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Decision No. 57361

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Investigation on the Commission's own motion into the operations, rates and practices of the CALIFORNIA BIG TEN COOPERATIVE, INC., a corporation, ALLIED FOODS INC., a corporation, and AL WINNER, an individual.	)	Case No. 6069

Turcotte & Goldsmith by Jack O. Goldsmith, and Al Winner in propria persona, for California Big Ten Cooperative, Inc., Allied Foods, and Al Winner, respondents.

Edward G. Fraser, for the Commission staff.

O P I N I O N

The views expressed by this Commission interpreting the law in Case No. 6063, San Diego Shippers Association, et al, contemporaneously decided, govern the ruling in this case. This also is a determination of public utility status proceeding instituted upon the Commission's own motion into the operations and practices of the California Big Ten Cooperative, Allied Foods, Inc., and Al Winner, an individual, for the purpose of determining whether these respondents, or any of them, have been, and are now, operating as freight forwarders in violation of Section 220 of the Public Utilities Code and without the certificate of public convenience and necessity required by Section 1010 of said Code.

Public hearings were held on this matter in Los Angeles on June 18 and 19, 1958, before Commissioner Ray E. Untereiner and Examiner James F. Mastoris at which time evidence was presented and the matter submitted.

Facts

Four distinct entities are ostensibly involved in this proceeding; however, the activities of all are determined primarily

by one man, respondent Al Winner. Our evaluation of the facts shall be based upon the relationship each organization bears to the other and to Mr. Winner.

The first is a California corporation, respondent Allied Foods, formerly called Allied Canning Company, organized as a profit-making venture in December, 1945, for the purpose of manufacturing, producing and selling pickles and related pickled products. Its office was, and is, located in Los Angeles.[1/] Mr. Winner is president and manager of said corporation and acted in such capacity during the period the staff alleges that illegal freight forwarder operations were being conducted.

The second is respondent California Big Ten Cooperative, formally organized in November, 1954, as a no-stock, no-profit cooperative association for the specific purpose of handling, storing and distributing food products through the cooperation of its members. The evidence at hearings indicated that in effect the ultimate purpose was to better the members' competitive position with large chain stores through cooperative buying, advertising and selling. The main office was in Los Angeles. Mr. Winner was one of the seven original directors of said organization and later its president. Allied Foods was one of the fourteen members who agreed to subscribe to the initial membership of said corporation. All fourteen members were manufacturers or distributors of food products.

This cooperative provided for a maximum of 200 memberships, the fee for each membership being $35. The bylaws of this association prohibited the transfer of membership certificates to persons or companies not engaged in the production or distribution of food products handled by said association. Said organization abandoned

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1/ Exhibit No. 1.

operations under its incorporated name sometime in the latter part of December, 1954. It was suspended in January, 1958, by the California Secretary of State for nonpayment of taxes.

The third entity involved was Allied Pool, an organization which had, and has now, no formal legal existence. It has never registered under the California fictitious name statute, nor does it appear to have been the object of any formal organization. Its purpose appears to serve as an operational reference name for the convenience of shippers in Los Angeles covering the freight consolidation activities of California Big Ten Cooperative, Inc., Allied Foods, Inc., and respondent Winner. Evidence at the hearing indicated that it came into existence after the discontinuance of the name "California Big Ten Cooperative" because of dock separation problems in Los Angeles. Mr. Winner was, and is, the general manager of said Allied Pool.

The fourth entity, therefore, is, as is disclosed from the preceding description of the other respondents, the key individual in the whole consolidation process. His interweaving activities must be disentangled in order to determine whether any or all of the respondents were acting as freight forwarders during the period from December, 1954, to December, 1957.

Freight forwarding operations came into existence when the California Big Ten Cooperative was formed in 1954. The members acting pursuant to the avowed purposes of the Cooperative consolidated their freight in Los Angeles in order to take advantage of the truckload, as distinguished from the less-than-truckload, volume rates on transportation to San Francisco, Sacramento and other northern and central California points. At first, the shipping docks of the various members were used for the purpose of consolidation. Later, Southern Pacific's

dock space in Los Angeles was rented and, at first, California Motor Express, a highway common carrier, transported the commodities as the underlying carrier. By consolidating their freight, the members were able to ship food products into the northern California territory at rates which could not be utilized economically by the individual member-shipper. Initially, it appears that the consolidation process was limited to the members of the cooperative or to shippers in the food product business. Upon discontinuance of the cooperative name in 1954, it was decided that such limitations were no longer necessary. Apparently, acting upon advice of counsel, the members permitted nonmembers to ship with the members' tonnage. Moreover, the restriction to commodities in the food industry was no longer applicable and, as a result, freight of various and nonrelated general commodities was consolidated and forwarded to the points of destination in San Francisco and Sacramento (Exhibits 16, 17). The California Big Ten Cooperative continued in operation during this transitional stage in order to complete redemption of certain advertising labels used by the shipper while they were still members of the Cooperative.

