Decision No. 17788

BEFORE THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA.

J. B. LAVENSALER, DAVIS & PATTEN, HILL BROS., CRAWFORD & EDMUNDS, ANTON & GREEN and J. W. CURRY,
Complainants,

vs.

CHARLES KUPPINGER,
Defendant.

ORIGINAL

Case no. 2169

W. H. Hazell, for Complainants,
Chas. A. Beck, for Defendant.

BY THE COMMISSION:

O P I N I O N

The complaint in this proceeding was filed by certain merchants engaged in business at Lakeport, against Charles Kuppinger, who is conducting a motor freight line as a common carrier under certificate from this Commission between Lakeport and Hopland and also between Ukiah and Upper Lake. It alleges that the freight rates charged by defendant between Hopland and Lakeport are excessive and unreasonable; that they are unduly prejudicial to Lakeport and unduly preferential of Upper Lake and Kelseyville, both of which are commercially competitive with Lakeport; that defendant has accorded certain shippers of freight between Hopland and Lakeport rates lower than the published rates; that

the rates for such transportation charged certain shippers were lower than those charged other shippers; and that complainants are able to contract with other parties to haul their freight between Lakeport and Hopland at a lower rate than that charged by defendant. The complaint prays that defendant's certificate be cancelled and that complainants be permitted to contract with other parties for the transportation of their freight between Hopland and Lakeport at a rate not exceeding $6.00 per ton; or, in the alternative, that defendant's rates be reduced from $8.00 to not exceeding $6.00 per ton, and in addition, that he be required to establish special commodity rates on certain articles, such as sugar, salt, flour, feed and grain, also cement, lime, iron and steel, nails, lumber and other heavy building materials.

By his answer, defendant denies that he has charged or received rates differing from those set forth in the published tariffs, except where erroneous rates have been assessed, which errors have been promptly corrected when called to defendant's attention; defendant denies that the rates between Hopland and Lakeport are discriminatory, asserting that the lower rate specified in the complaint covers carload business and cannot reasonably or justly be applied to small loads necessiting a pick-up and delivery service; as a separate defense defendant alleges that he is preparing a revised schedule of class and commodity rates, resulting in no increases, but clarifying ambiguities in

the existing tariff, and standardizing and reducing rates in numerous instances; as a further separate defense, defendant challenges the Commission's jurisdiction, in a proceeding such as this, (the same being a complaint, and not an application for a certificate), to permit the establishment of another automotive freight service, or to establish a discriminatory and preferential rate schedule.

The issues, as formulated by the pleadings, may thus be summarized; (1) that the rates are discriminatory against complainants in that they are unduly prejudicial to Lakeport and unduly preferential of Upper Lake and Kelseyville; and further, that defendant has favored certain shippers, to the prejudice of complainants; (2) that defendant has been guilty of rebating, in that he has failed to observe the published tariff rates; (3) that the Commission is without power, in this proceeding, to authorize a service by another operator, or to establish a discriminatory or preferential rate schedule for such operations; and (4) that the rates are excessive and unreasonable. In connection with the last point, we shall consider the proposed revised schedule of rates.

A public hearing was held before Examiner Austin at Lakeport, when evidence was offered, the matter was submitted, and it is now ready for decision.

We shall discuss the evidence as it relates to the principal issues raised in the complaint. Unless otherwise expressed, all rates mentioned are in cents per 100 pounds.

Discrimination against Complainants.

It is contended by complainants that the rates were unduly prejudicial against Lakeport and preferential to Upper Lake and Kelseyville. Inasmuch as Kelseyville is not served by the defendant, the rates to this point, although lower than those to Lakeport, cannot be considered as prejudicial to Lakeport, since it must appear that the same carrier serves both points before the rates can be held discriminatory or prejudicial.

Defendant operates an automobile truck line between Lakeport and Hopland, a distance of 21-1/2 miles; and also between Ukiah and Clear Lake Lodge via Upper Lake, the distance from Ukiah to Upper Lake being 25 miles and from Ukiah to Clear Lake Lodge 31 miles. Between Lakeport and Upper Lake, which are nine miles apart, defendant conducts no service. Defendant has published on building materials a rate of 25 cents from Ukiah to Upper Lake, and 40 cents from Hopland to Lakeport, excepting cement, upon which has been published a commodity rate of 25 cents. The rates to Upper Lake, defendant testified, were reduced to facilitate the reconstruction of buildings destroyed by a disastrous fire, but he admitted that they were not published until several months after the fire and that similar concessions were not accorded Lakeport upon the occasion of fires in that community.

