

Decision No. \_\_\_\_\_

**60446**

**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 CHARLES W. )  
CARTER COMPANY, doing business as )  
AUTOMOTIVE WAREHOUSE CO. and )  
AUTOMOTIVE AND INDUSTRIAL WARE- )  
HOUSE CO. )

Case No. 6083

Loveless, Schauer & Clarke, by Richard  
Schauer and Emmet D. Hurley, Jr.,  
for respondent.  
William A. Sims, for Weber, Wright & Sims;  
W. Newton Hall, for Walker Manufactur-  
ing Company of Wisconsin; John L.  
Milligan, for M. H. Klinger Company,  
interested parties.  
Hugh N. Orr, for the Commission staff.

O P I N I O N

This matter is on rehearing of an investigation on  
the Commission's own motion to determine whether respondent  
is a warehouseman within the definition of Public Utilities  
Code Section 239 and subject to the jurisdiction of this  
Commission under Section 216 of that code and whether re-  
spondent has violated Public Utilities Code Sections 1051 and

489 by failing to secure a certificate of public convenience and necessity and failing to file requisite tariffs.

The rehearing was held in Los Angeles on June 9, 11, 12 and July 6, 1959 before Commissioner C. Lyn Fox and Examiner Donald B. Jarvis.

The Charles W. Carter Company is a California corporation. It does business under its own name as an automotive parts distributor. The automotive parts distributor business is located at 2221 East Washington Boulevard, Los Angeles, California. When the Carter Company conducts operations as an automotive parts distributor it purchases automotive parts from manufacturers and accessories at substantial discount and resells these parts and accessories to jobbers, dealers and retailers at lesser discounts. We are not here concerned with these operations because goods stored at the Washington Boulevard address are owned by the Carter Company. No authority is conferred upon this Commission by the constitution or laws of this state to regulate the private storage of goods by the owner thereof.

The Order Instituting Investigation was filed on April 8, 1958. At that time, and at the time of the original hearing, the Carter Company was doing business at 1341 South Hope Street, Los Angeles, California under the name of Automotive and Industrial Warehouse Co., and it also did business at 1406 South Grand Avenue, Los Angeles, California under the name of Automotive Warehouse Co. At the time of the rehearing the Carter Company was in the process of discontinuing its operations at the South Hope Street location but had not yet done so.

Both the Automotive and Industrial Warehouse and the Automotive Warehouse are listed in the classified section of the Los Angeles telephone directory under the heading of "Warehouses - Private." Their representatives attend automotive trade conventions in part for the purpose of securing additional business. At the time the Order Instituting Investigation was filed the Automotive and Industrial Warehouse and the Automotive Warehouse had between them a total of 47 accounts. At the time of rehearing the total number of accounts held by these warehouses was 23.

The warehouses had contracts with each of these accounts. Some of the contracts were written, others were oral. The terms of many of these contracts were substantially changed after the Order Instituting Investigation was filed. Each of the contracts provides or provided that the warehouse in question be compensated by receiving a commission calculated in terms of a percentage of net sales of merchandise shipped from the warehouse. These sales, in the main, are made by salesmen of the various manufacturers served, although some sales are made by the Carter Company and its two subsidiaries.

The commissions varied from 2 percent to 7 percent. Some of the contracts provide or provided for a guaranteed minimum commission per month or per year. The contracts also provide or provided for a charge of \$2.00 or \$3.00 per man-hour for services not included in the commission. Each of the contracts has or had a 30-day termination provision which could be exercised by the warehouse or storer.

Prior to the Order Instituting Investigation the Automotive and Industrial and the Automotive warehouses handled items which were not automotive. The handling of these items has been discontinued.

The practices of the Automotive and Industrial and the Automotive warehouses both prior to and after the Order Instituting Investigation have been fairly consonant. The manufacturers who have contracts with the warehouses ship their merchandise to the warehouse involved. One or more of the warehouse's personnel become acquainted with the specific products held at the warehouse for the manufacturer, together with catalogues and price information furnished by the manufacturer. The manufacturer supplies the warehouse with a list of accredited customers to whom goods may be shipped on either oral or written orders. The customers of the warehouse are jobbers or wholesalers. The warehouse also supplies to the manufacturer credit information with respect to a particular wholesaler or jobber so that the manufacturer can determine whether he should be included on the list of accredited customers. Sales representatives for the Carter Company, who act in part for the warehouses, have authority to cause the delivery of goods to new customers subject to the eventual approval of the new customer by the manufacturer.

When a customer on the "accredited list" places an order, the warehouse ships the merchandise in the name of the manufacturer.

On occasion the warehouse prepays the freight on the shipment to the customer.

The warehouses handle certain items which are individually packed by the manufacturer and when the warehouses fill an order for one of these items it is reshipped in the original package. In many instances manufacturers ship to the warehouses packages containing a quantity of a particular item and when the warehouses fill orders for one or more of these items it is necessary to break bulk. At least 50 percent of the orders filled by the warehouses require the breaking of bulk. No extra charge is made for this service.

An executive of the companies testified that the warehouses will not handle automotive lines which compete with those of manufacturers with whom they have contracts. They will not enter into contracts with manufacturers who, in their opinion are disreputable or who have cheap or shoddy merchandise.

The warehouses, at cost, rent office space and provide a switchboard and telephone answering service to representatives of some of the manufacturers who have contracts with them. In some instances personnel of the warehouses or Carter Company assist distant manufacturers with the collection of bills.

