

Decision No. 612S2**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 PRIVATE )  
 WAREHOUSE, INC., a California )  
 corporation. )

Case No. 6308

Handler & Baker, by Marvin Handler, for  
 respondent.  
Graham, James & Rolph, by Boris E. Lakusta,  
 for Warehousemen's Association of San  
 Francisco, interested party.  
Hector Anninos and Frank O'Leary, for the  
 Commission staff.

O P I N I O N

On July 14, 1959, the Commission issued an order institut-  
 ing an investigation on its own motion into the operations and  
 practices of Private Warehouse, Inc., for the purpose of determining:

1. Whether respondent is operating as a public utility within the definition of Sections 216 and 239 of the Public Utilities Code.
2. Whether respondent has violated Section 1051 of said Code by operating a business of warehousing without first having secured from the Commission a certificate of public convenience and necessity.
3. Whether respondent has violated Section 489 of the Public Utilities Code and General Order No. 61 of the Public Utilities Commission by failing to file and publish schedules and tariffs of rates and charges.

Public hearings were held before Examiner Thomas E. Daly on March 30, 31 and April 1, 1960, at San Francisco. The matter was submitted upon the receipt of concurrent opening and closing briefs. Following three extensions of time the final briefs were filed on November 4, 1960.

On September 28, 1959, respondent filed Application No. 41521 requesting a certificate of public convenience and necessity to operate as a public warehouseman. During the course of hearing on Application No. 41521 counsel for the Warehousemen's Association of San Francisco, which appeared as a protestant, made a motion for the consolidation of Case No. 6308 and Application No. 41521 for the purpose of hearing and decision. The motion was denied. On September 6, 1960, counsel filed a formal motion to consolidate said proceedings. The formal motion will also be denied.

In 1943 Mr. Joe Ratto acquired the F. J. Burns Draying Company, a carrier that operates under certificated and permitted authority duly issued by this Commission. As a service incidental to his transportation business, Mr. Ratto commenced warehousing in 1945. Subsequent thereto Mr. Ratto caused the F. J. Burns Draying Company to be incorporated and both the transportation and warehousing businesses were transferred to the newly formed corporation. This dual operation was continued until 1957 when Mr. Ratto caused to be incorporated Private Warehouse, Inc., respondent herein. The warehouse business was transferred to respondent and the transportation business was retained by F. J. Burns Draying Company.

The principal office is located at 516 Townsend Street, San Francisco, which is owned by Mr. Ratto and jointly used by respondent, F. J. Burns Draying Company and the Wilson Trucking Company, a radial carrier, owned and operated by Mr. Ratto.

A representative of the Commission staff investigated respondent for a total of 12 days in March, April and June, 1959. The investigation disclosed that respondent has storage facilities at six locations in San Francisco with space totaling 257,000 square feet. Each warehouse has rail spur track facilities.

The staff's Exhibit No. 1 indicates that as of April 9, 1959, respondent was serving 49 accounts. During the period September 1957 through April 1959 it served a total of 91 accounts. The following is a summary of the duration that said accounts were served during the period mentioned (Staff Exhibit No. 3):

<u>No. of Months</u>	<u>No. of Accounts</u>	<u>No. of Months</u>	<u>No. of Accounts</u>
1	8	11	4
2	4	12	1
3	2	13	3
4	3	14	3
5	2	15	3
6	7	16	1
7	1	17	2
8	2	18	2
9	6	19	6
10	7	20	23

Exhibit No. 4, introduced by the staff, discloses that from July 1958 through March 1959 respondent stored a variety of 51 commodities. Exhibit No. 5 indicates that during the same period a total of 227 cars were unloaded by respondent. Exhibit No. 6 shows that respondent realized a gross income of \$54,198.91 for the last four months of 1957; \$144,518.98 for the year 1958, and \$42,265.03 for the first four months of 1959.

The staff representative testified that during his investigation of respondent he noticed a sign on the building located at 516 Townsend Street which read: "F. J. Burns Draying, Pool Car Distribution, Warehouse Space Available." He further testified that on Pier 25, a warehouse facility leased by respondent, he saw written in crayon on the wall of the building the following: "F. J. Burns Draying, Warehouse Space Available." Respondent's telephone number was also written on the wall.

