

Decision No. 36756

BEFORE THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application	)	
of Western Warehouse and Transfer	)	
Company, a corporation, for authority	)	Application No. 25648
to sell and convey prescriptive	)	
right..	)	

ORIGINAL

CLARK, COMMISSIONER:

Appearances

DANA R. WELLER, for Western Warehouse  
& Transfer Company.  
LEROY M. EDWARDS, for J. S. Craig.

O P I N I O N

By Decision No. 36417 of June 8, 1943, applicant corporation was authorized, without hearing, to sell and transfer to J. S. Craig, an individual, and J. S. Craig was authorized to acquire, "whatever operative right Western Warehouse and Transfer Company may (then) possess to store property as a public utility warehouseman in Los Angeles." Thereafter, on August 24, 1943, good cause appearing, the Commission reopened this application for the purpose of determining whether said Decision No. 36417 should be rescinded, altered, or amended.

Public hearing on the reopened proceeding was had at Los Angeles on October 1 and 4, 1943.

Testimony was offered by J. Lane Barbour and C. S. Thomas of the Commission's Division of Investigation; by George F. Schneider, and Dana R. Weller, officers of Western Warehouse & Transfer Company (hereinafter called Western); and by J. S. Craig. From the full record now before the Commission, it appears that for some years

Western conducted a public utility warehouse business at 364 South Anderson Street, Los Angeles. During the month of April, 1943, George F. Schneider, president and general manager of Western, having decided to discontinue the warehouse business, arranged to sell the real property to a nonutility corporation. On April 28, Western addressed a letter to all of its patrons, advising them of the decision to sell the warehouse and allowing thirty days' notice "for convenience in handling merchandise in transit." Documents for sale of the property were placed in escrow on the same day.<sup>1</sup> On May 10, Western filed with this Commission an application (No. 25620) for authority to discontinue service as a public utility warehouse and to cancel all rates.<sup>2</sup> Shortly thereafter, J. S. Craig, president of Central Warehouse & Storage Company, Los Angeles, communicated with Schneider and offered, as an individual, to purchase the Western "operative right" for the sum of \$200. Schneider agreed, and the instant application for authority to sell and convey the operative right from Western to Craig was filed with the Commission on May 27. An amendment, reducing the stated consideration from \$200 to \$1, was filed on June 3, 1943. The amended application, as hereinbefore indicated, was granted without public hearing on June 8, 1943.

According to the application, Craig proposed to continue the warehouse business of Western at 1601 East 16th Street, Los Angeles. The record now shows, however, that Craig did not actually intend to solicit or serve Western's patrons, but desired the

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<sup>1</sup>

Sale was consummated on or about June 14, 1943.

<sup>2</sup>

Action by the Commission on Application No. 25620 was deferred in view of the filing of the present application. Request for dismissal was filed by attorney for Western on June 23, 1943.

operative right primarily so that he might serve a somewhat different class of patrons.<sup>3</sup> Moreover, the building at 1601 East 16th Street was not made available for public storage at all. At the time of the hearing Craig had not yet received property for storage, but planned to conduct a warehouse business at 1000 Santa Fe Avenue, Los Angeles.<sup>4</sup>

It is clear that the actual active business of Western was, for practical purposes, discontinued on April 28 when all of its customers were notified in writing of the sale of the warehouse. Any storage business conducted after that time was merely incidental to the completion of existing contracts. The patrons were allowed thirty days to make other arrangements, and none were told that Western's business would be "continued" under new ownership. The patrons, or substantially all of them, have in fact gone to other warehousemen for the required service. It is evident that what Western and Craig sought to transfer was not a going warehouse business, but rather what they construed to be an acquired right to operate a certain area of floor space in the City of Los Angeles for public storage.

Rights and privileges of warehousemen may be transferred only upon authorization by this Commission (Public Utilities Act, Section 50½). Public convenience and necessity need not be shown in such cases, but transfer will not be authorized where it does not appear to be in the public interest. In the instant proceeding, the business of Western was discontinued. Craig sought to acquire

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<sup>3</sup> It appears that Western specialized in "distribution" accounts, and that Craig did not seek patrons who required general distribution in addition to storage.

