

Decision No. 23351

BEFORE THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA

PETALUMA AND SANTA ROSA RAILROAD
COMPANY, a corporation,

Complainant,

vs.

BEN BAYLINSON, doing business
under the name and style of
"PETALUMA FRUIT AND PRODUCE CO.,"

Defendants.

ORIGINAL

Case No. 2917

Geary & Geary and C. J. Tauzer, by Donald Geary,
for Complainant.
Silverstein & Silverstein, by Sidney Silverstein,
for Defendants.
E. W. Hobbs, for Northwestern Pacific Railroad,
Intervener.
W. S. Johnson, for Southern Pacific Company,
Intervener.
Edward Stern, for Railway Express Agency,
Intervener.

BY THE COMMISSION:

O P I N I O N

Complainant, Petaluma and Santa Rosa Railroad Company, a corporation, is engaged in the operation of a boat line and an electric railroad, as a common carrier of passengers and property between San Francisco and Santa Rosa, Sonoma County, and intermediate points under jurisdiction of this Commission and under tariffs heretofore filed with this Commission. It alleges that the defendant, Ben Baylinson, has been engaged in the business of operating automobile trucks for the transportation of property as a common carrier for compensation over a regular highway route between San Francisco and Santa Rosa, and intermediate points, includ-

ing Petaluma, and that defendant has not heretofore obtained from this Commission a certificate or right so to do; that said alleged operations are in violation of the laws of the State of California and the rules and regulations of this Commission. Complainant seeks an order requiring Ben Baylinson to cease and desist from the further transportation of property, as alleged.

Defendant, by his answer, denies that the service he is conducting is that of a common carrier over any route in the state, and affirmatively alleges that the transportation of property being conducted is under private contract and as a private carrier for which no certificate is required from the Commission.

Upon the issues thus joined, a public hearing was conducted at San Francisco by Examiner Williams. At this time complainant moved the inclusion of Sam Baylinson, brother and copartner of defendant herein, as a codefendant herein. It was stipulated by defendant that the motion should be granted. The proceedings therefore are against the copartnership of Ben and Sam Baylinson, and will be so regarded hereafter.

Complainant called as its chief witness Ben Baylinson, who frankly explained all the business of defendant herein. It appears that defendant has, for a number of years, conducted what is known as the Petaluma Fruit and Produce Company, and that its chief business was the purchase at San Francisco or Oakland, of fruit and produce, and delivery and sale of the same to customers at Petaluma. In August, 1930, defendants entered into a written agreement with the Western Refrigerator Company of Petaluma, by which they agreed to haul eggs and butter from Petaluma to San Francisco, making one trip daily, except Sundays, between termini. Later, they were approached by certain grocers and produce men in Petaluma and Santa Rosa, to whom they had been selling fruit and produce wholesale,

who engaged them to carry packages or freight from certain wholesale houses in San Francisco to those grocers in Petaluma and Santa Rosa, and they entered into written agreements with them (Exhibit No. 5). In addition, they performed certain ancillary service in the purchase of commodities required by these customers. Following this, they solicited freight from wholesale grocers and others in San Francisco to be carried back to these customers, and, in turn, solicited these customers for authority to transport freight for them (Exhibits No's 1, 2, 3 and 4). Defendants maintained headquarters only at Petaluma, and their trips to San Francisco were mainly delivery and pick-up without any terminal to which property could be delivered by consignor. Only one truck of the four owned by the copartnership was used in this business, the others being used for the transportation of produce for wholesale delivery or for a vegetable and fruit selling route maintained by the copartners between Oakland and the Brentwood region for similar purposes.

The record shows that defendants solicited shippers in San Francisco who had customers in Petaluma and Santa Rosa, and also solicited customers at other places for return movement. All of these movements were covered by written agreement, except in one instance. These writings have been placed in evidence and the form, in its essential portions, reads as follows:

** * * That the party of the first part will haul and deliver the merchandise of the party of the second part for a rate of 20¢ per hundred pounds, with a minimum of 40¢ per delivery, from San Francisco to Santa Rosa including all way points, for a period beginning the above date and to and including November 10, 1931.

"It is understood that if the service rendered under this agreement is not satisfactory to the party of the second part, then upon five days' notice to the party of the first part, the party of the second part may terminate this agreement.

"The truck operated by the party of the first part is fully covered by insurance, including \$5000.00 cargo insurance."

