

Decision No. 20000

BEFORE THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA

REGULATED CARRIERS, INC.,
a corporation,

Complainant,

vs.

ARTHUR S. LYON, FIRST DOE, SECOND
DOE, THIRD DOE, FOURTH DOE, FIFTH
DOE, FIRST DOE CORPORATION, SECOND
DOE CORPORATION, THIRD DOE
CORPORATION, FOURTH DOE CORPORATION,
FIFTH DOE CORPORATION,

Defendants.

Case No. 3523

ORIGINAL

Reginald L. Vaughan and Scott Elder for affiant
and for Regulated Carriers, Inc.,

Clifford A. Russell and A. M. Mull, Jr., for
Arthur S. Lyon.

BY THE COMMISSION:

OPINION, FINDINGS AND JUDGMENT

By Decision 27086, dated April 21, 1934 (Exhibit A),
Arthur S. Lyon was ordered to cease and desist operating as a
transportation company, as defined in Section 1, Subdivision (c),
of the Auto Truck Transportation Act (Chapter 213, Statutes
1917, as amended), with common carrier status between Sacramento,
Sacramento County, and Placerville, El Dorado County, without a
certificate of public convenience and necessity or prior right
authorizing such operation.¹

On October 16th, 1934, an application for order to show
cause and affidavit of Fred N. Bigelow was filed with the
Commission. It alleged, in substance, the rendering of Decision

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Decision 27086 was personally served on Arthur S. Lyon on the
25th of May, 1934 (Exhibit B), and Lyon testified he had
personal knowledge of that decision and the contents thereof.

27086 and that Arthur S. Lyon, notwithstanding the desist order therein contained, with knowledge thereof and subsequent to its effective date, had refused and failed to comply therewith, though able to, and had continued to operate as a common carrier between Sacramento and Placerville. Certain specific violations were set forth, alleged to have occurred on the 8th and 13th days of September, 1934.

On the 22nd of October, 1934, Arthur S. Lyon was ordered to appear and show cause why he should not be punished for contempt (Exhibit C). On the return date the respondent appeared in person and was represented by counsel. He admitted continuing operation in violation of Decision No. 27086, but stated he had then, at the time of the hearing, desisted. On March 18th, 1935, the Commission rendered its Decision No. 27831 (Exhibit D), in which it was stated, "Under all of the circumstances, and in view of the fact that respondent was a small operator, has been badly advised in the past, and has now complied with the prior order, I am of the opinion that the present decision should be dismissed." The decision so ordered.

Subsequently, however, on June 5th, 1935, a second application for order to show cause and affidavit of Fred N. Bigelow was filed with the Commission, and on June 10th, 1935, Arthur S. Lyon was again ordered to appear and show cause why he should not be punished for contempt.²

The second affidavit in substance alleges the prior proceedings before the Commission, that Arthur S. Lyon, still without operative right and subsequent to the effective date

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The second affidavit and order to show cause were personally served on Arthur S. Lyon on June 17, 1935 (Exhibit E).

of Decision 27086, and with knowledge thereof, has failed and refused to comply with said decision and has continued to operate as a common carrier between Sacramento and Placerville. In addition, the affidavit sets forth in a single count certain specific violations alleged to have occurred on the 26th and 27th days of April, 1935. Other specific violations are alleged on information and belief to have occurred on the 1st, 3rd, 10th, 13th, 19th, 20th, 21st, 22nd and 25th days of April, 1935.

The evidence may be summarized as follows:

T. G. JOHNSON, of Made-Rite Sausage Co., Sacramento, testified that since November or December, 1934, his company has used Lyon's service for the transportation of collect and prepaid shipments from Sacramento to Placerville once or twice a week. One such collect shipment occurred on the 25th of April, 1935,³ consigned to L. D. Forni. Lyon receipted for the shipment when picking it up on a hand bill (Exhibit 1). On or about May 1st, 1935, Lyon presented to the witness for signature a certain contract which he executed for his company without conversation respecting it (Exhibit 2).⁴ No difference was observed in the

³ Alleged in the affidavit (p. 7)

⁴ This contract reads as follows:

