

Decision No. 28224 28224

BEFORE THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA

In the matter of the Investigation on)
the Commission's own motion into the)
matter of the cancellation of the ware-)
house tariff of W.R. Ballinger & Son,)
filed on July 23, 1927.)

Case No. 3230

WAREHOUSEMEN'S ASSOCIATION OF THE PORT)
OF SAN FRANCISCO,)

Complainant

vs.

BASHAW AREY COMPANY, a corporation,)
W.R. BALLINGER & SON, a corporation,)
A.J. BECKER, doing business under the)
fictitious name of BECKER STORAGE CO.;)
J.H. KRUMLINDE, CLAIRE E. WILSON,)
AUGUST J. LOTTI, NATHAN FRANK, FRANK W.)
GALEY and CLIFFORD E. BRODEUR, doing)
business under the fictitious names of)
FELIX GROSS COMPANY; C.C. MILLER, doing)
business under the fictitious name of)
MILLER MOVING AND STORAGE COMPANY;)
WORTH WAREHOUSE CO., INC., a corporation;)
RICHARD VAN HOESEAR, doing business)
under the fictitious name of CONSOL-)
IDATED MILLING CO., FIRST DOE CORPOR-)
ATION, SECOND DOE CORPORATION, THIRD)
DOE CORPORATION, FOURTH DOE CORPORATION)
FIFTH DOE CORPORATION, SIXTH DOE CORP-)
ORATION, FIRST DOE, SECOND DOE, THIRD)
DOE, FOURTH DOE, FIFTH DOE and SIXTH)
DOE.)

Defendants,

WAREHOUSEMEN'S ASSOCIATION OF THE)
PORT OF SAN FRANCISCO,)

Complainant

vs.

Lawrence P. Hanson, doing business)
under the firm name of HANSON-LONG)
EXPRESS, and J.C. COUGHLIN, doing bus-)
iness under the firm name of REDLINE)
TRANSFER COMPANY,)

Defendants,

ORIGINAL

Case No. 3300

Case No. 3720

Reginald L. Vaughan and Scott Elder for complainant in Cases 3300 and 3720, and as an interested party in Case 3230.

Hugh K. McKeivitt and Joseph DeMartini, for defendant in Case 3230.

J. F. Vizzard for C. C. Miller, Miller Moving and Storage Company; J. C. Coughlin, Red Line Transfer Company, and A. J. Becker Storage Company.

Robert W. Harrison and Maurice R. Carey, for Worth Warehouse Company, Inc.

WHITSELL, Commissioner:

O P I N I O N

These proceedings involve the right of W. R. Ballinger and Son, A. J. Becker, doing business under the fictitious name of Becker Storage Company, C. C. Miller, doing business under the fictitious name of Miller Moving and Storage Company, Worth Warehouse Co., Inc., and J. C. Coughlin, doing business under the firm name of Redline Transfer Company, to have on file with the Commission tariffs for warehousing operations in San Francisco and to operate thereunder.¹ Case 3230, directing W. R. Ballinger and Son to show cause, if any they have, why their Warehouse Tariff No. 1, C.R.C. No. 1, should not be cancelled, was issued by the Commission on its own motion following receipt of advice from respondents themselves that for five consecutive years they had conducted no warehouse business. Cases 3300 and 3720 were instituted upon complaint. In them it is alleged that none of the defendants actually conducted a public warehouse business in good faith or otherwise on August 2, 1927, the date Section 50 $\frac{1}{2}$ of the Public Utilities Act became effective, and that they therefore have no prescriptive operative rights. The Commission is asked to make an order (1) cancelling and annulling the tariffs filed by defendants on the ground that

¹ Following stipulations entered into between complainant and the other defendants named in the titles, complainant has requested that as to those defendants the complaint be dismissed.

they do not possess any operative rights authorizing them to engage in public utility warehouse business in San Francisco, and (2) if defendants or any of them should be found to have actually operated as warehousemen under such tariffs, requiring them to cease and desist from such operations.

