

Decision No. 82457

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 Leyba Trucking Service, Inc., a California corporation dba ENTERPRISE TRUCKING SERVICE.

Case No. 9579
(Filed July 3, 1973)

Frank Leyba, for respondent.
Elmer J. Slostrom, Attorney at Law, for the
Commission staff.

O P I N I O N

On July 3, 1973 the Commission instituted an investigation on its own motion of Leyba Trucking Service, Inc., a California corporation, doing business as Enterprise Trucking Service (respondent), to determine whether respondent is engaged in the business of storing property for others for compensation in the cities of Oakland and Emeryville, and operates said business as a public utility as defined by Section 216(a) and (b) and as a warehouseman as defined by Section 239(a) and (b) of the Public Utilities Code, without having secured a certificate of public convenience and necessity as required by Section 1051 of the Public Utilities Code, and without being exempted from securing such certificate under the provisions of Section 1052.

Public hearing was held before Examiner Meaney in San Francisco on August 28, 1973, and the matter was submitted on that date.

Mr. G. H. Demut, Associate Transportation Representative with the Compliance and Enforcement Branch of the Commission staff, testified that he investigated this case on various dates from August 1 to December 31, 1972 and also on various dates in January and February of 1973.

The witness presented exhibits which included documentation of storage and handling charges plus rent earnings for 10 different accounts. Exhibit 2 summarizes the earnings for the period August through December 1972 as follows:

<u>Name of Account</u>	<u>August</u>	<u>September</u>	<u>October</u>	<u>November</u>	<u>December</u>	<u>Total</u>
Baxter Company	\$ 640.00	\$ 640.00	\$ 640.00	\$ 640.00	\$ 640.00	\$3,235.00
Belfast Beverage	500.00	500.00	375.00	375.00	-	1,750.00
DeYoung Chemical	125.00	127.60	117.60	127.60	137.60	635.40
Harrison & Cross- Field	1,022.25	1,463.25	421.80	851.60	851.60	4,610.50
W. H. Hutchinson & Son (Powell & Hutchinson)	228.52	223.96	198.16	190.48	208.54	1,049.66
Lester L. Lawson & Co.	726.40	275.00	275.00	275.00	275.00	1,826.40
Midland & Ross	1,660.70	1,368.61	1,614.63	1,548.36	1,568.58	7,760.88
James T. Powell & Associates	245.40	205.00	250.80	205.00	205.00	1,111.20
Troy of Calif.	1,819.00	627.00	621.95	427.50	495.75	3,991.20
Western Die	675.00	421.50	559.00	559.00	559.00	2,773.50
Total	\$7,642.27	\$5,851.92	\$5,073.94	\$5,199.54	\$4,976.07	\$28,743.74

Exhibit 13 is a compilation of correspondence concerning respondent's warehousing facilities. These were written at various dates from 1966 through 1972. Most of the letters appear to follow up phone conversations with persons or organizations (other than the above-named accounts) concerning the availability of warehouse facilities.

The letters make it clear that Frank Leyba, respondent's president, considered the warehousing operation to be distinct from respondent's transportation business. A letter signed by Leyba to Youngstown Sheet and Tube Company dated January 24, 1966 states that it follows up on a conversation concerning warehousing and distribution of Youngstown products, and points out "you may select any carrier you desire that serve [sic] various points which we do not." The letter also mentions that respondent would be willing to keep a "running card filing system" and to submit a monthly inventory report. A letter from Leyba dated December 2, 1968 to Mr. Mack Browder of the Dr. Pepper Company states in part:

"I believe that my warehouse has sufficient space to accommodate your products as well as an ideal location for distribution. Further, I am sure that I could cut your present warehousing costs by 1/3 along with giving you faster more efficient service."

Other letters signed by Leyba are similar in substance, stressing the ideal location and the availability of necessary space. Some of the letters give prospective customers direct quotations of storage and handling facilities. A letter dated February 15, 1972 to Ovaltine Food Products in Illinois appears to be a direct solicitation for business without any prior phone call. The letters are to various parts of the country. Letters dated August 3, 1972 to various persons connected with R. J. Reynolds Tobacco Company, Winston-Salem, North Carolina, appear to have followed a business trip made by Mr. Leyba to that area.

Exhibit 15 consists of two business cards, both for Enterprise Trucking Service. Both cards list 3442 Adeline Street, Oakland, as the address, and indicate Frank Leyba as the president. One of the two cards, below the name of the business, contains the word "warehousing" in addition to the words "trucking" and "distribution".

Exhibit 16 is page 947 of the classified section of the Oakland telephone directory. Enterprise Trucking Service, Inc. is listed under "Warehouses - Private".

