

ORIGINAL

Decision No. 32532.

BEFORE THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of)
M. L. O'CALLAGHAN, doing business as)
J. S. O'CALLAGHAN WAREHOUSE CO. and)
ROBERTSON DRAYAGE CO., INC., for an) Application No. 22675.
order authorizing the former to sell)
and the latter to purchase rights)
and privileges of warehousemen.)

WAREHOUSEMEN'S ASSOCIATION OF THE)
PORT OF SAN FRANCISCO,)
Complainant,) Case No. 4410.
vs.)
MARY L. O'CALLAGHAN,)
Defendant.)

BY THE COMMISSION:

APPEARANCES

Ware & Berol, by Edward M. Berol, for applicant
Robertson Drayage Co., Inc.
Stanislaus A. Riley and Ware & Berol, by Edward M. Berol,
for applicant M. L. O'Callaghan, doing business
as J. S. O'Callaghan Warehouse Co.
L. A. Bailey, Varnum M. Paul and Reginald L. Vaughan, for
Warehousemen's Association of the Port of San
Francisco, protestant in Application No. 22675
and complainant in Case No. 4410.
Ben Cassinerio, for Central Warehouse & Drayage Company.
C. E. Geneva, for Dodd Warehouses.
A. L. Fuller, for DePue Warehouse Company of San Francisco.
John Zeile, for Sea Wall Warehouses.

O P I N I O N.

In Application No. 22675, as amended, M. L. O'Callaghan,
an individual doing business as J. S. O'Callaghan Warehouse Co.,
requests an order approving the transfer from the estate of J. B.
O'Callaghan, deceased, to her of an operative right to engage in
business as a public utility warehouseman in San Francisco. Such
a transfer has heretofore been approved by decree of distribution

of the Superior Court of the State of California, in and for the City and County of San Francisco. If the transfer be authorized by this Commission, applicant requests a further order authorizing the sale and transfer by her to Robertson Drayage Co., Inc. of said operative right; and Robertson Drayage Co., Inc. requests authority to acquire and purchase said operative right and hereafter to operate thereunder. The sale and transfer is to be in accordance with an agreement, a copy of which is attached to and made a part of the amended application. According to this agreement, the consideration to be paid upon consummation of the transfer is \$2,500.

In Case No. 4410, Warehousemen's Association of the Port of San Francisco alleges that defendant Mary L. O'Callaghan does not possess, nor has she ever possessed, a valid operative right which would authorize her to engage in the business of a public utility warehouseman in San Francisco, and that neither J. B. O'Callaghan nor his estate possess such an operative right. The Commission is requested to make its order (a) declaring that defendant does not possess any operative rights which would authorize her to engage within San Francisco in the business of a public utility warehouseman, (b) directing defendant to cancel and annul forthwith any warehouse tariff she may have on file with the Commission, and (c) denying the amended Application No. 22675.

Public hearings were held at San Francisco before Examiner E. S. Williams. The proceedings were heard on a common record and were submitted on briefs.

The operative right proposed to be transferred by the application herein was originally held by J. E. Clarkson, an individual doing business under the fictitious name of Clarkson & Morse. It was acquired by virtue of operation prior to the enactment of Section

50½ of the Public Utilities Act, which became effective August 2, 1927. By Decision No. 27547 of November 26, 1934, in Application No. 19689, the transfer of this operative right to J. B. O'Callaghan, an individual doing business under the fictitious name of J. S. O'Callaghan Warehouse Company, was authorized. Upon its acquisition by J. B. O'Callaghan, the warehouse business was moved from 2325 Alameda Street, San Francisco, to 625 Folsom Street, San Francisco.

J. B. O'Callaghan died on November 14, 1935, and M. L. O'Callaghan, his mother and sole heir, was appointed administratrix of his estate. Subsequently, by court decree dated September 29, 1936, the property was distributed to applicant M. L. O'Callaghan.

