Decision No. [illegible]

ORIGINAL

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 of LYON VAN & STORAGE COMPANY, a corporation.) Case No. 4296

C. P. VON HERZEN, for Respondent;

PHIL JACOBSEN for C. W. Carlstrom, doing business as Ace Van & Storage Co., interested party;

HAROLD W. DILL, for The Truck & Warehouse Association of San Diego and Imperial Counties, interested party;

JACKSON W. KENDALL, for Bekins Van & Storage Co. and Bekins Van Lines, Inc., as their interest may appear; and

WILLIAM L. CARPENTER, for Argonne Van & Storage Co. and Argonne Van Lines, as their interesta may appear.

BY THE COMMISSION:

OPINION

This proceeding was instituted by the Commission, on its own motion, for the purpose of determining whether or not respondent, LYON VAN & STORAGE COMPANY, a corporation, is operating in violation of Section 50-3/4 of the Public Utilities Act between San Diego and La Mesa, Coronado, a d National City, on the one hand, and Los Angeles, Pasadena, Long Beach, Glendale, Alhambra, and Hollywood, and intermediate points, on the other hand, and over regular routes

between said points, as a highway common carrier without a certificate of public convenience and necessity.

Public hearings were held in Los Angeles and San Diego, evidence was received, briefs filed, the matter submitted, and it is now ready for decision.

The evidence shows respondent is a corporation engaged in the storage and moving of household goods and personal effects. Offices are maintained in Los Angeles, Long Beach, San Diego, and at other points. About 24 trucks are operated from the Los Angeles office, 2 large vans and certain smaller trucks from San Diego, and 5 trucks from the Long Beach office. Not all of this equipment, however, is operated between points and over the routes here involved.

Respondent holds Permits Nos. 19-454 and 19-455, as a radial highway common carrier and highway contract carrier, respectively, and No. 19-456 as a city carrier. It holds no certificate of public convenience and necessity as a highway common carrier, nor has it ever had on file or presented for filing any tariff as a highway common carrier between the points involved.

Records of the company were produced showing traffic hauled between the termini mentioned in the order of investigation, or which moved over highways Nos. U. S. 101 and 101-A between San Diego and Coronado, on the one hand, and Los Angeles, Beverly Hills, Hollywood, Alhambra, Pasadena, and Glendale and intermediate points, on the other, during the period from May, 1937, to November, 1937, inclusive. Approximately 175 shipments were handled for almost an equal number of shippers. Shipments moved on 93 different days, and in both directions on 17 days, indicating approximately 110 trips during the seven months. Employees of the company testified that

shipments were dispatched from the San Diego office for Los Angeles or vicinity an average of 1½ times a week, and from Los Angeles office for San Diego and vicinity several times a week.

Witnesses for the company further testified that patronage is sought by advertising in telephone directories and on highway signs, and that no obtainable traffic is ever declined. The evidence clearly establishes that respondent is a highway common carrier operating usually and ordinarily over U. S. Highways 101 and 101-A between San Diego, La Mesa, Coronado, and National City, on the one hand, and Los Angeles, Pasadena, Glendale, Alhambra, and Hollywood, on the other hand, and serving the public generally.

Respondent not only admits but affirmatively claims that the operation it is conducting between said points is that of a highway common carrier, but it contends that it possesses a lawful right to so operate. In this connection it urges that in 1928 it acquired all rights and assets of four other companies, each of which had been so operating since prior to 1917, and that it has continued such operations itself uninterruptedly ever since, and therefore possesses a "grandfather" or prescriptive right so to operate. The four companies referred to are Pioneer Transfer & Storage Company, Long Beach Transfer & Warehouse Company, California Fireproof Storage Company, and Lyon Fireproof Storage Company. In some instances there was a direct transfer of assets and operative rights from the predecessor companies to respondent, and in others control was acquired by stock transfer, the transferor corporation continuing to exist but its functions and operative rights being taken over and exercised by the respondent. At the present time all of the corporations, control of which was thus acquired, have been dissolved and their rights and assets directly transferred to the respondent.

Evidence was introduced intended to establish that each of the said acquired companies was operating as common carrier on July 26, 1917, and so operated continuously thereafter until respondent acquired their business.

Respondent contends that this evidence is sufficient, first, to establish that each of said predecessor companies had acquired a right to operate without a certificate of public convenience and necessity by reason of the provisions of Section 5 of the Auto Stage & Truck Transportation Act (now Section 50-3/4 of the Public Utilities Act), and second, that such rights are now vested in it by virtue of a "merger" in it of the predecessor companies. Relying on California Interurban Transportation Association v. Yellow Vans Associated, et al, Decision No. 25261, 38 C.R.C. 156, respondent urges that it should be ordered to cease and desist from its highway common carrier operations between Los Angeles and San Diego subject to the qualification that if, prior to the effective date of the order, respondent shall file tariffs as such carrier covering service between said points and justify them if suspended, the order to cease and desist shall not become effective at all.