James S. Hill, of the firm of Hill Bros., one of the complainants, testified that his firm conducts a store at Lakeport, serving generally all of the communities in Lake County, and that in so doing he meets with competition from the merchants of Upper Lake. Because of the lower rates enjoyed by the latter, Hill Bros. have been unable to meet competition, particularly on heavy materials. Substantially the same testimony was given by J. B. Levensaler, one of the complainants, who encounters similar competition, being forced to absorb the difference in freight charges in order to meet the prices of the Upper Lake merchants. Two merchants of Lakeport called by the defendant testified that they were not affected by this competition. It also appears that Lakeport merchants meet with competition at Ukiah, the merchants at this point, because of lower prices, being able to attract trade naturally tributary to Lakeport.

In justification of the difference in rates, defendant testified that upon the route between Hopland and Lakeport the grades were more severe and the elevation much greater than upon the road between Ukiah and Upper Lake, resulting in higher operating costs between Hopland and Lakeport. In addition a bi-weekly service is maintained at Upper Lake, while at Lakeport the service is conducted daily throughout the summer, and bi-weekly in winter.

In view of the dissimilarity of operating conditions, and the less frequent service to Upper Lake, it cannot be

said that the rates to that point are unduly preferential nor discriminatory against complainants. Upon this issue we must hold that complainants have failed to make a sufficient showing. The lower rates to Ukiah are incidental to its location upon the railroad, an advantage for which defendant is not responsible.

Complainants have failed to substantiate the alleged violation of the long-and-short-haul rule. A farmer living in Scotts Valley three miles west of Lakeport, testified that upon freight hauled from Hopland defendant charged a rate exceeding that to Lakeport, an intermediate point. However, his testimony as to specific shipments and the rates actually assessed was so uncertain that no finding of discrimination can be predicated thereon; nor does it appear that defendant had any certificate to operate beyond Lakeport over the route in question. Unless it can be shown that defendant was operating over a regular route under a certificate duly granted, we cannot find there was any violation of the long-and-short haul clause. The question of the legality of defendant's operations is not before us in this case.

Rebates:

It is charged by complainants that defendant has been guilty of rebating, in that he has failed to observe the published tariff rates. The evidence deals with but one specific instance. It appears that in August, 1925, defend-

ant hauled a carload of cement and brick consigned by Proctor & Cleghorn of Santa Rosa to Anton & Green (one of complainants) at Lakeport under a rate less than that published in the tariff. Defendant admitted that he had hauled these commodities for others at $5.00 per ton and had charged Proctor & Cleghorn only $3.25 per ton, but asserted that he had endeavored to collect the difference between the charges imposed and those accruing under the tariff, introducing in support of this contention a freight bill for the undercharge which had been sent to Proctor & Cleghorn and referred by them to the consignee. Complainants have emphasized the fact that the bill was not rendered until after the institution of this proceeding, claiming that the bill was a mere subterfuge. Defendant denied that he had granted any rebates to any shippers, stating that he had charged the tariff rates, and that he had never offered to haul for any shipper at rates lower than those published in the tariffs. He also denied that he had ever predicated his freight charges upon any false billing of shipments, asserting that the weights upon which charges were based were those shown upon the railroad freight bills, defendant himself never having weighed the shipments. However, he has not strictly followed the tariff in respect to the class rates. At present the class rates are as follows: first class, 50 cents; second class, 48 cents; third class, 45 cents; and fourth class, 40 cents. Under the tariff previously in effect there were but two rates, viz.; 40 cents and 50 cents. Under the present tariff, defendant has assessed a rate of 40 cents on all commodities taking a rate lower than 50 cents, failing to this extent to observe the second and third class rates. Although defendant has

undoubtedly failed to obey the injunction of the statute, requiring a strict observance of tariff rates, it is apparent that in so doing he has accorded to all shippers equal treatment, consequently it cannot be said that in following this practice there has been any moral obliquity on his part. But the lack of evil intentions will not excuse his failure to comply with the law, and in the future defendant will be required to observe the rates published in his tariff. If for any reason they are objectionable, defendant's remedy is to change the tariff, not to disregard it.

Proposed Contract Rates.