Defendants in their answers deny the allegations of the complaints and allege that they were operating warehouses in good faith in San Francisco on or prior to August 2, 1927, under tariffs filed with the Commission. None of them contend that they hold certificates of public convenience and necessity.

The matters were submitted upon a common record at public hearings had at San Francisco.

Familiarity with Sections 2 $\frac{1}{2}$ and 50 $\frac{1}{2}$ of the Public Utilities Act is essential to a proper understanding of the controversy here. Both of these sections became effective August 2, 1927. Section 2 $\frac{1}{2}$ reads;

"The term "warehouseman", when used in this act, includes every corporation or person, their lessees, trustees, receivers or trustees appointed by any court whatsoever, owning, controlling, operating or managing any building, or structure, or warehouse, in which merchandise, other than second-hand household goods or effects, and other than merchandise sold but retained in the custody of the vendor, is regularly stored for the public generally, for compensation, within this state, excepting warehouses conducted by any nonprofit, cooperative association or corporation which is engaged in the handling or marketing of the agricultural products of its members; also excepting warehouses conducted by the agents, individual or corporate of such associations or corporations, while acting within the limitations imposed by law or the principal of any such agent."²

² The term was previously defined in Section 2(aa) as including "every corporation or person *** owning, controlling, operating or managing any building or structure in which property is regularly stored for compensation within this state in connection with or to facilitate the transportation of property by a common carrier or vessel or the loading or unloading of same other than a dock, wharf or structure owned, operated, controlled or managed by a wharfinger". This subsection has not been revoked.

The pertinent portion of Section 50 $\frac{1}{2}$ reads:

"No warehouseman shall hereafter begin to operate any business of a warehouseman, as defined in Section 2 $\frac{1}{2}$ of this act, in any incorporated city, or city and county of this state having a population of one hundred fifty thousand or more, without first having obtained from the railroad commission a certificate declaring that public convenience and necessity require or will require the transaction of business by such warehouseman. * * *

"No such certificate shall be required by any warehouseman as to storage or warehouse space actually operated in good faith at the time this act becomes effective, under tariffs and schedules of such warehouseman lawfully on file with the railroad commission."

W. R. BALLINGER & SON

W. R. Ballinger & Son, a corporation, is the respondent in Case 3230 and a defendant in Case 3300. Throughout this proceeding it will at times be referred to as a respondent. On July 23, 1927, W. R. Ballinger & Son filed with the Commission, effective July 25, 1927, its Warehouse Tariff No. 1, C.R.C. No. 1, applicable at 50 Hawthorne St., San Francisco. The only storage rate contained in this tariff, which remains in effect unchanged, is one of "6 $\frac{1}{2}$ cents per sq. ft. per month, Minimum charge \$3.00", for "Rental of space without Labor or other Service".

Respondent's records introduced as Exhibits 3 and 3-A show that during the period January 1, 1927, to August 2, 1927, referred to throughout the hearing as "the test period", they stored at 50 Hawthorne Street diversified commodities for 28 different accounts.³ The revenue derived therefrom ranged from \$39.00 to \$168.87 per month, and totalled \$785.59 for the entire period. With few exceptions the records do not show either the weight or the dimensions of the articles stored, but clearly indicate that it was the general practice to assess a flat

³ These commodities are described as Vault Doors, Materials, Trailer and Awnings, Crates, Cartons, Boxes, Barrels, Equipment, Radio Equipment, Crockery, Ash Cans, Machinery Stock, Scrap Iron, Bake Ovens, Furniture, Stationery, Galvanized Iron Beams and Transformers.

charge rather than a charge per square foot.⁴ Annual reports filed with the Commission for the years 1927 to 1931 inclusive show that respondent did no public utility warehouse business during that period.⁵ These reports are supported by letters written to the Commission by respondent.⁶ Respondent paid no license fee to the City and County of San Francisco as required under the charter, and did not subscribe to the Warehouse Code of Fair Competition. Three witnesses testified that W. R. Ballinger & Son had been known to be a public warehouseman as well as a drayman and rigger long before the effective date of Section 50 $\frac{1}{2}$ of the Public Utilities Act. There is also considerable testimony regarding moneys expended for improvements to respondent's building.

