Decision No. [illegible]

ORIGINAL

BEFORE THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA

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| In the Matter of the Investigation on the Commission's Own Motion into the operations, rates charges, contracts and practices, or any thereof, of LELAND DOSS. | ) ) ) ) ) | Case No. 4243 |

Charles Lederer, for Respondent.

BY THE COMMISSION:

O P I N I O N

This proceeding was instituted by the Commission on its own motion to inquire into the motor truck operations of respondent Leland Doss and to determine whether or not he was conducting such operations as a highway common carrier between fixed termini or over a regular route without a certificate of public convenience and necessity in violation of the Public Utilities Act; also to determine whether or not he was operating as a radial highway common carrier or highway contract carrier at rates less than those prescribed by Decision No. 28761.

Public hearings were held before Examiner Elder at Alturas on December 2nd and 4th, 1937, at which respondent appeared and was represented by counsel. Testimony and documentary evidence were received from numerous public witnesses and from respondent and the matter submitted. It is now ready for decision.

It appears from the evidence that prior to 1935 respondent was employed as a driver for Ray Frailey, who then held a certificate of public convenience and necessity as a highway common carrier of freight between Alturas, on the one hand, and points in Surprise Valley, namely, Cedarville, Lake City and Fort Bidwell, on the other hand. In January, 1935, Frailey applied to the Commission for authority to abandon his operation and for revocation of his certificate, which was granted (Decision No. 27681, Application No. 19756). The evidence further shows that when Frailey discontinued, respondent purchased Frailey's equipment and continued Frailey's former operations as respondent's own business.

Despite the enactment of the Highway Carriers' Act, which became effective September 16th, 1935, respondent held no permit or other operative right of any kind from the Commission until December 14th, 1935, when, upon his application therefor being received, he was issued permit No. 25-1 as a radial highway common carrier, pursuant to the mandatory provisions of the Highway Carriers' Act. On September 17th, 1936, respondent received, pursuant to his application therefor, another permit, No. 25-27, as a highway contract carrier.

In the meantime, however, on December 6th, 1935, respondent filed Application No. 20287 for a certificate of public convenience and necessity to operate between Alturas and Surprise Valley points as a highway common carrier. This application closely followed the filing of a similar application by J. L. Hawkins, Application No. 20147, and the two applications were heard on a consolidated record.

In Decision No. 28851 Hawkins' application was held to be most in the public interest as he offered both a passenger and freight service and Doss only freight; Hawkins proposed rates somewhat lower than Doss, and held a contract for the transportation of United States Mail, the revenue from which appeared to be almost essential to the proper maintenance of the service in view of the light traffic anticipated. Hawkins' application was therefore granted and respondent's denied.

It appears from the record herein, however, that at the time of this decision, respondent, by reason of his former association with Frailey, already was serving substantially all, or at least a large majority, of the merchants in Surprise Valley and carrying most of the traffic. When his certificate was denied, respondent had prepared a form of written contract, presented it to his shippers telling them that he had to have a contract to operate lawfully, and secured their signatures thereon. Nineteen such contracts were received in evidence, fifteen being dated June 4th or June 8th, 1936, and the others in May or June, 1937. It is to be noted that until September 17th, 1936, respondent held only a radial highway common carrier permit. All the contracts were in

substantially the same form.(1) Five, however, omit the clause contained in the others by which the first party agrees to give respondent all shipments moving between the points named in the contracts. There was testimony that this omission was unintentional, but the five contracts in question, though of similar date to the others, were obviously written on a different typewriter and were

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(1) A typical contract was the following, received in evidence as Exhibit No. 14:

"THIS AGREEMENT, executed in triplicate, JUNE FOURTH 1936.

BETWEEN D S DENEHY COMPANY OF CEDARVILLE CALIFORNIA party of the first part and LELAND DOSS OF FORT BIDWELL, CALIFORNIA party of the second part.