<sup>4</sup> The applicable tariffs were revised effective August 5, 1943, to show the participation of J. S. Craig, doing business as Western Warehouse & Transfer Co., at 1601 East 16th Street. An amendment was issued on September 9, to become effective October 16, 1943, changing the location to 1000 Santa Fe Avenue, Los Angeles.

Western's right to do business, and to use this operative right as his authority to commence and conduct a new business, serving a different class of customers, in a different location. Transfer of the operative right under these conditions and for this purpose would in effect circumvent the statutory requirement that no warehouseman shall "begin to operate" any business of a warehouseman in any city having a population of one hundred fifty thousand or more, without first having obtained from the Commission a certificate declaring that public convenience and necessity require or will require the transaction of business by such warehouseman (Public Utilities Act, Section 50½).

It is now apparent that the Commission was not in possession of all pertinent facts when it issued Decision No. 36417<sup>5</sup> authorizing transfer of the operative right from Western to Craig. Upon the full record now developed it does not appear to be in the public interest that the authority sought in this application be granted. Decision No. 36417 should be rescinded, and the application denied.<sup>6</sup> If J. S. Craig is of the opinion that public convenience and necessity require or will require the transaction of business by him as a warehouseman, an appropriate application for the necessary certificate should be filed with the Commission.

I recommend the following form of orders:

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<sup>5</sup> As shown in the opinion portion of that decision, the Commission understood that Craig would "continue the operations heretofore conducted by the corporation," whereas it now appears that Craig did not intend to continue the operations of Western in any literal sense.

<sup>6</sup> Application No. 25620, supra, by which Western Warehouse & Transfer Co. sought authority to discontinue service, will be granted.

## O R D E R

Public hearing having been held in the above entitled proceeding and the Commission now being fully advised, and based upon all of the facts and circumstances of record,

IT IS HEREBY ORDERED that Decision No. 36417 of June 8, 1943, in the above entitled application be and it is hereby rescinded.

IT IS HEREBY FURTHER ORDERED that the above entitled application, as amended, be and it is hereby denied.

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

The foregoing opinion and order are 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 7<sup>th</sup> day of October, 1943.

Francis R. Havenner

Richard H. Backus  
Arthur W. Dewey  
 Commissioners

D I S S E N T

(Commissioner C. C. Baker)

No less than four good and sufficient grounds obtain for and underlie this dissent to the decision of the majority herein,--a decision which ignores and flaunts both competent legal advice and the applicable law in the premises, and which is wholly without any specific findings of fact upon which to predicate its order of rescission.

This proceeding involves but a single issue, namely, the sale and transfer by the Western Warehouse & Transfer Company to one J. S. Craig of that certain operative right by virtue of which the former had conducted a public warehouse business in the City of Los Angeles for many years. This operative right, although intangible in nature, constitutes property; and, as such, it may be sold and transferred as any tangible utility property, subject only to the proviso, as specified in the Public Utilities Act, that the transfer be approved by an appropriate order of the California Railroad Commission.

At this point it should be observed that the said operative right was acquired by prescription, through usage, and that it became a confirmed prescriptive right on the 2nd day of August, 1927, under a statutory grant of authority. Such established prescriptive right embraces a territory co-extensive with the boundary lines of the City of Los Angeles, at any point wherein the Western Warehouse & Transfer Company could, at its election, establish and maintain its warehouse. It was, in effect, an offer to receive and store commodities of various types for those of that area, by reason whereof everyone within the city having occasion to store any of such indicated commodities was a potential patron of the Western Warehouse & Transfer Company.

Any and all limitations or restrictions with respect to a prescriptive operative right become fixed, by operation of law, as of the time the

right itself becomes vested. It follows, as a matter of law, that the Railroad Commission is without authority to partition any such prescriptive right or to attach any limitations thereto whatsoever against the will of the owner thereof.

The foregoing matter, as a background, together with a brief outline in the nature of a chronological chain of related events, as next hereinafter set forth, should serve to cast upon the screen in bold relief the illegality and the absurdity involved in the said majority decision.

On May 10th, 1943, the Western Warehouse & Transfer Company, hereinafter referred to as "Western", sought authorization from this Commission, through a verified application, to discontinue service as a public utility. (App. No. 25620). In its said application, Western represented that it was then "engaged in conducting a warehouse at #364 South Anderson Street, in the City of Los Angeles, its principal business being the storage of sugar, salt, flour and canned goods."