One of the primary purposes behind the aforementioned change was to increase tonnage to more than one truckload a day to northern California points. By permitting nonmembers to join the consolidation, the advantages and savings of volume rates were multiplied. As the operations progressed it became apparent that only on rare occasions would the required truckload tonnage be met by food products alone. Evidence disclosed that, between 1955 and the end of 1957, the shippers were averaging between 20 to 40 per cent savings on the "spread" between less-than-truckload and truckload rates. As a result this operation became so popular that, in a 20-month period from 1955 to 1957, approximately 34 million pounds were shipped by merchants and manufacturers in the Los Angeles area through respondents' facilities. Some individual consignors used these services daily and

shipped between 60,000 to 90,000 pounds a month. One shipper was shipping between 100,000 to 150,000 pounds a month as late as February, 1958. As previously indicated, any shipper could use these services. There was no association, no organization, no name other than the aforementioned "Allied Pool". There were no dues, no memberships, no fees, no meetings. One new shipper certified that he specifically asked whether he had to join an association or organization and was told by Allied Pool's terminal manager that such was not necessary. The only qualifications to the utilization of the services were 1) that the shippers had to telephone their orders to the respondents by noon of the day in which the shipments were to be made; 2) they could not add to the order after it had been made; and 3) they had to transport their freight from their plant or store to the assembly point. One shipper witness testified that he was notified the acceptable minimum requirement weight was 500 pounds. However, there was no other evidence on this qualification.

Solicitation of new customers was generally by personal contacts and telephone calls by respondent Winner and the terminal manager. There was no evidence of use of the conventional methods of solicitation such as advertising, announcements, brochures or the like, although the classified section of the Los Angeles Telephone Directory disclosed that the respondents were listed under the title "Freight Forwarders" for the years 1955, 1956 and 1957. The name used was "California Big Ten Cooperative - Allied Pool", although only the name "Allied Pool" was used in 1957.

Respondents offered testimony showing that, although some personal contacts and telephone calls were made, many new shippers joined the consolidation activity after learning of the service that was provided from other shippers. Moreover, Mr. Winner testified that he did not authorize the telephone company to place his operations under the title "Freight Forwarder", although he admitted that

he did not protest the listing made. Moreover, he testified that, to the best of his recollection, no new shipper was ever obtained through this source. The shippers using these facilities had no oral or written contract with the respondents which obligated them to use only the respondents' services.

When the respondents received an order from a shipper, a set of "shipping instructions", also called a "manifest", was prepared by the employees at Allied Pool's office.[2/] Said instructions consisted of the name of the consignor, the consignee, the commodities to be shipped, and the weight thereof. Between 12:00 p.m. and 1:00 p.m. on the day of the order, the terminal manager's staff would assemble all the individual "shipping instructions" and prepare a master bill of lading. Said master bill of lading would then be affixed to the "shipping instructions" and the two would be delivered to the line-haul carrier. The respondents would retain a copy of the master bill. When the freight reached the consolidation dock, the respondents' employees assembled it and loaded the truck. The next morning the rate clerk would rate the shipments from the information on the bill of lading copies. "Allied Pool - California Big Ten" was the named consignor on said shipments.[3/]

Payment for the entire transportation from Los Angeles to point of destination was made by the consignor, during the early stages of this operation, directly to Allied Foods who in turn paid the underlying carrier. Said carrier billed Allied Foods for the line-haul transportation. The shippers were charged the volume rate, plus a 10-cents-per-100-pounds "inclusion charge" to cover administrative and handling expenses. This charge was subsequently increased to 14 cents. As the operation progressed, payments were made to the

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2/ Exhibits 10 and 11.
3/ Exhibits 12 and 14.

post office box address of Allied Pool in Los Angeles, although many shippers continued to make payment at the Allied Foods' office in Los Angeles. If the respondents arranged local pickup transportation, which was an uncommon occurrence, such charges were included in the billing to the customer. All billings to customers at first were made by Allied Foods[4/] through its offices in Los Angeles. Shippers were billed in accordance with the actual amount of tonnage each had shipped. In 1955, shippers were billed from the dock offices under the Allied Pool label.[5/]

The expenses of the consolidation operation were paid by Allied Foods. Such consisted of office and administrative expenses, dock space at the Southern Pacific depot, and wages of the office and dock employees. Allied Foods maintained in its offices separate bookkeeping accounts for Allied Pool. Moreover, it appears to have allocated the expenses and manhours of the employees attributable to the consolidation activities of Allied Pool.[6/] The employees of Allied Pool were also employees of Allied Foods. Said employees consisted of a terminal operations manager, a rate clerk, a stenographer, and receiving clerks who handled the freight on the dock. Orders to purchase needed supplies and equipment for Allied Pool were directed to Al Winner at the Allied Foods office.