WITNESSETH: THAT whereas the first party is engaged in the business of merchandising in its various branches at CEDARVILLE CALIFORNIA and is desireous of having its freight carried between ALTURAS AND CEDARVILLE either way and second party is desireous of transporting the freight of first party between said ALTURAS AND CEDARVILLE either way as also between CEDARVILLE AND LAKE CITY either way and between CEDARVILLE AND FORT BIDWELL either way as same may be desired by first party now therefore in consideration of the foregoing and other good considerations moving between these said parties of the first and second part it is mutually agreed as follows:

THAT daily through the year excepting SUNDAYS the second party agrees to transport all freight delivered second party by first party from ALTURAS TO CEDARVILLE either way at the rate of 20 cents per 100 pounds, between CEDARVILLE AND LAKE CITY either way at the rate of 15 cents per 100 pounds and first party agrees to give second party all of its freight to haul, between CEDARVILLE and FORT BIDWELL either way at the rate of 15 cents per 100 pounds and second party agrees to maintain daily round trip service between the above points excepting SUNDAYS and throughout the year and this agreement to be binding on the respective parties for the period of ____ years from date.

D S DENEHY COMPANY FIRST PARTY

BY Ray Abam (SD)
Leland Doss (SD)
OF FORT BIDWELL CALIFORNIA SECOND PARTY

WITNESSES:
1. D. J. Craig (SD)
2. "

differently arranged typographically, and give indication of having been prepared specially. Several of the contracts state no term. Freight charges on traffic purportedly hauled under others were not paid by the parties with whom respondent had entered into the contracts, and the contracts cannot be deemed applicable thereto. In another instance one of the shippers went out of business but respondent continued serving the successor for months before entering into a new contract.

Respondent testified that in soliciting the contracts it was his intention to limit himself to a few, but he also stated that he got all the contracts he could around the business houses, that all the shippers or receivers he asked signed contracts with him, and that only two who asked him for contracts did he refuse. These he declined because he thought he had too many contracts.

James Steven McCartney, cashier for Southern Pacific Company at Alturas, testified, significantly, that respondent hauls for the big firms and Hawkins for individuals; also that respondent accepts shipments going to receivers with whom he has contracts, but declines others.

Nevertheless, respondent's operations are not restricted to serving parties with contracts. The evidence shows numerous shipments handled for various others on demand. These, respondent said, he believed he could legally handle under his permit as a radial highway common carrier, though his operations are almost wholly between the points above named. Respondent

introduced evidence that he had declined to transport property for three persons who had requested service of him, but those refusals occurred subsequent to the inception of the present formal investigation questioning the propriety of his operations.

The conclusion is inescapable that respondent has been operating as a highway common carrier without certificate. The original status of the operation when respondent took it over from Frailey was that of a common carrier, and respondent has continued it in substantially the same manner ever since, entering into written contracts with the regular shippers and receivers of freight when his certificate was denied, to give the operation the color of a contract carrier service. In this we do not mean to impute to respondent any conscious resort to a subterfuge; but regardless of his motive, his mistaken practices produced the same result as a deliberate intent to disguise the nature of his business. The stereotyped form of contract used by respondent negatives the existence of any attempt on his part to meet any peculiar or special needs of his patrons, if any such needs exist. The omission in certain contracts of the clause imposing an apparent mutuality of obligation on the shippers by requiring them to tender respondent all of their shipments, suggests a readiness to yield to his patrons' reluctance to accept such an obligation; and the omission of the term of the contract in others, and the other irregularities above mentioned, tend further to demonstrate that appearance rather than substance was foremost in respondent's mind. This is confirmed by the repeated testimony of his patrons that respondent told them he wanted a written contract so he could operate

legally. The prevalence of service rendered on request to casual and intermittant shippers goes further to establish respondent's common carrier status. McCartney's testimony that respondent did not take from the depot shipments consigned to parties with whom respondent had no contracts does not affect this conclusion for it does not appear that the station agent had any authority from the owners to tender respondent the shipments or that there was any tender by anyone through whom the owners might become bound to pay respondent his freight charges. There is no convincing evidence of any genuine limitation or restriction of service whatever.