By a verified application (No. 25648) filed on May 27th, 1943, Western and the said J. S. Craig joined in seeking authority from the Commission for the former to sell and the latter to purchase Western's said "prescriptive right to operate a warehouse in the City of Los Angeles." The application further recited that Craig, as such transferee "proposes to continue the said business at #1601 East Sixteenth Street, in the City of Los Angeles." The consideration for such transfer was stated to be in the sum of \$200.

Accompanying the said application No. 25648 was a letter of transmittal, which advised the Commission that the former application (No. 25620) would be dismissed,<sup>1</sup> and added that Western was about to dispose of its

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1. Appropriate dismissal was filed on July 23, 1943 leaving no issue before the Commission in Application No. 25620. However, the majority saw fit to grant the application by Decision No. 36417 of June 8th, 1943.

real property at 364 South Anderson Street to the Zellerbach Paper Company for a cash consideration of \$85,000. Expeditious action upon the part of the Commission was requested on the ground that the then existing facilities of the Zellerbach Paper Company were being taken over by the Federal Government.

A majority of the Commission, however, with reference here to Commissioners Havenner, Sachse and Clark, declined to sign an appropriate order whereby the proposed transfer of the said operative right would be duly approved and without which approval the transfer could not be effected. Underlying such refusal to issue the necessary order was the opinion, expressed and argued by Commissioners Havenner and Sachse, that an operative right, disassociated from tangible property, has no monetary or marketable value whatsoever, and that, therefore, the Commission could not consistently vote to approve or consent to the said proposed transfer, notwithstanding that the specified consideration was the nominal sum of \$200 only. It was further declared, and reiterated with emphasis, by the two last mentioned of the said majority, that their said position or attitude in the premises "involved a principle", that is to say, that it would be adverse to the public interest and contrary to proper regulation of public utilities to countenance a transfer for value of an operative right which they held to be wholly without value, and that it was their policy to be "consistent" by refraining from any act that would not be in accord with their said doctrine of "the principle involved". Indeed, the said two members so stressed the said items of "principle" and "consistency" that those terms yet abide in ready memory as we pursue the incidents of the case yet further.

Because of the urgency of the matter, as indicated above, and as clearly disclosed by the record herein, Western and Mr. Craig, on June 3rd, 1943, filed with the Commission a verified amended application, again re-



questing authorization for such proposed transfer of the said operative right. This application differed from the original application No. 2564E in two particulars only, to-wit, that it recited (1) that the consideration had been reduced from \$200 to but \$1.00, and (2) that each of the several patrons of the Western Warehouse & Transfer Company had assented to a discontinuance by Western of its warehouse operations.

In this connection, it is interesting to note that when there was presented to the Commission on the 8th day of June, 1943, a proper form of order granting the prayer of the said application by approving the transfer for the consideration of \$1.00 only, two of the said majority members broke all speed records in affixing their signatures to the order. Commissioner Clark withheld his signature. So, too, did this dissenting Commissioner. Not, however, because of any scruples against approval of the transfer, irrespective of whether the consideration be \$1.00, \$200, or even a much larger sum, but solely because I would not permit it to appear, through my signature thereto, that I was a party to the obvious surrender of the said two Commissioners with respect to "the principle involved", or that I was in step with them as they made their graceful exit from the realm of boasted consistency and entered into the sphere of glaring inconsistency.

Thus on the 8th day of June, 1943, based upon the pleadings of record, but with particular reference to the said amended application, the Commission, by a bare majority vote, issued Decision No. 36417, by which Western was authorized to sell and Mr. Craig to acquire whatever operative right the former then possessed, and being that certain prescriptive right hereinbefore defined. The transfer was complete in every respect the moment the said decision was signed and filed, and at that very moment title to the said operative right passed to and became vested in Mr. Craig, the transferee. Thereupon Mr. Craig became clothed with lawful authority to establish, maintain and operate a warehouse at any point within the City of Los Angeles,

and to serve any or all of those within such area who might elect to offer for storage any such commodities as Western had been accustomed to handle. There can be no point, therefore, in those portions of the majority decision which recite that (1) "Craig did not actually intend to solicit and serve Western's patrons but desired the operative right primarily so that he might serve a somewhat different class of patrons"; that (2) "the building at 1601 East Sixteenth Street was not made available for public storage at all"; and that (3) "At the time of the hearing Craig had not yet received property for storage but planned to conduct a warehouse business at 1000 Santa Fe Avenue, Los Angeles."

