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ORIGINAL

Decision No. 60846

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Investigation on the Commission's own motion into the operations, rates and practices of Estelle M. Walters, also known as Estelle (Mrs. Everett E.) Henning, doing business as H. G. WALTERS WAREHOUSE.	)))))))	Case No. 6290

Marquam C. George, for respondent.

Sam R. Choate, for California Warehousemen's Association, interested party.

Hugh N. Orr, for the Commission staff.

O P I N I O N

On June 23, 1959, the Commission issued an order instituting an investigation on its own motion into the operations and practices of Estelle M. Walters, also known as Estelle Henning and Mrs. Everett E. Henning, doing business as H. G. Walters Warehouse (hereinafter referred to as respondent) for the purpose of determining:

(1) Whether respondent is operating as a public utility within the meaning of Sections 216, 239, 2507 or 2508 of the Public Utilities Code.

(2) Whether respondent has violated Section 1051 by failing to secure a certificate of public convenience and necessity or to operate under tariffs and schedules lawfully on file with the Commission.

(3) Whether respondent has violated Sections 489, 2551 or 2555 of the Public Utilities Code by failing to file and publish schedules of her rates and charges in accordance with the requirements of said sections, and in accordance with General Order No. 61 of the Public Utilities Commission.

Public hearings were held before Examiner James Mastoris on November 17 and December 7, 1959, and on February 16 and 26, 1960, at San Francisco. An additional day of hearing was held before Examiner Thomas E. Daly on July 7, 1960, at San Francisco on which date the matter was submitted.

Respondent owns and operates a warehouse located at 1301 Sansome Street, San Francisco. The four-story building was constructed in 1910 and consists of 32,000 square feet of space, including 7,000 square feet of office space.

The Commission's staff was forced to take an indirect approach to its investigation due to the fact that respondent refused the staff access to her business records on the ground that she operated a private warehouse over which the Commission has no jurisdiction. She produced certain requested records pursuant to a subpoena duces tecum and testified under the adverse witness rule.

In the presentation of its case the staff introduced exhibits reflecting rail car shipments made to and from respondent's place of business by Southern Pacific Company, The Atchison, Topeka and Santa Fe Railway Company and Western Pacific Railroad. The rail cars were spotted by the State Belt Railroad on a spur track located near respondent's warehouse. Exhibits were also introduced showing truck shipments transported for respondent by Colma Drayage, Inc. The exhibits covered the period from January 1958 through February 1959 and indicate that respondent did business with approximately fifty different companies dealing in confectionery supplies, candies, canned goods and certain miscellaneous commodities. The record does not clearly show, however, that all carload shipments delivered to respondent were placed in storage, for in many instances distribution was made directly from the rail car by Colma Drayage, Inc.

Respondent testified that her deceased husband H. G. Walters was engaged in the popcorn and candy business. In 1946, he purchased the property located at 1301 Sansome Street, from the Haslett Warehouse Company for the purpose of using it as a manufacturing plant. It was so used until 1951 when Mr. Walters passed away. In 1949 a sixteen-room penthouse was added and serves as the home of respondent.

Following the death of her husband, respondent leased the building to C&H Sugar Company. Upon the termination of the lease in 1953 she leased a floor of space to the Walter Baker Division, General Foods Company for a year and a half period. This marked the beginning of respondent's warehouse business. Since that time her operations have increased to the point where she handles approximately thirty warehouse accounts. Respondent employs two women in the office. Two warehousemen are employed full time; however, they are hired and paid by Colma Drayage, Inc., which performs respondent's truck transportation service.

Respondent attributes her start and subsequent business success to her home located on the top of the warehouse building. After her husband's death, food brokers, who were both business as well as social friends, upon visiting the penthouse would see the available warehouse and during the course of the evening ask for space for themselves or for recommended friends. She assertedly has never held her services out to the public and does not wish to operate as a public warehouse. The sign on the building as well as her telephone listing, stationery and business cards contain the words "Private-Warehouse". She stated that she has consistently refused space to strangers on the average of two a month and has accepted only accounts from friends or those recommended by friends. The terms of storage are for the most part reduced to writing in the form of letters. Because her home is located on top of the building she has tried to limit the type of commodity stored and has eliminated those commodities that would be offensive or hazardous.

