

Decision No. 57712

ORIGINAL

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 PAJARO VALLEY COLD STORAGE COMPANY, a corporation.

Case No. 6080

Wyckoff, Parker, Boyle and Pope, by Phillip T. Boyle and Harry F. Brauer, for respondent.
A. B. Christiansen for Pacific States Cold Storage Warehousemen's Association, interested party.
Hector Anninos and George Kataoka, for the Commission staff.

O P I N I O N

On April 1, 1958, the Commission issued an order instituting an investigation on its own motion into the operations, rates and practices of the Pajaro Valley Cold Storage Company, a corporation.

A public hearing was held on July 24, 1958, in Watsonville, at which time the matter was submitted subject to the filing of briefs. These briefs have now been filed and the matter is ready for decision.

Purposes

The order of investigation was instituted to determine whether the respondent may be operating as a public utility without having filed schedules of rates and charges as required by Sections 489 and 2555 of the Public Utilities Code, and for other purposes.

Facts

Based upon the evidence introduced into the record at the time of the hearing of this matter, the Commission hereby finds the

following facts to exist:

1. The Pajaro Valley Cold Storage Company was originally organized as a cooperative in 1919. When first formed the company had 18 members. These first 18 members were all apple growers in the Pajaro Valley. At the present time the company has 27 members. This increase in membership has resulted because of the inheritance by relatives of fractional interests originally owned by deceased members. At the present time all of the recipients of fractional interests in memberships are not apple producers in their own right. At the present time 14 of the 27 members are apple producers, the remaining 13 are not. However, because of fractional interests in memberships the 14 producing members constitute over half of the entire membership of the company.

2. The company owns and operates a warehouse in Watsonville. This warehouse provides for two types of storage of food commodities, cold and frozen. The warehouse has 11 different storage rooms, of which all can be used for cold storage but of which only 5 rooms can be used for frozen storage. The entire warehouse has storage capacity of between 560,000 and 600,000 apple boxes.^{1/} Of this total storage approximately 260,000 apple boxes of storage space can be devoted to frozen storage space. The company employs 10 persons. These consist of 4 warehousemen, 4 engineers, a bookkeeper and a general manager.

3. During the month of June of every year the members of the company convene for the purpose of determining how much storage space is to be allocated to cold storage and how much storage space is to be allocated to frozen storage. This allocation is based upon the needs of the members for cold storage space for the purpose

^{1/} Storage space in cold storage warehouses in the Watsonville area is measured in terms of standardized apple boxes.

of storing the apples that the members produce. In making this allocation numerous variables are taken into consideration, such as the expected size of the apple crop for that year, market conditions and other economic factors. When it is determined how much space is to be allocated for cold storage, the balance is used for frozen storage.

4. After the amount of storage space that is to be allocated to cold storage has been determined this space is then divided among the various members with each member receiving a portion of the space depending upon his fractional interest in the company. After the respective member's apple crop is harvested, the storage space allocated to that member is used to store his apples that are not otherwise destined to go directly to market. The apple harvesting season commences in the middle of September and is completed by the first of November at which time storage of apples in the warehouse reaches its peak. From the first of November until approximately the first of March of the following year, the apples in storage are removed periodically depending upon market conditions. In the late spring of the year the space allocated to cold storage is normally not utilized.

5. The members of the company who are not apple producers and, therefore, who do not utilize their portion of the share of storage space for the storage of their own apples, transfer their space to other members in need of additional space or to nonmembers who need cold storage space for apples. This transfer of space is brought about by the preparation and signing of the transfer order. This order is prepared by the company's general manager at the instruction of the member transferor and is signed by both the member transferor and the transferee. The transferor is paid directly whatever rental arrangement is agreed to between the transferor and

the transferee. However, upon the demand of the company, the transferee is required to pay directly to the company the amount of any assessments levied on the transferor by the company. The company does reserve the right to reject any transferee it considers undesirable. No such objection has been made in recent years. Producing members of the company likewise on occasion will transfer all or some of the cold storage space allocated to them to those persons who have purchased that member's apples, inasmuch as it is the custom in the locality that a producer of apples will sell whatever cold storage space he has available to the person to whom he sells the apples. For the year ended May 31, 1957, out of some 288,000 apple boxes of storage space allocated to members there was transferred some 233,000 boxes of storage space. Some of this space, however, was transferred to members as well as nonmembers. With respect to its cold storage space, the company has on occasion accepted apples for storage from other nonmembers. Apparently the company accepts these apples for storage because a member has requested it to do so. For the year ended May 31, 1957, there were six such nonmembers whose apples were stored. During this year the amount of apples stored for each of such nonmembers ranged from nine boxes to 3,696 boxes. The compensation for this storage, when received is paid directly to the company.