Nor is there any point in this further assertion in the said decision, namely, that "Craig sought to acquire Western's right to do business, and to use this operative right as his authority to commence and conduct a new business, serving a different class of customers, in a different location." For just as Western, by virtue of its prescriptive right, might have spotted its warehouse in any section of the city and at such point have served those who chose to patronize his business, whether former patrons, new patrons, or a mixture of the two classes, Mr. Craig, who had acquired the precise rights and privileges that Western had possessed, could lawfully do likewise. There is no law to the contrary, and the Railroad Commission cannot, by any edict of its own design, alter, qualify, or set aside the applicable law or the practical effect thereof.

Two months and sixteen days thereafter, Commissioners Havcnner, Sachse and Clark signed and filed of record a certain order, the effect of which was to reopen the said proceeding based on Application No. 25648 "for the purpose of determining whether Decision No. 36417 should be rescinded, altered or amended." Then, after another interval of more than two months, these three selfsame Commissioners issued a new order designed to rescind and, therefore nullify, the former order of June 8th, 1943, which gave

approval to and authorized the desired transfer of the said prescriptive operative right.

According to the majority view, as expressed by Commissioner Clark in this last decision of the series, "the Commission was not in full possession of all pertinent facts when it issued Decision No. 36417." Suffice it to submit, as a response to that statement, that no material facts were disclosed through the hearing that followed the reopening of the case that were not known to the Commission at the time Decision No. 36417 was signed and filed of record.

Still further, in this last decision the said majority hold, as a conclusion, that "Upon the full record now developed, it does not appear to be in the public interest that the authority sought in this application be granted." It is pertinent to observe at this point that the act of the majority, in reopening the case, operated to place the Commission in the position of an adversary party. It thereby assumed the burden of seeking to establish by competent evidence that the prior order of the Commission, thus made an issue, should be set aside or annulled. (Morgan vs United States, 304 US 1,20; 82 L. Ed. 1129, 1133).

The testimony of the two Commission witnesses, however, stands to substantiate the factual representations of the verified original and amended applications. So, also, does the testimony of certain executives of both the transferor and transferee, as well as of the Secretary of the Los Angeles Warehousemen's Association, who testified on behalf of Mr. Craig. With reference both to the pleadings and to the testimony of these witnesses, the record serves to establish, beyond the shadow of a doubt, the following facts: That (1) at the time of the transfer Western was operating a general public warehouse business under a statutory grant of authority at 364 South Anderson Street, Los Angeles; that (2) Mr. Craig sought to acquire that particular prescriptive operative right to the end that he might engage in a general public warehouse business at 1601 East Sixteenth Street, Los Angeles; that (3)

Mr. Craig is a warehouseman of extensive experience; and that (4) there is a definite need for added warehouse facilities in Los Angeles.

Moreover, the single fact that Western, through usage, had acquired its said prescriptive right, coupled with the fact that Western continued to serve the public for many years next prior to the said transfer, operates to raise the presumption, albeit a rebuttable one, that there was a public need for the service rendered, and, therefore, that a continuation thereof would be in the public interest. Although merely a presumption, yet in law it is both sufficient and conclusive unless and until rebutted by competent adverse evidence. But there is not a scintilla of evidence in the record even tending to overcome the force and effect of such presumption, to-wit, that there was, at the time of the transfer, a subsisting need for the service, by reason whereof the said presumption alone is sufficient to support the original order authorizing the said transfer; and, somewhat conversely, sufficient alone to refute the said conclusion of the majority, quoted above, to the effect that the proposed order would not be in the public interest.

No exception may be taken to the action of the majority in reopening Application No. 25643. Authority to do so is accorded by Section 64 of the Public Utilities Act. But the power to "rescind, alter or amend any order or decision" of the Commission is not unlimited in its scope, notwithstanding the opinion of the majority to the contrary.

