AGO

Decision No. 12679

BEFORE THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA.

ORIGINAL

CITY OF OAKLAND, a municipal Corporation,

Complainant,

vs

SAN FRANCISCO-OAKLAND TERMINAL RAILWAYS, a corporation,

Defendant.

Case No. 1840.

Leon E. Gray for City of Oakland, Complainant;

Lemmel D. Sanderson, City Attorney, for City of Berkeley, Complainant.

Peter F. Dunne and A. L. Whittle for San Francisco-Oakland Terminal Railways, Defendant.

MARTIN, Commissioner:

O P I N I O N

In this case the cities of Oakland and Berkeley seek the removal of an alleged discrimination against children attending institutions of learning within their municipal limits in that the San Francisco-Oakland Terminal Railways, a corporation, operating a common carrier street railroad in and through several municipalities, including these complainant cities, accords a 2½¢ fare to school children in the cities of Alameda and Richmond, while at the same time demanding a 6¢ fare from school children of Oakland and Berkeley.

25

Defendant, in its answer, denies that this difference in fare is based upon an arbitrary or unreasonable distinction, and alleges that the cities of Richmond and Alameda have, by ordinance, required the reduced fare of 2½¢ now charged to school children in those cities. Public hearing was had in this matter before Commissioner Martin; briefs were filed and the case is now ready for decision.

Section 17 of the Public Utilities Act (Statutes of 1915, Chapter 91, as amended) provides that:

> "Nothing in this act contained shall be construed * * * to prohibit the issue of reduced rate transportation by common carriers to children attending an institution of learning."

Defendant argues that this provision gives it a free hand to grant or to withhold reduced rates to school children as it sees fit, and that neither the general principles of public utility law nor the specific provisions of the California Constitution and Public Utilities Act relating to discrimination and undue preference apply. It follows, so defendant argues, that this Commission is without power or authority to direct the removal of any discrimination which may result.

This argument is, in our opinion, unsound. While it seems clear that, as Section 17 of the Public Utilities Act now reads, this Commission is not empowered to require common carriers to accord reduced rate transportation to children attending an institution of learning (Beals v. San Francisco-Oakland Terminal Railways, 11 C. R. C. 963), we can find nothing in that section which would evidence an intent upon the part of the Legislature to free common carriers from the constitutional and statutory prohibition of undue or unreasonable discrimination between persons or localities included within this or other classes to which special rates may be accorded.

In the recent case of Nashville C. & St. Louis Ry. v.

Tennessee, 16 U. S. Supreme Court Adv. Ops. 616; 67 L. ed.(decided May 21, 1923), the United States Supreme Court had under consideration a provision of the act to regulate commerce (Section 22),which reads:

> "Nothing in this act shall prevent the carriage, storage or handling of property free or at reduced rates for the United States, state or municipal governments * * *."

The State of Tennessee excepted from a rate increase carload shipments of rock, sand and gravel consigned to public authorities or their agents and to be used in building public highways. Certain carriers claimed before the Interstate Commerce Commission, and that Commission found, that such exception created an undue prejudice to certain persons and localities engaged in interstate commerce. The lower Federal Court declared the Commission's order void, and enjoined its enforcement, but the United States Supreme Court reversed that decree, and, in the course of its opinion, said:

> "Congress did not intend, by this provision concerning reduced rates and free transportation, to create an instrument, by which the carrier was authorized, in its discretion, to subject interstate commerce to undue prejudice, or by which the state was empowered to compel the carriers so to do. The object of the section was to settle, beyond doubt, that the preferential treatment of certain classes of shippers and travelers, in the matters therein recited, is not necessarily prohibited. And in this respect its provisions are illustrative, not exclusive. It limits, or defines, the requirement of equality in treatment which is imposed in other sections of the act. By so doing, it preserves the right of the carrier, theretofore enjoyed, of granting, in its discretion, preferential treatment to particular classes in certain cases. Only in this sense can it be said that the section is permissive. It confers no right upon any shipper or traveler. Nor does it confer any new right upon the carrier.
>
> "The grant of a lower rate on road material to a government engaged in highway construction may benefit the government without subjecting to prejudice any person, locality, or class of traffic. But a lower rate may result in giving to a single quarry within the state all of the governmental business, so that competing quarries and localities within or without the state, or interstate traffic, would be prejudiced. That such undue discrimination does, and will, result from the order of the Tennessee commission, was expressly found by the Interstate Commerce Commission. Its findings are necessarily conclusive, since the evidence on which it acted was not introduced in this suit. Louisiana & P. B. R. Co. v. United States 257 U.S. 114; 66 L.ed. 156; 42 Sup. Ct. Rep. 25."

In the case of State ex rel Atwater v. Del. L. & W.R. Co., (N. J.) 2 Atl. 803 (1886), the Court said:

> "A company is under no obligation to establish commutation rates for a particular locality, but when it has established such rates, and commutation tickets are sold thereat to the public, the refusal of such a ticket to a particular individual, under the same circumstances and upon the same conditions as such tickets are sold to the rest of the public, is an unjust discrimination against him, and a violation of the principles of equality which the company is bound to observe in the conduct of its business."

To the same effect see In the Matter of Party Rate Tickets, 12 I. C. C. 96; Western Pacific R. R. Co. v. So. Pac. Co., 55 I. C. C. 71, 74.