Complainant relied largely upon the admissions made by re-

⁴ In one instance in which the dimensions are shown the charge was assessed on basis of 3 cents per square foot instead of 6 $\frac{1}{2}$ cents as shown by the tariff; in other instances crates, cartons and barrels, of which neither the contents if any, size nor weight are shown, charges were assessed at rates of 4 cents each for the crates and cartons and 15 cents each for the barrels. One lot of crockery, the weight and size of which is not shown, was charged for at a rate of 25 cents per case, and two bake ovens \$5.00 per month.

⁵ None of these reports shows any operating revenue and expense. The 1927 and 1928 reports are unsigned. The 1929 report is signed but not verified; it contains the following statement: "Our warehouse has been ready for operation for the last two years, but due to general business conditions and the fact we are still waiting for our spur track, we have done no business during the year 1929." The 1930 report contains the statement: "We did not conduct any operations during 1930 due to the fact that our spur track is not installed". The 1931 report stated: "Not operating - no spur track". These latter two reports were made under oath.

⁶ The following are excerpts from these letters:

May 17, 1928: " * * * We have not filed our 1927 annual report due to the fact that we have only moved into our new building a very short while ago and have not taken advantage of the permit issued us by yourselves up to date."

May 28, 1928: " * * * We anticipate to do a warehouse business in the near future and wish to have our warehouse tariff kept."

Apr. 9, 1929: "We are not and cannot compete as a public warehouse until such time as a spur track is put in alongside our property."

May 17, 1929: " * * * Kindly be advised that we are not operating a warehouse as a public utility. We have hopes and understand that there will be a spur track in front of our property in the near future, and until that time we will not operate but want to start from that time on if possible."

spondent in the reports and letters heretofore referred to. It argued that respondent's tariff was not adaptable to public warehousing and that the president of the respondent corporation, the witness who testified that he had solicited warehouse business, did not know the rates and stated that they were assessed by space, by weight and by volume, whereas the tariff, as has been stated, provides only a space rate. Such storage as respondent did perform complainant contends was not public but private in nature. Finally it contends that if respondent was operating a public utility warehouse in 1927 such operation has since been abandoned.

BECKER STORAGE COMPANY

On July 21, 1927, defendant Becker Storage Company filed with the Commission its Warehouse Tariff No. 1, C.R.C. No. 1, applicable at 1636 Market Street, San Francisco. The tariff became effective July 25, 1927. It contained rates for the storage and handling of "merchandise not otherwise specified", based on a scale graduated according to the cubic measurement of the article stored, and also rates for rental of space without labor or other service of 7½ cents per square foot for basement space and 10 cents per square foot on other floors, minimum charge \$3.00 per month. This tariff was cancelled August 25, 1927, by Becker Storage Company Warehouse Tariff No. 2, C.R.C. No. 2, which was substantially similar to C.R.C. No. 1, excepting that the rates on "merchandise not otherwise specified" shown in C.R.C. No. 1 were restricted to "private locked room storage" and lower rates based on cubic dimensions established for "open space" storage. This latter tariff has neither been cancelled, reissued nor amended.

Defendant testified that household goods and personal effects comprised the greater portion of its storage during "the test period". Property stored for the Board of Trade or for the Sheriff constituted

another substantial portion. However storage of merchandise is said to have returned approximately \$200 per month during the same period.⁷ Because of the lack of information in the exhibits it is impossible to reconcile the rates charged with those shown in the applicable tariff. In most instances however it appears that a flat charge was made rather than a charge based on square or cubic footage. The same form of warehouse receipts was issued for merchandise as for household goods storage. This is the form approved by the California Van and Storage Association and is non-negotiable. Defendant testified that he advertised in newspapers and in the classified telephone directory under the headings of "Moving", "Storing" and "Packing". He has not advertised for merchandise specifically but apparently accepted it when offered. He also called in person on a few automotive equipment places. He has not subscribed to the Merchandise Warehousing Code.