That decision involved complaints against a number of household goods movers alleged to be operating without certificates in violation of the Auto Stage & Truck Transportation Act, the provisions of which have since been incorporated into the Public Utilities Act in Sections 2-3/4 and 50-3/4 thereof. In its opinion the Commission reviewed the history of truck regulation in California up to that time, discussed the evidence pertaining to the several defendants, and concluded that with but a few exceptions it was clear they were common carriers, and that some were operating between fixed termini or over regular routes so as to be subject to the Act.

However, the Commission observed that in view of the changing concept both of common carrier and regular route operations, the absence of bad faith, and the possibility that some of the defendants might have prescriptive rights by reason of similar operations in 1917, opportunity should be afforded such defendants to file and justify tariffs based upon such prior operations. Accordingly, as to such defendants, the Commission issued a form of order similar to that requested by the respondent here.

The circumstances of the instant case, however, do not justify or permit the issuance of such an order here. Respondent is entitled to no special consideration because of the changing concepts of common carriage or fixed termini and regular route operations referred to in the Yellow Vans decision, for that decision itself served to clarify fully those concepts with respect to such operations as respondent's in ample time for respondent to have asserted its rights and filed its tariffs long before the institution of this proceeding. No such tariffs have been offered for filing, even up to the present time, and it is evident that the claim of prescriptive right was evolved shortly before the hearing herein as a defense to the charge of illegal operations.

Moreover, no such uncertainty could exist with respect to the status of respondent's operations as existed in the case of the defendants in the Yellow Vans case. There the operations between the respective termini occurred one to three times a month, whereas the evidence shows respondent averages approximately three trips a week between Los Angeles and San Diego.

In 1934, Lyon Van Lines, respondent's wholly owned subsidiary, operating as a highway common carrier between various other points in this State, by Application No. 19697, applied for a

certificate of public convenience and necessity to operate between San Diego and Los Angeles. It was alleged therein that the Van Lines operated in conjunction with respondent, its parent company. The Van Lines urged that it should be permitted to continue common carrier operations, which it virtually admitted it was then conducting between Los Angeles and San Diego, because the Commission had erroneously denied an application of a predecessor of the Van Lines for a certificate so to operate. The Commission, in Decision No. 27919 dated April 29, 1935, denied the certificate, stating that in view of applicant's fully informed management, as well as other circumstances, it was difficult to understand its contention and that the applicant's unlawful operation could not be condoned. There is every reason to believe that the applicant and its parent company were each fully familiar with the other's operations, since they operated in conjunction with each other. The application, moreover, was filed some time after the Yellow Vans decision was rendered, and the applicant was represented by the same attorney who represented several of the defendants in the Yellow Vans case. Yet no contention was then made that either the applicant or its parent company, the respondent here, possessed a prescriptive right to conduct such operations. The fact that it was thought necessary for the Van Lines to secure a certificate to authorize such operations strongly suggests that its parent company was not then carrying on in its own name, and in competition with the subsidiary, the identical operations which the subsidiary was then conducting illegally and which respondent is now conducting.

In recent years also other applications for certificates between these points have been denied. (<u>Application of Carlstrom</u>, No. 19767, Decision No. 27919; <u>Application of Carlstrom</u>, No. 20836,

Decision No. 31190). It is not contended here that there is any public convenience and necessity for respondent's service.

All of these circumstances, not to mention others appearing in the record, combine to differentiate respondent's situation here from that of the defendants in the Yellow Vans case, to raise doubt of the validity of the prescriptive right which respondent claims, and to bring out the inequitability of asserting it only at this late day.

But wholly apart from and in addition to the foregoing considerations, there is in our opinion a very cogent and impelling reason why the Commission should not, and under the law may not, accept respondent's claim. Even if it were to be assumed that the evidence established beyond question that respondent and its predecessor companies had conducted operations as common carriers usually and ordinarily between Los Angeles and San Diego continuously and in good faith since prior to 1917, there has been no authorization by the Commission for the transfer of any prescriptive right of the predecessor companies to respondent, and under the provisions of Section 50-3/4 of the Public Utilities Act, formerly contained in the Auto Stage & Truck Transportation Act, an attempted transfer of such an operative right without the authority of the Commission is completely void and of no effect. The attempted exercise of the right by the unauthorized transferee results in the abandonment thereof by the transferor. Application of Butler & Grundy, 25 C.R.C. 679, 686; Pickwick Stage v. Craig, 18 C.R.C. 517, 551; Application of Geo. Imperiale, 17 C.R.C. 170; Hodge Transportation Co. v. Ashton Truck Co., 24 C.R.C. 116; Re California Bank of Modesto, 19 C.R.C. 702; Blackmore v. Pub. Utilities Commission, 160 N.E. 27; Hart v. Seacoast Credit Corp., 169A 648. If any such right was ever held by any of respondent's predecessor companies, respondent now has no authority to exercise it.