The witness noted that a letter signed by the Commission Secretary had been sent to Leyba on August 30, 1972 (Exhibit 17) reminding Leyba that, as a result of a recent study, the staff's opinion was that his company's warehouse operations were those of a public warehouseman. The letter recites that Section 216, 239, and 1051 of the Public Utilities Code were read to him, and copies of those sections were given to him.

Mr. Demut stated he had a final conversation with Mr. Leyba on February 8, 1973, at which time Leyba stated he kept no separate records for warehousing and indicated at that time that he had approximately 40,000 square feet of floor space available at the Adeline Street address in Oakland and also approximately 28,000 square feet of floor space available at 4067 Watts Street in Emeryville.

Exhibits 3 through 12 contain various types of documentation showing, for the accounts tabulated above, various charges, primarily for warehouse rent by the month. As to some of the accounts, there also appeared various handling charges in addition to the rentals. Exhibit 14 contains disbursement and receipt cards prepared by the respondent as to the commodities stored for the above-tabulated accounts.

Leyba told the witness that there were oral contracts only, and that respondent charged by space, without regard to any minimum weight. A flat sum was figured based upon the amount of space used, and this became the monthly rent. Leyba stated that Enterprise handled all outbound freight that came within the scope of his Commission authority; otherwise, he would call another trucking company. According to the witness, Leyba stated that each account carried its own insurance and floor tax and that the supervision over the merchandise was entirely by the party who stored it in his warehouse. A warehouse receipt was not issued.

The witness stated that he admitted unloading box cars for Harrison & Crosfield and that he unloaded trucks and trailers for Powell and Hutchinson, and also occasionally for Troy of California. Leyba stated to the witness that he advanced no transportation charges for outbound shipments.

The witness reviewed Exhibits 10 and 11 for the Powell and Troy accounts, respectively, and pointed out the handling charges on the documentation.

Frank Leyba testified that he is president of both Enterprise Trucking Service and Leyba Trucking Service, Inc. He admitted that in view of the handling of the products that he had acted as a warehouseman for the following accounts: Troy, Harrison & Crosfield, and James T. Powell. As to the remainder of the accounts, he denied being a warehouseman, apparently on the basis that all he was selling was space, and that regarding the remainder of the accounts, each of the parties handled all their own goods.

Leyba explained that, regarding Belfast Beverages (part of a Pepsi-Cola organization), from time to time Belfast had "giveaway deals" and these special packagings would be stored briefly, then delivered to the bottling company. His company no longer handles this account since Pepsi-Cola now has a warehouse next door to his property.

As to Baxter Company, Leyba stated that his company did all the trucking for the company when they lost their lease in San Francisco and moved to East Bay. He stated Baxter Company occupies 15,000 square feet on the Leyba premises, that he does the trucking, and that Baxter Company handles everything in and out of the warehouse.

Leyba pointed out that DeYoung Chemical is out of business and that all he had in his company's warehouse was approximately three pallets of materials from a time previously when this company owned its own merchandise, but more recently it had functioned as a broker, purchasing chemicals wholesale from outfits in San Francisco and selling them throughout the East Bay. The three pallets were "left over" from when the owner of the business purchased materials for sale.

Leyba stated that the Hutchinson and Powell accounts are tied into one another. Hutchinson makes bottle caps. Powell is a carrier. The bottle cap crowns were delivered from Chicago on Santa Fe Railroad cars at 40th and San Pablo. The handling charges on the documentation have to do with unloading the palletized material and putting it in storage. Leyba stated that a salesman of the company kept inventory and kept track of the orders.

Lawson Company, according to Leyba, is a broker for military goods. Most of the orders are direct from the military to Lawson and are not stored in Leyba's warehouses. Respondent apparently handles small local orders and Lawson uses a small amount of floor space for storing of samples.

The above accounts are handled in the Oakland warehouse. Leyba stated that in Emeryville he handled Western Die Casting, Midland & Ross, and Troy of California.

Regarding Western Die Casting, Leyba stated that a fire burned down Western's building. The owner occupied offices in the Emeryville building and stored damaged dies and other materials there for approximately one year until the building was rebuilt. No trucking was connected with this operation.

Leyba stated that Midland & Ross is an electrical supply company which has its own warehouseman and does all its shipping and unloading itself. Leyba's company hauls piggyback trailers for this company.

As to Troy of California, Leyba testified that this company moved from San Diego to the East Bay. The goods of this company comes in containers which respondent would truck, unload, and store.

Leyba was not familiar with the tariffs for public warehouses. He stated that his charges were figured on breaking even as to the warehousing space so that he could make more money on his trucking. He insisted that all he was doing was subleasing space and that "they do whatever they want with it".

Regarding the Midland & Ross account, the testimony of Leyba was not entirely borne out by the invoices, which reveal, in addition to warehouse rentals, "warehouse labor" at the Emeryville address on various occasions.

