

REEM

Decision No. 23176

BEFORE THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA.

EL DORADO MOTOR TRANSPORT
COMPANY, INC., a Corporation,

Complainant,

vs.

J. ELLIS,

Defendant.

ORIGINAL

Case No. 2860.

Sanborn, Roehl, Smith & Brookman,
for Complainant.

Thomas Maul for Defendant.

Edward Stern for Railway Express
Agency, Inc., Intervenor.

BY THE COMMISSION:

O P I N I O N

El Dorado Motor Transport Company, Inc., complainant in the above entitled proceeding, complains and alleges in substance and effect that J. Ellis, defendant, has in numerous instances within the past two years performed transportation services, and has transported property over the public highways of this state between Sacramento and Placerville and way-points as a common carrier for compensation, without having obtained from the Railroad Commission a certificate of public convenience and necessity. Complainant prays for an order commanding defendant to forthwith cease and desist from operating automobile trucks as a common carrier between Sacramento

and Placerville and waypoints in violation of the provisions of Chapter 213, Statutes of 1917, as amended.

J. Ellis, defendant, by his written answer herein, denies generally and specifically all the material allegations contained in said complaint.

A public hearing on said proceeding was conducted by Examiner Satterwhite at Sacramento, the matter was duly submitted and is now ready for decision.

Complainant called the defendant as a witness in support of its complaint, together with several other witnesses.

The record shows that for about ten years last past the defendant has been engaged in the business of buying produce from wholesale merchants at Sacramento and selling it to eight or ten particular customers at Placerville, all of whom are retail merchants conducting stores in that community.

This produce has consisted mainly of fresh fruit and vegetables and some groceries and smoked meats. The defendant has operated but one truck in hauling this produce and has never sought to enlarge or increase his business as a produce peddler at Placerville, although there are many other retail grocers and produce merchants operating there. It appears that defendant has from time to time, as a matter of favor or accommodation to his customers, and then only when truck space permitted, transported for them from Sacramento certain goods and merchandise upon request. This limited transportation service was performed both under written and verbal agreement, specific charges being made by agreement and in numerous instances no charge at all being made.

The undisputed testimony of the defendant shows that during the many years he has operated as a peddler of produce he has confined his peddling business, and also his transportation services to eight or ten specific patrons, with the exception of several recent shipments, about 12 in all, made in the early months of this year for accommodation only. These few recent shipments were mostly consignments from The Thomson-Diggs Co., a Sacramento wholesaler, to consignees at Placerville all of whom were personal friends or acquaintances of Ellis with one exception.

The record shows that the transportation services performed by the defendant for his eight produce patrons and a few acquaintances was incidental to his business as a produce peddler.

The testimony further shows that he has never by signs or advertising matter or by personal solicitation of any kind sought to secure transportation business, and that he has never held himself out as a common carrier at any time or in any way offered to serve the public generally in the transportation of merchandise of any kind between Sacramento and Placerville or elsewhere.

We do not believe that the "contracts for hauling" entered into by defendant in themselves establish the service performed to be that of a private carrier nor should our decision herein be taken as sanctioning such a form of agreement. The mere fact that verbal or written agreements exist does not of itself create the status of private carrier. Under the particular facts of this proceedings, the present record does not show that there has been such a "holding out" in the acceptance of accommodation shipments transported for the few Placerville patrons of defendant's produce business (many of

which shipments were transported without charge) as is contemplated by the statute regulating common carriers. This decision is not intended to be determinative in other cases which may arise involving this particular defendant or others claiming to be private carriers.

After a careful consideration of all the evidence in this proceeding, we are of the opinion and hereby find as a fact that the defendant, J. Ellis, is not operating as a common carrier between Sacramento and Placerville and intermediate points and that his transportation service or operations are those of a private carrier. The complaint should, therefore, be dismissed.

O R D E R

A public hearing having been held in the above entitled complaint, the matter having been duly submitted, and the Commission being duly advised, and basing its order on the findings of fact in the foregoing opinion;

IT IS HEREBY ORDERED that the complaint in the above entitled proceeding be and the same is hereby dismissed.

Dated at San Francisco, California, this 13th day of December, 1950.

C. J. Deane
Leon Whittell
Theodore
M. H. Lee
Commissioners