

Decision No. 76609

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 BOB & JACK  
TRUCKING CO., INC. and LOYALTY  
WAREHOUSE CORPORATION. }

Case No. 8848  
(Filed September 24, 1968)

Silver & Rosen by Martin J. Rosen, for  
Bob & Jack Trucking Co.; Wyman,  
Bautzer, Finell, Rothman & Kuchel by  
Charles L. Fonarow, for Loyalty  
Warehouse, respondents.  
James Quintrall, for Los Angeles Ware-  
housemen's Association, interested  
party.  
S. M. Boikan, Counsel, and E. H. Hjelt,  
for the Commission staff.

O P I N I O N

By its order dated September 24, 1968, the Commission instituted an investigation into the operations, rates and practices of Bob & Jack Trucking Co., Inc. (Bob & Jack) and Loyalty Warehouse Corporation (Loyalty) for the purpose of determining whether Bob & Jack has violated Sections 3541, 3664, 3667 and 3668 of the Public Utilities Code by either charging, demanding, collecting or receiving a lesser compensation for the transportation of property than the applicable charges prescribed by the Commission, or by engaging in the device of paying a commission, refunds or remitting part of such charges to Loyalty in order to enable it to obtain transportation of property for less than such applicable rate or charges.

Public hearing was held before Examiner O'Leary on June 5 and 6, 1969 at Los Angeles. On the latter date respondents filed a motion to dismiss which was taken under submission and the

matter was continued to a date to be set pending a ruling on the motion to dismiss. Briefs on the motion to dismiss have been filed by respondents and the staff.

Bob & Jack operates pursuant to radial highway common carrier and highway contract carrier permits. It operates 2 tractors, 4 trucks, and 4 trailers and employs 4 drivers and 1 office worker. A terminal is maintained on the premises of Loyalty in the City of Commerce. Its gross operating revenue for the year 1968 was \$265,358.

The staff presented evidence which discloses that during the period January 1, 1967 and June 30, 1967 Bob & Jack made payments to Loyalty and a Yolanda Columbo.

The payments made to Loyalty were for clerical services rendered by Loyalty for Bob & Jack, terminal rental and equipment rental. The payments made to Yolanda Columbo were described as a commission for sales and public relations. At the outset of the hearing the staff stated that it did not question the payments to Loyalty for clerical services and terminal rent as being excessive. With respect to the payments to Loyalty for equipment (fork lift) rentals and the payments to Yolanda Columbo, the staff does not raise any issue of reasonableness but does raise the issue of the failure of Bob & Jack to keep records adequate to permit the Commission to determine the reasonable value of such services.

In its brief the staff asserts that the motion to dismiss should be denied because it does not comply with Rule 56 of the Commission's Rules of Practice and Procedure. Said rule provides:

"MOTION TO DISMISS. A motion to dismiss (other than a motion based upon a lack of jurisdiction) any proceeding before this Commission, which is based upon the pleadings or any matter occurring before the first day of hearing may only be made

upon five days' written notice thereof duly filed and served upon all parties to the proceeding and all other parties upon whom service of copies of the pleadings are therein shown to have been made."

The motion made herein obviously is based upon the staff showing at the hearing, not upon the pleadings or any matter occurring before the first day of hearing. Rule 56 does not apply.

The staff acknowledges that there is nothing in the Public Utilities Code or this Commission's decisions which prohibit a carrier and shipper from engaging in transactions apart from the purchase and sale of transportation. The staff points out, however, that in the context of the structure of minimum rates established by this Commission, such transactions have the inherent danger that they will be used as a device to enable the shipper to obtain transportation for less than the minimum rates prescribed by the Commission. The staff concedes that when carriers enter into such transactions with shippers and pay more than the fair market value for the services provided by the shipper, only the difference between the payments and the fair market value would constitute a device or rebate in violation of Sections 3667 and 3668 of the Public Utilities Code.

The Commission has previously stated that carriers making such payments must be prepared to demonstrate affirmatively that they are legitimate. (Clawson Trucking Co., 62 Cal. P.U.C. 105.) However, the Commission later said "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." (Davies Warehouse, et al., 66 Cal. P.U.C. 731.) In view of the fact that the

staff does not raise the issue of reasonableness, respondents have nothing to refute concerning the alleged violations of Sections 3667 and 3668 of the Public Utilities Code. The staff presented no evidence to show that Bob & Jack had charged or collected any lesser rate than the minimum in violation of Sections 3664, 3667 and 3668 of the Public Utilities Code. There is no evidence that Bob & Jack violated Section 3541 of the Public Utilities Code.

After consideration the Commission finds that the staff has not sustained its burden of proof and concludes that the motion to dismiss should be granted and that the investigation should be discontinued.

O R D E R

IT IS ORDERED that:

1. The motion to dismiss is granted.
2. The investigation herein is discontinued.

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

Dated at San Francisco, California, this 30th day of DECEMBER, 1969.

William J. Lyons, Jr.  
President

*I dissent -*

*The staff should have been allowed to re-open its case to correct any deficiencies.*

*in its showing, rather than dismiss the proceeding & then require the parties to start a new action*

Thomas L. Sturgeon  
Commissioners

*Robert J. Whelan*

Commissioner A. W. Gatov, being necessarily absent, did not participate in the disposition of this proceeding.