Annual reports for the years 1927 to date under the heading "Principal commodities stored" carry the notation "Furniture, Household Goods, Merchandise". All but two (years 1931 and 1932) show operating revenue which ranges from \$209.95 in 1923 to \$45,227.20 in 1927. Those for the years 1931 and 1932 bear notations "No Merchandise Storage during year, Household Goods only", and "No Commercial Merchandise Stored, Household and Personal Effects only", respectively.

Complainant urges that defendant's business is on all fours with that considered by this Commission in Los Angeles Warehousemen's Association vs. Lyon Fireproof Storage Co., 37 C.R.C. 133. The facts there obtaining are fully set forth in the opinion. It was there found that Lyons Fireproof Storage Co. was not acting as a public utility

⁷ Exhibit 15 prepared by complainant lists 29 transactions "other than for Board of Trade and the Sheriff lots" reported by Becker Storage Co. for the period January 1 to August 2, 1927. The revenue derived therefrom ranges from \$67.60 to \$95.10 per month.

warehouseman within Los Angeles in good faith under tariffs lawfully on file with the Commission upon the effective date of the Public Utilities Act. While there undoubtedly is a general similarity between defendant's operations and those there considered, there are numerous distinctions. In the Lyon case, for example, "the very few accounts of commercial goods covering the period of three and a half years" (1925, 1926, 1927 and the first half of 1928) "consisting of no more than ten or twelve accounts in all, were 'distress storage' accounts". While here, too, exclusive of household goods and personal effects "distress" goods comprised the bulk of the storage the record shows that during the test period defendant did store other miscellaneous merchandise.

J. C. COUGHLIN (REDLINE TRANSFER CO.)

Mr. J. C. Coughlin, who during 1927 was and still is manager of Redline Transfer Company, testified that he has been unable to locate any warehouse records for 1927, but that he did engage in the warehousing business. He recalled having stored linoleum, kotex, brushes and window sash. His first tariff, which became effective July 15, 1927, remains unchanged. It names a storage rate of $1\frac{1}{2}$ cents per cubic foot per month for "Merchandise not otherwise specified", and one of $6\frac{1}{2}$ cents per square foot per month for "Rental of space without labor or other services". Charges collected were assessed on a square foot basis. Annual reports filed for the years 1927 to 1931 both inclusive show varying amounts of operating income derived from storage but the witness could not say what portion thereof, if any, was derived from storage of general merchandise as distinguished from baggage and second-hand household goods or effects.⁸ The 1927 report also bears the notation "Warehouse rented. Operates in conjunction with mercantile business".

⁸ Section 2 $\frac{1}{2}$ of the Act excludes from the term "warehouseman" storers of "second-hand household goods or effects" and "merchandise sold but retained in the possession of the vendor".

What the statement "warehouse rented" means, the witness could not say, although he signed the report. The reports for 1932 and 1933 show that no warehouse business was transacted. Up to 1932 the principal commodity stored according to the reports was linoleum; in 1932 trunks. Reports for 1933 and 1934 under this heading read "None". No warehouse receipts have been issued. Like defendant W. R. Ballinger & Son this defendant has not subscribed to the Warehouse Code of Fair Competition nor paid a license fee to the City and County of San Francisco. So far as the witness knows there was no attempt made to advertise a merchandise warehousing business.⁹

C. C. MILLER (MILLER MOVING AND STORAGE CO.)

At the time the complaint was filed Miller Moving and Storage Company was the fictitious name under which C. C. Miller did business; since then this business has been transferred to Miller Van and Storage Co., a corporation. The first tariff filed by this defendant became effective July 25, 1927. The only storage which the record shows this defendant performed during 1927 was that of household goods and one shipment of auto tires. Annual reports filed by this defendant show that during 1927, 1928, 1929 and 1930 the principal commodities stored were household goods and auto tires and during subsequent years, household goods. The reports for 1927 and 1928 carry the notation, "Storage business carried on in connection with moving business". The report for 1931 shows no operating revenue. Those for the other years show revenue from public storage ranging from \$51.50 to \$1060.00. A letter addressed to the Merchandise Warehousing Trade Code Authority under date of November 20, 1934, and signed "Miller Moving & Storage, per R. Miller", reads: "We wish to state that we are not a merchandise warehouse and that we are registered under the Household Goods Code".