The question to be determined is whether the warehouse operations conducted by respondent come within the meaning of Sections 239(b) and 2508 of the Public Utilities Code which provide as follows:

Section 239(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, individuals or corporate, of such associations or corporations, which acting within the limitations imposed by law on their principals."

Section 2508: "'Food warehouseman' 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."

The record clearly shows that respondent not only operates a warehouse for compensation, but that the major portion of her business consists in the regular storage of food goods. If the service is offered to the public generally respondent then falls within the meaning of Sections 239(b) and 2508 and is then subject to the jurisdiction of this Commission.

The Supreme Court of this State has established the rule that dedication of property to a public use is a prerequisite to finding public utility status and that such dedication is never presumed but must be shown by evidence of unequivocal intention to dedicate which, in turn, can be shown by evidence that the property or service is available to the public and not just privileged individuals.

If we are to draw any conclusion as to respondent's intention with respect to dedication we must look to her course of conduct. The uncontroverted evidence is to the effect that she has caused the words "Private Warehouse" to appear on the outside of her building,

on her stationery, on her business cards and in her telephone listing, accounts are never solicited, but on the contrary are refused on the average of two a month; new accounts are accepted on the basis of friendship or upon the recommendation of a friend; the contractual terms of each account are usually reduced to writing in the form of letters; and storage is limited to commodities that are neither offensive nor hazardous to respondent's home life.

Under the rule laid down by the Supreme Court of this State it is apparent that these are not factors that indicate an unequivocal intention to dedicate one's property to a public use, (Pajaro Valley Cold Storage Co. v. Public Util. Com., 54 A.C. 248). While such rule is not presently followed by the Supreme Court of the United States it having abandoned the dedication theory, nevertheless, this Commission is bound by said rule, the same being the law as announced by the Supreme Court of California. As a result, the Commission finds and concludes that respondent's warehouse operations do not fall within the meaning of Sections 239(b) and 2508 of the Public Utilities Code and are therefore not within the jurisdiction of this Commission.

O R D E R

An investigation having been instituted, a public hearing having been held and the Commission being informed in the premises,

IT IS ORDERED that the investigation herein instituted on the Commission's own motion is hereby discontinued.

The effective date of this order shall be the date hereof.

Dated at San Francisco, California, this 4th day of October, 1960.

President

Commissioners

I dissent from the majority opinion. Under any theory, whether it be that of the United States Supreme Court or the California State Supreme Court, the respondent is operating a public warehouse as defined by the Public Utilities Code of the State of California.

While it is understandable that the majority opinion could not possibly recite all the evidence adduced at the hearing, there are certain facts not contained therein which are significant and should be noted:

1. The record reveals the respondent's husband, upon purchasing the warehouse, inquired as to the possibility of obtaining a certificate as a public warehouse. He was informed there was no chance (Tr. 389). Further, the respondent, Mrs. Everett E. Henning (nee Walters), upon the death of her husband in 1951, contacted the California Public Utilities Commission to obtain a public warehouse certificate and was told one had not been issued for twenty years and it was doubted that she could secure one (Tr. 390). The respondent also testified that she had opportunities to purchase a certificate costing far more than the business could ever return to her pricewise (Tr. 390). The respondent stated that notwithstanding the above circumstances, she entered the warehouse storage business in 1952.

2. The transcript shows that from the period January, 1958, through March, 1959, the Walters' Warehouse handled approximately 83 separate items (primarily food) charged to 50 different accounts.

3. The respondent effectively competed with public warehouses and charged rates below those of a regulated warehouse. A letter dated April 1, 1957, directed to the Franklin Baker Division of the General Foods Corporation, signed by H. G. Walters Co., in the next to last paragraph states: "Upon examination, you will note that some of our existing rates are less than half those presently charged by public warehouses. In view of the above rates effective in public warehouses, we do not feel that our proposed rates are very far out of line...." (Exh. 24).

4. There is evidence that the respondent has stored goods as overflow from a public utility warehouse (Tr. 393); that customers have transferred goods from public warehouses to the H. G. Walters Warehouse.

