week from a publisher in Los Angeles to points in the San Francisco area and various intermediate points and from a publisher in San Jose to various northern California points; the shipments ranged in weight from 31 to 36,092 pounds.

"The representative testified that he was furnished with the following information by Mr. McGiboney, vice-president of respondent, and Mr. Guernsey, vice-president of operations for respondent, during his investigation: Both had previously been employed by HTC for a number of years and have been with respondent since its inception; shipments from and to points within and between the San Francisco and Los Angeles areas are transported on equipment operating between San Francisco and Los Angeles; all operations are out of the San Francisco and Los Angeles terminals; respondent has five regular morning pickup and afternoon delivery routes out of the San Francisco terminal for the Bay Area and interlines with two other common carriers for pickups and deliveries to the Chico, Sacramento, Stockton, and Modesto areas; pickups are by bobtail equipment which brings the freight to the terminal for loading on linehaul rigs; five of its drivers had previously been employed by HTC; respondent operates three schedules per day from San Francisco to Los Angeles and two schedules per day in the opposite direction; Mr. Paschke who operates Pat's Coast Express is employed by respondent as the dispatcher at its Los Angeles terminal; Mr. Paschke dispatches either his own equipment or the equipment of two other carriers to make

pickups and deliveries in the Los Angeles Area and utilizes the services of one of the carriers to make pickups and deliveries in San Diego; respondent does not use its own equipment to perform pickup and delivery services for its Los Angeles terminal; the pickup and delivery carrier receives a division of 35 percent of the rate assessed by respondent; respondent has never refused any freight it could handle, but if the request for service is from a new customer, it is referred to respondent's president to determine whether it can be handled.

"Photocopies of two printed points lists published by respondent were presented in evidence by the staff as Exhibits 19 and 20. The first lists 132 cities, communities, and places served by respondent from its San Francisco terminal, and the second lists 331 such locations served by respondent from its Los Angeles terminal. Both of the lists have respondent's name printed in large type at the top and the statement 'Over-Night...Every Night!' printed immediately thereunder, and both show an address and telephone number for San Francisco, Oakland and Los Angeles. The representative stated that Mr. McGiboney had informed him that the purpose of the lists is to let shipping clerks know what points are served by respondent. A photocopy of both sides of a rate sheet published by respondent was placed in evidence as Exhibit 24 by the staff. It includes a summary of transportation rates and certain rating rules, and shows respondent's name and San Francisco address and telephone number. It is printed on both sides of a piece of cardboard.

"The representative testified that Mr. McGiboney furnished him with copies of letters from his correspondence file and that Exhibit 22 includes all 19 copies. He pointed out that the letters were sent to various shippers; that they referred to the service offered by respondent; and that some referred to the points

lists and rate sheets. In the witness's opinion, the letters and the points lists and the rate sheets constituted solicitation on the part of the respondent.

"The staff introduced in evidence summaries of certain of respondent's accounting records for the second period investigated. These included excerpts from the respondent's petty cash slips which show expenditures on behalf of shippers for lunches, tickets to sporting events and other promotional purposes. Also included was a list of checks drawn by respondent against Account No. 4450 which is described in the Uniform System of Accounts as covering 'expenses, other than salaries, in connection with advertising for the purpose of securing traffic.'

"The representative testified that respondent's president and Mr. McGiboney informed him as follows regarding the contractual relationship between respondent and its customers: Respondent initially had written contracts with some of its customers and oral contracts with the balance; after the staff advisory conference on February 19, 1971, all written contracts were canceled, and subsequent thereto, respondent has had oral contracts with all of its customers; the oral contracts run for a one-year period and require the shipper to give respondent a stated amount of tonnage over a period of time. If the stated amount is not tendered, the shipper is to pay for the deficiency; the president stated that he relies on his memory to know whether each shipper tendered the required amount. The oral contracts do not bind the customers to use respondent's service exclusively.