On occasion the warehouses act as warranty agents for some of the manufacturers. They exchange or repair defective goods. Also, some items in the automotive trade are sold with the proviso that the old part being replaced be returned to the manufacturer so that he can rebuild and resell it. These old parts are called cores. The warehouses are authorized to receive cores for certain manufacturers. The warehouses permit the manufacturers to borrow and return items to inventory at no extra charge.

The vice president and general manager of the Carter Company, who is in charge of the warehouses, testified that the extra hourly labor charge provided for in the contracts with manufacturers had not been collected during the three years he has supervised the operations of the warehouses.

A monthly bill is rendered to each manufacturer for items not included in the commission such as office rent, telephone and telegraph charges, parcel post charges, prepayment of freight and other miscellaneous items. These items are billed at cost.

The Commission takes official notice that the population of the City of Los Angeles is greater than 150,000. It is conceded that neither the Charles W. Carter Company, nor the Automotive and Industrial Warehouse Co., nor the Automotive Warehouse Co. holds a certificate of public convenience and necessity under Public Utilities Code Section 1051 to operate as a warehouseman. None of these companies has on file with this Commission a tariff required by Public Utilities Code Section 489. Thus, the key question in this proceeding is whether the Charles W. Carter Company, doing business as Automotive and Industrial Warehouse Co. and the Automotive Warehouse Co., is a warehouseman as defined in Section 239 of the Public Utilities Code. If it is not a warehouseman as defined in that section no certificate or tariff is required. If it is a warehouseman as so defined the company is violating law and an appropriate order should be entered by this Commission.

The pertinent portion of Section 239 is as follows:

"239. (a) 'Warehouseman' includes: ...

"(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."

The Automotive and Industrial and the Automotive warehouses receive and hold goods for manufacturers. The Carter Company takes the position that this service is not storage for compensation as defined in Section 239(o). It is alleged that a commission is received by the warehouses only after a sale of merchandise and that storage is an incidental factor along with other factors which occur in the process of making a sale. Therefore, the commissions received by the warehouses are based on sales and not storage. On the other hand there are instances where a contract between a manufacturer and one of the warehouses calls for a guaranteed minimum commission and to that extent compensation is not wholly dependent on sales. It is also true, however, that in the instances where a contract does not call for a guaranteed minimum commission, no compensation is received by the warehouse until a sale is made.

It may sometimes be extremely difficult to determine, from a given set of facts, whether, in the case of a business relationship involving numerous and perhaps unusual types of services, including the storage of goods, such services are merely incidental to the primary purpose of engaging in public utility warehouse operations, or whether the storage of goods is an incidental, though essential element of a nonutility operation. In such cases, a regulatory commission has an extremely grave responsibility to avoid the possible destruction of a legitimate business enterprise through erroneous

findings of fact which result in an unlawful extension of regulatory authority.

The record is replete with the undisputed testimony that respondent provides a comprehensive service on a commission basis and while storage is involved in the service rendered, it cannot be said to be the basic service. On the contrary, it is one of a number of services which range from maintenance of inventory, packaging, shipping, sales efforts, collection of bills and providing credit information on prospective customers. Although a public utility warehouse frequently may offer some of the services rendered by respondent, such services are distinct and separate from the basic service of storage, and additional charges are levied therefor; insofar as public utility warehouses are concerned, such auxiliary services may be said to be incidental to the basic service of storage. In contrast, the storage provided by respondent as a part of its comprehensive service may be said to be incidental to the over-all service rendered; hence it cannot be said that the business as conducted by respondent conforms to the definition of a warehouseman in Section 239. The evidence is clear, also, that respondent limits his clients to manufacturers of noncompetitive lines and refuses to serve clients purveying inferior merchandise, and thus does not hold itself out to serve the public generally and cannot be said to be a warehouseman as defined in Section 239.

Based upon the foregoing, the Commission is of the opinion and finds that the Automotive and Industrial Warehouse Co. and the Automotive Warehouse Co. are not public utility warehouses and have not been illegally operating as warehousemen.



O R D E R

A public hearing having been held and based upon the evidence therein adduced,

IT IS ORDERED that the investigation herein instituted upon the Commission's own motion be terminated.

The effective date of this order shall be twenty days after the date hereof.

Dated at San Francisco, California, this 26<sup>th</sup> day of July, 1960.

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President

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Commissioners

Commissioner Everett C. McKeage, being necessarily absent, did not participate in the disposition of this proceeding.

~~I dissent.  
Peter E. Mitchell, Commissioner~~

I DISSENT.

In my opinion, the respondent is engaged in public warehousing in addition to his other activities. The fact that he furnishes a so-called "package deal" does not militate against his being engaged in public warehousing. The contention of the respondent that he has not dedicated his property and services to a public use is not well taken. The respondent performs public warehouse services for that segment of the public which he holds himself out to serve. It is elementary that a public utility does not have to serve the entire public -- only that segment of the public which he holds himself out to serve. If we are to follow a rule that an entity may avoid public utility status by selecting only the good accounts and rejecting the unprofitable ones or those accounts which are undesirable, we must admit that an entity may profit by its own misconduct. In other words, there would be a premium upon refusal to perform a public duty.

I interpret Section 239 (b) to require the following tests:

Warehouse - - - - in which merchandise is regularly  
stored - - - - for the public generally - - - - for  
compensation.

The facts in this case, as deduced by the evidence, show that:

- (a) merchandise is regularly stored;
- (b) for the public generally;
- (c) for compensation.

A close evaluation of the evidence indicates that "storage" is more than incidental, even though included in the so-called "package deal."



Peter E. Mitchell, Commissioner