

Decision No. 3:2471

BEFORE THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA

ORIGINAL

In the Matter of the Investigation on)
the Commission's own motion into the)
operations, rates, charges, contracts,)
and practices of FRANK SPINGOLO.)

Case No. 4527

JOSEPH C. TOPE, for respondent.

BAKER, COMMISSIONER:

OPINION AND ORDER

This proceeding was instituted by the Commission on its own motion for the purpose of determining whether or not Frank Spingolo, hereinafter called respondent, has been operating as a highway common carrier between Stockton and territory proximate thereto, on the one hand, and San Francisco and Oakland, on the other hand, without a certificate of public convenience and necessity or other operative right therefor. Public hearing was had on July 6, 1940, in San Francisco, and July 25, 1940, in Stockton, and the matter was duly submitted on briefs and is now ready for decision.

It appears that during the season from April or May to September or October of each year since he entered the trucking business in 1932, respondent, whose main office is in Oakland, has regularly engaged in transporting fresh fruits and vegetables from the Stockton area to San Francisco and Oakland by means of

motor vehicles over U. S. Highway 50, his trucks leaving Stockton between 5:00 and 10:00 p.m. each day except Saturday and arriving in San Francisco and Oakland early the following morning. He holds a radial highway common carrier permit, issued on December 16, 1935, and a highway contract carrier permit, issued on August 16, 1938, but possesses no certificate of public convenience and necessity to operate as a highway common carrier.

Respondent contends that he has been operating as a highway contract carrier, and that he has transported only such property as has been tendered to him by his father, Victor Spingolo, who is a fruit and vegetable broker and has a place of business in Stockton on the premises of the San Joaquin Marketing Association, where each day numerous growers market their produce. This place of business is also used by respondent as his Stockton terminal. The property which passes through or is handled from Victor Spingolo's place of business consists of two types, which may be described as follows: (1) produce which he has purchased pursuant to orders from San Francisco and Oakland wholesale dealers, and (2) produce which is left at his place of business by various growers to be sent to such dealers on consignment. He receives no compensation with respect to the second type, and apparently accepts the shipments merely so that his son, respondent, may obtain the hauling thereof. Respondent transports the consignment shipments to San Francisco and Oakland wholesale houses specified by Victor Spingolo. The billing names the respective growers as the shippers, and the consignees advance respondent's freight charges and deduct them from the remittances to the growers. With respect to the other class of shipments, it appears that Victor Spingolo receives orders from various San Francisco and Oakland dealers to purchase specified

kinds and quantities of produce, and that he thereupon consummates purchases with various growers at stated prices and tenders the property to respondent for transportation. The billing on such shipments likewise shows the growers as the shippers, and the freight charges are collected from the consignees, but the latter do not deduct the same from their remittances to the growers; rather, they issue checks to the growers in amounts based on the purchase price, and also pay a commission to Victor Spingolo for obtaining the produce.

It is undisputed that respondent has transported all shipments handled by Victor Spingolo in either of the ways described above, and that Victor Spingolo has always accepted all consignment shipments which have been left with him by the public in general for transportation to San Francisco and Oakland. According to Victor Spingolo's testimony there are approximately thirty or forty growers from whom he has regularly both bought fruit and accepted consignment shipments, and an additional twenty-five or thirty growers each year from whom consignment shipments have been accepted infrequently. Thus it is apparent that respondent's service not only has been available to the general public but has actually been used by a large number of shippers.

Respondent's contention that so far as he knows he has always transported property only for his father, Victor Spingolo, is not supported by the evidence. To begin with, respondent's billing names the various growers for whom consignment shipments are hauled as the shippers, and respondent admittedly has known that such shipments are on consignment and that the freight charges are ultimately paid by the growers. Secondly, the evidence shows that during a conversation with E. H. Griffiths, Supervising

Inspector in the Commission's Division of Investigation, respondent named from memory at least seventeen growers for whom he stated he was transporting property. Furthermore, in 1938 respondent filed with the Commission a schedule in which he named ten growers with whom he purported to have transportation contracts, and he admitted on the witness stand that he had transported property for them between the points in question. Moreover, respondent had been advised by Griffiths on three occasions during 1938 and 1939 that since the growers controlled the routing and paid the transportation charges on their consignment shipments, they were the persons for whom the service was being performed, and that respondent should restrict his services to a limited group thereof if he desired to operate as a highway contract carrier. Finally, he admitted that his father had entered into transportation contracts in respondent's behalf and was in charge of his Stockton operations. These facts clearly show that respondent knew he was transporting property for the public generally rather than merely for his father.

