

EEM

Decision No. 23118

BEFORE THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA.

J. W. SILVA, )  
 Complainant, )  
 -vs- )  
 D. O. MILLS, )  
 Defendant. )  
 ----- )

ORIGINAL

Case No. 3004.

Ervin S. Best for Complainant,

J. A. Bardin and J. T. Harrington,  
by J. A. Bardin, for Defendant.

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 D. O. Mills ever since the month of May, 1930, has been operating auto trucks as a common carrier in the business of transporting property for compensation between San Francisco and Salinas, and between Salinas and San Jose, without having obtained from the Railroad Commission of the State of California a certificate of public convenience and necessity authorizing such operation.

The defendant D. O. Mills, by his written answer herein, denies generally and specifically all the material allegations contained in said complaint and alleges further that he is operating as a private carrier under contract, and also as a further

and separate defense defendant alleges 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, the matters set forth in said complaint have already been adjudicated and that the facts therein set forth are now res adjudicata by reason of a judgment rendered in the said Superior Court of Monterey County.

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.

For several years last past the defendant has been engaged in a local transfer and transportation business in Salinas. The evidence shows that ever since April, 1930, and continuously up to the present time, the defendant has also been conducting a truck transportation business between Salinas and San Jose and between Salinas and San Francisco and that the volume of tonnage hauled by the defendant between these terminals has been so large that five daily round trips weekly and some times six round trips have been made in order to meet the demands of his customers and other shippers for whom he has been hauling.

The defendant has been able to obtain this substantial tonnage by reason of the fact that in the early months of 1930 he entered into verbal arrangements with at least three of the largest and leading business establishments at Salinas by virtue of which he has hauled between San Francisco and Salinas almost daily extensive shipments of goods, wares and merchandise purchased or sold by his Salinas customers. The defendant's

principal customers at Salinas consist of three:

Farmers's Mercantile Co. of Salinas, California,		
Anderson-Dougherty-Hargis Co.	"	"
Sego Milk Company,	"	"

The Farmer's Mercantile Company is the largest retail firm in Salinas dealing in groceries, hardware and miscellaneous implements. Anderson-Dougherty-Hargis Co. deal extensively in plumbing supplies, sheet metal, well casing, pumps, stoves, water heaters, etc. Sego Milk Company is a large producer of canned milk at Salinas.

These firms in the aggregate make very extensive purchases from numerous jobbers and wholesalers at San Francisco. The defendant has been for many months last past, and is now, operating daily two trucks between San Francisco and Salinas in order to meet the transportation needs of his Salinas patrons. The defendant from time to time transports large quantities of case goods from Salinas to San Jose for the Sego Milk Company.

Numerous wholesale houses at San Francisco, in response to requests or directions of the above named customers of defendant, deliver goods and merchandise purchased by these customers to the defendant upon call at San Francisco. The record shows that the following named shippers at San Francisco have transported during the past year a very large volume of freight to the three chief customers of defendant at Salinas:

Fairbanks Morse	California Steel Prod.
Schilling & Company	Ramona (or Pomona) Macaroni Co.
M. J. Brandenstein	American Biscuit Company
S. & W.	Standard Biscuit Company
Stulsaft	Hills Brothers
Public Service Brass	Baker & Hamilton
Jones Bros.	Muller Co.

It appears also that while many wholesale houses have shipped their goods f.o.b. San Francisco in the defendant's trucks, the above named fourteen wholesalers have prepaid the freight charges to the defendant when shipping to the defendant's customers at Salinas.

The testimony of defendant shows that while he has no oral or written agreements with any of the above named wholesalers at San Francisco relative to payment of freight charges, he has accepted, and will continue to accept, any proffered freight charge from any wholesaler or jobber at San Francisco when their shipments are hauled by him to his three chief customers at Salinas. This practice of defendant in collecting freight charges from wholesalers at San Francisco, in our opinion, brings his truck operations clearly within the principles laid down in the recent case of Jack Hirons, 32 C.R.C., page 51, wherein the Commission said:

"Some courts have said that a common carrier is one who holds himself out to carry goods of all persons indifferently. But the holding out which was so important a factor in earlier definitions seems to imply no more than the existence of a transportation business which may serve such persons as choose to employ it. It is obviously not a prerequisite that, to be classed as a common carrier, one must undertake to serve all persons without limitation of any kind as to the place where his services are given or the class of goods which he professes to haul. Neither does a limitation imposed regarding the number of shippers served, or the requirement of an express contract in each case prior to the rendition of the service, necessarily fix a carrier's operations as purely private. In other words, if the particular service rendered by a carrier is offered to all those members of the public who can use that particular service, the public is in fact served, and the business is affected with a public interest, though the actual number of persons served is limited." \* \* \* \* \*

"The fact that there are a limited number of such persons does not, as we have seen, make the service private, and, even if we should view the operations of respondent as being performed wholly under a valid contract with a single employer since this employer has entered into such agreement merely for the account of others with whom it happens to sell its commodities, the transportation service of the respondent is directly for the benefit of those other persons, and must be regarded as public in its nature."

Moreover the testimony of defendant also shows that he was under no duty to continue his trucking services for any length of time for his Salinas customers, nor were these customers under any obligations to patronize him at all or for any fixed period of time, nor was there any definite understanding that the defendant was to transport any amount of freight. In this connection the defendant testified in part as follows:

- Q. "You considered then that you could quit any time and they could quit any time? A. Yes sir, nothing to bind me.
- Q. As I understand your testimony you could quit hauling for the Farmer's Mercantile Co. tomorrow morning or refuse to haul another pound for them? A. I imagine that I could.
- Q. I ask you as a matter of fact according to your verbal agreement that you entered into, did you have any verbal agreement whereby you must haul for a definite period of time or not? A. No. there was not.
- Q. In other words then, according to your agreement, you could quit tomorrow morning, could you? A. I guess I could- sure I could quit.
- Q. You didn't agree to haul for him one day if you saw fit to discontinue your truck services, isn't that so?"
- A. "That feature was never taken into consideration."

The evidence shows that the defendant's method of operations permits him to conduct a profitable truck transportation service between the points named for a portion of the public at all times without serving all persons or shippers generally by the simple plan of substituting, if or when necessary, other

customers and shippers for those who may quit or discontinue the service.

The defendant has interposed the special defense of res adjudicata in this proceeding and contends that the 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 involved in the present complaint, instituted in the Superior Court of Monterey County by the complainant herein against the defendant. The defendant has advanced little or no argument, or presented any legal authorities in support of his contention upon this special defense, and after a careful consideration of the matter we are of the opinion that there is no merit in this special defense.

#### 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 D. O. Mills is operating as a transportation company, and as a common carrier, within the meaning of Chapter 213, Statutes 1917, as amended, between Salinas and San Francisco and between Salinas and San Jose without first having obtained a certificate of public convenience and necessity therefor.

IT IS HEREBY ORDERED that said D. O. Mills immediately cease and desist his common carrier operations until he shall obtain the requisite certificate of public convenience and necessity from this Commission, and

IT IS HEREBY FURTHER ORDERED that the Secretary of this Commission shall cause a certified copy of this decision to be personally served upon D. C. Mills and that he shall cause certified copies of this decision to be mailed to the District Attorney of the City and County of San Francisco and the District Attorneys of Santa Clara and Monterey Counties.

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

Dated at San Francisco, California, this 12<sup>th</sup> day of October, 1931.

C. J. Leary  
Leon Coburn  
W. J. Lee  
W. B. Lewis  
Frederic G. Stevens  
Commissioners.