ELH

Decision No. 17520

BEFORE THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA.

ORIGINAL

BAY CITIES TRANSPORTATION COMPANY, a corporation, Complainant, vs. ALAMEDA TRANSPORTATION COMPANY, a corporation, Defendant.	Case No. 2254
In the Matter of the Application of ALAMEDA TRANSPORTATION COMPANY, a corporation, for permission to acquire the prescriptive operating rights of W. D. Heryford, doing business as Alameda Transportation Company, or for a certificate of public convenience and necessity to operate boats for the transportation of property (freight) for compensation, between points on the inland waters of this state and for permission to issue stock.	Application No. 12437

Sanborn & Roehl and DeLancey C. Smith, by A. B. Roehl, for Complainant in Case No. 2254, and Protestant, Bay Cities Transportation Company, in Application No. 12437.

Glensor, Clewe & Van Dine, by H. W. Glensor, appearing for Defendant, Alameda Transportation Company, in Case No. 2254, and for Applicant, Alameda Transportation Company, in Application No. 12437.

E. W. Hollingsworth and R. T. Boyd, for Oakland Chamber of Commerce.

L. H. Rodebaugh, for San Francisco-Sacramento Railroad Company.

LOUTTIT, Commissioner:

O P I N I O N

The Bay Cities Transportation Company, a public utility, filed its amended complaint herein against the defendant, Alameda Transportation Company, on the 17th day of July, 1926, alleging

76

improper and unlawful acts and practices of the defendant in the operation by the latter of its service on the inland waters of the State of California between Oakland and San Francisco. An answer was filed by the defendant on the 9th day of August, 1926. On July 3, 1926, the defendant filed its supplemental application in Application No. 12437 seeking a modification of or an amendment to the certificate of public convenience and necessity issued to it by the Commission on the 17th day of March, 1926 (Decision No.16211, Application No. 12437), under which certificate the defendant was authorized "to operate said boat Jessie Matson for the transportation of freight between San Francisco and all points on the Oakland Estuary, including all shipyards,and between San Francisco, Avon, Bay Point and Richmond." The amendment or modification sought by this supplemental application is for authority to operate "the said 'Jessie Matson' and any other boats or barges, and/or vessels which may from time to time be necessary to actually transport the freight offered to applicant as a common carrier for transportation, such transportation to be over the same routes and under the same tariffs as apply to said 'Jessie Matson.'" By consent of counsel for the respective parties in both proceedings, the matters were consolidated for the purposes of hearing and decision.

The issues framed by the pleadings in Case No. 2254 are as follows:

First. Whether or not the defendant is and has been operating the vessels "Utility" and "Fidelity" for the transportation of property for compensation between points on the inland waters of the State of California without having first obtained a certificate from this Commission so to do; and

Second. Whether or not the defendant has charged, demanded, collected, and received a lesser or/and different compensation for the transportation of property between points on the inland waters of the State of California than the rates and charges applicable to such transportation as specified in its schedules and tariffs on file with the Commission, which were in effect at the time such charges were demanded, collected, and received.

The prayer of the complainant is for an order of this Commission directing the defendant to cease and desist from operating the vessels "Utility" and "Fidelity," and, with respect to the allegation that the defendant has demanded, collected and received improper compensation, for such order or orders as to the Commission may seem proper in the premises.

Public hearings were held, the matters were duly submitted, and are now ready for decision.

The pleadings admit and the evidence establishes that the defendant has operated the vessels "Utility" and "Fidelity" for the transportation of property for compensation between San Francisco and Oakland, California.

On January 13, 1926, this defendant filed its Application No. 12437 praying that this Commission authorize the transfer to it of the prescriptive operative rights of one W. D. Heryford between points on the San Francisco Bay and tributaries thereof, or, in the event that such transfer could not be authorized, that a certificate be granted to the defendant for the operation of the "Jessie Matson" between the same points. Subsequent to the filing of this application, the defendant was notified that this Commission was without authority to authorize such a transfer, but could, if proper showing that necessity for such

service existed, grant a certificate as prayed for in its application for operation of the "Jessie Matson" to Alameda Transportation Company, provided that W. D. Heryford would file a written surrender of his prescriptive operative rights with this Commission. Pursuant thereto such a written surrender was filed, and on the 17th day of March, 1926, this Commission rendered its Decision No. 16211, granting a certificate to the defendant for the operation of the vessel "Jessie Matson" for the transportation of freight between San Francisco and all points on the Oakland Estuary, including all shipyards and between San Francisco and Avon, Bay Point and Richmond.

The defense urged by the defendant is that the Commission inadvertently restricted the defendant's certificate to the use and operation of the vessel "Jessie Matson." The theory of the defendant is that the Commission did not intend to limit the defendant to the operation of a single vessel, to-wit: the "Jessie Matson," but that the intention was to allow it to operate "vessels" between the points named in the certificate. To this theory I can not subscribe.