"THIS AGREEMENT made and entered into this 1st day of May, A.D. 1935, by and between MADE RITE SAUSAGE COMPANY, a firm, party of the first part, and ARTHUR S. LYON, party of the second part,

W I T N E S S E T H:

WHEREAS, the party of the first part conducts a wholesale meat business in the City of Sacramento, County of Sacramento, State of California; and,

WHEREAS, the said first part is desirous of shipping their said products to Placerville;

NOW, therefore, it is agreed that the said party of the second part will haul or transport all meat and products appurtenant thereto from Sacramento to Placerville.

nature or character of Lyon's operation before and after the execution of the contract. In addition to Lyon's service, the Made-Rite Sausage Co. has used its own trucks and the service of El Dorado Motor Transport and Pierce Arrow stages for transportation to Placerville during the same time respondent was patronized.

L. B. LANCASTER, of Western States Grocery Company, Sacramento, testified that for a year or two previously his company has used respondent's service four or five times a week for transportation of "collect" shipments of groceries from Sacramento to Placerville. Uniform straight bills of lading were used with these shipments, thirteen of which, all signed by respondent, relating to shipments subsequent to April 9, 1935, were received in evidence (Exhibit 3). Following the first contempt proceeding there was an interruption of several weeks in respondent's service. In the Spring of 1935 respondent again solicited the company's shipments. A contract was prepared by the company's attorney which was executed, but not offered in evidence. It did not, however, obligate the company to patronize respondent, and other services have been used contemporaneously. There was no difference in the type of service received from respondent before and after the execution of the contract.

4 (Continued from foot of page 3) -

At the following rates;

Thirty-five cents per hundred
Twenty-five cents minimum

MAKE OF CAR: Chevrolet SERIAL NO. 60A1-1512
ENGINE NUMBER T4808570 LICENSE NUMBER B.E.P.C. R1884

IN WITNESS WHEREOF, the parties hereto have hereunto set their hands the day and year first above written.

MADE RITE SAUSAGE CO.,

(Signed) Thores G. Johnson, First Party

" Arthur S. Lyon Second Party."

This contract is in substantially the same form as 18 of the other 21 contracts received in evidence, except that the other eighteen read "any or all" in place of "all" in the paragraph commencing "Now, therefore *****".

R. E. JAMES, of Mebins & Drescher, wholesale grocers, Sacramento, testified that his company frequently used respondent for "collect" shipments to Placerville, Coloma and intermediate points. Twenty shipping documents used in connection with such shipments on and subsequent to April, 4th, 1935, all signed by respondent at the time of the pick-up, were received in evidence (Exhibit 4). On April 22nd, 1935, one such shipment was made to J. W. Balderston of Coloma, and another to L. T. Butts of Placerville. Mebins & Drescher has never had a contract with respondent but uses the service at the request of customers who pay the hauling charges.

GEORGE S. PRITCHARD, a butcher of Placerville, testified that in April, 1935, he learned of respondent's service and asked respondent to haul for him. Respondent said he could take care of Pritchard and shortly thereafter called, bringing with him a form of contract which Pritchard signed at respondent's request (Exhibit 5, dated April 15, 1935). Since then Pritchard has made two or three shipments a week by respondent, paying the freight thereon. He was unable to state on which days in April, 1935, such shipments were made. In addition he has routed by respondent shipments which he purchases from Swift & Company. He believed that, having a contract with respondent, he ought to use respondent's service for all of his shipments between Sacramento and Placerville.

STANLEY A. YORE, of Bordens Capitol Dairy in Sacramento, testified that for years he has used respondent's service between Sacramento and Placerville an average of two or three times a week. There was an interruption in the service prior to April 1st, 1935, but about that date he requested respondent to resume

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Alleged in the affidavit (p.6) and shown by shipping documents in Exhibit 4 dated April 19th, 1935.

hauling. Respondent was willing to do so if Bordens would sign a contract with him and he produced a form which was signed on April 1st, 1935 (Exhibit 6). Thereafter service was rendered two or three times a week as previously, hauling charges being paid by Bordens as each shipment was picked up. No difference in the character of the service before and after signing the contract was observed. All the shipping documents were sent to the company's office at San Francisco and Yore was unable to state the particular days in April when shipments were made.

