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ORIGINAL

Decision No. 78361

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Investigation on the Commission's own motion into the operations, rates and practices of J & R WAREHOUSE & SERVICE CO., INC., a corporation.	Case No. 9026 (Filed February 20, 1970)

Garcia, Bruzzone & Dunn and Dooley and Dooley, by David M. Dooley, Attorney at Law, for respondent.
James Quintrall, for Los Angeles Warehousemen's Association, interested party.
Michael J. Stecher, Attorney at Law, and J. B. Hannigan, for the Commission staff.

O P I N I O N

The Order Instituting Investigation herein seeks to determine whether respondent is operating as a public utility warehouseman without a certificate and without having filed tariffs. Hearing was held on June 9 and 10 before Examiner Gilman in San Francisco.

Respondent is a Wisconsin corporation which has been operating for some years in California. In 1961, its stock was owned by one Julius Finter. At that time it stored goods for some fifteen to twenty different candy accounts. In 1965, the Jennaro family acquired all of J & R's stock. At that time the warehouse was located in Alameda.

J & R then moved its warehouse to 95 Market Street, Oakland, California, which was located near the Howard Terminal facility. In 1968, J & R employed three office girls, one warehouseman and one truck driver. It stored for twelve candy accounts and one vinegar account. To service these accounts, J & R had storage facilities estimated as providing 16-20,000 square feet of net space.

In 1970, because it found that the location of the Market Street facility was not satisfactory, respondent relocated at 5745 Peladeau, Emeryville, California. Currently, it has twelve candy storers and the same vinegar storer. It now uses approximately 27,000 square feet of net storage space.

It has no sales force; it lists itself as a private warehouse in the telephone directory, and the business cards of its executives bear the legend "J & R Private Warehouse".

The candy which respondent stores is a specialty item in the warehouse field. Because of its perishability and its short shelf life, stock must be stacked correctly. As it absorbs odor it must be stored away from oil or chemicals or soaps. To facilitate the handling of these specialty items, respondent has invested in electrical forklifts to avoid contamination by exhaust fumes.

Respondent holds a radial highway common carrier permit from this Commission. All outbound candy shipments from the warehouse are transported via respondent's trucks. If the destinations are within respondent's authority the candy is carried solely by respondent;[1/] when the destinations are beyond the limits of respondent's authority, it acts as drayman to transport the commodities to the ultimate carrier. The staff investigation reported that no shipments were made for persons or firms not storing at the warehouse.

Is Respondent Serving A Portion Of The Public?

Respondent makes its leasehold available regularly for compensation for storage of property by others. Respondent has no potential or present proprietary interest in the goods stored, so

1/ Respondent will also, if requested, ship by mail.

consequently there has been no dedication of property interest to a proprietary use.

The evidence refutes any possible claim that the space is dedicated to each individual customer. Customers may withdraw their goods without notice and pay only for services rendered. Given the lack of even a semi-permanent commitment by customers, no rational businessman would be likely to afford them a commitment of property. There is also direct proof that no customer has a claim either to a specified area or to an undivided share of space.

Respondent's customers do not constitute a group. The record negates any system or organization or communication between them aside from that which pervades the candy industry generally; nor is there any indication that warehouse-customer relations are conducted on a joint rather than an individual basis.

Respondent's customers do not possess special characteristics in common which would set them apart from the general public of candy storers, including those who have been rejected by respondent.

If respondent's services are demonstrably not reserved for proprietary use or to specific individuals or a definable group or class, then by elimination respondent's customers must constitute the "...public or any portion thereof". (Sections 207, 239(b) and (c), Public Utilities Code.)

Our discussion of respondent's carrier operations is also material to this issue. Respondent's candy customers are unquestionably members of the public when they deal with respondent as a carrier and the property used in that operation is dedicated to a public use. (Rampone v. Leonardi, 39 CRC 562; Inv. of Worley, 56 PUC 125.) When storage and transportation are as integrated as

respondent's, we can perceive no rational basis for a claim that the customers change from private to public as their goods move from storage onto the highway. The public has access to respondent's public transportation services only through the warehouse doors. In such circumstances, respondent will not be heard to claim that those doors are private.

Rejections

Respondent has rejected several prospective customers. The testimony concerning these rejections supports our conclusion that respondent is a public utility.

Respondent's capacity is limited, not by the amount of storage space, but by the amount of management and employee time available for services connected with intake inventory control and distribution. Respondent's president testified that lack of capacity in this sense was the ultimate reason for each rejection.

One established customer was asked to withdraw his goods. This customer stored soap, which commodity is likely to contaminate candy stored nearby. Consequently, this action establishes only that respondent's limited dedication excludes commodities inconsistent with confectionery and is immaterial to the proper classification of respondent's past, present and prospective customers.

Respondent's behavior in these respects is not distinguishable from that of a public utility which is not required to accept customers whose requirements would exceed its dedicated capacity or require activities otherwise outside the scope of its dedication.