If, in the instant case, approval of the proposed transfer had been obtained through fraud or false representation as to material matters, the Commission would not only be acting within its lawful authority in rescinding the order, but it would be its duty to do so. But in the absence of such fraud or misrepresentation, a rescission of the original order would be without legal sanction. In the Matter of the Application of Benjamin Walters (App. No. 20164, Dec. No. 28676), decided March 30th, 1936, an issue was raised, in the nature of a question of law, identical with the issue in this

case. In its decision involving the said Application No. 20164, the Commission said, in part: "The jurisdiction of this Commission to dispose of the issues which have thus been presented is limited solely to determining whether the Commission's approval of the original application was obtained by some fraud or misrepresentations of the parties, or whether the provisions of that order have since been violated." (39 C.R.C. 667, at 671).

To my mind, there is no evidence whatsoever in the record showing, or even tending to show, that Western and Mr. Craig acted otherwise than honestly, openly and with the utmost good faith. Nor do the majority members of the Commission challenge the bona fides of the parties to the said transfer. Neither do they predicate their decision upon any averment or finding of fraud, misrepresentations, or breach of any order of this Commission. They thus by-pass the only bases for a legal rescission of the original order.

It is well settled that any decision of a quasi-judicial body, such as this Commission, made after hearing, must be supported by evidence formally introduced upon the hearing in order that the decision may be sustained. Moreover, any finding without supporting evidence is beyond the legal power of the Commission to make. Consequently, any order based thereon is contrary to law and hence subject to reversal by a court of competent jurisdiction.

(Interstate Commerce Commission v. Louisville & N.R. Co., 227 U.S. 88, 57 L. Ed. 431; United States v. Abilene & S.R. Co., 265 U.S. 274, 68 L. Ed. 1016; Morgan v. United States, 298 U.S. 468, 480; 80 L. Ed. 1288, 1295; Chicago Junction Case, 264 U.S. 258, 68 L. Ed. 667; In re Benjamin Walters, 39 C.R.C. 667, 671; and Bakersfield v. Lang, Case No. 2006, Decision No. 12085 of March 21, 1927, 29 C.R.C. 872.)

This dissent would be incomplete if it failed to note and comment upon yet another portion of the majority opinion, as expressed by Commissioner Clark, to-wit, that "it is clear that the actual active business of Western

was, for practical purposes, discontinued on April 26th." Thus, by innuendo, the majority seek to project the inference that there had been an abandonment by Western of its operative right and, therefore, that there remained nothing to transfer. But the record, as heretofore pointed out, clearly shows that Western was still operating, as a going concern, up to and on the very day of the transfer. Hence, if an implied finding of abandonment is intended, it is sufficient to cite to the fact that such implication is not supported by the evidence. Of much greater significance, however, is the fact that it clearly appears upon the face of the majority decision that the majority based their order of rescission, not on a finding or even on an averment of abandonment, but solely upon their conclusion, which likewise is wholly without the support of evidence, that, as expressed, "Upon the full record now developed it does not appear to be in the public interest that the authority sought in this Application be granted."

In the original order of June 8th, however, it was submitted, as a conclusion, that the proposed transfer of the said operative right appeared to be in the public interest. Commissioners Havenner and Sachse were signatories to that decision. But now, with reference to the subsequent opinion and order of rescission, they reverse themselves by a holding, likewise as a mere conclusion and in the absence of any findings of fact, that it does not appear to be in the public interest to authorize the said transfer. Although the majority have been quite venturesome throughout, yet it will be observed that they did not venture to find that such transfer would be adverse to or incompatible with the public interest.

By virtue of Section 50 $\frac{1}{2}$  of the Public Utilities Act, Western possessed a statutory grant of authority to operate a public utility warehouse business within the City of Los Angeles. Also, by virtue of legislative enactment it was provided that a prescriptive right, so acquired, may be transferred "as other property", but "only upon authorization by the Railroad Com-

mission." In the instant case, the authorization had been granted (Decision No. 36417, June 8th, 1943). Nowhere in Section 50 $\frac{1}{2}$ , or elsewhere in the Act, is there a requirement that the transfer of a prescriptive right be subject to the limitation that the transferee shall confine his service to those who were patrons of the transferor, receive and store only the types of merchandise handled by the transferor, or operate the business at its location as of the time of the transfer. All that could be legally required of Mr. Craig at the time of the transfer was that he evidence his intention to store merchandise for the public generally, for compensation, within the City of Los Angeles. (Sec. 2 $\frac{1}{2}$ ).

