

Decision No. 32226

BEFORE THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Investigation on
the Commission's own motion into the
operations, rates, charges, contracts,
and practices, or any thereof, of
ARTHUR S. LYON.

Case No. 4322

ORIGINAL

A. M. MULL, Jr., for respondent.

WAKEFIELD, Commissioner:

O P I N I O N

This proceeding was instituted by the Commission on its own motion to determine whether or not Arthur S. Lyon, respondent herein, was engaged in the transportation of property over the public highways in this state between Sacramento, on the one hand, and Placerville and intermediate points, on the other hand, as a highway common carrier as that term is defined in Section 2-3/4 of the Public Utilities Act without first having obtained from the Railroad Commission a certificate of public convenience and necessity therefor, as required by Section 50-3/4(c) of said Act, and whether or not respondent was transporting property as a highway carrier other than a highway common carrier at rates less than the minimum rates established for such transportation by the Commission in its Decision No. 28761, as amended, in Case No. 4088, Part "A".

Public hearings were held in Sacramento on June 22nd and August 25th, 1938, at which place and times respondent appeared with counsel and participated in the hearings. Testimony was received from numerous shippers served by respondent, from employees of the Commission, and from respondent himself, who voluntarily testified in his own behalf, and the matter was submitted and is now ready for decision.

The record shows that respondent holds highway contract carrier permit No. 34-11 issued to him by the Commission on November 6, 1935. Since that time he has continuously been engaged in the business of transporting property for compensation or hire by means of a motor vehicle over the public highways of this state between Sacramento and Placerville and points intermediate and proximate thereto. The bulk of respondent's business consists of transporting shipments from wholesale business houses in Sacramento to retail stores in the Placerville area. His service is almost a daily one, as he makes four or five trips each week between the points named. The evidence shows that since July 1, 1937, he has transported property for approximately 60 firms, about half of whom are consignors in Sacramento who prepay the freight on their shipments, and the remainder of whom are consignees in and near Placerville who pay the freight charges on shipments they receive.

The record reveals that this service was performed for the general public. It appears that respondent freely solicited shipments not only from consignors in Sacramento but also from consignees in and near Placerville, and urged the latter to instruct the firms in Sacramento from whom they purchase to ship via respondent. A further indication of his willingness to serve the general public is the absence of any limitation or restriction of his service to a selected group of shippers. Respondent testified that he considered the existence of contracts with the consignors from whom he received shipments sufficient to confer upon him the status of a highway contract carrier, and that he accordingly did not enter into contracts with consignees receiving shipments from such consignors, even though the consignees paid the freight charges and directed the routing. It is obvious, however, that under such circumstances the service is performed for the consignees and that a contract with the consignor cannot be considered as a limitation on the availability of the service. It should also be noted that respondent held contracts with only a portion of the consignors served and frequently accepted and transported shipments even though he had no contract with either the consignor or the

consignee. Furthermore, the contracts which were introduced in evidence did not bind the shippers to use respondent's service, but merely purported to obligate the latter to transport all shipments tendered to him for transportation between the points in question. Some of the shippers who signed such contracts testified that they had not intended thereby to bind themselves to use respondent's services, that they had in fact used respondent and other carriers indiscriminately, and that they had signed the agreements only because of respondent's representations that he was not permitted to carry their goods without such agreements. Even had these contracts imposed mutually binding obligations on both parties, however, it is doubtful that they would have been an effective limitation of his offer of service, in view of respondent's apparent willingness to enter into such contracts with all shippers and to serve persons with whom he had no contracts.

It is clear, therefore, that respondent's service between these points was available to the general public, was regularly conducted between fixed termini and over a regular route, and was accordingly that of a highway common carrier. Since he was not engaged in such operations on July 26, 1917, and has not obtained a certificate of public convenience and necessity therefor from the Commission, he should be ordered to cease and desist therefrom.

This is not respondent's first appearance before this Commission. He was held to be conducting a highway common carrier service between the same points in issue here, and was ordered to cease and desist therefrom, in Regulated Carriers v. Lyon, Case No. 3523, Decision No. 27086, dated May 21, 1934. He was subsequently cited twice for contempt of that order, admitted his guilt on the first occasion,⁽¹⁾ and was found guilty and fined \$100.00 on the second.⁽²⁾ Such proceedings have apparently been insufficient to impress upon respondent the necessity for abstaining from operations for which he has no authority. Under the circumstances, the Commission's attorney should be directed to pursue the additional remedies provided in Section 76 of the Public Utilities Act by commencing an action against respondent

(1) Regulated Carriers, Inc. v. Lyon, Case No. 3523, Decision No. 27831, dated March 18, 1935.

