

JR (a)

ORIGINAL

Decision No. 74622

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Investigation on the Commission's
own motion into the rates, prac-
tices, operations and facilities
of LOYALTY WAREHOUSE CORPORATION.

Case No. 8571
(Filed December 27, 1966)

In the matter of the application
of LOYALTY WAREHOUSE CORPORATION,
a California corporation, for
authority to operate a public
warehouse in the City of Commerce,
County of Los Angeles, State of
California, pursuant to the provi-
sions of Section 1051 of the
Public Utilities Commission Code.

Application No. 49289
(Filed April 14, 1967)

Wyman, Finell & Rothman, by
Charles Fonarow, for Loyalty
Warehouse Corporation.
James Quintrall, for Los Angeles
Warehousemen's Association,
protestant.
Richard D. Gravelle, Counsel, for
the Commission staff.

OPINION ON REHEARING

By Decision No. 73760, dated February 28, 1968, in
Case No. 8571 and Application No. 49289, the Commission ordered
that Loyalty Warehouse Corporation (Loyalty) cease and desist
from conducting the business of a warehouseman as defined in
Section 239(b) of the Public Utilities Code, and cease and
desist from conducting the business of a food warehouseman as
defined in Section 2508 of the Public Utilities Code. The
Commission further ordered that Loyalty's application for
authority to operate a warehouse or food warehouse be denied.

On March 8, 1968, Loyalty filed an "Application for Rehearing for Stay Order and for Oral Argument Before Commission En Banc".

On May 14, 1968, the Commission issued its "Order Granting Rehearing" (Decision No. 74099) which provides: "It is ordered that rehearing of Decision No. 73760 is hereby granted, limited to oral argument, said rehearing limited to oral argument to be had before such commissioner or examiner and at such time and place as may hereafter be designated.

"It is further ordered that the effective date of Decision No. 73760 is suspended pending further Commission order."

On June 11, 1968, oral argument was held in Los Angeles before Commissioners Mitchell, Gatov, Morrissey and Symons, and Examiner Rogers, and the matter was submitted.

Loyalty's arguments were, in general, enlargements on its arguments set forth in its application for a rehearing, i.e., that the decision is drastic and puts Loyalty out of business; that the determination that Loyalty is a warehouseman is erroneous in that it applies the law as amended effective after the order instituting investigation was filed; that the finding that public convenience and necessity do not require a warehouse in the City of Commerce is erroneous; and that the Commission discriminated in prosecuting Loyalty and not other so-called private warehouses.

Counsel for Loyalty conceded that under the law as it presently exists Loyalty is conducting a public utility warehouse

operation and attempted to orally amend the application to seek a certificate of public convenience and necessity for the operation of 65,000 square feet of warehouse space in the City of Commerce. We rendered our decision denying the application for a warehouse certificate on the evidence presented by Loyalty during the hearings. Loyalty is at liberty to file a new application at any time. The existing warehousemen are entitled to appear in opposition to such application. We can see no reason for permitting an amendment to the application and the request for authority to amend the application is denied.

Whether or not Loyalty must cease operation as a public utility warehouseman, unless or until it receives a certificate of public convenience and necessity, if the decision is allowed to stand is not a persuasive reason for reopening the matter. Loyalty could very easily have applied to this Commission for a certificate before it commenced operations and thereby have saved much time and expense.

At the time the application and the investigation were heard, Section 239(b) of the Public Utilities Code contained the phrase ". . . is regularly stored for the public generally . . ." and Section 2508 contained the phrase ". . . regularly received from the public generally . . ."

Subsequent to the final day of hearing the said sections were amended to provide, respectively" . . . for the public or any portion thereof . . ." and " . . . from the public or any portion thereof . . ."

Counsel for Loyalty argued that under the law, as it existed at the time the hearings concluded, Loyalty was not a public utility warehouse and it did not need a certificate.

He conceded that under the above amendments Loyalty needs a certificate to continue business.

Section 207 of the Public Utilities Code defines "public or any portion thereof" as meaning "the public generally, or any limited portion of the public."

We find that by the 1967 amendments to Sections 239(b) and 2508 of the Public Utilities Code the legislature intended only to make all the referred-to sections consistent, and did not intend to change the meaning or interpretation of Sections 239(b) and 2508 of the Public Utilities Code. We will amend page 16 of Decision No. 73760 to reflect this finding.

Loyalty states that under California law it is abundantly clear that discriminatory administration or enforcement will not be tolerated and will furnish a basis for invalidating rulings against the discriminated party. Loyalty has failed to point out any discrimination by this Commission relative to Loyalty. Facts were presented to us which showed that Loyalty was operating illegally and we so found and ordered Loyalty to cease such operations. This was in pursuance of our official duty and it is presumed we performed our duty regularly (California Evidence Code, Section 664).

The finding that public convenience and necessity do not require that Loyalty be granted authority to operate as a public utility warehouse is amply supported by the record. We do feel, however, that Loyalty operated illegally for the reason that it misconstrued the law and believed that it was operating legally. We find that the application should be reopened to permit Loyalty to present evidence, if it can, that public convenience and necessity require the operation by it of public utility warehouse space in the City of Commerce.

We see no reason to change Decision No. 73760 insofar as Case No. 8571 is concerned, but we will set aside the portion of said decision which denies Loyalty's application for a public utility warehouse certificate and permit Loyalty to present further evidence relative thereto.

We will amend page 16 of Decision No. 73760 to read as hereinafter set forth. The effective date of Decision No. 73760 will be stayed pending further order of this Commission.

ORDER ON REHEARING

IT IS ORDERED that:

1. Page 16 of Decision No. 73760 is amended to read as follows:

"The final hearing on the herein-considered matters was held on September 28, 1967. At that time Section 239(b) contained the phrase ' . . . , is regularly stored for the public generally, . . . ' and Section 2508 contained the phrase ' . . . regularly received from the public generally, . . . ' Effective November 8, 1967, the two sections were amended to read as hereinbefore quoted.

"Loyalty urges that the statute as it existed at the time of the hearing is applicable. The staff urges that the matters should be decided on the basis of the amended statute. We agree with Loyalty that we must take the statutes as they existed at the time the hearings were held if the subsequent amendments would disadvantage Loyalty (Helm v. Bollman, 176 Cal. App. 2d, 838).

"It appears that the above amendments were enacted to make Sections 239(b) and 2508 consistent with Section 216 of the Public Utilities Code which uses the language, 'public or any portion thereof.' In addition, Section 207 defines the term 'public or any portion thereof' as meaning 'the public generally, or any limited portion of the public'

"We find that, by the 1967 amendments, the legislature intended only to make all the referred-to sections consistent, and did not intend to change the meaning or interpretation of Sections 239(b) and 2508 of the Public Utilities Code.

"The order of investigation includes an investigation to determine whether or not Loyalty is a warehouseman as defined by Section 239(a) of the Public Utilities Code, supra.

"We find that no services are involved which are within the purview of Section 239(a)."

2. The submission of Application No. 49289 is set aside and a rehearing of Decision No. 73760 relative to said application only is hereby granted, said rehearing to be had before a Commissioner or Examiner and at a time and place to be specified by the Commission.

The Secretary is directed to cause appropriate notice of rehearing to be mailed at least ten days before such rehearing.

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

Dated at San Francisco California, this 4th day of SEPTEMBER, 1968.

William Sproule, Jr.
President

[Signature]

[Signature]

Shed P. Monroney
Commissioners

-6- Commissioner William M. Bennett

Present but not participating.

I dissent.
[Signature]