Relying upon Decision No. 36417, Western sold its business properties, situate at 364 South Anderson Street, to the Zellerbach Paper Company and transferred its prescriptive operative right to Mr. Craig. And Mr. Craig, likewise in reliance upon Decision No. 36417, assumed himself to be the owner of the said prescriptive right and forthwith proceeded to expend both considerable time and money in preparing to function as a warehouseman pursuant to the force and effect of the operative right so acquired.

Upon the effective date of the said transfer, to-wit, the 8th day of June, 1943, the full legal title to the said operative right, as a definite item of property, vested in Mr. Craig. He may be divested of his title thereto only by and through a decree of a proper tribunal, after hearing, upon competent evidence to the effect that he had acquired or that he held the property illegally, but not otherwise. To deprive him of the property through the expedient reflected from the decision of the said majority would constitute taking of property without due process of law in violation of a constitutional guarantee. The applicable law on this point is too well established to require citation of authority.

But wholly apart from the application of the "due process" clause of the Constitution, and even discounting to the vanishing point the force

and effect of the indicated statutory law in the premises, there yet remains, in my judgment, a sufficient basis for objection to and a protest against the holding of the majority, in this: That, whereas it appears from the evidence of the record not only that Mr. Craig committed no wrongful act in acquiring the said operative right, but that he acted throughout honestly, frankly and in perfect good faith, it would be an act of injustice, with attendant damage and loss to Mr. Craig, to deprive him of his said property right upon the mere pretext, unsupported by the evidence, that the said transfer is not in the public interest. Moreover, it would be an act unworthy of this Commission,--a quasi-judicial body that should not dare to assume to function in the absence of a keen sense of the beneficent rules of equity.

If the Commission may, upon such facts as obtain in this case, rescind an order whereby the transfer of an operative right was approved, then it may at any time, in response to its mood of the moment, and whether motivated by personal inclination, prejudice, whim or caprice, invalidate any other operative right, whether prescriptive pursuant to statutory grant or existing by virtue of a certificate of public convenience and necessity. And if the Commission could thus arbitrarily nullify an operative right that had vested in the transferee four months ago, it could, by the same tokens and by the selfsame process, extinguish a like operative right that had become vested at any prior time within the history of this Commission.

Hence it is that the decision to which this dissent is addressed serves to jeopardize every operative right in this State that is subject to regulation under the Public Utilities Act. And if the operative right involved in this case may be taken from the bona fide owner in the manner and by the process indicated by the majority opinion, then each and every public utility operation in California can be subjected to like treatment. For all that appears to the contrary, such may be the objective contemplated, and



may even be deemed to reflect the present policy of this Commission.

A decision of the type involved in this proceeding, inspired as it is, by some motive unknown, but obviously not the product of a bona fide endeavor to respond to legal dictates, falls inevitably into the classification of an arbitrary decree; and, being thus the reflection of an arbitrary act, it is in no sense judicial in character and is, therefore, a reflection upon the quasi-judicial body that functions as the California Railroad Commission.

Somewhat in the nature of a summation, the essence of this dissent may be submitted thus:

1. That the said majority decision does not contain, nor does it purport to be based upon, any specific findings of fact.

2. That this decision is predicated solely upon the conclusion, itself without support in the evidence, to the effect that the transfer of the said operative right would not be in the public interest.

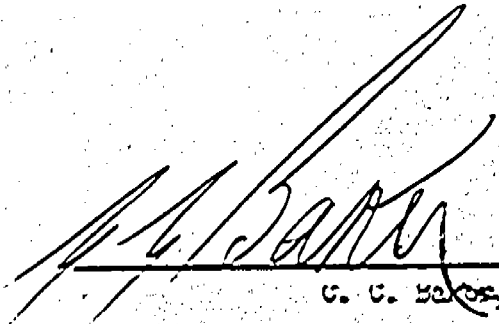
3. That the operative effect of the majority decision is to rescind the former or original order of June 8th, 1943, and that such act of rescission is illegal in that it is not based upon any lawful grounds.

4. That the said decision is in violation of the "due process" clause of the Constitution.

5. That the effect of the rescission, itself the product of an illegal act, is to subject Mr. Craig, the transferee, to a positive injustice, attended by an appreciable damage and loss.