ERNEST A. WILLIAMS, of Roma Wine Company, Sacramento, testified his company has made shipments over respondent's line between Sacramento and Placerville an average of twice a month. An interruption in respondent's service occurred in the spring of 1935, following which respondent would haul only if a contract was signed. Respondent presented for signature a contract calling for all the wine company's shipments to Placerville, which Williams declined to sign and the contract was therefore amended to call for "any or all" such shipments (Exhibit 7, dated April 22, 1935). Williams was unable to recall and had no records to indicate the specific dates in April when shipments were made by or received from respondent. Since June or July, 1935, the Wine Company has prepaid all transportation charges at the time of pick-up, but prior thereto some shipments were collect and some prepaid.

C. F. HATTESSEN, of Van Voorhees Phinney Co., in the wholesale saddle, harness and shoe business in Sacramento, testified that on April 24th, 1935,⁶ pursuant to instructions from the Tracy Shoe Store in Placerville, his company consigned

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Alleged in the Affidavit (p.7).

to the shoe store a collect shipment of shoe dressing over respondent's line. Respondent receipted for the shipment by signing the bill of lading (Exhibit 8). Other similar shipments have been made to Placerville by respondent during 1934. Van Voorhees Phinney Co. has no contract with respondent.

EMIL SACCANI, of Meredith Fish Co., Sacramento, testified that for the past two years respondent has called at his company's business place every Wednesday and sometimes on Thursdays for shipments going to Pritchard Meat Co. in Placerville. Such a shipment was made collect on the 25th day of April, 1935,⁷ at Pritchard's request, respondent receipting for the shipment on a hand tag made out by the Fish Company (Exhibit 9, dated April 25, 1935). The remaining documents in Exhibit 9 are other hand tags signed by respondent at the time of pick-up of other collect shipments. Meredith Fish Company has no contract with respondent.

EARL A. LAVINE, of McKesson-Kirk-Geary, dealers in wholesale drugs and liquors, Sacramento, testified his company has used respondent's service for shipments to Placerville, El Dorado and Diamond Springs four or five times a week for the past five or six years. Uniform straight bills of lading are used with the shipments, seventeen of which, all signed by respondent, for shipments on and subsequent to April 1st, 1935, were received in evidence (Exhibit 10). Seven shipments occurred on April 1st, 1935,⁸ one each to the Bottle Shop, Placerville, prepaid; A.T. Hopkins, El Dorado, prepaid; L. T. Butts & Son, Placerville, collect; Round Tent, Placerville, prepaid; Raffles Hotel, Placerville, collect; Dick Crowder, Placerville, prepaid, and

⁷ Alleged in the affidavit (p. 7 & 8).

⁸ Alleged in the affidavit (p. 6).

Dick Crowder, Placerville, collect. On the 24th of April, 1935, a prepaid shipment⁹ was made by respondent to Wisdom & Longhurst at Placerville. On the 27th of April, 1935, a collect shipment¹⁰ was made by respondent to Fox Brothers at Placerville. On March 30th, 1935, the company entered into a contract with respondent (Exhibit 11) in the execution of which the witness did not participate. McKesson-Kirk-Geary feels free to use any service to Placerville it may choose.

CHARLES E. CLARK, JR., of Elmer Paper Company, Sacramento, testified that since 1934 his company has been making collect shipments to Placerville by respondent about twice a month on customers' instructions. Respondent signs for the shipments at the time of pick-up on tags prepared by the company, seven of which were produced (Exhibit 12). On April 15th, 1935, a contract was entered into with respondent at respondent's request (Exhibit 13). No difference was observed in the service before and after signing the contract.

B. BRODOVSKI, of Valley Paper Company, Sacramento, testified that since 1933 his company has made collect and prepaid shipments to Placerville by respondent about once a week. He could not state on what days in April, 1935, such shipments occurred. His company signed a contract with respondent on June 27, 1935 (Exhibit 14) on a blank form produced by respondent. There was no difference in the service before and after the signing of the contract.