Frances O'Callaghan, who assertedly has acted for her mother in all matters concerning the operation of the warehouse business since the death of J. B. O'Callaghan and who was said to be familiar with the business theretofore conducted by J. B. O'Callaghan, testified that at all times J. B. O'Callaghan and his successors (hereinafter sometimes collectively referred to for convenience as the O'Callaghan interests) had exercised the operative right acquired from J. H. Clarkson; that warehousing facilities and space for the performance of public utility warehousing operations had been continuously maintained at 625 Folsom Street, San Francisco;¹ and that during all of this period warehousing accounts

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The witness stated that warehousing space referred to consisted of 1,000 square feet of space set aside for this purpose in a building in which J. S. O'Callaghan & Son operates a drug distributing business.

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had been actively solicited. She conceded that applicant had not obtained any business but asserted that no business had ever been refused and that, had warehousing business been offered, the O'Callaghan interests were at all times in a position to handle such business and would have accepted it.

J. Robertson, President of Robertson Drayage Co., Inc., testified that in the event the Commission should authorize the transfer of the operative right in question, his company had financial means to carry on the business. He stated that steps had been taken to provide suitable facilities where such a business could be conducted and arrangements had been made for the use of 25,000 square feet of storage space.

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The testimony of the witness with respect to the solicitation of warehouse accounts was that she made trips east in October of 1936, in March and November of 1937, and in March and November of 1938, and corresponded with eastern firms in an attempt to obtain warehouse business. The trips were also made in the interest of a drug distributing business operated under the name of J. S. O'Callaghan & Son. The witness stated she specifically recalled having visited the Sweetheart Soap Company, New York City, N. Y., soap manufacturers, and the Sitroux Company, dealers in tissues and napkins, in connection with the solicitation of warehouse accounts. Correspondence handled with J. L. Somers Manufacturing Company, Newark, New Jersey, dealers in such articles as ice picks, shoe horns, beverage spoons, cork screws, magazine spoons; Sterns Electric Paste Company, Inc., Chicago, Ill., dealers in rat paste; World's Dispensary Medical Company, Buffalo, N. Y., dealers in drug items; and Seebasco Company, Richmond, Va., dealers in drug items, was submitted in evidence. The correspondence consisted of letters addressed to J. S. O'Callaghan & Son, the name under which a drug distributing business is conducted, seeking to have this firm act as their sales representative, and copies of replies thereto over the name of J. S. O'Callaghan & Son stating that J. S. O'Callaghan & Son was unwilling to act as the firm's sales representative but that the firm might profit by using its warehouse storage facilities. The correspondence with the World's Dispensary Medical Company consisted of a letter dated February 7, 1939, (a date immediately preceding the filing of the application herein), soliciting warehouse business from that firm. The statement was made by the witness that both J. S. O'Callaghan & Son and J. S. O'Callaghan Warehouse Company were fictitious names under which individuals operated and that no attempt was made to use the separate names in these transactions.

The granting of the application was opposed by the Warehousemen's Association of the Port of San Francisco (hereinafter referred to as the Association), which Association was also the complainant in Case No. 4410. Its position in both of these proceedings was the same, namely, that whatever operative right may have been acquired by J. B. O'Callaghan pursuant to the authority granted by Decision No. 27547, supra, was subsequently lost (1) by abandonment by virtue of nonuse, and (2) through forfeiture because of a violation of the provisions of the Public Utilities Act and the express condition attached to operative right acquired by J. B. O'Callaghan requiring the written consent of this Commission prior to any transfer thereof. The Dodd Warehouse Company, Sea Wall Warehouses, Central Warehouse and Drayage Company, Inc., and Depue Warehouse Company also protested the granting of the application. These latter protestants did not set forth the grounds for their protest and did not otherwise participate in the proceedings.