6. That the said majority decision in itself lays a basis for and invites an inference to the effect that this Commission is either ignorant of the law, or that it is content to roam aim-

lessly amid the maze of utility regulation without legal guidance, unless, perchance, it may be inferred that the Commission has embraced that type of philosophy which seeks attainment of a desired end through any convenient expedient, irrespective of established legal procedure and, perhaps, even in defiance of the law itself.

  
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G. C. Baker  
Commissioner.

D I S S E N T

Commissioner Baker's dissent; in most able and thorough manner, discusses the legal and factual aspects of the majority opinion and order. I am in full accord with the views expressed therein. In addition, I feel compelled to review further the procedural irregularities which preceded its adoption.

Transfer of the prescriptive right involved was originally authorized by Commissioners Havenner, Sachse, and myself on June 8, 1943, on its merits based on verified pleadings. The parties in good faith consummated the transaction on or about July 14. Forty-six days after the order became effective the majority, without setting aside the previous order, reopened the proceeding for reconsideration.

The majority decision rescinding the authority previously granted is based upon a false doctrine and is without supporting facts. As a precedent, the decision is far-reaching in its effect not only upon warehousemen but also upon transportation companies and public utilities generally.

In signing the decision the majority was well advised. The members of the Commission's staff, both legal and technical, who were consulted, with but a single exception, were unequivocally opposed to the position assumed by the majority. They expressed the firm belief that the action contemplated would be improper, unsound in principle, and, if contested, would probably be declared invalid. It should be stated, that in the instance of the single exception, the staff member carefully qualified his position. The majority, however, arbitrarily determined to carry out its own will.

I cannot subscribe to the bureaucratic methods of utter disregard of and contempt for established practices evidenced by the majority's action in this proceeding.

*Justin J. Calver*  
COMMISSIONER

Concurring Opinion

The authors of the two dissenting opinions herein have taken such liberty with the truth in attempting to justify their obviously unsound position and have so completely disregarded pertinent facts in this entire matter that I feel not only justified but compelled to respond.

Briefly and frankly stated, this opinion and order approved by the majority of the Commission, namely Commissioners Havenner, Sachse and this Commissioner, which rescinds Decision No. 36417, was made necessary, and was voted for by Commissioners Havenner and Sachse, only because, as stated by President Havenner, the previous Commission action as far as his vote was concerned was based upon misconception of the facts surrounding the entire matter.

The earlier decision hereby rescinded was, in my opinion, the result, and another example, of the Commission's failure to insist upon having proper and adequate information before being persuaded to pass official judgment in such so-called "urgency" matters as this was represented to be.

If there had been any real need for quick action on the part of the Commission for the purpose of making available for other occupancy the property of the Western Warehouse, this could have been simply and expeditiously accomplished by prompt Commission action upon the first application in this series filed by Western Warehouse on May 10, 1943, asking permission to discontinue its operation. This application was not submitted to the Commission for official action although it was on file for 17 days before the joint application asking authority to transfer by sale the prescriptive right involved was filed by Craig and the Western Warehouse and Transfer Company. It is therefore quite evident that the emergency feature did not develop, or was not recognized, until hasty action

by the Commission in approving the application to transfer was urged.

This Commissioner vigorously maintained that the Commission did not have sufficient factual information to enable it to intelligently pass judgment on this matter and therefore steadfastly opposed the granting of the joint request to sell and transfer the prescriptive right involved in these proceedings and he voted accordingly when action was taken on both the first application made for transfer for a two hundred dollar consideration and the amended application with the sale price represented to be changed to one dollar.

The farcical method resorted to and employed in this case in submitting an amended application in which the sale price was supposed to have been changed from \$200 to \$1 (in order to meet the objections of two Commissioners), as was brought out in the hearing and made a part of the record, certainly should not go unmentioned, nor was it forgotten by any of the three majority members when passing final judgment.

Disregard and contempt for past practice of the Commission is stressed in the dissent herein. I welcome this opportunity to state that it is my firm intention, as long as I am a member of this Commission, to be influenced and guided in all my acts by past practice only in so far as public interest is thereby best protected and public welfare best served. This opinion and order is founded on that principle. I hasten to add that I fully realize that the procedure followed and the steps taken in finally arriving at the decision in this case was a decided departure in many respects from the heretofore customary (and, if you please, often perfunctory) past practice employed by the Commission as an official body. This particularly applies as far as warehouse permits and prescriptive right transfers are concerned. The unsound, hastily taken position by the two dissenting members, and which position

it will be noted they are still attempting to justify and defend, is only added proof of this fact and also emphasizes the need for a change in procedure. I feel it appropriate and necessary to add that certain staff members also fall into that category and accordingly their similarly arrived at position is now leaned upon by the two dissenting Commissioners.