J. A. MAXWELL, of Swift & Co., Sacramento, testified that since 1933 his company has shipped by respondent an average

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The affidavit alleged the delivery of a shipment to the McKesson-Kirk-Geary on this date and, on information and belief, the leaving of an order for merchandise. (p. 7)

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Alleged in the affidavit (p. 10).

of five times a week between Sacramento and Placerville, both collect and prepaid. The service was uninterrupted for about eight months following the first contempt proceeding but in the spring of 1935 respondent called on Maxwell, stated that he was serving three or four firms under contract and asked Swift & Co. to make such a contract also. After correspondence with the company's San Francisco office, a contract was signed, Maxwell believes, on the form received as Exhibit 16 (second sheet).¹¹ At the same time an indemnity agreement was signed in the same form as one previously executed (Exhibit 16, first sheet). There has been no difference in the service since the signing of the contract except that respondent's new truck is faster than the old and makes quicker deliveries. On April 27th, 1935, a prepaid shipment¹² was made by respondent to Lynn & O'Neill in Placerville, respondent receipting for the shipment on a uniform straight bill of lading (Exhibit 15). In addition to respondent's service, Swift & Co. also ships to Placerville via El Dorado Motor Transport.

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This contract reads as follows:

"This agreement made on this _____ day of _____, 1934 between Arthur S. Lyon party of the first part and Swifts & Co. party of the second part.

The party of the first part agrees to deliver to Placerville and way stations meat etc. at the rate of thirty-five cents (35¢) per cwt for the party of the second part. Said freight to be paid either by consignor or consignee as per their selling agreement.

(Signed) Arthur S. Lyon"

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Alleged in the affidavit (p. 10).

MELVIN OLIVER PORTER of Armour & Co., Sacramento, testified that every Wednesday respondent picks up shipments consigned to Raley's Market, Pioneer Market and Forni's Market, Placerville. Shipments of fresh meat are prepaid and of smoked and cold meats collect. There was an interruption in the service during the spring of 1935. Armour & Co. has no contract with respondent and the witness did not know whether or not Virden Packing Company, which was consolidated with Armour & Co. in May, 1935, had a contract with the respondent.

FRED N. BIGELOW testified that between April 24th and April 27th, 1935, he made a personal investigation of respondent's operations by following respondent's truck as respondent made pick-ups and deliveries in Sacramento and Placerville and operated his truck over the highways. On April 25th, 1935, Bigelow watched respondent, in Sacramento, pick up shipments or leave orders for merchandise at certain business places, as alleged in the affidavit (p. 7). On the 25th of April, 1935, Bigelow saw respondent operating his truck, loaded with freight, on the highway between Sacramento and Placerville, followed respondent to Placerville, where he saw respondent unload and deliver shipments at certain business places, as alleged in the affidavit (p.8). On the 26th of April, 1935, Bigelow saw respondent operating his truck, loaded with freight, in Sacramento, followed him to Placerville where he watched respondent unload and deliver shipments at certain business places, as alleged in the affidavit (p.9). On the 27th of April, 1935, Bigelow, in Sacramento, watched respondent make a delivery and pick-up and load shipments on his truck, as alleged in the affidavit (p.10), followed respondent in his loaded truck to Mills, Diamond Springs and Placerville, in each of which places he watched respondent unload and deliver shipments at certain business places, as alleged in

the affidavit (pps. 10 and 11). On April 25th, 1935, Bigelow had a conversation with respondent in Placerville, during which he told respondent he was investigating the operation, believed it to be in violation of the Commission's cease and desist order, and proposed filing with the Commission an affidavit charging respondent with contempt.

On behalf of respondent, Henry S. Lyon, respondent's son, testified that he is an attorney. In the spring of 1935 his father told him of requests from former patrons to resume service. He advised respondent that to operate legally he must have contracts with his customers and observe and conform to the contracts. He prepared a form of contract for his father substantially in the form of Exhibit 2. Later he heard that the form he approved had been changed but had no knowledge of the nature or extent of the changes or of any of the details of his father's business.