Rates

Respondent's rates are not established by negotiation but are announced to potential storers on a take-it-or-leave-it basis. While each customer is not charged the same rate, it is management's

intent that the rates be nondiscriminatory. The customers who are charged more than the prevailing level are those who require additional services.

In both respects, the rating practices of respondent are not distinguishable from those of a public utility voluntarily complying with its common-law obligations.

Has Respondent Dedicated?

We regard the evidence of long-continued nontemporary service to a portion of the public as sufficient to establish dedication even without evidence of an express holding out.

Respondent's self-serving declaration that it is private, publicized by signs, stationery and directory listing, is not sufficient to refute this conclusion unless accompanied by a consistent course of conduct.

Scope of Dedication

Respondent's operations, rate structure and even its equipment are peculiarly suited to meet the special needs of the candy industry. All of respondent's customers (except for the vinegar storer mentioned above), are candy storers. Respondent would have us hold that a dedication limited to a single commodity is not a dedication at all.

However, we conclude that such a limitation, even if established beyond doubt, is not material to a determination of utility status; in our view, it is quite as possible for property to be dedicated to a limited public use as to one involving general commodities. We have for instance held carriers to be common - i.e., public - despite the fact that their carriage was limited to movie film (Overnite Motor Express v. Steele & Thomas, 60 PUC 533). 2/ Assuming this holding to be sound, there would appear no reason

2/ Cf. also Garment Carriers, Inc., D.62337, App. 42707.

why a warehouse could not be public though its dedication was intentionally limited to a single commodity or class of commodities.

We also note that a utility may deliberately dedicate itself to serve a limited territory and that such limitations are valid. (Cf. Greyhound Lines v. PUC, 68 Cal.2d 406.) We can perceive no logical reason why commodity as well as territorial limitations should not be recognized without detracting from utility status.

Is Respondent a §239(a) Warehouseman?

Section 239(a) of the Public Utilities Code includes all warehousemen regularly storing goods "...in connection with or to facilitate the transportation of property by a common carrier...."

Since transportation and carriage are performed by the same entity, we could envision no stronger connection between storage and transportation than that exhibited here, and will conclude respondent's storage to be in connection with common carrier transportation.

If respondent's operations were solely those of a warehouseman as defined by §239(a), it would not require a certificate for continued operation (§1051, Public Utilities Code). Since we have, however, determined that respondent is also a §239(b) warehouseman this distinction is not material.

Is Respondent a Food Warehouseman?

During the period covered by the staff's field investigation, California food warehousemen were governed by the provisions of §§2501 et seq., Public Utilities Code. Subsequently those provisions were repealed and §239(c) substituted.

The Order of Investigation herein referred to the prior statutes rather than to the legislation in effect at the date of its issuance. Respondent claims that because of this oversight we cannot within the confines of this proceeding determine whether respondent is a food warehouseman.

Regardless of whether the old or new legislation governed this proceeding, the material issues of fact would have been the same, as would the consequences of a decision unfavorable to respondent. Respondent makes no claim that it would have conducted its defense in a different manner if the order had been formally amended prior to hearing. Consequently there has been no denial of due process and no impediment to our consideration of the issues of fact common to both old and new legislation.

Respondent's past operations were within the definition of the prior legislation; if continued they would be within the new definition and hence unlawful until certificated.

Findings

The Commission finds that:

1. Respondent is engaged in the business of storing goods for compensation on other than a temporary basis.

2. Respondent has not dedicated storage space for its own use.

3. Respondent has not dedicated space to any of its candy customers as individuals.

4. Respondent's candy customers do not constitute a group or class distinguishable from the general public of candy storers.

5. Respondent refrains from discriminating between its customers in establishing rates for storage and related services. The rates are not negotiated with customers.

6. Respondent has rejected prospective customers on the grounds of lack of capacity or on the grounds of incompatibility of the goods to be stored with candy.

7. Respondent specializes in the storage of candy.

8. Respondent's past and present candy customer lists are not distinguishable from a random selection of the total population of candy storers in the San Francisco Bay Area.

9. Respondent has operating authority from this Commission as a common carrier and has no operating authority as a contract carrier.

10. Respondent carries only candy stored in its warehouse and performs part or all of the transportation of each shipment of candy leaving its warehouse.

11. Respondent has no certificate of public convenience and necessity as a warehouseman, nor has it filed tariffs with this Commission for its storage and related services.

Conclusions

The Commission concludes that:

1. Respondent's customers constitute a portion of the public.

2. Respondent has dedicated its leasehold and personal property to a public use for storage.

3. Respondent stores in connection with common carriage.

4. Respondent is operating unlawfully as a public utility warehouseman as described in Section 239(a), (b) and (c) of the Public Utilities Code.

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O R D E R

IT IS HEREBY ORDERED that respondent shall cease and desist from operating as a public utility warehouseman as described in Section 239(a), (b) and (c) of the Public Utilities Code unless or until it obtains proper authority to so operate.

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

Dated at San Francisco, California, this 2nd day of MARCH, 1971.

Chairman

Commissioners

Commissioner William Symons, Jr., being necessarily absent, did not participate in the disposition of this proceeding.