6. During part of the period of time within which apples are not stored in that portion of the warehouse allocated to cold storage, that entire portion allocated is rented to Libby, McNeill & Libby for the cold storage of pears. The pear season during which this space is rented commences approximately August 1 and continues through until the middle of September. The rent paid by Libby, McNeill & Libby for this storage space is paid directly to the

company and not to the individual members. Under the arrangement entered into between Libby, McNeill & Libby and the company, the former must pay for the entire space rented regardless of whether it is used or not. In several instances, Libby, McNeill & Libby has secured fruit from another canner to occupy space it did not use.

7. In placing the apples in the warehouse for storage, normally a certain amount of the space must be devoted to maintaining aisles and also a certain amount of space is maintained as a safety factor for insuring that sufficient space has been allocated to the individual members. In some circumstances apples can be stored in such a manner so as to eliminate the aisle space and the safety factor space. When this is accomplished the rent resulting from the use of the aisle space and the safety factor space is paid directly to the company. This aisle space and safety factor space when utilized is available both to members and to the nonmembers who are transferees of space from members.

8. Notwithstanding that during certain periods of the year the cold storage space is not completely utilized, the company has turned down offers to rent that space.

9. The balance of the total space available in the warehouse that is not allocated as cold storage space, is turned into frozen storage space. The amount of this frozen storage space will vary each year depending upon the amount of space allocated as cold storage space. During the year ending May 31, 1957, approximately two-fifths of respondent's over-all storage space was allocated to frozen storage.

10. At the present time commodities are stored in this frozen storage space by three frozen food processors. There is a business relationship between these three frozen food processors and various members of the company. These three food processors are the only ones allowed to deposit property in the frozen storage space.

In the past respondent had also received commodities from another food processor before it went out of business. The company has also accepted commodities for frozen storage from two competing frozen storage companies as an accommodation when the latter companies were filled.

11. Under their arrangements with the company these three frozen food processors can transfer commodities in storage to various other parties. By means of these transfers the company has stored in its frozen storage space commodities owned by up to 20 different persons or organizations during any one year. When one of the three frozen food processors deposits commodities in the frozen storage space it receives a memorandum of deposit from the company. When it desires to transfer all or a portion of such commodities to various transferees, it prepares instructions for transfer. The company then prepares a transfer slip which is given to the transferee. In some instances, instead of issuing a transfer slip the company will issue a nonnegotiable warehouse receipt to the transferee. This is done only at the transferee's request and is done for the purpose of allowing the transferee to use stored commodities as collateral for financing reasons. The normal procedure is for the transferees to pay for the storage of the commodities in the frozen storage space. This revenue is paid directly to the company and not to the individual members.

12. It was stipulated between the respondent and the Commission staff that the respondent is presently incorporated under the general corporation law. Respondent's Articles of Incorporation have been amended to provide that respondent is organized for profit.

13. Under its arrangements with Libby, McNeill & Libby the company requires that all of the commodities stored by Libby, McNeill & Libby will be removed if necessary at the commencement of the apple season.

14. The charges assessed by the company for the use of the frozen storage space is based upon the tariff of another local frozen storage warehouse. Based upon all of the evidence in the record, the Commission finds that the company has not filed tariffs with the Commission setting forth the rates and charges assessed by it for storage.

15. All of the members of the company pay assessments to the company to defray the costs of operating the warehouse. Such assessments have been paid by the members during all but three years of the company's existence. The revenue received by the company from Libby, McNeill & Libby, from the rental of the aisle and safety factor space, and from the rental of the frozen storage space is used to lower the members' assessments. At the present time the company has an operating deficit.

16. The company's name is listed in the classified section of the local telephone directory under the heading "Cold Storage Warehouses". This listing was not made at the request of the company and the company is not charged for such listing. The company also has distributed pencils, pens and paper matchbooks bearing its name.

17. The company's warehouse is served by a railroad spur track and approximately fifty to sixty railroad cars of frozen merchandise are shipped annually from the warehouse.

18. Individual members of the company who do not wish to use all of their space, will solicit for their own interests in order to obtain lessee's for the space allotted to them.

19. The Commission takes official notice that the population of the City of Watsonville is less than 150,000.

Statutes

In order to ascertain whether the respondent's warehouse operations constitute a public utility, it is first necessary to examine the statutes pertaining to the type of business activities which constitute public utilities. The statutory material governing the public utility status of warehouses is located in two different parts of the Public Utilities Code. One group of statutes is found

in the Public Utilities Act itself^{2/} and deals with warehousemen in general. The second group of statutes is found in the Food Warehousemen's Act^{3/} and deals exclusively with the storage of food commodities.