"The representative testified that he found no evidence of any written contracts in respondent's files; that in response to his request for copies of all written contracts respondent might have had with its customers, respondent furnished him with copies of 11 memoranda of understanding; and that copies of the memoranda are included in Exhibit 31. A review of this exhibit discloses that each

of the 11 memos is in the form of a letter addressed to a particular company with a space for the signature of respondent's president only; all are dated July 15, 1970, two days after respondent's contract carrier permit was issued; and each states that it is understood the shipper will tender so many pounds of freight to respondent at minimum rates and that if the tonnage is not met, the shipper agrees to pay the difference. The weight to be tendered varies in the memos and ranges from 5,000 to 150,000 pounds. There are no other provisions in the memos. The witness stated that he was informed by Mr. McGiboney that the memos had been rescinded because they had gotten out of hand.

"The representative testified that he had visited four of the major shippers to whom the memos of understanding had been sent. He stated that each had informed him in essence that it had no agreement with respondent to tender any minimum amount of tonnage; that it would continue to use respondent only so long as it gave good service and met prevailing rates; and that it also used the services of other carriers.

"With respect to the shipments designated as subhauls by respondent in Exhibit 1, all but one show Los Angeles or Southern California points as the origin. The representative testified that all billing for these shipments was on respondent's San Francisco or Los Angeles freight bills. For this reason, he asserted, it is his opinion that in each instance the origin carrier was actually performing a pickup service for respondent and that respondent was in fact the prime carrier and not the subhauler.

"The staff also introduced in evidence as Exhibit 18 a page of the Classified Section of the San Francisco Telephone Directory which shows respondent listed under the heading 'Trucking' with two telephone numbers, one for general offices and one for pickup and dispatch. The listing is not in bold type, and respondent had no display advertising in the directory in connection therewith.

"The representative stated that respondent had made available all of its records to him and had furnished him with all information requested. He asserted that based on the facts and information developed during his investigation, it was his opinion that the operations of respondent are those of a highway common carrier.

Respondent

"Respondent presented three exhibits at the hearing and no additional evidence. However, its counsel did extensively cross-examine the staff witness and the witness for HTC and Container. The three exhibits consisted of a business card for a San Francisco Port official, several pages of the Attorney listings in the San Francisco Telephone Directory and a business card of respondent's counsel. According to respondent, the purpose of the exhibits was to show that an expenditure in connection with the San Francisco Port Authority included in the staff's exhibit summarizing respondent's petty cash slips was not for advertising and that the mere listing in the Classified Section or the use of business cards does not of itself constitute advertising.

Interested Parties

"Testimony and exhibits were presented on behalf of HTC and Container by their president. He stated that on November 2, 1968 Container purchased all of the capital stock of HTC from Edgar A. Hills, Sr.; that the transaction included the acquisition of two additional companies owned by Hills, Sr., namely, Publishers Motor Transport, which owns all of the revenue trucking equipment of HTC, and Alfred J. Olmo Drayage Company, a local South San Francisco drayage company; and that HTC's principal operation is between the San Francisco and Los Angeles areas.

"The president testified that Container is owned by approximately 500 shareholders; that it has made no money since acquiring HTC with which to pay dividends to its shareholders; that HTC is the

only business in which Container is engaged; and that approximately 80 percent of HTC's income is from highway common carrier operations and the balance is from freight handling. He also detailed the employment of E. A. Hills, Jr. by HTC and his leaving and forming respondent company.

"Exhibits 39 and 40 placed in evidence by HTC are lists of points served by HTC from its Los Angeles and San Francisco terminals, respectively. The president pointed out that the points lists published by respondent are substantially identical. He stated that since commencing operations, respondent has solicited a number of HTC's major customers; that respondent is operating a highway common carrier service in direct competition with HTC; that HTC has lost a substantial amount of business to respondent; that as a result thereof HTC is now losing \$600,000 to \$700,000 in revenues per year it previously enjoyed before respondent commenced operating as a purported permit carrier; that said revenue loss is a serious financial threat to HTC's survival; and that if respondent were directed by the Commission to cease its illegal operations, he would expect that HTC would recover some of its lost business.

"The participation by Delta Lines, et al., in the hearing was through their attorney. They presented no witnesses.