In essence then, we find the respondent enjoys all the benefits of a business free from the regulation so mandatory for her competitors, and in addition, suffers none of the disabilities. If, as this Commission stated in the Carter Case (Case No. 6083, Decision No. 60446, July 26, 1960), 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, how much more serious is their duty to avoid the destruction of legitimate regulated business enterprises through the adoption of an impractical and unworkable theory which allows a competitive enterprise to charge unregulated rates at less than half those charged by the regulated enterprises.

The majority opinion implies that were we to follow the United States Supreme Court, a different finding might be reached. Since Nebbia vs New York, 291 U.S. 502, the United States Supreme Court has looked to see whether a business is "affected with a public interest" to determine regulation. I can agree with the majority implication that the respondent's business is so affected. I cannot agree with the majority opinion in their interpretation of the decisions of our State Supreme Court. Whether you adhere to the "affected with a public interest" theory of the United States Supreme Court, or the "dedicated to a public use, generally" theory of the California Supreme Court, my conclusion is the same.

Inasmuch as the majority opinion feels bound to their interpretation of the "dedication" theory, it would be well to review the decisions of the California Supreme Court and set forth what we believe to be the expressions of the Court on the law.

The majority opinion contains the pertinent sections of the Public Utilities Code, Sections 239 (b) and 2508. Further, it concedes that the respondent operates a warehouse for compensation and that a major portion of her business is the regular storage of food goods. There remains only the issue of whether the service is offered to the public generally. The majority opinion concludes

apparently that this means service to the whole world, the universe; that any restriction would void the dedication. Yet, our State Supreme Court has not so interpreted this provision. Nor do I.

The Allen Case, 179 Cal 68, stated that "dedication to the public is never presumed without evidence of unequivocal intention that the property is available to the public and not just to privileged individuals" (underscore added). Apparently, the majority decision herein rests upon their interpretation of this case. In the Allen Case, the Court appeared more concerned with the problem of intent than with formulating a definition of "the public generally". This was done later. In California Water & Tel vs Public Utilities Commission, 51 Cal (2)478 (1959), the Supreme Court said that if there is any evidence before the Commission that could support its finding of dedication, such finding will not be disturbed. Also, the Court found that service only to a restricted class constituted dedication of service to the public. Similarly, Commercial Communications, Inc., vs Public Utilities Commission, 50 Cal (2)512 (1958), the Court held that dedication to a portion of the public is sufficient.

If I were to accept the majority opinion, although hundreds of the public were served by a utility, mere refusal to serve two members a month would divorce the business from regulation. Obviously, such a construction is not feasible. No business enterprise can reasonably be expected to serve every member of the public and handle every commodity. The population of the United States is in the neighborhood of 180,000,000.

What then is the test? How can we determine "dedication to the public generally"? Service or holding out of service to a certain segment of the public or genus in the main or without exact limitation is sufficient to constitute dedication. Certainly, the California Water & Tel case (supra) and the Commercial Communications, Inc., case (supra) are consonant with such rationale.

In the instant case, the respondent contends she was unable to secure a public warehouse certificate. She thereupon regularly stores food goods and has over 50 accounts. No successful business entrepeneur today would accept a client without some knowledge of the client's financial stability, his reliability, his

standing in the community. Nor does the respondent. She will accept only clients who are vouchsafed by her acquaintances. Does this indicate a restriction by class or commodity? Or, isn't it rather a tribute to the good business acumen of the respondent? What regulated or unregulated warehouse would accept a customer without first some verification of authenticity? The majority opinion confuses sound business judgment with class limitation. The record shows that the only space refused by the respondent on the average of twice a month is to strangers.

The latest decision of the California Supreme Court on the subject, Pajaro Valley Cold Storage Co. vs Public Utilities Commission, 54 A.C. 248, found that a cooperative whose members had a vested right to a part of the storage space and could transfer their space to non-members was not a public utility. The cooperative stored only apples and pears plus three or four customers for frozen storage. As the Court points out, with the reservation of space by the members for use at any time, there was insufficient evidence to show an unequivocal intent to dedicate to the public generally.

It is my conclusion that the H. G. Walters Warehouse is affected with a public interest and has unequivocably dedicated its property to the public generally. It is operating as a public utility.

Peter E. Mitchell
Commissioner