Respondent asserts, however, that its acquisition of its predecessor companies' rights and property was by merger and not by transfer. Whether or not this would make it possible to dispense with obtaining authority from the Commission to succeed to the rights of the predecessor companies is subject to question. But in any event there is no evidence sufficient to establish that respondent acquired the rights and assets of its predecessors by merger rather than by transfer. The parties themselves evidently deemed the transactions to involve such a transfer as to require authority of the Commission for the transfer of warehouse operative rights under Section 50½, for such authority was sought and obtained by respondent and one of its predecessor companies. (Application of Pioneer Truck & Transfer Co. & Lyon Van & Storage Co., No. 19855, Decision No. 27842, March 25, 1937.)

Respondent also urges that in Decision No. 26993 dated April 30, 1934, involving suspensions of tariffs filed by certain of the defendants in the Yellow Vans cases pursuant to that decision, the Commission recognized prescriptive rights held by transferees of the original operators who did not have the Commission's authority for the transfer. Examination of this decision, however, reveals no instance in which an unauthorized transferee has been held entitled to exercise a prescriptive right of its transferor, nor do we know of any other instance in which this has been done. If by inadvertence recognition had ever been given to operative rights claimed by an unauthorized transferee no justification would thereby be afforded for the Commission advisedly and knowingly to commit the same error here.

We are therefore of the opinion and find that respondent, in violation of Section 50-3/4 of the Public Utilities Act, is operating as a highway common carrier between San Diego and Coronado, on the one hand, and Los Angeles, Pasadena, Beverly Hills,

Glendale, Alhambra, and Hollywood, and intermediate points, to-wit, via U. S. Highways 101 and 101-A without a certificate of public convenience and necessity or other operative right. Respondent will be required to discontinue such operations.

An order of the Commission directing the suspension of an operation is in its effect not unlike an injunction by a court. Violation of such order constitutes a contempt of the Commission. The California Constitution and the Public Utilities Act vest the Commission with the power and authority to punish for contempt in the same manner and to the same extent as courts of record. In the event a person 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; re Ball & Hayes, 37 C.R.C. 407; Wermuth v. Stamper, 36 C.R.C 458; Pioneer Express Company v. Keller, 33 C.R.C. 371.

ORDER

The above-entitled case having been duly heard and submitted, and the matter being ready for decision, and the Commission now being advised in the premises,

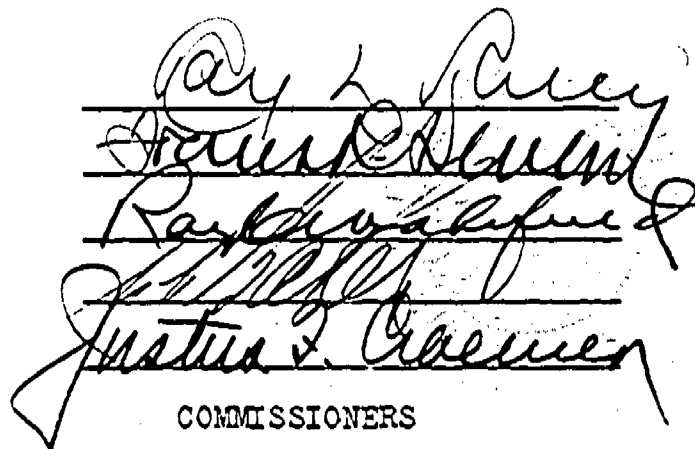
IT IS HEREBY FOUND that Lyon Van & Storage Company is operating as a highway common carrier, as defined in Section 2-3/4 of the Public Utilities Act, over public highways in the State of California between fixed termini, to-wit, between San Diego, and Coronado, on the one hand, and Los Angeles, Beverly Hills, Pasadena, Glendale, Alhambra, and Hollywood, and intermediate points, on the other hand, and over regular routes between said points, to-wit, over Highways 101 and 101-A, without first having secured from this Commission a certificate of public convenience and necessity or without prior right authorizing such operations.

Based upon the opinion and findings herein,

IT IS HEREBY ORDERED that the following designated highway common carrier, to-wit: Lyon Van & Storage Company, a corporation, cease and desist, directly or indirectly, or by any subterfuge or device from operating as a highway common carrier between any or all of the following points: to-wit, Los Angeles, Pasadena, Glendale, Alhambra, and Hollywood, on the one hand, and San Diego, La Mesa, Coronado, and National City, on the other hand, or over regular routes between said points, to-wit, over U. S. Highways 101 and 101-A, unless and until it first has obtained from the Commission a certificate of public convenience and necessity authorizing such operations.

IT IS HEREBY FURTHER ORDERED that the Secretary of the Railroad Commission is directed to cause personal service of a certified copy of this decision to be made upon said respondent and to cause certified copies hereof to be mailed to the District Attorneys of Los Angeles and San Diego Counties and to the Department of Motor Vehicles, Highway Patrol, Sacramento.

Dated at San Francisco, California, this 9th day of July, 1940.



COMMISSIONERS