Testimony indicated that, whenever Allied Foods itself shipped through Allied Pool's facilities, it was not billed for the transportation. It further appears from Exhibit 19 (Allied Pool's Freight Revenue) and the testimony of Mr. Winner that whenever the revenue from Allied Pool's operations, including the revenue from Allied Foods' freight, exceeded the expenses on any given month, the

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4/ Exhibits 5 and 7.
5/ Exhibit 8. (The bottom of this invoice reads, "Freight bills must be paid within 7 days---Federal Carrier Reporter, Page 23126, Par. 23009." Such reference is an Interstate Commerce Commission General Order relating to collection of rates by common carriers.)
6/ Exhibit 19.

increment would be added to the expenses attributable to certain managerial employees the following month. In other words salaries at Allied Foods' office, as well as the bonus usually given to the salaried traffic manager, were raised the following months in the amount of the increment in order that said preceding month's profit would be offset and absorbed. In this fashion there would be an "averaging out" of profits over a period of months so that Allied Pool's profit and loss statement showed an operation at cost. There were no refunds ever made to the shippers who used the Pool. If a loss was suffered, such would be absorbed by Allied Foods.

In 1957, the respondents switched underlying carriers from California Motor Express to Pacific Motor Transport, a certificated common carrier, and in November of that year rented dock space from said carrier.

Mr. Winner testified that his organizations were not liable if goods were damaged or lost en route to destination. He stated that he did not insure the shipments and that shippers would have to look only to the line-haul carrier for reimbursement.

Findings and Conclusions

The issue here is identical with the issue in the aforementioned San Diego Shippers Association, et al, case. The contentions of the parties are analogous. The facts are similar in many particulars. The principles of law applicable to that case control here. Our interpretation of the law and citation of authorities in that case under the title, "Discussion of Law and Conclusions", needs no further repetition or elaboration here. We see no reason for a conclusion different from that reached in that case. The evidence places the respondents squarely within the general definition of a "freight forwarder" set forth in Section 220 of the Public Utilities Code.

By permitting any shipper in the Los Angeles area to join the consolidation, the respondents have, in effect, been serving the public. It may be that when the respondent, California Big Ten Cooperative, consolidated and forwarded for its members only in 1954, such operations could have been within the first part of the exemption of Section 220 of the Public Utilities Code. It may be that, even after the abandonment of the formal organization, the operations were exempt as long as the former members continued to forward food products as an informal association of related shippers. But when they brought in any public shipper who wished to ship or use their facilities and who had no relationship to them or to the food industry the respondents ceased to be the "group of shippers" intended by the exemption. There was no selectivity, no connection, no relationship between shippers. Any member of the public who had been contacted or who had heard about the operations could use the facilities without anything further being said or done. The qualifications imposed by the respondents were not true qualifications limiting or classifying a "group" but appeared to be requirements of convenience inserted for the line-haul carrier. They were not badges of classification.

Although soliciation of new customers was not conducted by the usual advertising media, nevertheless it did occur. Testimony was received that personal solicitation in the form of personal contacts and telephone calls by Mr. Winner and the former traffic manager of Allied Pool was made to many shippers over the period extending from January, 1955, to December, 1957. The lack of protest to the telephone directory's listing of the respondents as "freight forwarders" year after year cannot be disregarded. Nor can we overlook the implication of the cautionary language used at the bottom of Allied Pool and Allied Foods' invoices to shippers (Exhibits 8, 13, 14); the inserted warning refers to a General Order applicable to common carriers. We are satisfied from the foregoing facts that

there has been a sufficient "holding out" of the respondents' transportation facilities to the public.

Nor does the evidence justify a finding that this was a nonprofit enterprise. When the respondents permitted public shippers to join their activity, they were operating for hire (San Diego Shippers Association, et al). The profit came from the "spread" revenue as well as "inclusion charge" income. Furthermore, in this matter there exists a set of facts, not found in the San Diego case, which supplement our conclusion that the operations were engaged in for profit.