Respondent testified he discontinued his operation for several months after the first contempt proceedings. Certain old customers requested him to resume hauling, and when his son advised him an operation under contract was lawful, he took the form of contract his son prepared to former customers, obtained their signatures on the contracts and resumed hauling for them.

On cross-examination, respondent testified he took the form contract not only to the customers who had requested him to resume but to others as well. He procured twenty-one contracts in all, those not previously mentioned being with Virden Packing Co., Swift & Co., Western States Grocery, Crystal Creamery (not offered in evidence) and ten more, received in evidence as Exhibit 17, with the following: L. D. Forni, dated April 1, 1935; Capital Cigar & Liquor Company, dated August 15, 1935; Cardinet

Candy Company, June 1, 1935; Mrs. C. L. Mass, May 5, 1935; Bert McDowell, wholesale grocers, July 9, 1935; Northern Tobacco Company, June 19, 1935; Pureta Sausage Company, March 18, 1935; Fox Bros., May 3, 1935; L. T. Butts & Son, March 23, 1935; Pino Vista Dairy, March 21, 1935. Respondent could not recall any shippers of merchandise whom he was serving prior to the interruption with whom he did not enter into contracts upon resuming his operation. He did, however, discontinue his previous practice, for two patrons, of taking clothes from Placerville to Sacramento to be cleaned and returning them to Placerville. On one occasion, since resuming, he refused the request of a retired business man of Placerville to haul some lemon juice from Sacramento to be used at a social function. He admitted there are numerous merchants for whom he hauls, and who pay him freight charges, with whom he has no contracts, including McEachern Grocery at El Dorado;¹³ Geo. Davenport, Camino;¹⁴ J. W. Balderston, Coloma;¹⁵ C. Gardella, Placerville;¹⁶ Round Tent Cigar Company, Placerville;¹⁷ H. J. Lindbergs, Placerville;¹⁸ and there are other such patrons as well.

¹³ Bill of Lading in Exhibit 3 dated August 9, 1935.

¹⁴ Freight bills in Exhibit 4, dated April 4th and 18th, 1935.

¹⁵ Freight bills in Exhibit 4, dated April 19th, 1935.

¹⁶ Freight bills in Exhibit 4, dated April 5, 1935.

¹⁷ Freight bill in Exhibit 10, dated April 3rd, 1935.

¹⁸ Freight bill in Exhibit 10, dated April 3rd, 1935.

Other such merchants apparent in the record by comparison of collect consignees shown on the bills of lading with respondent's list of contracts are as follows:

Raber & Herman, Placerville;
N. P. Hankin, Camino,
Dick Crowder, Placerville.

The record is clear that during the period alleged in the affidavit respondent was operating as a common carrier and as a transportation company within the meaning of the Auto Truck Transportation Act. The evidence shows that in all essential respects respondent's operation, when recommenced after the temporary cessation, was identical to that previously conducted which was held illegal in Decision No. 27086. It is apparent that respondent merely secured his patrons' signatures to so-called "private contracts" and resumed business where he had left off, rendering the same service as before. Clearly respondent was posing as a private carrier.

Haynes v. McFarlane, 207 Cal. 529;

Frost v. Railroad Commission, 271 U.S. 583; 46 S. Ct. 607; 70 L. ed. 110.

The contracts, moreover, impose no obligation upon the shippers and are purely rate quotations, not contracts for transportation.

Respondent urges, however, that he relied upon his son's legal advice and acted without bad faith. While not a defense, this fact is entitled to consideration as a mitigating circumstance. But we cannot overlook that respondent contented himself with legal advice which was superficial in the extreme, particularly in view of his recent experience in the first contempt proceeding. The advice was largely academic and did not purport to pass on the methods and practices respondent proposed to and did adopt and pursue. It does not appear that respondent made any effort to acquaint his attorney with the actual facts surrounding his business. Even after affiant had told respondent his operation was about to be questioned again before the Commission, respondent nevertheless expanded his operation

and signed additional contracts without attempting to assure himself that he was on safe ground. The evidence clearly shows, moreover, that respondent did not restrict his hauling to patrons with contracts.

