

E

Decision No. 23911

BEFORE THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA.

J. W. SILVA,  
Complainant,

vs.

FRANK HOOVER,  
Defendant.

Case No. 3017.

ORIGINAL

Ervin S. Best for Complainant.

A. E. Warth and C. C. Baker for Defendant.

W. S. Johnson for Southern Pacific Company,  
Intervener on behalf of Complainant.

BY THE COMMISSION:

O P I N I O N

J. W. Silva, complainant in the above entitled proceeding, complains and alleges in substance and effect that Frank Hoover has for about two years last past been operating auto trucks as a common carrier in the business of transportation of property for compensation between Salinas and San Francisco and Salinas and Oakland and intermediate points, to-wit: South San Francisco and San Leandro, without having obtained from the Railroad Commission of the State of California a certificate of public convenience and necessity authorizing such operations.

The defendant, Frank Hoover, by his written answer herein, denies all the material allegations contained in said complaint and alleges that he is operating as a private carrier under contract, and also as a special defense that by reason of the fact that the said complainant had heretofore commenced an action in the Superior Court of Monterey County, embracing the same issues as embraced in complainant's complaint herein, said complainant has elected his remedy and is bound thereby and should

be estopped from seeking any redress in any other tribunal except the duly established civil courts.

Public hearings on said proceeding were conducted by Examiner Satterwhite at San Francisco and Salinas, the matter was duly submitted and is now ready for decision.

Complainant called the defendant as a witness and several other witnesses in support of his complaint.

The record shows that for several years last past the defendant has been engaged in a local transfer and transportation business in Salinas and adjacent territory. In the conduct of his business defendant has been engaged in the operation of motor trucks to other points and places in California, but more particularly Salinas and Oakland and San Francisco and intermediate points.

The undisputed testimony of defendant shows that during the past two years and continuously up to the present time, in response to the request of various shippers and business establishments at Salinas, he has transported such a substantial tonnage of freight, both northbound and southbound, between Salinas on the one hand, and Oakland and San Francisco, on the other hand, that he has been obliged to maintain regularly two or three trips weekly and to operate two trucks and trailers which are a portion of his equipment available to this particular out of town service by reason of the fact that the rest of his equipment is necessary for his local demands at Salinas. These truck operations to the Bay cities and vicinity have proven lucrative and profitable and were being conducted at the time of the hearings in this proceeding.

Defendant admitted that he has hauled for at least a dozen shippers within the last year or so between Salinas and the Bay cities named and classified them as his regular or irregular customers. The following named business firms constitute the shippers named by defendant, about eight of whom he indicated might fairly be classed as his regular customers:

1. Salinas Soda Works
2. Salinas Beverage Company
3. Salinas Tallow Works
4. Sacot Foundry Company
5. Boyer Fertilizer Company
6. Cornell Tractor Company
7. Mitchell-Silliman Company
8. Salinas Valley Canning Company
9. Salinas Elevator Company
10. Firestone Service Stores
11. Pontacq Laundry
12. Farmers Mercantile Company
13. Sterling Lumber Co.

The transportation services performed for the above named shippers were in all instances based upon a verbal agreement or understanding whereby defendant had indicated his willingness upon request or call to haul their particular commodities for a rate named and agreed upon.

The Salinas Soda Works and the Salinas Beverage Company from time to time purchased large quantities of case goods (cereal beer) from five different brewing companies in San Francisco which have been transported upon call to Salinas by defendant who also returns the empties. The Salinas Tallow Works sell large quantities of hides at intervals to certain consignees at San Francisco or Oakland which have been hauled by defendant. The Cornell Tractor Company at San Leandro at certain seasons of each year ship tractors and tractor machinery to Salinas which were transported by defendant upon call. Fertilizer has been hauled from South San Francisco to Salinas for the Boyer Fertilizer Company by defendant whenever this patron had "a load." The other patrons above named have had smaller tonnage, but have been served on various occasions by defendant upon request during the last year or so. The record also shows that there has been considerable freight hauled between the points involved by defendant for the benefit of other shippers or consignees, but with whom the defendant had no direct arrangement.

The following excerpt from the testimony of defendant

affords a recent illustration of the transportation practices of defendant for some time past. Silliman & Company are potato dealers at Salinas who sell to consignees at San Francisco. Defendant testified in part as follows:

Q. In addition to those already named that you do hauling for, and stand ready on call, you haul for\*\*\*\*\*?

A. I haul potatoes for Silliman & Company every year about this time, eight or ten loads.

Q. You stand ready to haul for Silliman?

A. No, not anything.

Q. You stand ready to haul for Silliman on call potatoes between San Francisco and Salinas?

A. When he rings me up I go and get them.

The uncontradicted record shows that defendant had in no instance, either orally or in writing, in his trucking service for his patrons to and from the Bay cities' communities ever provided for any specific period of time for which he was bound or for any definite amount of tonnage which he was obligated to haul. There was never any obligation on the part of the shipper or patron to patronize the defendant or any duty upon the defendant to continue his on call operations. The defendant's hauling charges in any case never amounted to anything more than a formal rate quotation with no obligation on the part of the shipper to accept it or furnish further shipments. The defendant has frequently declined shipments from time to time from different shippers, but his refusals were based upon his desire and plan not to increase his equipment or investment thereon or enlarge his trucking operations between Oakland or San Francisco to a point where such operations might interfere with his local business at Salinas.

This Commission has in several recent decisions indicated the distinction between the lawful "private carrier" and the unlawful so-called "contract hauler" claiming to be a private carrier. The following comparatively recent decisions of this Commission indicate that the defendant's trucking operations, as shown by the record herein, places him clearly in the last named category:

Re: Jack Hiron, 32 C.R.C., 48, 53.

P. & S. R.R. Co. vs. Deysher, 32 C.R.C., 141, 145.

Re: Rasmussen, 34 C.R.C., 497 and cases there cited.

Motor Freight Terminal Co., et al. vs. C. S. Taber, et al., C.R.C. Decision No. 23237, Case 2881.

Motor Freight Terminal Co., et al. vs. J. O. Bray, et al. C.R.C. Decision No. 23409, Case 2882.

The defendant, in his answer as above indicated, has interposed the specific defense of res adjudicata in this proceeding and claims that this Commission is without jurisdiction by reason of a certain judgment having been rendered prior to the commencement of this case in an injunction proceeding embracing the same issues as embraced in the instant complaint, instituted in the Superior Court of Monterey County by the complainant herein against the defendant herein.

Defendant has submitted no legal authorities or advanced any argument in support of his contention upon this special defense and we are of the opinion, after a careful consideration of the matter, that there is no merit in this special defense of res adjudicata.

O R D E R

Public hearings having been held in the above entitled proceeding, the matter having been duly submitted and being now ready for decision,

IT IS HEREBY FOUND AS A FACT that Frank Hoover, <sup>is</sup> operating

as a transportation company within the meaning of Chapter 213, Statutes of 1917, as amended, between Salinas and San Francisco and Oakland and intermediate points, to-wit: South San Francisco and San Leandro, without having obtained a certificate of public convenience and necessity therefor,

IT IS HEREBY ORDERED that said Frank Hoover immediately cease and desist his common carrier operations until he 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 Frank Hoover and that he shall cause a certified copy of this decision to be mailed to the district attorneys of San Francisco, Alameda, San Mateo and Monterey counties.

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

Dated at San Francisco, California, this 24<sup>th</sup> day of

July, 1931.

C. Seavey

\_\_\_\_\_

M. B. Lewis

Frederic G. Stewart

Commissioners.