Discussion

"The major issue for our determination is whether the status of the transportation business activities of respondent as described herein is that of a highway common carrier or a highway contract carrier. In the event it is concluded that the status is not that of a highway contract carrier, a secondary issue to be considered is whether said business operations could be conducted as a radial highway common carrier.

"Following is a brief summary of the pertinent provisions of the Public Utilities Code which define and distinguish the three aforementioned classes of carriers: The term 'common carrier' includes every highway common carrier, Section 211(d). A highway common carrier is one who is in the business of transporting property as a common carrier for compensation over any public highway of this state between fixed termini or over a regular route, Section 213. A common carrier who performs service for the public or any portion thereof for compensation is a public utility subject to jurisdiction under Part 1 of Division 1 of the Code, Section 216(b). Between fixed termini or over a regular route means the termini or route between or over which any highway common carrier usually or ordinarily operates, even though there may be periodic or irregular departures, Section 215. A highway contract carrier is defined in the Code by exclusion and is stated to be every highway carrier other than a highway common carrier, a radial highway common carrier or certain other named specialized carriers with which we are not concerned, Section 3517. A radial highway common carrier is every highway carrier operating as a common carrier not subject to regulation under Part 1 of Division 1 of the Code which includes highway common carrier, Section 3516.

"The Public Utilities Code requires that each class of carriers must obtain operating authority from the Commission before commencing operations. A highway common carrier must obtain a certificate declaring that public convenience and necessity require such operation, Section 1063. Respondent does not have a certificate. Both a highway contract carrier and a radial highway common carrier must obtain a permit authorizing such operation, Section 3571. Respondent obtained a highway contract permit before it commenced operations. It obtained a radial highway common carrier permit subsequent to this investigation.

"The basic distinction between a highway common carrier and a highway contract carrier is that the former operates as a common carrier, whereas, the latter cannot. The term 'common carrier' is not defined in the Public Utilities Code. We must, therefore, look beyond the Code for its definition and meaning. California case law in interpreting the Code has consistently held that the term is to be given its common law meaning, that is, an unequivocal intent on the part of the carrier to dedicate its property to public use, Samuelson v. Public Utilities Commission, 36 Cal. 2d 722 (1951); Souza v. Public Utilities Commission, 37 Cal. 2d 539 (1951); Alves v. Public Utilities Commission, 41 Cal. 2d 344 (1953); Nolan v. Public Utilities Commission, 41 Cal. 2d 392 (1953); Talsky v. Public Utilities Commission, 56 Cal. 2d 151 (1961). Furthermore, under the Public Utilities Code, one cannot be a common carrier without at the same time being a public utility, Section 216(b). The test used to determine public utility status is the same as that applied in common carriage cases. Thus, the concepts of public utility and common carriage have as a mutual characteristic a general holding out to serve the public or a portion thereof. On the other hand, a contract carrier provides service to only a selected number of customers, and this service is not offered to the public, Allen v. Railroad Commission, 179 Cal. 68 (1918).

"The question of whether a carrier has unequivocally intended to dedicate its property to public use is a question of fact. This issue is determined by considering all the facts relating to the carrier's conduct of its operations, In re Nikkola Express, Inc., 70 CPUC 13, 15 (1969). In determining whether one is in fact a 'highway contract carrier', it is of controlling importance to determine by his conduct in soliciting and procuring contracts that he has not made available his services generally to the public or a substantial portion thereof, Rampone v. Leonardini, 39 CRC 562 (1936).

"Before considering the issue of dedication to public use by the public or a portion thereof, we will first consider the question of whether the evidence establishes respondent's operations to be between fixed termini or over a regular route. As stated in Section 213 of the Public Utilities Code, a highway common carrier operates between fixed termini or over a regular route. Therefore, if respondent does not so operate, its operations would not be that of a highway common carrier. Respondent, in its brief, points out that the law is definite that a contract carrier, so long as its operations remain such, may operate between fixed termini or over a regular route, Alves v. Public Utilities Commission, 41 Cal 2d 344 (1953). It argues, however, that its operations do not come within either category.