F I N D I N G S

1. On April 21st, 1934, the Railroad Commission, in its Decision 27086, found as a fact that Arthur S. Lyon was operating as a transportation company as defined in Section 1, subdivision (e), of the Auto Truck Transportation Act (Chapter 213, Statutes 1917, as amended), with common carrier status between Sacramento, Sacramento County, and Placerville, El Dorado County, and without certificate of public convenience and necessity or prior right authorizing such operations; and ordered a cessation of such common carrier operation between Sacramento and Placerville. Said order has never been revoked, annulled or stayed and is now in full force and effect.

2. A certified copy of said Decision 27086 was personally served on Arthur S. Lyon on the 25th day of May, 1934, and said Arthur S. Lyon had personal knowledge and notice of said decision and the contents thereof on and prior to the effective date thereof, and was able at all times thereafter to comply with said order.

3. On June 5th, 1935, the affidavit of Fred N. Bigelow was filed in which it was alleged in substance that said Arthur S. Lyon, notwithstanding the order contained in Decision 27086, with full knowledge of its contents and subsequent to its effective date, has failed and refused to comply with said order in that he has continued to operate, control and manage an auto truck as a common carrier of property for compensation between Sacramento and Placerville,

and more particularly on the 27th day of April, 1935.

4. Upon said affidavit being received and filed, the Railroad Commission on June 10th, 1935, issued its order directing Arthur S. Lyon to appear on August 20th, 1935, and show cause why he should not be punished for the alleged contempt set forth in said affidavit. Said order to show cause, together with the affidavit upon which based, was personally served upon Arthur S. Lyon on the 17th day of June, 1935. Upon the return date, Arthur S. Lyon appeared in person and was represented by counsel. Hearings were had and the matter submitted.

5. Notwithstanding the order of the Railroad Commission contained in its Decision 27086, the said Arthur S. Lyon failed and refused to comply with the terms thereof and continued to and did operate, control and manage the business of operating an automobile truck for the transportation of property as a common carrier for compensation over the public highways in this State within the meaning of Chapter 213, Statutes of 1917, as amended, between Sacramento and Placerville and more specifically on the 27th day of April, 1935.

6. The above failure of the said Arthur S. Lyon to comply with said order of the Railroad Commission, as set forth in Finding No. 5 above, was a contempt of the Railroad Commission of the State of California and its order, and in violation of Chapter 213, Statutes of 1917, as amended.

J U D G M E N T

IT IS HEREBY ORDERED AND ADJUDGED that Arthur S. Lyon has been and is guilty of contempt of the Railroad Commission in disobeying its order of April 21st, 1934, contained in its Decision 27086, said contempt having taken place on the 27th

day of April, 1935, as more specifically found in finding No. 5 above.

IT IS HEREBY FURTHER ORDERED, ADJUDGED AND DECREED that for said contempt of the Railroad Commission and its order, said Arthur S. Lyon be punished by a fine of One Hundred Dollars (\$100.00) to be paid to the Secretary of the Railroad Commission within ten (10) days after the effective date of this Opinion, Finding and Judgment; and that in default of payment of the aforesaid fine, said Arthur S. Lyon be committed to the county jail of the County of Sacramento, State of California, until such fine be paid or satisfied in the proportion of one (1) day's imprisonment for each Five Dollars (\$5.00) thereof that shall so remain unpaid, such imprisonment to be cumulative and not concurrent.

IT IS FURTHER ORDERED that the Secretary of the Railroad Commission, if the above fine is not paid within the time specified above, prepare, sign and issue appropriate order or orders of arrest and commitment in the name of the Railroad Commission of the State of California, to which shall be attached and made a part thereof a certified copy of this Opinion, Findings and Judgment.

IT IS FURTHER ORDERED that this Opinion, Findings and Judgment shall become effective twenty (20) days after personal service of a certified copy thereof upon Arthur S. Lyon.

DATED at San Francisco, California, this 30th day of September, 1935.

Leon C. Whiskey

M. H. Can

M. B. Harris

W. L. Thompson

Joann R. Delvin

Commissioners.