Under the provisions of section 50(d) of the Public Utilities Act "no corporation * * * shall hereafter operate * * * any vessel * * * without first having obtained from the railroad commission a certificate declaring that present or future public convenience and necessity require * * * such operation," and the same section further provides that this Commission is authorized to issue such a certificate of public convenience and necessity "as prayed for, or to refuse to issue the same, or to issue it for operation between certain points only." When the Commission issued the certificate above named, it issued the same as prayed for, which was for the operation solely of the "Jessie Matson." Such a restriction and limitation to the one vessel was not in-

advertently made.

The operation by the defendant of the vessels "Utility" and "Fidelity" is neither in pursuance of permission or authority granted by the Commission, nor is it an operation within the exception named in section 50(d) of the Public Utilities Act, but is a direct violation of that section. The defendant, therefore, should be ordered to cease and desist from the operation of the vessels "Utility" and "Fidelity" unless and until a certificate of public convenience and necessity is obtained therefor as required by law. I recommend that an order be made accordingly.

As to the second issue, whether or not the defendant has charged, demanded, collected, and received a lesser and different compensation for the transportation of property between points on the inland waters of the State of California than the rates and charges applicable to such transportation as specified in its schedules and tariffs lawfully on file with this Commission, the record discloses that the defendant's Local Freight Tariff No.1, CRC No. 1, contains a limited number of specific commodity rates, and also a scale of class rates, five classes, one to five inclusive. The class rates are governed by a classification contained in the body of the tariff and are only applicable in the absence of specific commodity rates, by virtue of Rule 1, paragraph (b), which reads:

> "Class rates shown in this tariff apply only in the absence of commodity rates. Whenever a commodity rate is established it removes the application of class rates from or to the said points on that commodity."

There are some 40 or 50 specific commodity rates in the tariff including rates of $1.50 per ton, subject to a minimum weight of 30 tons, and $3.00 per ton on shipments in lots of less than 30 tons, applicable on freight n.o.s. (not otherwise specified). The latter two rates are generally lower than the

80

rates for commodities specifically named and, in the original tariff, applied between San Francisco and Oakland only. However, effective June 13, 1926, in Supplement No. 2 to the tariff, the application of the rates on freight n.o.s. was amended to embrace all points in the Oakland Estuary; this primarily for the purpose of including the Encinal Terminals, located on the Alameda side of the estuary. The establishment of the commodity rates on freight n.o.s. together with those commodity rates already in effect virtually provided commodity rates for any and all freight offered. Thus, on and after June 13, 1926, defendant maintained two sets of commodity rates: first, those on commodities definitely listed in the tariff, and, second, the $1.50 rate and $3.00 rate applicable on all other commodities embraced within the generic term of "freight n.o.s."

Defendant's General Manager interprets the term "n.o.s." to mean "not otherwise specified by the shipper" and testified that it has been the practice, where shipments of miscellaneous freight were presented for transportation and billed as such, to apply the $1.50 per ton or $3.00 per ton rate according to the weight of the shipment, even though there were included therein commodities for which specific higher commodity rates were provided; in other words, the freight n.o.s. rates were applied according to the way the shipper billed the shipment and not with due regard to whether a shipment contains a commodity that should have taken a higher or lower rate. There was, however, an exception to this practice, viz: that when the commodities classified higher than the first class, defendant arbitrarily and without authority assessed class rates applicable thereto.

The interpreation placed by defendant on the term "freight n.o.s." is strained, illogical and without tariff authority. From the facts presented in this case it appears positively that defendant has placed this interpretation upon the term "freight n.o.s."

81

simply as a devide to enable preferred shippers to obtain the benefit of rates lower than those lawfully in effect.

Defendant maintained that the tariff is ambiguous and is subject to misinterpretation, but a careful examination of the tariff fails to sustain this contention. In fact, the opposite is true, for the tariff clearly specifically sets forth when class rates may be used, when commodity rates may be used and when low rates on freight n.o.s. may be used.

From the record it appears that on June 25, 1926, defendant accepted from the Consolidated Motor Freight Lines, Inc. and transported from San Francisco to Oakland 25,550 pounds of freight billed by the consignor as miscellaneous freight. Part of this shipment of 25,550 pounds was 720 pounds of canned goods shipped by the complainant, which shipment the complainant alleges to be in violation of section 17(a) of the Public Utilities Act. It was admitted by a witness for defendant that this shipment may or may not have contained commodities specifically listed in the tariff. It is in evidence that defendant assessed a rate of $1.50 per ton and collected freight charges in the sum of $38.33, where, if the shipment did not also contain freight having a specific commodity rating, the lawful applicable rate on file with this Commission was $3.00 per ton, but not to exceed the charges that would have accrued at the rate of $1.50 per ton, with a minimum weight of 30 tons, therefore, the lawful charges were $45.00, and the shipment was undercharged in the amount of $6.67.