The burden of proving that the exemption applies lies with the party claiming it. The respondents claim it here, yet their evidence falls far short of showing that Allied Pool is a separate entity from the profit-making venture of Allied Foods. A separate name, an apparent separate set of accounts and an allocation of expenses are the only distinguishing characteristics setting apart Allied Pool. Everything else points to the fact that Allied Foods is supporting and receiving the benefits from these consolidation activities. And such benefits constitute profits within the meaning of Section 220. Allied Foods pays the expenses and absorbs a loss, if any. No refunds of any excess are made to the shippers. The bookkeeping entries made to adjust the profit cannot cover the fact that the evidence shows a profit is being made on any given month. We are far from convinced that Allied Foods and Allied Pool are not one and the same; thus, it follows that Allied Foods and Mr. Al Winner are presently conducting the consolidation operations in question.

The respondents also have failed to show that the second part of the exemption applies to them. They are not "shipper's agent" but instead provide for a complete and through truck service at through rates from Los Angeles to San Francisco or Sacramento (San Diego Shippers Association, et al). They served the general public

and assumed the burden of providing the entire and safe transportation. The fact that the public served was limited in territorial scope is not controlling. Under such circumstances said second exemption cannot apply and the reasons set forth in the San Diego case govern. Their attempt to disclaim their liability is not controlling for the law will, nevertheless, imply it when their operations fit into the freight forwarder definition. Furthermore, as the line-hauler's trucks usually make split deliveries at the northern California points, the consolidation does not appear to come within the definition of a pool-car shipment.[7/]

Upon consideration of all the evidence, we hereby find that:

(1) That respondent Allied Foods, a corporation, has, subsequent to January, 1955, commenced and now is, operating under the name and stead of "Allied Pool" as a freight forwarder, as defined by Section 220 of the Public Utilities Code, and as a common carrier as defined in Section 211(a) of the Public Utilities Code, for compensation, undertaking the collection and shipment of property of others, and, as consignor, shipping and arranging to ship the same over the line of a common carrier at the tariff rates of said carrier between points in this state, and that said service was and is performed for the public, or such portion thereof as can and chooses to utilize the same; and said respondent has not secured from the Public Utilities Commission and does not hold a certificate that public convenience and necessity require such operation.

(2) That respondents Al Winner and California Big Ten Cooperative and Allied Pool are likewise found to be operating as freight forwarders as hereinabove set forth.

7/ "A pool car shipment consists of a consolidated lot of small shipments intended for different consignees and forwarded as a single carload shipment to a carrier at a destination point for unloading and distribution of the component parts to the ultimate consignees. Shipper thereby is charged a lesser freight than if component parts were shipped as separate items." Draymen's Associations of S.F. (1958) 56 PUC 138.

All respondents will be ordered to cease and desist from the operation of this service unless and until they shall obtain a certificate of public convenience and necessity to operate as a freight forwarder. This order includes California Big Ten Cooperative even though its corporate existence is presently suspended for non-payment of taxes; a future payment of said taxes by this respondent could restore its corporate life and reactivate its operations.

An order of the Commission directing that an operation cease and desist is in its legal effect the same as an injunction by a court. Contempt of the Commission arises when there is a violation of such order. The California Constitution and the Public Utilities Act vest the Commission with power and authority to punish for contempt in the same manner and to the same extent as courts of record.

O R D E R

Public hearings having been held in the above-entitled proceeding, evidence having been received, the matter having been duly submitted, and the Commission now being fully advised,

IT IS HEREBY ORDERED:

(1) That said respondent Allied Foods, also known as Allied Pool for the purpose of this order, shall cease and desist from engaging directly or indirectly, or by any subterfuge or device, in any or all of said operations as a freight forwarder unless and until it shall first secure from this Commission a certificate that public convenience and necessity require the same.

(2) That said respondent Al Winner shall cease and desist from engaging directly or indirectly under the name of Allied Foods, Allied Pool, California Big Ten Cooperative, or any other name, or by any subterfuge or device, in any or all of said operations, as delineated in the opinion preceding this order, as a freight forwarder,

unless and until he shall first secure from this Commission a certificate that public convenience and necessity require the same.

(3) That said respondent California Big Ten Cooperative shall cease and desist from engaging directly or indirectly, or by any subterfuge or device, in any or all of said operations as a freight forwarder unless and until it shall first secure from this Commission a certificate that public convenience and necessity require the same.

The Secretary of the Commission is directed to cause personal service of a certified copy of this decision to be made upon said respondents.

This order shall become effective twenty days from and after the date of such service.

Dated at San Francisco, California, this 23rd day of September, 1958.

Lyn Fox
President

Commissioners