

Decision No. 23245.

BEFORE THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA

CALAVERA ROCK CORPORATION,  
a corporation,  
Complainant,

vs.

SAN DIEGO & ARIZONA RAILWAY CO.,  
a corporation; L. E. AUL, EDGAR F.  
HASTINGS, E. A. HORNBECK and CHAS.  
L. GOOD, being four fifths of the  
Members of the Board of Supervi-  
sors of San Diego County, Califor-  
nia; GEORGE W. HESTON, Treasurer  
of San Diego County, California;  
CHAUNCEY R. HAMMOND, Auditor of  
San Diego County, California;  
ATCHISON, TOPEKA & SANTA FE R.R.,  
a corporation; BERT NOBLE; and  
E. G. FENTON MATERIAL CO., a cor-  
poration,  
Defendants.

ORIGINAL

Case No. 2910.

Sanders & Jacques, by Hugh A. Sanders; and L. E. Stewart, for the complainant.  
R. G. Dilworth, for defendant San Diego & Arizona Railway Company.  
E. W. Camp, Mark W. Reed, C. K. Adams, Berne Levy and G. E. Duffy, for defendant The Atchison, Topeka and Santa Fe Railway Company.  
O. T. Helping and P. H. Campbell, for defendant Bert Noble.

DECOTO, Commissioner:

OPINION

This proceeding involves an alleged collusion on the part of defendants to apply or obtain, or to seek to apply or obtain, a rate lower than that lawfully on file with the Commission for the transportation of crushed rock from Otay Gravel Pit on the San Diego and Arizona Railway Company to Vista on The

Atchison, Topeka and Santa Fe Railway Company, in violation of Sections 17 and 23 of the Public Utilities Act.

Public hearings were held at Los Angeles November 7, 1930, and at San Diego on December 5, 1930.

The essential facts of record relating to this complaint may be summarized as follows: On or about May 26, 1930, the Board of Supervisors of San Diego County called for bids for the improvement of C.E.C. Route 14 and its re-location (Marron Canyon Road) located in the vicinity of Vista, San Diego County. Ten contractors submitted bids. The lowest bidder was Bert Noble, who agreed to construct a Portland cement concrete road at a total cost of \$135,961. Before the bids were submitted Bert Noble and seven of the other nine contractors were notified that The Atchison, Topeka and Santa Fe Railway Company (hereinafter called the Santa Fe) would extend to them a special rate of 80 cents per ton on crushed rock from Kincaid to Vista. The record contains a sworn statement from Bert Noble and others to the effect their bids to the County were based upon an 80-cent freight rate for the movement of the rock needed in the construction of the road. This rate was 30 cents lower than the rate lawfully on file in the tariff of the Santa Fe for the transportation of rock from Kincaid to Vista, and was quoted upon the assumption that the paving of the Marron Canyon Road was county work, for which a special reduced rate could be given under the provisions of Section 17(4) of the Public Utilities Act. Under this section of the Act special reduced rates for the United States, State, County or Municipal governments may be granted and withdrawn at will and need not be filed with the Commission (County of Los Angeles et al. vs. A.T. & S.F. Ry. Co. et al., 32 C.R.C. 296).

The bid of Bert Noble was accepted by the Board of

Supervisors on or about June 3, 1930. Under the terms of the contract Bert Noble agreed to furnish all labor, equipment and material and to supply all things necessary to construct the road. The construction required several hundred tons of rock which could be obtained at Kincaid, Otay Gravel Pit or Vista. After the contract was awarded an arrangement was made to obtain the rock from the H. G. Fenton Material Company at Otay Gravel Pit instead of Vista. The San Diego and Arizona Railway Company and the Santa Fe jointly offered the same rate as the Santa Fe had offered from Kincaid, namely, 80 cents per ton. The rate lawfully on file with this Commission from Otay Gravel Pit to Vista was \$1.10 per ton. The lower rate was quoted upon the assumption that the rock was to be used for county work.

Complainant maintains a rock plant in the vicinity of Vista. The rock produced is of a type which could be used in the paving of the Maroon Canyon Road. Complainant apparently endeavored to have its rock used, basing the price thereof upon what it believed the lowest price from competing plants would be if a freight rate of \$1.10 per ton were paid to Vista. Complainant was unaware that the railroads had offered special reduced rates from Kincaid and Otay Gravel Pit to Vista. Upon learning that an 80-cent rate had been offered from Otay Gravel Pit complainant filed an informal complaint with the Commission, attacking the legality of the reduced rate, which was followed by the formal complaint here under consideration.

Apparently the filing of these complaints raised some doubt as to the legality of Bert Noble directly receiving a special county rate, in view of the fact that the contract made it incumbent upon him to supply all material used in the construction of the road. But convinced that the County had actually

received the benefit of an 80-cent rate, the Board of Supervisors by resolution attempted to make it legally applicable by agreeing to have the Otay Gravel Pit rock consigned to the County at Vista, in care of Bert Noble, and to pay all the freight charges thereon, with the understanding that the County would be reimbursed by the contractor. The defendant railroads also attempted to legalize the 80-cent rate by specifically publishing it in Supplement 11 to Pacific Freight Tariff Bureau Tariff 131-E, C.R.C. 444. The reduced rate was suspended by the Commission (Case 2941). Later the railroads asked for and obtained authority to restore the \$1.10 rate. Upon its restoration our order of suspension was vacated (Decision 23193 of December 17, 1930).

During the pendency of this proceeding all of the rock to be used in the construction of the Marron Canyon Road has been transported from Otay Gravel Pit to Vista. In all instances the defendant railroads collected the full tariff rate of \$1.10 per ton and have stipulated that they would make no attempt to refund to the basis of any other rate without first obtaining authority from this Commission to do so.

Complainant while admitting that the lawful rate was collected contends that defendants acted in collusion to seek to obtain a rate lower than that lawfully applicable, which it is asserted is as much forbidden by Section 23 of the Act as actually obtaining an unlawful rate. I do not believe however that a fair analysis of the record will support complainant's position. While it is true defendants did seek to apply or obtain an 80-cent rate, it could legally be applied if the rock were transported for the County. There is evidence in the record to show that the majority of the contractors, including Bert Noble, submitted their bids on an 80-cent basis, which lends support to defendants' contention that the County obtained the benefit of the lower rate and

it should therefore be applied under the provisions of Section 17(4) of the act. Although I believe defendants misinterpreted this section of the act, I am convinced they acted in good faith in attempting to obtain a special county rate upon the theory that it was legally applicable. There is nothing in the record to show any willful desire on the part of defendants to obtain any rate lower than that lawfully applicable.

There is no question that the 80-cent rate to Bert Noble was an illegal rate and could not be legalized by any subterfuge on the part of the Board of Supervisors.

I am of the opinion the complaint should be dismissed. The following form of order is recommended.

O R D E R

This case having been duly heard and submitted, full investigation of the matters and things involved having been had, and basing this order on the findings of fact and the conclusions contained in the opinion which precedes this order,

IT IS HEREBY ORDERED that the complaint in this proceeding be and it is hereby dismissed.

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 31st day of December, 1930.

Chas. E. Leary  
Commissioner

Thos. B. Lewis  
Commissioner

Commissioners.