The agreements (Exhibit No. 5) with grocers at Petaluma or Santa Rosa were in similar form. In all, five written agreements with shippers at San Francisco and seven with grocers at Petaluma and Santa Rosa, were placed in evidence. It is admitted that transportation similarly was being conducted for the United Drug Company of San Francisco, with whom no writing had been executed. The record also shows that the Western Refrigerator Company terminated its agreement instantly without reference to the rights of termination in the writing submitted in evidence. In addition, defendant, Sam Baylinson, testified that he solicited most of the grocery stores in Petaluma; the Kraft Cheese Company of San Francisco; Best Foods; Armour's Agency, San Francisco; Kingan's Agency, San Francisco, and Piggly Wiggly Stores, San Francisco, in an effort to make agreements similarly with them. The charges were prepaid by the consignor, except a small portion, which was collected from the consignee. It was also shown that deliveries had been made by defendants at Sebastopol, and that at times other deliveries had been made at Novato, Sebastopol, Penn Grove, San Francisco, and other points.

H. G. Graham, Traffic Manager of the Petaluma and Santa Rosa Railroad, testified that this carrier operated stern-wheel boats from San Francisco to Petaluma, two services daily, which connected with electric trains for Petaluma and Santa Rosa and intermediate points, and Sebastopol. By the testimony of J. J. Geary, General Passenger and Freight Agent of the Northwestern Pacific Railroad, it was shown that this railroad served all points between Sausalito and Santa Rosa on the route followed by applicants, which was admittedly the main state highway.

The facts on the whole are undisputed, defendants contending that their operation is that of a private carrier not subject to regulation. It is our opinion that the agreements submitted

represent little more than agreements as to rates, and are not in themselves conclusive as to the fact of whether common carrier service is being performed. What the defendants in this proceeding did was to solicit business in San Francisco from those shippers whom they knew were consigning freight to points between San Francisco and Santa Rosa. They also solicited available shippers or receivers that to their knowledge were receiving or forwarding freight at Petaluma or Santa Rosa between these points and San Francisco. The mere fact that written agreements are entered into does not relieve one otherwise a common carrier transportation company of the necessity of acquiring a certificate of public convenience and necessity from this Commission (Chapter 213, Stats. 1917, as amended). The record discloses that defendants are performing transportation service as a common carrier over the routes and between the termini and intermediate points stated.

The fact that no depot or office was maintained at San Francisco or Oakland does not alter the aspects of common carrier service, in our judgment. The operation of defendants herein, in matters of fact, is somewhat analogous to those in Petaluma and Santa Rosa Railroad Company v. George A. Leal, 33 C.R.C. 63, where it is stated:

"The form of contract relied upon by defendant as placing his operations in the category of a private carrier does not relieve the defendant from compliance with the statutory law, it appearing that the services of defendant are available to any one offering a satisfactory tonnage and meeting the other nominal requirements of the defendant, one of which is the execution of a contract which, in effect is but the quotation and acceptance of a scale of rates with no obligation on the shipper or receiver to have any specific tonnage transported during the life of the contract, being merely a rate quotation guaranteed for the period of the contract, and subject to cancellation on one to five days' notice."

(See also Sierra Railway Co. v. Berg, 35 C.R.C. 508, Decision 23121 in Case 2896.)

We are of the opinion that defendants are operating an automotive truck service as a common carrier for compensation

and as a "transportation company" over the public highways between San Francisco, and Sausalito, Petaluma, Cotati, Santa Rosa, Sebastopol, Penn Grove, and between San Francisco and points intermediate in the aforesaid communities, without first having obtained a certificate of public convenience and necessity from this Commission, as required by the provisions of Chapter 213, Statutes of 1917, as amended.

An order requiring defendants to cease and desist such operations will be entered accordingly.

ORDER

Public hearing having been had herein, and the matter submitted on briefs,

IT IS HEREBY FOUND AS A FACT that Ben Baylinson and Sam Baylinson, operating under the name and style of Petaluma Fruit and Produce Co. are operating a common carrier trucking service and as a "transportation company" within the meaning of Chapter 213, Statutes 1917, as amended, between San Francisco, Petaluma, and Santa Rosa, and San Francisco and points intermediate to Petaluma and Santa Rosa, via Sausalito and San Rafael without first having obtained a certificate of public convenience and necessity therefor.

IT IS HEREBY ORDERED that said Ben Baylinson and Sam Baylinson immediately cease and desist such common carrier operations until they shall have obtained the requisite certificate of public convenience and necessity from this Commission; and

IT IS HEREBY FURTHER ORDERED that the Secretary of this Commission cause a certified copy of this decision to be served upon said Ben Baylinson and Sam Baylinson, and that certified copies of this decision be mailed to the district attorneys of Marin and Sonoma counties, and the City and County of San Francisco.

This decision shall become effective twenty (20) days after the date of service above-mentioned.

Dated at San Francisco, California, this 2nd day of February, 1931.

C. E. Deaver
Leon Whitely

W. A. Con

M. B. Harris

Fred G. Stenrod
Commissioners.