The complainants ask that they be authorized to enter into a contract with certain carriers, other than defendant, for the transportation of their goods at rates lower than those charged by defendant. Defendant, however, challenges the Commission's power in this proceeding to sanction such an arrangement, contending that no proper application is now before the Commission which would authorize the granting of a certificate for such a service. If complainants desire to contract with a private carrier for the transportation of their goods, no such authority is necessary (Frost & Frost v. Railroad Commission, _____, U.S. _____; 70 Law. Ed. 682). And if it is to be assumed that complainants are seeking a certificate of public convenience and necessity for the operation of a motor truck freight service, we believe this objection is sound, since the law provides that a proper

application be filed with the Commission and a fee of $50.00 be paid before such a certificate can be granted. (Stats. 1917, ch. 213, as amended). This requirement certainly is not met by the mere allegation in a complaint such as this, that a contract can be made by complainants for the transportation of their goods at certain rates. Therefore, the request for authority to establish this service must be denied.

Unreasonable and Excessive Rates.

Upon most of the staple commodities received by complainants, defendant's rate is $8.00 per ton (fourth class), some commodities being assessed the first class rate of $10.00 per ton. The evidence shows that complainants have made substantial shipments over defendant's line from Hopland to Lakeport at the rates mentioned.

In substantiation of the charge of unreasonableness, complainants referred to the rates formerly prevailing between Hopland and Lakeport before the era of truck transportation. In 1906 the rate was $5.00 per ton; about 1917 the rate on groceries was $5.00 per ton in the summer and $6.00 per ton in the winter, being advanced soon afterwards to $6.00 and $7.00 per ton, in summer and winter respectively; and now the rate chiefly utilized is $8.00 per ton applicable throughout the year, defendant having abolished the differential between summer and winter rates about one year prior to the hearing. Formerly there were two routes between Hopland and Lakeport, viz.,

the Pieta toll road, which was used occasionally in winter, and the Glen Alpine road, a free road, which was the route ordinarily followed. Both of these roads were much inferior to the present route, being almost impassable in winter, one witness stating that the present roads in winter are in better condition than the former roads in summer. At present the two towns are connected by a state highway. The round trip by horse drawn teams consumed two days, while now three round trips daily can be made by truck. During the summer the teams carried an average load of three tons each, and in winter, from one to three tons, more horses being used in winter than in summer. An experienced teamster and truck operator testified that in his judgment one 1½-ton truck is equivalent to three six-horse teams, in point of efficiency. It was admitted by certain of complainants' witnesses, and shown by defendant, that operating costs have increased substantially since the days of horse drawn vehicles.

Certain comparative rates were submitted, designed to test the reasonableness of the rates under attack. One of complainants testified that the rail rate on flour and sugar from San Francisco to Hopland, a distance of 100 miles, was $6.00 per ton, while between Hopland and Lakeport, a distance of 21 miles, defendant's rate was $8.00 per ton. But in the absence of any showing of similarity of surrounding circumstances and conditions, this comparison is of little weight. Another witness, also a complainant, testified that the rates charged by another carrier on some commodities between Hopland and Kelseyville, a distance of 26 miles, were $5.00 and

$6.00 per ton, as compared with defendant's rate of $8.00 per ton. Because of this disparity in the rates, the merchants of Kelseyville are at a distinct advantage in competing with complainants for the trade of the territory between the two towns, the distance between them being only eight miles. This witness also stated that the combination rail and truck rate from San Francisco to Kelseyville via Hopland was about the same as the combination rate between the same points for the boat, rail and truck service via Vallejo and Calistoga. However, the truck service to Kelseyville is less frequent than defendant's schedules, due apparently to the competition between the two lines. Here again, complainants have failed to point out any similarity of surrounding transportation circumstances and conditions. In submitting rate comparisons, it was incumbent upon complainants to show that they were a fair measure of the reasonableness of the rates in issue.

The truck operator with whom complainants proposed to contract for hauling their goods from Hopland, at a rate of $5.00 per ton in summer and $6.00 per ton in winter, estimated his operating costs to be $3.85 per ton, assuming that he will carry an average paying load of 4 tons per truck, which assumption was based upon a statement alleged to have been made by defendant, who later denied having done so, stating that his average load did not exceed 2-1/2 tons per trip. An analysis of his costs indicates that his allowance for depreciation is low, ordinary repairs having been included in this item, consequently his costs will be somewhat higher, but to what extent cannot be determined from the record.