Section 17 of the Public Utilities Act places upon common carriers the duty of strictly enforcing the provisions of the tariff. Paragraph 2 of section 17(a) reads:

> "No common carrier shall charge, demand, collect or receive a greater or less or different compensation for the transportation of persons or property, or for any service in connection therewith, than the rates, fares and charges applicable to such transportation as specified in its schedules filed and in effect at the time. * * *."

The traffic official of defendant with some twenty years of experience in tariff and rate work was certainly qualified to correctly interpret the published rates.

I am convinced on this record that the defendant has knowingly and willfully permitted the terms of its tariffs to be violated in contravention of section 17(a), paragraph 2 of the Public Utilities Act, and I recommend that it be ordered to appear before this Commission to show cause why it should not be subjected to a penalty as provided by Section 76(a) of the Public Utilities Act for violation of Section 17(a) 2 of the Public Utilities Act.

In proceeding CRC Application No. 12437, the Alameda Transportation Company (defendant in CRC Case No. 2254) has filed its application as above stated for an amendment to or modification of the certificate of public convenience and necessity heretofore issued to it by the Commission seeking, in the present proceeding, a modification of or an amendment to the said certificate, so that it may be authorized and permitted to operate these two vessels, to-wit: "Fidelity" and "Utility", in addition to the "Jessie Matson."

This petition, considered as an application to amend an order under Section 64 of the Public Utilities Act, I do not believe sufficiently supported by the evidence adduced in support of the application.

If the said application be considered as an application to the Commission for a certificate of public convenience and necessity to operate the vessels "Utility" and "Fidelity", the evidence offered at the hearing as to public convenience and necessity is confined almost entirely to testimony that the Alameda Transportation Company has developed a great deal of business since the issuance to it of the certificate to operate the "Jessie Matson," the handling of which business necessitates the operation of the two vessels in question. The record discloses that the defendant has in large measure developed its

S3

business by demanding, charging and receiving lower rates than those contained in its published schedules and tariffs on file with the Commission, and the evidence further shows that this business was developed while the two vessels were being illegally operated. Under the circumstances, I feel that sufficient evidence of public convenience and necessity has not been adduced, and recommend that the application be dismissed without prejudice.

O R D E R

A complaint having been filed by the Bay Cities Transportation Company, a corporation, against the Alameda Transportation Company, a corporation, alleging that the latter has been and is operating the vessels "Fidelity" and "Utility" between San Francisco and Oakland without a certificate of public convenience and necessity from this Commission, which is alleged to be contrary to the Public Utilities Act, public hearings having been held thereon, the matter having been duly submitted, and being now ready for decision,

IT IS HEREBY FOUND AS A FACT that the defendant, Alameda Transportation Company, has been, and is operating the vessels "Fidelity" and "Utility" between San Francisco and Oakland without a certificate of public convenience and necessity from this Commission, which is required under section 50(d) of the Public Utilities Act, and

A supplemental application having been filed in Application No. 12437 of the Alameda Transportation Company, a corporation, for an amendment to Decision No. 16211 of this Commission, dated March 17, 1926, said supplemental application requesting

that the Alameda Transportation Company be given permission to operate additional vessels other than it was authorized to operate by said Decision No. 16211, public hearings having been held thereon, the matter having been duly submitted, and being now ready for decision,

IT IS HEREBY FOUND AS A FACT that public convenience and necessity do not require the operation of additional vessels as requested in the supplemental application, and

A complaint having been filed by the Bay Cities Transportation Company, a corporation, against the Alameda Transportation Company, a corporation, alleging that the latter has charged, demanded, collected and received a lesser and different compensation for the transportation of property between San Francisco and Oakland, being on the inland waters of the State of California, than the rates and charges applicable to such transportation as specified in its schedules filed with the Railroad Commission, public hearings having been held thereon, the matters having been duly submitted and being now ready for decision,

IT IS HEREBY FOUND AS A FACT that on the 25th day of June, 1926, the Alameda Transportation Company transported 25.550 pounds of miscellaneous freight for the Consolidated Motor Freight Lines, at a rate less than that lawfully on file for the transportation of such freight, in violation of paragraph 2 of section 17(a) of the Public Utilities Act.

WHEREFORE, IT IS HEREBY ORDERED that the Alameda Transportation Company be, and the same is hereby ordered to cease and desist from the operation of the vessels "Fidelity" and "Utility" as to the inland waters of the State of California unless and until a certificate of public convenience and necessity is obtained therefor from this Commission, and

IT IS HEREBY FURTHER ORDERED that the supplemental application of the Alameda Transportation Company, a corporation, for an amendment to Decision No. 16211, dated March 17, 1926, be, and the same is hereby denied.

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 22nd day of October, 1926.

H. M. Bramhall

C. Stevens

Leon O. Whitsell

Thos. S. Lowell

Commissioners.