We think the principles above declared apply with peculiar force to the case now under consideration. The provision of the Public Utilities Act here in question "preserves the right of the carrier, theretofore enjoyed, of granting, in its discretion, preferential treatment to children attending an institution of learning." It confers no right upon school children as a class to demand such preferential treatment, but this Commission recognized in the Beals case (supra) that the initial granting of such preferential treatment is fully within the discretion of the carrier. But the provision does not "confer any new right upon the carrier," and we cannot subscribe to the argument that the carrier is by it empowered, arbitrarily, to create an unreasonable discrimination as between persons within the favored class.

Section 21 of Article XII of the Constitution of this State provides:

> "No discrimination in charges or facilities for transportation shall be made by any railroad, or other transportation company between places or persons, or in the facilities for the transportation of the same classes of freight or passengers within this State."

The Public Utilities Act (Section 19) provides:

> "No public utility shall, as to rates, charges, service, facilities or in any other respect, make or grant any preference or advantage to any corporation or person or subject any corporation or person to any

prejudice or disadvantage. No public utility shall establish or maintain any unreasonable difference as to rates, charges, service, facilities or in any other respect, either as between localities or as between classes of service. The commission shall have the power to determine any question of fact arising under this section."

The question of primary importance, therefore, seems to us to be whether or not the charging of but 2½¢ to school children of Alameda and Richmond, while demanding 6¢ from those of Oakland and Berkeley is an unreasonable differentation or an undue or arbitrary discrimination against the latter, and therefore prohibited by law. Clearly the defendant could not lawfully exclude from a generally applied school children's rate, any particular child, or those attending a particular school, unless such discrimination could be justified by some actual and reasonable difference in the class of service rendered.

Defendant's street car system comprises a network many miles in extent serving a closely built up region, divided for purposes of local government, into several separate municipal corporations, and commonly known as the "East Bay District", or the "East Bay Cities." To all intents and purposes, this region constitutes a single metropolitan area including the present complainants and also the cities of Alameda and Richmond. To accord reduced rates to the school children of the latter cities, while demanding full fare of those of complainants, Oakland and Berkeley, is, we think, a discrimination which cannot be justified upon any logical or reasonable ground. Defendant has not attempted to justify such discrimination, except upon the ground of franchise requirements but has argued that the ordinary principles condemning discrimination in rates do not apply. As stated above, this Commission is of the opinion that these principles do apply, and we hereby find as a fact that the discrimination here in question is unreasonable and unjust

and must be eliminated. It is well settled that franchise provisions are not controlling over the exercise of the police power of the state in the regulation of public utilities. One of the most important branches of such regulation is the elimination of undue preference and of unreasonable or arbitrary discrimination.

The case presents marked points of similarity to that of South San Francisco Chamber of Commerce v. Southern Pacific Co., et al. (18 C. R. C. 997), decided by this Commission on October 11, 1920, and commonly known as the "switching limits" case. In that case it was shown that the charges for switching freight in carloads between Oakland wharf and Elmhurst, a distance of 9.9 miles, were 30¢ per ton, minimum $6.50 per car, while the charges for switching freight, regardless of classification, between San Francisco and South San Francisco, a distance of 9.1 miles, were 60¢ per ton. Defendant, Southern Pacific Company, urged--as has defendant in the present case--that the lower rate between Oakland and Elmhurst was a franchise requirement, but the Commission held that such franchise provisions are not conclusive in the determination of issues of this nature, and found that such practices subjected South San Francisco to unreasonable prejudice and disadvantage in violation of Section 19 of the Public Utilities Act. The carrier was ordered to submit to the Commission a tariff removing the discrimination. A similar order will be made in the present case.

In view of our conclusion as to the power and duty of this Commission to order the removal of an unreasonable discrimination within a class to which, under the provisions of Section 17 of the Public Utilities Act, a carrier may extend reduced fare privileges, it is unnecessary to consider whether or not any different conclusion would be violative of the constitutional pro-

vision against discrimination; and, in view of the order hereinafter made, it is unnecessary to discuss the power of this Commission to remove the discrimination here in question by the establishment of any particular rate.

O R D E R

The municipal corporations of Oakland and Berkeley having complained to the Commission that a fare of 6¢ assessed to children attending institutions of learning within their municipal limits is unjust, unreasonable and discriminatory to said school children in view of the action of defendant in charging children attending institutions of learning within the municipal limits of the adjacent municipal corporations of Richmond and Alameda but 2½¢; a public hearing having been held, briefs having been filed, and the Railroad Commission being fully apprised in the premises, and basing its order upon the findings of fact which appear in the opinion preceding this order,--

IT IS HEREBY ORDERED that the SAN FRANCISCO-OAKLAND TERMINAL RAILWAYS, a corporation, be, and it is hereby notified and required to eliminate on or before the 3rd day of December, 1923, the undue and unreasonable prejudice and disadvantage found in the preceding opinion to result from the publishing, demanding and collecting of a higher rate for the transportation of children attending institutions of learning within the municipal limits of the cities of Oakland and Berkeley, than it contemporaneously publishes, demands and collects for the transportation of children attending institu-

tions of learning within the municipal limits of the cities of Richmond and Alameda; and

IT IS HEREBY FURTHER ORDERED that defendant, San Francisco-Oakland Terminal Railways, be, and it is hereby directed to file with this Commission, on or before the said 3rd day of December, 1923, its schedule of fares applying to the class of transportation herein mentioned, which shall eliminate and put an end to the discrimination herein ordered abolished.

Dated at San Francisco, California, this 3d day of October, 1923.

C. S. Lewis

Irving Martin

J. T. Whitsell

Commissioners.