Testifying on behalf of respondent, Mr. Ratto stated that respondent is presently serving 39 regular accounts. Two of the accounts have written leases, one has a lease under an oral agreement

and the rest are just so-called "depositors." According to Mr. Ratto the business has been substantially the same since 1945 with little change in the regular customer accounts. Some accounts, he stated, have increased their business with the result that respondent's facilities and gross income have increased accordingly. He stated further that neither respondent nor its predecessors solicited or advertised, but on the contrary, refused new accounts. He was of the opinion that the Commission had lulled respondent into a false sense of security in that representatives of the Commission staff had conducted similar investigations of respondent's operations in 1955 and 1956 and no formal action was taken by the Commission. At that time respondent was assertedly serving between 44 and 48 regular accounts.

Mr. Ratto further testified that he was unaware of the crayon sign at Pier 25, but when its existence was made known to him it was immediately removed. Many of the 91 accounts listed in the staff's exhibits, he declared, were in the nature of helping people out in the time of emergencies or in the nature of temporary storage for customers of F. J. Burns Drayage. He further declared that in several instances the exhibits incorrectly list as separate accounts the names of companies that are merely affiliates of one of respondent's warehouse accounts. Respondent, he stated, maintains inventories for only three or four customers, the other accounts maintain their own inventories. On cross-examination the witness admitted that respondent tries to operate at capacity and if an account is lost an attempt is made to replace it if the occasion arises. The record is not quite clear just what procedure is followed in replacing accounts.

Sections 239 and 1051 of the Public Utilities Code read as follows:

"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 compensation 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. (Former Sec. 2 (aa). Amended 1955, Ch. 1091.)

"(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. (Former Sec. 2½. Amended 1955, Ch. 1091.)."

"1051. No warehouseman shall begin to operate any business of a warehouseman, as defined in subdivision (b) of Section 239, 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. ..."

It is possible that in those instances where respondent stored for accounts of F. J. Burns Drayage, which were in the nature of storage in transit and thus facilitating the transportation of property by a common carrier, such storage would fall within the meaning of Section 239(a) and would not require a certificate of public convenience and necessity. This type of storage, however, was admittedly conducted at a minimum and did not constitute the major portion of respondent's business. Should the balance of respondent's operations fall within the purview of Section 239(b), then a certificate of public convenience and necessity would be required. The question to be determined is whether respondent dedicated its service to the public generally or to a portion thereof.

To determine one's interest we must not only consider one's expressions of intent, but also one's course of conduct, for it is a well-established principle that actions flow from the essence.

On the one hand, respondent claims to be a private warehouse operating at a profit and a limited number of accounts over a long period of time. Notwithstanding the two signs, respondent claims that it has never solicited or advertised and has on frequent occasions refused new accounts. On the other hand, the record indicates that during the period covered by the investigation, even with the exceptions noted, respondent stored a wide variety of commodities and served substantially more accounts than the limited number conceded. Rather than a stability in accounts the record shows that there was a frequent turnover during the period considered. Respondent admittedly has contractual agreements with only three accounts. It attempts to operate at capacity and as accounts are lost new accounts are acquired.

It is only natural that a warehouseman would prefer to operate as private warehouseman if by doing so he could enjoy all of the advantages of a public warehouseman without any of the obligations imposed by law to protect the public interest. The line of demarcation between a private warehouse and a public warehouse is not always easy to determine and in many cases the warehouseman himself cannot tell when the line has been crossed. If it is apparent that an individual is using so-called private warehouse operations as a cloak behind which public warehousing is conducted his expressed intent is meaningless. In the case of honest mistake, expressions of intent must give way to the public interest where evidence of dedication to a public use is inconsistent therewith.

In the present case respondent has limited itself only to its capacity to serve. New accounts are acquired to operate as close

to capacity as possible. A public utility could not be expected to do more. We find that respondent has dedicated its property to the public use as a warehouseman.

After consideration, the Commission finds and concludes that respondent is a "warehouseman" as defined in Section 239(b) of the Public Utilities Code and that respondent is a public utility pursuant to Section 216 of the Code.

O R D E R

A public hearing having been held in the above matter and the Commission being informed in the premises,

IT IS ORDERED that Private Warehouse, Inc., cease and desist from operating as a public utility within the meaning of Sections 216 and 239 of the Public Utilities Code, until it has complied with Section 1051 of said Code by securing from the Commission a certificate of public convenience and necessity and until it has filed with the Commission its tariffs of rates and charges as required by Section 489.

IT IS FURTHER ORDERED that the motion to consolidate Case No. 6308 and Application No. 41521 is hereby denied.

The Secretary of the Commission is directed to cause personal service of this order to be made upon Private Warehouse, Inc., and this order shall be effective twenty days after the completion of such service upon the respondent.

Dated at San Francisco, California, this 28<sup>th</sup> day of December, 1960.

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President  
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Commissioners