Discussion

The preponderance of the evidence clearly establishes that respondent conducted the business of a warehouseman in both Oakland and Emeryville. The evidence is undisputed that respondent possessed no authority to operate as such. The documentation furnished by the staff shows clearly that (with the exception of Baxter Company and DeYoung Chemical, discussed below) the various commodities were regularly stored within the meaning of Public Utilities Code Section 239.

Mr. Leyba's theory that his company did not act as a warehouseman for other than Harrison & Crosfield, Powell & Hutchinson, and Troy of California because he did not furnish services but only rented space overlooks the fact that while Section 239(a) concerning storage of "property" requires that it be "in connection with or to facilitate the transportation of property by a common carrier or vessel, or the loading or unloading of property...", Section 239(b) regarding "merchandise" merely requires that such merchandise be "stored for the public or any portion thereof, for compensation, within this State..." (with certain exceptions not relevant here). It is clear from the testimony of the staff witness and also from Leyba's own testimony that as to Baxter Company, Belfast Beverage Company, Lawson & Company, Midland & Ross, and Troy of California, the storing was of merchandise and therefore falls under the purview of Section 239(b). Thus, regarding such accounts, whether the storing was done in connection with or to facilitate transportation is irrelevant.

Leyba's second argument, that all he did was to lease space and his customers did whatever they wanted with it, overlooks certain important factors. First, while in certain cases such as Loyalty Warehouse Corporation (1968) 68 CPUC 39, the Commission has considered as a factor whether a customer could withdraw goods and pay only for services rendered in determining whether a person or corporation operated as a warehouseman, this is merely one of many evidentiary facts which may be considered and is not a controlling test. Second, Leyba's argument overlooks the surrounding circumstances and evidence introduced regarding solicitation of accounts, described in detail above. As mentioned, the letters introduced cover a period of time from 1966 through 1972. Business cards contained reference to warehousing. The fact that Exhibit 16 shows the telephone listing as a "private" warehouse is, under these circumstances, immaterial. Respondent's customers are from various industries and therefore clearly possess no special characteristics

in common which would set them apart from the general public of storers (cf. J & R Warehouse & Service Company, Inc. (1971) 72 CPUC 2, 4).

Western Die Casting was not a warehouse account. As mentioned, Western's building burned down and Western occupied both office space and respondent's Emeryville building and some storage space for damaged dies and other materials. No trucking was connected with the operation, nor does it appear that any merchandise, as that term is used in Section 239(b), was stored.

It is unclear as to whether, during the period of investigation, the material stored by DeYoung Chemical constituted merchandise, and there appears to have been no connection with or facilitation of transportation of property, at least during that period.

Findings of Fact

1. Respondent does not hold authority from this Commission to operate as a warehouseman.
2. From 1966 through 1972, respondent solicited business from the public generally as a warehouseman.
3. From August 1972 through December 1972, respondent regularly stored property, other than liquid petroleum commodities in bulk and other than baled cotton, for compensation within this State, in connection with or to facilitate the transportation of property by a common carrier.
4. From August 1972 through December 1972, respondent stored merchandise, other than secondhand household goods or effects, and other than liquid petroleum commodities in bulk, and other than baled cotton, and other than merchandise sold but retained in the custody of the vendor, for the public or a portion thereof, for compensation within the State.
5. Respondent is not a nonprofit, cooperative association or corporation which is engaged in the handling or marketing of the agricultural products of its members.

6. The aforesaid conduct by respondent constituted a holding out to the public or a portion thereof that respondent was a warehouseman.

Conclusions of Law

1. Respondent has conducted the business of a warehouseman as defined by Public Utilities Code Section 239(a) without having secured from this Commission a certificate declaring that public convenience and necessity require the transaction of such business.

2. Respondent has conducted the business of a warehouseman as defined by Public Utilities Code Section 239(b) without having secured from this Commission a certificate declaring that public convenience and necessity require the transaction of such business.

3. Respondent has failed to obtain a certificate of public convenience and necessity to operate as a warehouseman, as required by Public Utilities Code Section 1051.

4. Respondent is not exempted from securing a certificate of public convenience and necessity under the provisions of Public Utilities Code Section 1052.

5. Respondent should be ordered to cease and desist from conducting the business of a warehouseman unless it first procures from this Commission a certificate declaring that public convenience and necessity require the transaction of such business.

O R D E R

IT IS ORDERED that Leyba Trucking Service, Inc., a California corporation, doing business as Enterprise Trucking Service, shall cease and desist from operating as a public utility warehouseman as defined in Public Utilities Code Section 239(a) and (b).

without first obtaining a certificate of public convenience and necessity, as required by Public Utilities Code Section 1051.

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

Dated at San Francisco, California, this 13th
day of FEBRUARY, 1974.

William L. Spurgeon
President
William L. Spurgeon
William L. Spurgeon
William L. Spurgeon
William L. Spurgeon
Commissioners