"The terms 'between fixed termini or over a regular route' are stated in the alternative. Either circumstance standing alone is sufficient to affect a carrier's status. Other than information regarding certain pickup and delivery routes for respondent's San Francisco and Los Angeles terminals, no evidence was presented regarding the routes used by respondent in performing any of the transportation herein. In answer to certain questions on cross-examination regarding this, the staff witness stated that he did not know what routes were used and had made no study of this during his investigation.

"We have heretofore considered the term 'between fixed termini' in the Investigation of Fleetlines, Inc., 52 CPUC 298 (1952), wherein we stated at page 308:

"Likewise, in considering the term "between fixed termini," we observe that this is not limited to so-called truck terminals. Modern hauling practices have in many cases eliminated the use of truck terminals in the delivery of freight. For example, a carrier hauling into a particular locality may make all of the deliveries directly from the truck rather than making use of any truck terminal in that connection. We find that the word "termini" in the statute implies a broader meaning than a truck terminal as such. A terminal may be a city, town or locality. It may be the place of business of a shipper or consignee. Indeed, it may be any location where a shipment is picked up or delivered. Any hauling must be from one point to another, so the test of "fixed termini" is not whether they are fixed points geographically, but whether they are "fixed termini" so far as the carrier is concerned. Here again the problem in one sense resolves itself down to the frequency of service. If the hauling of the carrier is of sufficient frequency between particular termini so as to constitute them termini between which the carrier "usually or ordinarily operates," then those termini must be considered as fixed so far as that particular carrier is concerned."

"According to the staff's Exhibits 5, 6, and 7, respondent transported 240 direct shipments between San Francisco and Los Angeles during the second period investigated by the staff which included the four weeks in 1971. Exhibit 8 shows 22 shipments between Los Angeles and Oakland, and Exhibit 9 shows approximately 500 shipments between places named in respondent's San Francisco area points list, which includes, among numerous other locations, San Francisco and Oakland (Exhibit 19) and places in Southern California named in its Los Angeles area points list, which includes, among numerous other places, Los Angeles and San Diego (Exhibit 20). Likewise, Exhibits 10 through 15 show a regularity of movement between Exeter, on the one hand, and San Francisco and Los Angeles, on the other hand. Exeter is shown on both points lists. We recognize that the frequency studies do not show shipments between

each and every location named in the two points lists during the review period, nonetheless, they do show that daily service is offered by respondent between the areas encompassed by the lists. The evidence shows that all shipments transported by respondent between Northern and Southern California points are handled through its San Francisco and Los Angeles terminals; shipments are picked up and brought to the origin terminal where they are loaded onto linehaul equipment and transported to the destination terminal at which they are transferred to other equipment for delivery. Respondent has five routes of its own and utilizes several other carriers to perform pickup and delivery service between the San Francisco terminal and the places named in the San Francisco points list; it utilizes the services of several other carriers, including the trucking company of its Los Angeles dispatcher, to perform pickup and delivery service between its Los Angeles terminal and the places named in its Los Angeles points list; all billing and collection is by respondent. This accounts for most of the transportation handled by respondent.

"Respondent, in its brief, asserts that the definition of the term 'fixed termini' in Section 215 of the Public Utilities Code has generally been interpreted by the Commission to mean daily transportation operating to particular cities. It is apparent that such transportation would be between fixed termini. However, as pointed out above in our discussion of the term 'fixed termini', it is not limited to a particular city or cities, but could include any locations or localities to which the carrier regularly and frequently operates, including groups of cities, towns, and places. Moreover, service less often than daily between certain termini could be considered to be between fixed termini. (See Pacific Southwest Railroad Association, et al. v. Harold Stapel, et al., 49 CPUC 407, 413 (1950).) The definition of this term in Section 215 makes no reference to any particular frequency

of service. It is a question of fact to be determined from all circumstances involved.

