

ORIGINALDecision No. 46614

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Investigation)
 on the Commission's Own Motion into)
 the operations, practices and con-)
 tracts of Harry Steward, doing)
 business as Auto Purchasing Agency.)

Case No. 5237

O P I N I O N

This proceeding is an investigation instituted on the Commission's own motion into the operations, practices and contracts of Harry Steward, doing business as Auto Purchasing Agency, for the purpose of determining (1) whether he has operated or is operating as a highway common carrier over regular routes or between fixed termini anywhere within the State of California in violation of any provisions of the certificate of public convenience and necessity granted by Decision No. 43023, as amended, in Application No. 28417, or without having obtained a certificate of public convenience and necessity, or possessed or acquired a prior right so to operate, in violation of the Public Utilities Code; (2) whether said Harry Steward has operated or is operating both as a common carrier and as a highway contract carrier of the same commodities between the same points, in violation of Section 4 of the Highway Carriers' Act, now Section No. 3542 of the Public Utilities Code; (3) whether he should be ordered to cease and desist from operating as a highway common carrier

until he should obtain authority from this Commission; and (4) whether the certificated or permitted rights, or any of them, of said Harry Steward should be cancelled, revoked or suspended.

Respondent Steward's operative rights were subject to the following condition, to wit:

The aggregate weight of shipments which Harry Steward may accept for transportation on any single day from any one consignor, consigned to any one consignee, at any one destination, shall not exceed 2,000 pounds.

Said respondent, by petition dated November 13, 1950, sought the elimination of the aforesaid weight restriction. The Commission, in an order dated November 28, 1950, reopened for further proceeding Application No. 28417 to consider the rescinding, altering, or amending of Decisions Nos. 43023, 43970 and 44129. Decision No. 43970 affirmed said weight limitation. Decision No. 44129 was a supplemental order amending the original certificate issued by Decision No. 43023 so as to include shipments of agricultural implements and parts to any consignee.

Hearings on reopening were held upon said petition and upon an application by said respondent requesting extensions of his operating rights to additional points without such restriction. At said hearings testimony was received upon the question of respondent's violation of the weight restriction and his violation of Section 4 of the Highway Carriers' Act, now Section 3542 of the Public Utilities Code.

In Decision No. 46503, dated December 4, 1951, in Applications Nos. 28417 and 32444, this Commission in its opinion stated:

"According to the undisputed testimony, Mr. Steward has been operating in disregard of the 2,000-pound restriction. The great bulk of such shipments are within the weight limitation. A substantial volume of the freight moves in amounts in violation of this restriction. In justification for such action applicant testified that upon advice of counsel he had entered into contracts with shippers as to amounts in excess of 2,000 pounds and that amounts up to 2,000 pounds were carried under authority of his certificate and amounts over 2,000 pounds were properly carried by virtue of his contract carrier permit. This is an obvious violation of Section 3542 of the Public Utilities Code as the same commodities are carried between the same points both as a highway common carrier and as a contract carrier. It appears from the record that applicant followed the advice of counsel in good faith; however we cannot concur in counsel's interpretation and applicant is placed on notice that the Commission in the future, will not condone illegal operations, even though based upon advise of counsel.

"It was applicant's position that the restriction was not a feasible one. He and several public witnesses testified that it is the practice of shippers to commence processing orders in the morning and accumulate shipments during the day as additional orders were received. For this reason the aggregate weight of shipments cannot, as a practical matter, be ascertained until the pick-up trucks arrive at the shippers' premises and in some cases not until the freight reaches the carrier's dock and has been weighed. Some shipper witnesses testified that if such restriction were strictly enforced they would forego using applicant's service although they liked such service and considered it to be greatly needed.

"The Commission finds, upon a consideration of all the evidence of record, that the 2,000-pound restriction is unduly burdensome upon applicant and if enforced will render the service unavailable to some businesses which need it. By actual experience applicant has demonstrated that he can carry all amounts of freight as offered to him and still render the expedited and efficient service needed by the portion of the public which he serves. In addition, the public using applicant's service should not be deprived of the rate benefits from the offering of larger weights.

"The public requiring this service should not be deprived of it for the reason that applicant may have violated Section 3542 of the Public Utilities Code or exceeded his certificated rights in violating its condition. It is the opinion of this Commission that the requested relief should not be granted by amending Decision No. 43023, which might be construed as in the nature of a nunc pro tunc action rendering all such past violations nonexistent. The relief will be granted by issuing a new certificate which will authorize future operation without this restriction."

"From the evidence of record the Commission finds that public convenience and necessity require that applicant be authorized to render the service proposed in Application No. 32444. Such a certificate will permit applicant to continue as a highway common carrier the operation it has been carrying on for several years. Protestants have not demonstrated that they will suffer materially by the granting of such rights to applicant. In addition, the evidence is convincing that there should be no limitation or restriction upon applicant as to the amounts of freight he may carry for any consignor. Also, he has sufficient equipment and is financially able to continue this service as a highway common carrier. This service will be performed at the same rates as now in effect on its certificated operation."

In view of the issuance to respondent of the certificate of public convenience and necessity by said Decision No. 46503, authorizing highway common carrier operations between all the points he presently serves, the continuance of such present service, which has been unlawful in the past, will in the future be entirely lawful. To order respondent to cease and desist from carrying on any of said operations or to reach the same result by the cancellation, revocation or suspension of respondent's certificated or permitted rights would be contrary to the public interest. Consequently, an order will be entered discontinuing the above-entitled proceeding. A public hearing in this proceeding is unnecessary.

O R D E R

Good cause appearing, IT IS ORDERED hereby that the investigation in this proceeding be and it is discontinued and that Case No. 5237 be and it is dismissed.

The Secretary is directed to cause a copy of this decision to be served upon Harry Steward.

The effective date of this order shall be twenty (20) days after the date of such service.

Dated at San Francisco, California, this 3rd day of January, ~~1951~~ 1952

R. F. Immert
President
Justin J. Casner
Harold A. Huls
Wassette Patten
Edw. E. Mitchell
Commissioners