The dissenting opinion contends that the Commission was not justified in rescinding its previous order on the claim that no new or important facts were developed at the hearing. I offer the following as only one illustration which plainly makes this contention ridiculous: It is definitely stated in the application requesting the Commission's approval of the sale and transfer, Application No. 25648, that "J.S. Craig proposes to continue said business at No. 1601 East 16th Street in the city of Los Angeles \* \*" (emphasis supplied) and even describes the type of structure and the amount of floor space and mentions the specific type of rail service available. The report of the Division of Investigation of the Railroad Commission, which investigation was made especially at the request of President Havenner because of the peculiar circumstances surrounding this case which began coming to light immediately subsequent to the first action of the Commission in this case, clearly shows that actual conditions made doubtful and certainly impracticable the use of the premises described in the application.

Of the several new and important facts which were developed at the hearing, two, in particular, were in direct contradiction to the statements of intention made in the filed and duly sworn application. One was that it was never really intended to continue the warehouse and transfer business such as was operated by the Western Warehouse and Transfer Company. The second was that the warehouse business which Craig intended to

operate under this prescriptive right was not to be located on the premises at 1601 16th Street, as listed and described in the application, but instead he intended to establish a new business at an entirely different location with building and facilities of different specifications and description.

In this case it is therefore perfectly obvious that public convenience and necessity was not and could not have been properly considered or passed upon by the Commission without having more reliable and complete information than it had in its possession at the time Decision No. 36417 was issued. Further, it is my well considered opinion that public convenience and necessity involves not only those who constitute the customer element of a warehouse business. The Commission should not disregard nor be unmindful of the position occupied by the warehousemen and their financial investment. Unless this Commission in all instances insists upon knowing the location where any new warehouse business is to be established as well as the location to which any warehouse business might be transferred and concerns itself accordingly to the extent of the Commission's authority so to do under its jurisdictional power, public interest cannot be properly considered, nor will private property rights of the warehousemen receive the consideration and protection to which they are justly entitled. Both the warehousemen and the customer public have a right to expect this all-important service from the California Railroad Commission as a regulating agency, and I consider it a Commission responsibility and duty, in fact an obligation, to more fully function along these lines in the future than it has in the past.

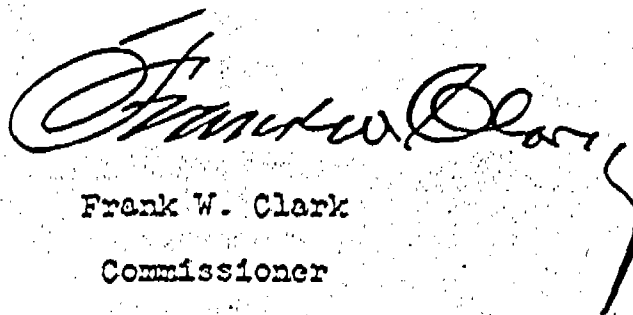
I now hesitate to dignify certain statements made by the two dissenting Commissioners by even referring to them.

However, the first one of these statements is, and I quote from Commissioner Baker's dissent: "And if the operative right involved in this case may be taken from the bona fide owner in the

manner and by the process indicated by the majority opinion, then each and every public utility operation in California can be subjected to like treatment. For all that appears to the contrary, such may be the objective contemplated, and may even be deemed to reflect the present policy of this Commission." This inane, ill conceived insinuation is so groundless, unjustifiable and under the circumstances so inappropriate in character that I submit it has no proper place in official proceedings of such a body as the California Railroad Commission.

The other instance I refer to is Commissioner Craemer's beguiling and rather amusing attempt to deprecate the majority decision in this case by endeavoring to label it with that hackneyed, meaningless and certainly herein misapplied partisan political phrase of the moment, "I cannot subscribe to such bureaucratic methods." (emphasis supplied)

Such tactics do not warrant further or more serious consideration.



Frank W. Clark  
Commissioner