"As to the assertion by respondent that some of its transportation was performed as a subhauler, the evidence does not support this allegation. The evidence shows that all of those shipments were brought to respondent's terminal by a local carrier; that respondent performed the linehaul transportation; that the freight bills were issued by respondent in its name; and that respondent collected the freight charges and remitted a percentage thereof to the pickup carrier. Based on this modus operandi, we find that respondent was the prime carrier for so-called subhaul transportation.

"We therefore must conclude that respondent's operations between San Francisco and Los Angeles, between San Francisco and Exeter, between Exeter and Los Angeles, and between Los Angeles and Oakland are between fixed termini. Having so concluded, we come next to the question whether, in connection with this service, the evidence establishes that respondent has unequivocally dedicated its property to public use and is offering its service to the public or a portion thereof. Our answer is in the affirmative.

"Dedication is a question of fact determined from a review of all the facts and circumstances surrounding the conduct of the carrier's operations. A review of the staff's frequency studies shows that respondent has provided transportation service for a substantial number of shippers. Furthermore, the exhibits show that respondent transported only one shipment for many of the shippers served and only a very few shipments for most of the remainder of the shippers served. This certainly does not evidence the continuous sort of arrangement between a carrier and shipper that contract carriage contemplates. To the contrary, it implies a holding out to the public generally. We recognize that the staff review periods are of limited durations of six weeks and four weeks, nonetheless, they are of sufficient duration to give an accurate portrayal of respondent's operations.

"As pointed out in respondent's brief, over half the number of shipments transported by respondent during the first period investigated by the staff were for five shippers and in excess of 50 percent during the second period investigated were for six shippers, but this fails to establish that such operations were conducted pursuant to its highway contract permit. Any common carrier may have particular customers who tender substantial numbers of shipments and tonnage to it and account for the majority of its business. In this regard, Exhibit 37 presented by HTC indicates that prior to the commencement of operations by respondent, the shippers referred to by respondent were regular customers of HTC and served by it under its common carrier authority. The president of HTC testified that all or a substantial portion of the business respondent now enjoys from each of those shippers had previously been handled by his company and that the operations of respondent are similar to those of his company, a highway common carrier. No evidence was presented which would show that respondent's procedures in handling transportation for a few shippers differed from those followed in handling transportation for the numerous other customers it served. The crucial question, however, is whether respondent's conduct demonstrates a holding out to serve the public, and we are of the opinion, based on a review of all the evidence, that the holding out and dedication to public use has been established.

"Furthermore, there is additional evidence in the record to support our determination of dedication and holding out by respondent. Exhibit 22 includes copies of 18 letters addressed to particular shippers by respondent informing them of its transportation service. Respondent, in its brief, argued that there was no showing that the originals of the letters were ever sent out. The staff witness testified that in response to his request for copies of its correspondence, respondent furnished him with its

file copy of the letters. It is reasonable, therefore, to presume that the originals were mailed out in the ordinary course of business, and, in the absence of evidence to the contrary, we so conclude. Also, the points lists published by respondent (Exhibits 19 and 20) which show all points served from its San Francisco and Los Angeles terminals have the statement "Over-Night...Every Night" shown thereon. This statement certainly manifests an intent on the part of respondent to perform regular service. Exhibit 24 is a copy of a printed rate sheet published by respondent. Regarding the points lists, respondent argues that there is no evidence that they were ever distributed. This is not so. Several of the letters in Exhibit 22 specifically state that a points list and/or rate sheet is enclosed. The important fact is that the points lists are available, and it is not unreasonable to conclude from this fact that respondent is interested in serving these particular termini, including those termini found to be 'fixed' above. (In re Nikkola Express, Inc., supra.) Additionally, there is evidence that respondent allocated some business expense to Account 4450 which is for advertising expense other than salary. Respondent argued that there is no showing in the record that any of said expenditures were for soliciting or advertising. However, the fact remains that respondent did have business expenses which it considered to be for advertising. Also, there is no evidence that new customers were ever turned away other than the statement made to the staff investigator that they were referred to respondent's president. Furthermore, respondent transports a wide variety of commodities, none of which appear to require unusual treatment.