Public Utilities Act

That group of statutes in the Public Utilities Act dealing with warehousemen in general provide that certain warehousemen are public utilities and as such are regulated by the various provisions of the Act. In effect these warehousemen are regulated by the same rules as other public utilities except with respect to the provisions relating to the obtaining of certificates of public convenience and necessity. With respect to such certificates, Section 1051 provides that no warehouseman shall begin to operate in any city or city and county having a population of 150,000 or more without first obtaining a certificate from the Commission. However, warehousemen operating in cities having lower populations may do so without first obtaining a certificate.

For the purposes of the present investigation, the significant provisions in the Public Utilities Act are the definitions of "public utility" and "warehousemen".

"Public Utility" is defined in Section 216 of the Public Utilities Code, the pertinent part of which states:

"'Public Utility' includes every ... warehouseman ... where the service is performed for the public or any portion thereof."

"Warehouseman" is defined in Section 239 of the Code, as:

"239. (a) 'Warehouseman' includes:
'Every corporation or person owning, controlling, operating, or managing any building or structure in which property, other than liquid petroleum commodities in bulk, is regularly stored for compen-

^{2/} Part 1 of Division 1 of the Public Utilities Code.
^{3/} Chapter 1, Part 2 of Division 1 of the Public Utilities Code.

sation 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 property, other than liquid petroleum commodities in bulk, and other than a dock, wharf, or structure, owned, operated, controlled, or managed by a wharfinger.

"(b) Every corporation or person owning, controlling, operating, or managing any building, structure, or warehouse, in which merchandise, other than secondhand household goods or effects, and other than liquid petroleum commodities in bulk, 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, except warehouses conducted by any nonprofit, cooperative association or corporation which is engaged in the handling or marketing of the agricultural products of its members and warehouses conducted by the agents, individual or corporate, of such associations or corporations, while acting within the limitations imposed by law on their principals."

It is to be noted from these definitions that "public utility" includes every "warehouseman" where the service is performed for the public or any portion thereof. It is also to be noted that Section 239 sets forth two definitions for "warehouseman", one pertaining to the regular storage of commodities in connection with or to facilitate the transportation of property by a common carrier or vessel or the loading or unloading of property and the other pertaining to the regular storage of commodities for the public generally. It appears clear from these two sections that if the respondent is to be a public utility under the Public Utilities Act, it must first be a warehouseman as defined in the Act.^{4/} However, it must be decided whether Section 216 sets forth an additional requirement that must be met before a warehouseman as defined in either Subsection (a) or (b) of Section 239, becomes a public utility.

^{4/} It is clear that an enterprise may not be a public utility under Section 216 unless it falls within one of the enumerated classes of public utilities set forth in that section. Television Transmission v. Public Utilities Commission, 47 Cal 2d 82, 85 (1956).

With respect to the definition of "warehouseman" in subsection (b) of Section 239, it is noted that this definition uses the term "public generally" whereas the definition of "public utility" in Section 216 uses the phrase "public or any portion thereof". The phrase "public generally" is not defined in the Code. The phrase "public or any portion thereof" is, however. This latter phrase is defined in Section 207 as meaning the public generally or any limited portion of the public.^{5/} Since the term "public generally" is included within the term "public or any portion thereof", a person or organization that meets the requirement of regularly storing merchandise for the public generally as set out in subsection (b) of Section 239 automatically meets the requirement of performing a service for the public or any portion thereof as set out in Section 216.

With respect to the definition of "warehouseman" in subsection (a) of Section 239, it is noted that this definition does not use either the term "public generally" or "public or any portion thereof". It is clear, therefore, that a person or organization which comes within the definition of "warehouseman" set out in subsection (a) of Section 239, must meet the further requirement of serving the public or any portion thereof, in order to become a public utility under Section 216.

^{5/} Section 207 states: "'Public or any portion thereof' means the public generally, or any limited portion of the public, including a person, private corporation, municipality, or other political subdivision of the State, for which the service is performed or to which the commodity is delivered."

One further matter should be pointed out with respect to the definition of "warehouseman" set out in subsection (b) of Section 239 which is that there is excluded from that definition "warehouses conducted by any nonprofit, cooperative association or corporation which is engaged in the handling of marketing of the agricultural products of its members". The Commission notes from the record that while the respondent was originally organized as a nonprofit cooperative, its Articles of Incorporation were amended to provide that it is "organized for profit" and, therefore, it does not come within this exception. The Commission also notes that the respondent has not claimed that it comes within this exception.