In support of its protest and complaint the Association introduced by reference annual reports filed with the Commission under the name of the J. S. O'Callaghan Warehouse Company for the years 1935, 1936, 1937 and 1938, all of which, it claimed, indicated that no warehousing operations were conducted by the O'Callaghan interests during those years. In addition, the Association's counsel developed on cross-examination that the space claimed by the O'Callaghan interests to have been set aside for public utility warehousing operations in a building located at 625 Folsom Street had not been fenced off from other space in that building and that this space sometimes had been used by J. S. O'Callaghan & Son for holding the merchandise of that firm handled in its drug distributing business conducted at the same address; that the O'Callaghan interests

paid no rental for such space, hired no employecs and had no other expenses; that they had available none of the printed forms ordinarily used in the conduct of warehouse operations; that they held no licenses to act as a public weighmaster; and that they had maintained no books or accounts. With respect to the claim of the O'Callaghan interests that warehouse business had been solicited, it was conceded by the witness for those interests on cross-examination that they had never solicited warehouse business from firms in San Francisco or from any of the former customers of J. E. Clarkson. The Association's counsel further developed on cross-examination that the O'Callaghan interests had placed no advertising in the classified section of the San Francisco Telephone Directory nor had they placed any entry in said directory under the name of J. S. O'Callaghan Warehouse Company or under any other name which would inform the public that they were engaged in the warehouse business.

The annual reports and other evidence of record show that no warehousing for the public has been performed by the O'Callaghan interests, during the period of more than four years they have held the operative right involved and that none has ever been performed at 625 Folsom Street. Moreover, the facts that the space the O'Callaghan interests claimed had been set aside for the performance of public utility warehousing operations was only an unfenced portion of a building used by J. S. O'Callaghan & Son, a firm engaged in a drug distributing business; that such space was sometimes used by J. S. O'Callaghan & Son in its drug distributing business; that according to the annual reports and other evidence no rental was paid for such space; that none of the other facilities ordinarily kept available by warehousemen actively engaged in performing a public warehouse service were maintained; that the asserted solicitation

of public utility warehousing accounts was conducted under the name of J. S. O'Callaghan & Son, and was restricted to eastern firms handling articles usually sold by drug stores and of the same general nature as those handled by J. S. O'Callaghan & Son in its drug distribution business; that none of the usual advertising media generally employed by public warehousemen in the larger population centers to inform the public that they were engaged in performing a public warehousing service were utilized by the O'Callaghan interests, show clearly that the O'Callaghan interests did not maintain necessary facilities and were not offering in good faith to provide warehouse service for the general public. The fact that annual reports have been regularly filed with the Commission during this period cannot be held to outweigh the clear evidence that actual operations had been discontinued, or to justify a finding that the operating rights had not in fact been abandoned, particularly when those reports show that no warehousing business has ever been done.

Upon careful consideration of all of the evidence of record, we are of the opinion and find that J. B. O'Callaghan, the Estate of J. B. O'Callaghan, and M. L. O'Callaghan have actually abandoned whatever public utility warehouse business in the City and County of San Francisco J. B. O'Callaghan may have acquired from J. H. Clarkson; that the operative right issued in the name of J. B. O'Callaghan, therefore, should be revoked and the tariffs on file in the name of J. S. O'Callaghan Warehouse Company canceled and that Application No. 22675 should be dismissed. In view of this finding it will not be necessary to pass upon the second question raised by the Association.

O R D E R.

Based upon the evidence received at the public hearing had in the above entitled proceedings and upon the conclusions and finding contained in the preceding opinion,

IT IS HEREBY ORDERED that the operative right issued in name of J. B. O'Callaghan, doing business as J. S. O'Callaghan Warehouse Company, in the City and County of San Francisco, be and it is hereby revoked and annulled and the tariff on file with the Commission in connection therewith be and it is hereby canceled.

IT IS HEREBY FURTHER ORDERED that Application No. 22675 be and it is hereby dismissed.

The effective date of this order shall be twenty (20) days from the date hereof.

Dated at San Francisco, California, this 8th day of November, 1939.

Robert W. [unclear]
Frank [unclear]
Ray H. [unclear]
[unclear]
Justus F. [unclear]