Respondent further contends that even though the consignment hauling was performed for a large number of shippers, it constituted only a negligible portion of his business, that the great bulk of the property transported was owned and carried for his father, and that he should accordingly be held to be a highway contract carrier. In this connection Victor Spingolo testified that only five or ten per cent of the shipments he handled were on consignment. Witness Griffiths testified, on the other hand, that Victor Spingolo had told him in 1939 that the consignment traffic constituted slightly over half of his business, and this was corroborated by Victor Spingolo's records

for June 25 and 26, 1940, which showed that twenty-five of the forty-five shipments handled on those days were on consignment. No other evidence was introduced in this regard. Irrespective of the percentage of the consignment shipments, however, the record shows that they were substantial in quantity and that they were transported for more than sixty growers annually, without any attempt being made to withhold respondent's services from the public generally. Furthermore, it is not entirely clear that the property which Victor Spingolo "purchased" was owned by and transported for him. While he testified that he purchased such property in his own behalf and later resold it to San Francisco and Oakland dealers, he was quoted by Griffiths as having stated previously that he made such purchases only as an agent for the San Francisco and Oakland dealers. The circumstances of the purchases would tend to support this latter view. Victor Spingolo made the purchases pursuant to orders from San Francisco and Oakland; the growers received the purchase price directly from the San Francisco and Oakland dealers, not from Victor Spingolo; respondent collected his freight charges from such dealers rather than from Victor Spingolo; and the latter received what he described as a "commission" from the dealers. While these facts indicate that respondent probably transported such shipments for the San Francisco and Oakland dealers rather than for his father, the record is not sufficiently clear to justify a finding to that effect, nor is such a finding necessary since the evidence relating to the consignment hauling of itself impels the conclusion that respondent held his services out to the general public and, accordingly, was a common carrier.

Since respondent has operated regularly as a common car-

rier between the points in question, over U.S. Highway 50, he is a highway common carrier within the purview of Section 2-3/4 of the Public Utilities Act and should be ordered to cease and desist from such operations unless and until he obtains a certificate of public convenience and necessity therefor.

An order of the Commission directing that a carrier cease and desist from an unlawful operation is in effect not unlike an injunction by a court. A violation of such order constitutes a contempt of the Commission. The California Constitution and the Public Utilities Act vest the Commission with power and authority to punish for contempt in the same manner and to the same extent as courts of record. In the event a party is adjudged guilty of a contempt he may be fined in the amount of \$500.00 or imprisoned for five days, or both. C.C.P. Sec. 1218; Motor Freight Terminal Co. v. Bray, 37 C.R.C. 244; re Ball & Hayes, 37 C.R.C. 407; Wermuth v. Stamper, 36 C.R.C. 458; Pioneer Express Co. v. Keller, 33 C.R.C. 571.

Public hearings having been held in the above-entitled proceeding, evidence having been received, and the matter having been duly submitted, I hereby find that respondent, Frank Spingole, has been owning, controlling, operating, and managing auto trucks used in the business of transportation of property as a common carrier for compensation over the public highways of this state between fixed termini, to-wit, Stockton and territory proximate thereto, on the one hand, and San Francisco and Oakland, on the other hand, and over a regular route, to-wit, U.S. Highway 50, as a highway common carrier as defined in Section 2-3/4 of the Public Utilities Act, and was engaged in such operation between May 1 and

July 24, 1940, and from approximately May to September, inclusive, annually from 1932 to and including 1939, without first having obtained from the Commission a certificate of public convenience and necessity therefor and without having a prior right to do so resulting from a good-faith highway common carrier operation conducted on July 26, 1917, and continuously thereafter.

The following form of order is recommended:

O R D E R

IT IS HEREBY ORDERED from the foregoing findings of fact that respondent, FRANK SPINGOLO, cease and desist from conducting, directly or indirectly or by any subterfuge or device, any and all operations as a highway common carrier as defined in Section 2-3/4 of the Public Utilities Act over the public highways of this state between Stockton and the rural area proximate thereto, on the one hand, and San Francisco and Oakland, on the other hand, unless and until he first obtain from the Railroad Commission a certificate of public convenience and necessity authorizing such operations.

IT IS HEREBY FURTHER ORDERED that the Secretary of the Railroad Commission cause a certified copy of this decision to be personally served upon respondent, Frank Spingolo, and this opinion and order shall become effective twenty (20) days after the date of such service.

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 4th day of
February, 1941.

H. B. Decker
Walter W. Decker
By S. Reilly
Justin J. Quinn
Francis C. Havenue

Commissioners.