⁹ Witness Coughlin on being asked what advertising he did in 1927 or had done since "in any newspaper or telephone directories or other mediums of advertising, concerning your merchandising warehousing business", answered "None that I know of". Tr. page 120.

WORTH WAREHOUSE COMPANY, INC.

The witness for this defendant testified that during 1927 it stored for S. H. Kress Co. who "handled everything", and that it handled a lot of paint for another concern. The witness was unable to produce any records to substantiate this or any additional storage. Its first tariff became effective June 2, 1927. Its annual report for the period ending December 31, 1927, verified February 14, 1928, bears the notation, "No business transacted to date. Corporation inactive". The report for 1928 likewise contains the notation, "No business transacted", and is supported by a letter dated February 15, 1929, reading in part: "You will note that these properties are under lease for the purpose of doing a warehouse business, but due to stress of other matters we are not operating at the present time". The 1929 report bears the notation, "No business transacted during 1929".

Varying amounts of revenue for storage are shown for the years 1931, 1932 and 1933. The report for 1934 was returned with a letter, dated January 7, 1935, signed by Worth Warehouse Co., reading: "We are returning herewith one copy of 1934 report of the Worth Warehouse Co., Inc., and for your information and files, no warehouse business of any nature was transacted by this concern for the year 1934". A sworn statement made in September 1931 in answer to a request from the City and County of San Francisco for a warehouse license fee under the heading, "Business, Profession and Occupation: Warehouse", reads, "Has no warehouse". Complainant contends that defendant's tariff was not suitable to public warehouse operation and introduced photographs to show that this was likewise true of the buildings.

The evidence necessary to prove or disprove the allegations of the complaints in Cases 3300 and 3720 and to reach a determination of the issues raised therein as well as in Case 3230 was largely in the possession of respondent and defendants. In addition to calling other witnesses,

complainant subpoenaed the defendants or their corporate officers together with their records. From the evidence thus adduced, complainant has made a prima facie showing that neither W. R. Ballinger & Son, C. C. Miller, J. C. Coughlin nor Worth Warehouse Company, Inc., engaged in public utility warehousing in good faith under tariffs on file with the Commission on August 2, 1927, the date on which Section 50½ of the Public Utilities Act became effective. This showing has not been rebutted. While there is some evidence that certain of these defendants performed storage service, the record made herein clearly indicates the character of service rendered to have been that of "private storage" rather than that of a "public utility warehouseman" operating pursuant to tariffs on file with the Commission. The Commission should require these defendants to cancel the tariffs on file in their names.

The record does not justify a positive finding that defendant Becker did not engage public utility warehousing in good faith prior to August 2, 1927. With respect to this defendant, therefore, the complaint should be dismissed.

The following form of order is recommended:

O R D E R

This matter having been duly heard and submitted,

IT IS HEREBY ORDERED that W. R. Ballinger & Son, J. C. Coughlin, C. C. Miller and Worth Warehouse Company, Incorporated, be and they are hereby ordered and directed on or before twenty (20) days from the effective date of this order, on not less than one day's notice to the Commission and the public, to cancel the tariffs on file with the Commission for warehousing operations at San Francisco.

IT IS HEREBY FURTHER ORDERED that in all other respects the complaints in Cases 3300 and 3720 be and they are hereby dismissed.

This order shall become effective twenty (20) days from the date hereof.

The foregoing opinion and order is hereby approved and ordered filed as the Opinion and Order of the Railroad Commission of the State of California.

Dated at San Francisco, California, this 16th day of September, 1935.

Leon Whitely

W. A. Linn

W. B. Lewis

Frank R. Stevens

Commissioners.