"Because the emphasis in determining a carrier's status is on its willingness to serve the public, the existence or non-existence of contracts is secondary and does not necessarily prove common carrier status, nor does it prove contract carrier status, California Milk Transport, Inc. v. Standard Trucking Co., Inc., 42 CRC 538 (1940). It is the overall operations of a carrier that

determine its status. Thus, a carrier whose operations come within the purview of highway common carriage cannot avoid such status by entering contracts with its shippers. We are of the opinion, moreover, that the alleged contracts have not been shown to be bona fide contracts between respondents and its shippers.

"As to the alleged written contracts, the staff witness testified that in response to his request for copies thereof, he was furnished with the copies of the 11 memoranda of understanding in Exhibit 31 and no other documents. These memoranda were the only written documents respondent had that even approached the stage of a written contract. Each was signed by respondent only. Their terms are general and vague and do not specify the period of time they are to run. These memoranda are not binding contracts.

"As we have stated in numerous prior decisions, including our decision in Nikkola Express, Inc., supra, there is no requirement that a contract carrier's agreements with its customers be reduced to writing. However, a review of all the evidence regarding the alleged oral contracts discloses that the circumstances surrounding them, as well as their terms, do not show bona fide contracts. We have, on the one hand, the statements to the staff witness by respondent that all written contracts were canceled and replaced with oral contracts, that it now has oral contracts with all its customers, and that the oral contracts require the shippers to supply a given amount of tonnage varying with each shipper, which if the tonnage requirement is not met, the shippers are required to pay for the weight not tendered. On the other hand, the four shippers interviewed by the witness informed him that they also used other carriers and that they would continue to patronize respondent only so long as it gave good service and met going rates. This shows a lack of intent on the part of those shippers to enter a binding oral contract with respondent. Furthermore, many customers tendered only one shipment to respondent, but there is no evidence of rates paid for tonnage not shipped. Also, there is no evidence that

respondent maintained any records regarding the alleged oral contracts other than the statement by its president to the staff witness that he had a good memory. After reading the record as a whole, we are of the opinion that the alleged oral contracts are so vague and nebulous as to be illusory and upon which a finding of contract carriage cannot be based. (See In re Edward L. Stratton (Stratton Truck Lines), 56 CPUC 129 (1958) and In re Nikkola Express, Inc., supra.)

"We will direct respondent to cease and desist operating as a highway common carrier and in addition thereto a punitive fine of \$2,000 will be imposed. While suspension or cancellation of respondent's permit authority has not been ordered, respondent is placed on notice that such action will be considered if respondent does not diligently and fully comply with our order. Respondent is further placed on notice that while we have determined that transportation between San Francisco and Los Angeles, between Oakland and Los Angeles, between Exeter and Los Angeles and between Exeter and San Francisco is highway common carriage, the cease and desist directive in the order which follows is not limited to that transportation but includes any and all transportation performed by respondent which comes within the category of highway common carriage.

Findings of Fact

"1. Respondent was issued a highway contract carrier permit on July 13, 1970, and was issued a radial highway common carrier permit on August 23, 1971. It holds no other highway carrier operating authority.

"2. All of the 132 cities, communities and places named in respondent's points list in Exhibit 19 are served through its San Francisco terminal, and all of the 331 such locations in Southern California named in its points list in Exhibit 20 are served through its Los Angeles terminal.

"3. The statement "Over-Night...Every Night" printed in bold type at the top of each of the points lists in Exhibits 19 and 20 and the fact that respondent has such lists show an intent on its part to offer daily service between all points named in each list.

"4. In performing transportation service between the points named in the list in Exhibit 19 and the points named in the list in Exhibit 20, the freight is picked up and brought to respondent's San Francisco terminal where it is loaded on linehaul equipment and transported to its Los Angeles terminal at which location it is transferred to other equipment for delivery. For shipments in the opposite direction, the procedure is reversed.

"5. Respondent utilizes its own bobtail equipment and the services of other carriers to perform pickup and delivery services for its San Francisco terminal, and it utilizes the services of other carriers exclusively to perform pickup and delivery services for its Los Angeles terminal.