Food Warehousemen's Act

The second group of statutes governing the regulation of warehouses are those found in the Food Warehousemen's Act and relate to the storage of food commodities. This Act provides that every food warehouseman doing business in the State is a public utility and is subject to the jurisdiction, control, and regulation of the Commission. The Act in effect prohibits food warehousemen from engaging in discriminatory practices and requires them to publish and file with the Commission tariffs setting forth their rates and charges which cannot be changed except by permission of the Commission. The Act does not require that food warehousemen obtain certificates of public convenience and necessity in order to operate. Inasmuch as the facts hereinabove found indicate that the respondent stores food commodities, this Act is pertinent to the present investigation.

Again the most important provision of the Act for the purposes of the present investigation, is the definition of "food warehouseman". Section 2508 of the Code defines this term as follows:

"2508. 'Food Warehousemen' includes every person, or corporation, their lessees, trustees, receivers or trustees appointed by any court whatsoever owning, controlling, operating, or managing any building, structure, warehouse, elevator, or plant in which food commodities, regularly received from the public generally, are stored for compensation, including cold storage plants and refrigerating plants, but not including private homes, hotels, restaurants, or exclusively retail establishments, or others not storing articles of food for other persons for compensation. Every person, or corporation

controlling, operating, or managing any building, structure, warehouse, elevator, or plant as aforesaid, is deemed to be engaged in the storage of food commodities within the meaning of this chapter."

Court Decisions

In addition to the foregoing statutory provisions pertaining to the public utility status of warehouses, examination must also be made of various California Supreme Court decisions relating to the question of when various businesses acquire public utility status. The Commission has found no decision of the California Supreme Court wherein the public utility status of warehouses was determined or any decisions which interpreted either Section 239 or Section 2508 of the Code.

The Supreme Court decisions have, however, laid down certain general rules relative to ascertaining whether certain property has acquired public utility status. It would appear from these decisions that before property can be held to acquire public utility status, it must have been devoted to the public use.^{6/} Further, that the test to be applied is whether or not there has been a holding out to the public or any limited portion thereof as contradistinguished from a holding out to serve only particular individuals.^{7/} However, dedication to a portion of the public will suffice.^{8/} Further, that the dedication of property to a public use is never presumed without evidence of unequivocal intention^{9/} which in turn can be shown by evidence that the property or service is available to the public and not just to privileged individuals.^{10/} The Supreme Court of this State has held that "the existence of a public utility within the meaning of the law is in its essence a pure question of fact ..."
(Western Canal Co. v. Railroad Commission 216 Cal. 639,645)

^{6/} Story v. Richardson, 186 Cal. 162 (1921)

^{7/} Van Hoosear v. Railroad Commission 184 Cal. 553 (1920)

^{8/} Commercial Communications v. Public Utilities Commission
50 AC 498 (1958)

^{9/} Allen v. Railroad Commission, 179 Cal. 68 (1918)

^{10/} Alves v. Public Utilities Commission, 41 Cal. 2d 344 (1953)

An examination of the phrases "regularly stored for the public generally" and "regularly received from the public generally" in the light of the principles set forth in these Supreme Court decisions indicates that the statutory definitions of "warehouseman" in subsection (b) of Section 239 and "food warehouseman" in Section 2508 apply to a great extent the same tests laid down by the Supreme Court for determining when there has been a devotion or dedication of property to public use. Likewise, the phrase "service to the public or any portion thereof" as used in Section 216 would seem to call for essentially these same tests.

Analysis of Facts

In view of the foregoing discussion, it would seem that any determination of respondent's status as a public utility requires an examination of all of the facts relative to respondent's operations with a view to ascertaining whether respondent has held itself out to serve the public generally or just selected individuals.

It would appear that the logical approach is to discuss first the cold storage phase of respondent's operation and then the frozen storage phase.

With respect to the cold storage phase of respondent's operation, the first point to be brought out is that there is no evidence that any of the commodities stored in the cold storage space were stored there in connection with or to facilitate the transportation of property by a common carrier or vessel or of loading or unloading property. Therefore, the definition of "warehouseman" set forth in subsection (a) of Section 239 is not applicable to the cold storage phase of respondent's operation. It follows then that with respect to this facet of its operation, if respondent is a "warehouseman" within the provisions of the Public Utilities

Act at all, it is so because of the definition set forth in subparagraph (b) of Section 239 relating to storage for the public generally.

