Decision No. 16723

ORIGINAL

BEFORE THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA

Los Angeles County, a Municipal Corporation, Gilmore Oil Company, a Corporation, Complainants, A. F. Gilmore Company, a Corporation, Intervener, vs. Pacific Electric Railway Company, a Corporation, Southern Pacific Company, a Corporation, Defendants.	CASE NO. 2111

BY THE COMMISSION:

OPINION AND ORDER ON APPLICATION FOR RECONSIDERATION OF THE RECORD AS MADE

This is an application of complainant, Gilmore Oil Company, a corporation, and of the intervener, A.F.Gilmore Company, a corporation, for reconsideration, on the record as made, of our Decision No.15788 entered December 21,1925 in the above entitled proceeding, insofar as the denial of an award of reparation is concerned. We found that the rates on road oil from Sherman Junction to Los Angeles, Compton and Baldwin Park were not unreasonable, per se, but that they were unduly discriminatory and prejudicial to Sherman Junction and unduly preferential to El Segundo to the extent the rates from Sherman Junction exceeded rates contemporaneously in effect from El Segundo, and

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directed defendants to remove this undue discrimination and preference by publishing from Sherman Junction to Los Angeles, Compton and Baldwin Park rates not in excess of those on road oil from El Segundo to the same points of destination.

Applicants, in their petition for reconsideration, direct attention to and rely upon the holdings of the Interstate Commerce Commission in Lester & Toner vs. Long Island Railroad, 83 I.C.C.251, and Mebius & Drescher Company vs.Central California Traction Company,42 I.C.C.599. In those cases the Interstate Commerce Commission awarded reparation upon the findings of undue discrimination and prejudice, but there was evidence before the Commission to the effect that the rates from the preferred points permitted complainants' competitors located at such points to control the selling price of the commodity and that such preferred rates were the direct and sole cause of complainants being damaged. Another reparation case, and one which the petitioners failed to recite, is A.H.Kerr & Company vs.Sand Springs Railway Company,et al., 62 I.C.C.296,302. Here the complainants referred to the Mebius & Drescher Company case, but in the Kerr proceeding the Interstate Commerce Commission held the opposite of that for which these petitioners are here contending and clearly points out that the issues in the Mebius & Drescher Company case were in no manner on all fours and did not parallel the Kerr case. The latter case involves facts similar to those in the proceeding here in controversy.

The following is quoted from A.H.Kerr & Company, supra:

> "They concede to their principal competitors a rightful advantage in materially lower production cost, enabling those competitors to reduce prices out of all proportion to the former differentials, but claim that their own rightful advantage in freight rates entitles them to damages and fixes the measure of such damages, on the theory that no matter what their eastern competitors' production cost advantage was, the delivered prices that they made, and which the complainants were compelled to meet were based in part upon freight rates and always reflected in full the advantage which the eastern plants had by reason of the unduly preferential rate adjustment". (301)

> "There is evidence to the effect that prices fluctuated from time to time and were met by complainants, but it is not shown that the Muncie or other competitors made advances or reductions in prices coincident with or conforming to the changes in freight rates. Neither is it established that, if the undue prejudice had been removed by an increase of the rates from the eastern plants, it would in any way have affected the complainants' competition".

> "It is clear that complainants in the case before us proceed upon the theory that, having met the prices of their competitors, they were necessarily and automatically damaged in amounts measured by the former rate differentials * * * * * * * * *. Recognition of such a theory would be contrary to the binding rule in the International Coal Co. Case, supra, which requires affirmative proof of the fact and amount of damage". (302)

Where rates are found to be not unreasonable, but only unduly discriminatory, complainant must prove by direct evidence that it has been injured; the exact amount of damage suffered by it, if any; that the damage suffered was the direct and proximate result of the lower rates from the preferred points and that such damage was clearly traceable to the rate paid. The amount of damages cannot be implied or left to conjecture, nor is the

amount of damage suffered necessarily the difference between the unduly discriminatory and prejudicial rate paid and the rate subsequently established. There was not in evidence in this proceeding any such proof and, therefore, reparation was denied. Pennsylvania Railroad Company vs.International Coal Co. 230 U.S. 184; Coal Switching Reparation Cases at Chicago, 36 I.C.C.226; C.D.Park vs.L & N Railroad ,55 I.C.C.703; Carnegie Steel Co.vs. Director General,96 I.C.C.527, and cases cited therein.

The allegations of the unreasonableness per se of the rates were not sustained; in fact, the record clearly shows the rates in controversy from El Segundo and other points to have been subnormal and depressed by reason of the actual and potential competitive influences.

In the light of the decisions herein referred to, we have carefully reviewed the record to determine if applicants have reasonably established the requisites necessary in discrimination cases to entitle recovery. This record is barren of proof that the damage alleged to have been suffered was directly attributable to the rates in effect from El Segundo. Neither does it appear of record that the Standard Oil Company in arriving at its selling prices for road oil, which it is stated applicants met, based its selling prices upon the El Segundo rates, or that the rate from El Segundo fixed the price of road oil and thus permitted the Standard Oil Company to control the selling price of the commodity.

The applicants have not, according to the legal requirements, proved that they were damaged by the payment of the discriminatory rates. Upon reconsideration of the record as made

and of our Decision No.15788, we affirm our former findings and conclusions and an order dismissing the application will be entered.

O R D E R

Upon further consideration of the record in the above entitled proceeding and of the petition for reconsideration,

IT IS HEREBY ORDERED that Decision No.15788 entered in the above entitled proceeding be, and the same is, hereby affirmed, and

IT IS HEREBY FURTHER ORDERED that the said petition be, and it is, hereby denied.

Dated at San Francisco, California, this 12th day of May, 1926.

H. H. Rominger

C. C. Young

Leon O. Whitsell

Commissioners.