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ORIGINAL

Decision No. 71878

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

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| Investigation on the Commission's own motion into the operations, tariffs, rates, charges, contracts, and practices of DAVIES WAREHOUSE COMPANY, a corporation; SAN DIEGO IMPERIAL EXPRESS, a corporation; B. W. HODGE TRANSPORTATION, INC., a corporation; L. L. HILLIARD, an individual, dba HILLIARD TRUCK LINES; and SOUTHERN CALIFORNIA FREIGHT LINES, a corporation; SOUTHERN CALIFORNIA FREIGHT FORWARDERS, a corporation. | Case No. 7998 |

Arthur H. Glanz, for Davies Warehouse Company, respondent.
Knapp, Gill, Hibbert & Stevens, by Karl K. Roos, for San Diego Imperial Express and B. W. Hodge Transportation, Inc., respondents.
Donald Murchison, for L. L. Hilliard, respondent.
Russell & Schureman, by Theodore W. Russell, for Southern California Freight Lines, Ltd., and Southern California Freight Forwarders, respondents.
James Quintrall, for Los Angeles Warehouseman's Association, interested party.
John C. Gilman and Frank J. O'Leary, for the Commission staff.

## O P I N I O N

The Proposed Report of Examiner Richard D. Gravelle in the above-entitled matter was filed on June 24, 1966. Said report would order discontinuance of this investigation. Exceptions to the report were filed by the Commission staff on July 26, 1966. Replies to the exceptions of the Commission staff were filed on behalf of respondent Davies Warehouse Company and respondents Southern California Freight Lines, Ltd. and Southern California Freight Forwarders on August 10, 1966.

The Commission staff (Staff) excepts on four grounds to the proposed report. The first exception is to the statement "There is no evidence as to the reasonableness of the charge made and hence it should be assumed that the charge was reasonable". The arguments in support of the exception are three in number: (1) that the quoted language places the burden of proof re reasonableness on Staff, (2) the Commission has historically refused to consider reasonableness of payments for loading charges by carriers to shippers, and (3) the evidence showed loading services were not performed on every shipment.

The Order Instituting Investigation in this matter is the framework within which both Staff and respondents must proceed. It sets out with some particularity the charges against respondents, gives them notice of their alleged violations and makes them generally aware of what Staff will attempt to prove. Staff is the moving party; it proceeds first in the hearing and must prove the matters alleged in the Order Instituting Investigation. If such proof is not forthcoming at the hearing, dismissal of the matter becomes warranted. In the instant case the Order Instituting Investigation, as amended, contains on page 2 the following language:

> "It further appearing that respondent warehouseman may have assessed and collected, and that respondent carriers may have paid, unlawful rebates in the form of charges for fictitious services purportedly rendered by respondent warehouseman for respondent carriers;" (Emphasis added.)

The evidence shows beyond question that the services for which charges were assessed and payments made were not fictitious. Consequently, Staff failed to prove the charges set forth in the Order Instituting Investigation. Assuming that the services while not fictitious still constituted a device or means by which payment

from the carriers to the warehouse was a violation of one of the sections of the Public Utilities Code cited in the Order Instituting Investigation and that the above quoted allegation constituted sufficient notice thereof, Staff is still required to prove such violation. In doing so where the payment for the service is not specifically precluded and it is the Staff contention that it did constitute a device or means in violation of the Public Utilities Code the question of reasonableness is raised, Re Clawson, 62 Cal. P.U.C. 105; Re Plywood, 62 Cal.P.U.C. 153. The Clawson case warns a carrier that, in making payments, it must be able to "demonstrate affirmatively that they are legitimate". The carrier must do so, however, only after Staff has made its case. In the absence of any evidence showing, for instance, that the charge and payment were unrelated to the service performed the respondents have nothing to refute with regard to the specific issue of reasonableness. The first two arguments advanced by Staff in support of its initial exception misconstrue or ignore the Clawson and Plywood cases. The Staff in support of its third argument relative to the allegation that loading services were not performed on every shipment and hence cannot be presumed reasonable cites several transcript references. Reference to those transcript citations shows that at best counsel for the Staff directed what he termed "hypothetical" questions to the witnesses concerning whether or not they would need loading help on shipments of a certain size. The statement that respondent warehouse was willing to provide free loading service to other carriers is without support in the record despite the four pages of transcript to which reference is made.

Taking the testimony as a whole, however, it may be concluded that there were occasions on which loading services were

not performed for the carrier respondents and yet a charge was levied and payment was made. These instances occurred when the carrier respondent or driver involved chose not to make use of the service that was available. To utilize this as proof that the charges were unreasonable is "boot strap" advocacy. If in fact the charges were unreasonable, the Commission staff was not without means to establish the same. It has not been here established.

The second Staff exception is to the failure of the proposed report to make findings on the issue of discrimination in that the respondent warehouseman did not comply with its tariffs and has therefore violated Public Utilities Code Section 453.

Reference to the Order Instituting Investigation shows that respondent warehouseman is charged with violating Sections 458, 459 and 3669 of the Public Utilities Code. There is no reference to Section 453 nor is there any reference therein to any issue of discrimination. Since said respondent was given no notice by the Order of the issue presently raised we cannot now consider the argument for purposes of imposing a penalty.

Staff's next exception is to the statement in the proposed report:

> "In the absence of specific rules laid down by this Commission, or a statutory restriction, activity such as outlined in this proceeding is not prohibited."

The argument is advanced that since the same personnel and equipment are employed by the warehouse to move the goods to the warehouse door and then beyond and into the carrier respondents' vehicles there should be no separation between the "utility" and "nonutility" function. Staff cites Public Utilities Code Sections 239(a), 454 and 491. None of these sections are mentioned in the

Order Instituting Investigation. Staff does not cite the tariff provision of the warehouse that is allegedly violated. Exhibit No. 17 is a portion of the tariff of Davies Warehouse Company. It provides that the warehouse responsibility to the storer ends at the delivery platform. Accessorial Service Charges may be levied for loading and unloading of trucks. When they are so levied the tariff provides the rate therefor. Here no such tariff charges were made, and the loading of trucks was the responsibility of the carriers. Respondent Davies Warehouse Company is hereby admonished that in the future its charges for loading and unloading trucks should comply with the provisions of its tariff Rules Nos. 35 and 37 or said rules should be clarified to specify whether they apply only to storers or to the public generally.

The last Staff exception would find inconsistency in the statements in the proposed report which deal with use of the loading service and payment therefor. We find no such inconsistency. The references clearly indicate that the selection of a specific carrier by the warehouse was dependent upon both use of the loading service and payment therefor. The point that Staff misses is that such activity is not precluded and is not a violation of the sections of the Public Utilities Code with which respondents were here charged.

We find that except as hereinabove stated the exceptions to the proposed report are without merit and hereby adopt the proposed report as filed on June 24, 1966.

Based upon the evidence of record, the briefs filed herein, the proposed report and the exceptions and replies thereto, the Commission finds that respondents have not violated

Sections 458, 459, 494, 3664, 3668, 3669 or 3737 of the Public Utilities Code.

The Commission concludes that the investigation herein should be discontinued.

## O R D E R

IT IS ORDERED that the Commission investigation herein is discontinued.

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

Dated at San Francisco, California, this 24th day of JANUARY, 1967.

President

Commissioners

Commissioner WILLIAM SYMONS, JR. did not participate in the disposition of this proceeding.