Three of the complainants, Messrs. Anton, Hill and Levensaler, testified that in their judgment defendant's rates were too high, Messrs. Anton and Hill basing their opinions on the cost of operating their own trucks, while Mr. Levensaler relied upon the opinion of other truck-men, as well on the lower rates accorded to the neighboring communities of Kelseyville and Upper Lake. It does not appear that their private truck operations are fairly comparable with those of defendant, since they are not obliged to follow a regular schedule, nor hire drivers specially for this purpose. As we have stated, complainants failed to show that the Kelseyville rate was a fair standard of the reasonableness of the Hopland rate; and as to Upper Lake, defendant justified the lower rates. One shipper called by complainants, and four called by defendant, expressed satisfaction with defendant's rates and service. Two of the latter apparently believed that the rates were established by the Commission itself, this circumstance evidently influencing their judgment. This, of course, is not true, the rates having been voluntarily made by defendant who has published and filed them with the Commission.

Defendant testified that his total investment is $65,000., including equipment and land and warehouses in Lakeport, Clear Lake Beach and Upper Lake. He has seven trucks, three of which are used in the Hopland-Lakeport service and one in the Ukiah-Upper Lake-Clear Lake Beach service, leaving three available for other work, such as hauling fruit during the summer. Only the total valuation was shown, no attempt being made to state the value of the separate items. He has shown the revenues and expenses incident to the operation of the Hopland-Lakeport service, but not

for his operations as a whole, nor has there been any allocation of costs between the Hopland-Lakeport or the Ukiah-Upper Lake routes. Necessarily, in the absence of such a showing, the estimate submitted as to the total value of both operative rights, can be of little value in the proceeding as a basis for measuring the reaconableness of defendant's rates.

Upon the assumption that the freight handled over the Hopland line has averaged 2-1/2 tons per day, and that three trucks are necessarily used in this service (one for the main line haul, another for emergencies, and a third for handling local deliveries in Lakeport), defendant thus summarizes the result of operations of this service for the years 1924 and 1925:-

	1924		1925
Gross Revenue	$7589.22		$8565.00
Fixed Expenses	$3790.52	$4340.30	
Operating Expenses	3188.76	3291.35	
Total Expenses -	6979.28		7631.65
Profit -	$ 609.94		$ 933.35

The details of the expenses incurred in 1924 (none were submitted for 1925) show that the fixed expenses, including insurance, cost of tires, garage rent, depreciation, and interest on equipment, are based on the use of three trucks in this service, allowance being made for use of the extra and delivery trucks during one-half the time in other service, an allocation of equipment which appears to be fair. Even allowing for the deduction of the item of interest on trucks, amounting to $523.00, it cannot be said that defendant's return was excessive.

Very little was said about the proposed schedule of revised rates pleaded in the answer. Defendant stated that he planned

to reduce the rates on certain heavy commodities, but the proposed tariff was not offered in evidence.

Under the circumstances we cannot find the rates in question to be unreasonable or excessive.

Upon consideration of all the facts of record, we are of the opinion and find as facts:

(1) That the rates assessed, charged and collected by defendant for the transportation of the commodities described in the complaint are neither unjust, unreasonable nor excessive;

(2) That said rates assessed, charged and collected by defendant for the transportation of said commodities between Hopland and Lakeport are not unduly prejudicial to nor discriminatory against complainants, nor unduly preferential to the merchants or community of Upper Lake, to the extent that they exceed the rates contemporaneously maintained by defendant for the transportation of said commodities between Ukiah and Upper Lake, or to any extent whatever.

An order will be entered dismissing the complaint.

O R D E R

This case being at issue upon complaint and answer on file, having been duly heard and submitted by the interested parties, full investigation of the matters and things involved having been had, and basing this order on the findings of fact and the conclusions contained in the preceding opinion, which said opinion is hereby referred to and made a part hereof;

IT IS HEREBY ORDERED, that the complaint in the within entitled proceeding be and the same is hereby dismissed.

IT IS FURTHER ORDERED, the effective date of this order shall be twenty (20) days from the date hereof.

Dated at San Francisco, California, this 20th day of December, 1926.

H. R. Brundige
C. L. Seavey
Ezra W. Decoto

Thos. S. Louttit
Commissioners.