Respondent makes no serious effort to dispute that he has been operating as a common carrier, at least so far as his service to shippers not under contract is concerned, and he pleads as his excuse his failure to understand the law. While such lack of understanding may perhaps have existed, this excuse is of little avail in any case. In In Re Rampone vs. Leonardini et al, Decision No. 28526, 39 C. R. C., p. 562, the Commission clearly defined a highway common carrier, a radial highway common carrier, and a highway contract carrier, and therein distinguished each type of carrier from the others. Furthermore, there is convincing evidence in this record that full and clear explanations of the law were repeatedly given respondent by the Commission, both by correspondence and by one of its inspectors.

Respondent appears to believe, however, that if he holds written contracts with all his patrons he may thereby avoid common carrier status and remain within the category of a contract carrier. This is not necessarily true. The essential test of a common carrier is a public holding-out or offer of service. Such a holding-out may exist even when written contracts are made with all shippers or

receivers served. It is normally encountered where, as here, the nature of the traffic and the needs of the shippers involve none of the special, unique or individualized service which is the natural field of the contract or private carrier, and the same or similar service could as well be rendered by an avowed common carrier. Any limitation of service or withholding of public holding-out under such conditions is usually artificial and unnatural to that type of traffic and operation. Moreover, from a practical standpoint, it is difficult to maintain if the operation is to succeed financially. But in the absence of such limitation of service or withholding of public dedication, the essential common carrier nature of the operation is not altered or successfully disguised by the use of any written contracts, whatever may be their form.

For the reasons already indicated we must conclude that respondent's service was originally offered to the public generally as a common carrier and its status as such has not been changed nor the holding-out withdrawn by respondent's general use of written contracts or otherwise. A cease and desist order should issue. No evidence was received respecting respondent's rates, as at the time covered by the investigation there were no highway carrier rates in effect between the points served by respondent.

An order of this Commission finding an operation to be unlawful and directing that it be discontinued is, in its effect, not unlike an injunction by a court. A violation of such order constitutes a contempt of the Commission. The California Constitution and the Public Utilities Act vest the Commission with power and authority to punish for contempt in the same manner and to the same extent as courts of record. In the event a party is adjudged guilty of contempt, a fine may be imposed in the amount of $500.00, or he may be imprisoned for five days, or both. C. C. P. Sec. 1218, Motor

Freight Terminal Co. v. Bray, 37 C. R. C. 224; In re Ball and Hayes, 37 C. R. C. 407; Wermuth v. Stamper, 38 C. R. C. 371. It should also be noted that under Section 79 of the Public Utilities Act, a person who violates an order of the Commission is guilty of a misdemeanor, and is punishable by a fine not exceeding $1,000.00 or by imprisonment in the County Jail not exceeding one year, or by both fine and imprisonment.

## O R D E R

Public hearing having been held in the above entitled proceeding, evidence having been received, the matter having been duly submitted and the Commission now being fully advised,

IT IS HEREBY FOUND that respondent Leland Doss, doing business as Surprise Valley Stage Line, is operating as a highway common carrier, as defined in Section 2-3/4 of the Public Utilities Act of the State of California, between the fixed termini of Alturas, on the one hand, and Cedarville, Lake City and Fort Bidwell, on the other hand, without first having secured from this Commission a certificate of public convenience and necessity authorizing such operation, and without other operative right, in violation of Section 50-3/4 of the Public Utilities Act.

IT IS HEREBY ORDERED that respondent Leland Doss immediately cease and desist from conducting or continuing, directly or indirectly or by any subterfuge or device, any and all said operation as a highway common carrier hereinabove in the next preceeding paragraph set forth, unless and until he shall have secured from the Railroad Commission a proper certificate of public convenience and necessity therefor.

IT IS HEREBY FURTHER ORDERED that the Secretary of the Commission cause service of this order to be made upon respondent Leland Doss.

IT IS HEREBY FURTHER ORDERED that for all other purposes the effective date of this order shall be twenty (20) days from the date of service hereof upon said respondent.

Dated at San Francisco, California, this 16th day of May, 1938.

Commissioners.