"6. Substantial numbers of shipments have been transported by respondent between San Francisco and Los Angeles, and between other places shown on the points list in Exhibit 19 and other places shown on the points list in Exhibit 20.

"7. Respondent operates three schedules southbound and two schedules northbound daily between its San Francisco and Los Angeles terminals.

"8. San Francisco and Los Angeles are fixed termini between which respondent usually and ordinarily operates on a daily basis.

"9. In addition to service between San Francisco and Los Angeles referred to in Finding 7, respondent offers daily service between all of the places and locations named in the points list in Exhibit 19 and all of the places and locations named in the points list in Exhibit 20.

"10. Oakland and Los Angeles are fixed termini between which respondent usually and ordinarily operates on a daily basis. Similarly service between Exeter and Los Angeles, and between Exeter and San Francisco is between fixed termini.

"11. The copies of the 18 letters in respondent's correspondence file addressed to various shippers informing them of its services (Exhibit 22), the points lists (Exhibits 19 and 20), the rate schedule sheet (Exhibit 24), and the allocation by respondent of some of its business expenses to Account 4450 which is for "expenses, other than salaries, in connection with advertising for the purpose of securing traffic" show that respondent engaged in solicitation and advertising.

"12. In the ordinary course of business the originals of the copies of the 18 letters in respondent's correspondence file would have been mailed to the shippers to whom they were addressed.

"13. The facts and circumstances surrounding the formation of the alleged oral and written contracts herein, and the terms thereof, under which respondent purports to operate, are so vague and uncertain as to be illusory. They do not establish the contract relationship required between a highway contract carrier and its customers.

"14. The operations involved herein were not conducted pursuant to contract.

"15. Respondent issued the freight bills, collected the transportation charges, and remitted a part of the charges to the pickup carrier for the transportation respondent claims was handled by it as a subhauler.

"16. Respondent did not operate as a subhauler in performing any of the transportation herein.

"17. Some of the customers served by respondent were heretofore served by HTC, a highway common carrier.

"18. Respondent, in performing the transportation referred to in Findings 7, 8 and 9 has held itself out to serve that portion of the shipping public which ships general commodities, and its service has been unrestricted.

"19. In performing the transportation referred to in Findings 8 and 10, respondent was operating as a highway common carrier. The transportation of the property was performed as a common carrier for compensation over public highways and between fixed termini, and therefore could not have been performed under radial highway common carrier authority.

"20. It has not been established that all of the points contained in Exhibits 19 and 20 are 'fixed termini'.

"Conclusions

"1. Respondent has operated as a highway common carrier, as defined in Section 213 of the Public Utilities Code, without first having obtained a certificate of public convenience and necessity from this Commission as required by Section 1063 of the Code.

"2. Respondent should be directed to cease and desist said operations until it obtains the required authority.

"3. Respondent should be directed to pay a fine pursuant to Section 3774 of the Public Utilities Code in the amount of \$2,000.

"O R D E R

"IT IS ORDERED that:

"1. Bay Area-Los Angeles Express, Inc., a corporation, shall cease and desist operating as a highway common carrier, as defined in Section 213 of the Public Utilities Code, between San Francisco and Los Angeles, Oakland and Los Angeles, Exeter and Los Angeles, Exeter and San Francisco, or between any other cities between which it operates as a highway common carrier, until it shall have first obtained from this Commission a certificate of public convenience and necessity authorizing such operations as required by Section 1063 of the Code.

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2. Respondent shall pay a fine of \$2,000 to this Commission on or before the fortieth day after the effective date of this order."

The Secretary is directed to cause personal service of this decision and order to be made upon respondent. Decision No. 80759 having been stayed by operation of law under Section 1733 of the Public Utilities Code, the effective date of said decision and order as hereby modified shall be twenty days after the completion of such service.

Dated at San Francisco, California, this 30th day of MAY, 1973.

Vernon L. Stinson
President
William S. Squire, Jr.
[Signature]
[Signature]
[Signature]
Commissioners