(2) Regulated Carriers, Inc. v. Lyon, Case No. 3523, Decision No. 28250, dated September 30, 1935.

in the Superior Court to recover penalties for his unlawful highway common carrier operations.

The finding that respondent has been operating as a highway common carrier disposes of the other issue in this case, namely, whether or not respondent has transported property as a highway carrier other than a highway common carrier at rates less than the minimum rates therefor established by the Commission. It is to be noted, however, that respondent, though purporting to act as a highway contract carrier, has in some instances failed to observe the minimum rates established for highway contract carriers by Decision No. 28761, as amended, in Case No. 4088, Part "A".

An order of the Commission directing that an unlawful operation cease and desist is in 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 a contempt he may be fined in the amount of \$500.00, or imprisoned for five days, or both. C.C.P. Sec. 1218; Motor Freight Terminal Co. v. Bray, 37 C.R.C. 244; re Ball & Hayes, 37 C.R.C. 407; Wermuth v. Stamper, 36 C.R.C. 458; Pioneer Express Co. v. Keller, 33 C.R.C. 571.

Public hearings having been held in the above-entitled proceeding, evidence having been received, and the matter having been duly submitted, I hereby find that respondent, Arthur S. Lyon, has been engaged since July 1, 1937, in the business of transporting property for compensation or hire by means of a motor vehicle over the public highways in this state between fixed termini and over a regular route, to-wit: between Sacramento, on the one hand, and Placerville and points intermediate and proximate thereto, on the other hand, as a highway common carrier as defined in Section 2-3/4 of the Public Utilities Act, without first having obtained from the Railroad Commission a certificate of public convenience and necessity therefor and without having a prior right to do so resulting from a good faith highway common carrier operation conducted on July 26, 1917, and continuously thereafter.

The following form of order is recommended:

ORDER

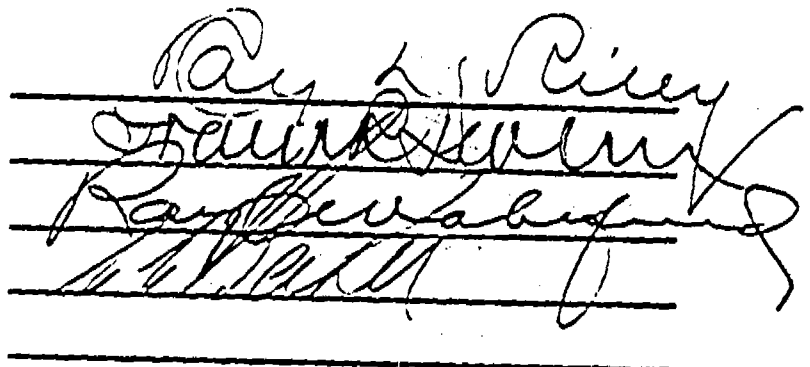
IT IS HEREBY ORDERED from the foregoing findings of fact that respondent, Arthur S. Lyon, cease and desist from conducting, directly or indirectly, or by any subterfuge or device, any and all operations as a highway common carrier as defined in Section 2-3/4 of the Public Utilities Act over the public highways of this state between Sacramento, on the one hand, and Placerville and points intermediate and proximate thereto, on the other hand, unless and until he first obtains from the Railroad Commission a certificate of public convenience and necessity authorizing such operations.

IT IS HEREBY FURTHER ORDERED that in all other respects this proceeding be and it is hereby dismissed.

IT IS HEREBY FURTHER ORDERED that the Secretary of the Railroad Commission cause a certified copy of this decision to be personally served upon respondent, Arthur S. Lyon, and this opinion and order shall become effective twenty (20) days after the date of such service.

The foregoing opinion and order are hereby approved and ordered filed as the opinion and order of the Railroad Commission of the State of California.

Dated at San Francisco, California, this 25th day of June, 1940.



COMMISSIONERS