Considering this phase of respondent's operation, then, the evidence shows that a large portion of the members of the company does not produce apples and that some are not even residents of this country; that these members rent their allotted cold storage space, and that while the rent is normally paid directly to the renting member, the company can upon demand require the lessee to pay directly to the company the amount of any assessments that may become due from the member lessor. The evidence further shows that the company rents the cold storage aisle space and the safety factor space; that this space is rented not only to members of the company, but also to nonmembers who have acquired other space; that the company itself receives the rental from this space and that this rental goes to reduce the assessments of the members. The evidence further shows that during a portion of the year when apples are not stored in the cold storage space, the company stores pears in that space for a nonmember of the company and that the revenue received for this storage is paid directly to the company. It is clear from the evidence that to a substantial extent, the cold storage space is being utilized by other than members of the company. Based upon all of the evidence in the record the Commission finds and concludes that with respect to the storage of commodities in its cold storage space by nonmembers of the company, the company is regularly storing commodities for the public generally and that it is regularly receiving food commodities from the public generally for storage.

Turning then to the frozen storage phase of respondent's operation, the first question to be decided is whether the fact that respondent's warehouse is located on a railroad spur track and that respondent ships fifty to sixty railroad cars of frozen merchandise from its warehouse results in respondent coming within the definition of "warehouseman" set forth in subsection (a) of Section 239 in that it stores commodities in connection with or to facilitate the transportation of property by a common carrier or the loading or unloading of property. It would appear, and the Commission so concludes that the Legislature in enacting this definition, intended that there be an additional relationship between the storage of property and its transportation over and above the mere fact that property was shipped to or from a warehouse by means of a common carrier, before the requirements of this definition are met. Any such additional relationship is not shown by the evidence. The evidence indicates, then, that with respect to the frozen facet of its operation, if respondent is a "warehouseman" within the provisions of the Public Utilities Act at all, it is so because of the definition set forth in subparagraph (b) of Section 239 relating to storage for the public generally.

Considering this phase of its operation, the evidence shows that respondent receives commodities from three food processors for storage in its frozen storage space and that respondent had received commodities from a fourth food processor, before it went out of business, for storage in its frozen storage space. The evidence also shows that these three food processors transfer certain

of the commodities stored by them to other parties while still in storage and that these other parties pay the charges for storage directly to the respondent. It is clear from this that the respondent is holding itself out to store for as many parties as might become transferees from the three food processors.

After an examination of all of the evidence in the record the Commission hereby finds and concludes that with respect to its frozen storage operation, respondent is regularly storing merchandise for the public generally for compensation and is regularly receiving food commodities from the public generally for storage for compensation.

Conclusions

Based upon all of the evidence of record, the Commission hereby finds and concludes that the respondent is a "warehouseman" as defined in Section 239 of the Public Utilities Code and a "food warehouseman" as defined in Section 2508 of the Code and that, therefore, respondent is a public utility pursuant to Sections 216 and 2507 of the Code.

Motions and Petitions

During the course of the hearing, a motion was made by the Commission staff to strike certain testimony from the record. This motion is hereby denied.

The respondent has filed a petition for a proposed report. This petition is hereby denied.

O R D E R

A public hearing having been held in the above-entitled matter and the Commission being fully informed therein,

IT IS ORDERED:

1. That the Pajaro Valley Cold Storage Company shall forthwith file with this Commission the necessary tariff schedules showing all rates and charges assessed by it as required by Sections 489 and 2555 of the Code and shall comply with all other pertinent provisions of the Public Utilities Code and the rules and regulations of this Commission.

2. The Secretary of the Commission is directed to cause personal service of this order to be made upon the Pajaro Valley Cold Storage Company and this order shall be effective twenty days after the completion of such service.

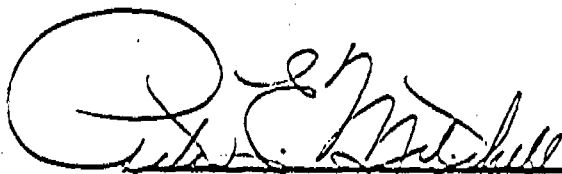
Dated at Los Angeles, California, this 9th day of December, 1958.

[Signature]
President
[Signature]
[Signature]
[Signature]
Commissioners

I dissent.

After a careful review of the evidence in this case, I cannot find and conclude that this Respondent has unequivocally dedicated its property to the public use within the meaning of the rules of law established by the Supreme Court of this State.

While it is true that isolated segments of the evidence could be said to point to public utility status, when the entire evidence in connection with the history of the Respondent is considered, it is my opinion that public utility status has not been shown.


Peter E. Mitchell, Commissioner