Decision No. 18800.

BEFORE THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA

ORIGINAL

In the Matter of the Suspension by the Commission on its own motion of Rule 85-A of Pacific Freight Tariff Bureau Exception Sheet 1-K, C.R.C. 384.

Case No. 2350.

A. L. Whittle, Berne Levy, H. W. Klein, J. F. Bon and H. C. Bush for F. W. Gomph and all carriers parties to the exception sheet.
E. W. Hollingsworth, R. T. Boyd and Bishop & Bahler, for California Manufacturers' Association, Western Pipe & Steel Company, Soule Steel Company, Gunn, Carle & Company, Pacific Coast Steel Company, W. S. Wetenhall & Company, Moore Dry Dock Company, and California Corrugated Culvert Company.
Seth Mann, for San Francisco Chamber of Commerce.
W. C. Hubner, for A. M. Castle & Company.
T. E. Banning, for California Development Association.
D. K. Donelson, for Pioneer Rubber Mills.
G. J. Olsen, for Dunham, Carrigan & Hayden Company.
H. H. Hoffman, for Baker, Hamilton & Pacific Company.
C. A. Teutschel, for Sacramento Chamber of Commerce.
E. G. Wilcox, for Oakland Chamber of Commerce.

BY THE COMMISSION:

O P I N I O N

By the publication of Rule 85-A in Supplement No. 7 to Pacific Freight Tariff Bureau Exception Sheet No. 1-K, C.R.C. 384, F. W. Gomph, Agent, made to become effective April 14, 1927, respondents propose certain changes alleged to result in both increases and reductions in the rules and ratings covering shipments of long and bulky articles loaded on open cars and on articles of the same description loaded in closed cars by the use

of, or through, the end window thereof.

Upon complaint of various Chambers of Commerce and shippers and receivers of freight the effective date of Rule 85-A was suspended by the Commission until August 14, 1927, and was further voluntarily suspended by respondents until October 15, 1927.

A public hearing was held before Examiner Geary at San Francisco August 4, 1927, and the case having been duly submitted and briefs filed is now ready for our opinion and order.

The publication of the suspended rule was intended to supersede Rule 85, shown on page 15 of Exception Sheet No. 1-K, C.R.C. No. 384. The latter rule, in effect on California intrastate traffic only, provides a minimum charge based on 5,000 pounds at the first-class rate for shipments consisting of long or bulky articles loaded on open cars, and a charge based on actual weight for shipments of the same description which are, or could be, loaded in a 36-foot box or stock car by the use of, or through, the end window. Rule 85 is an exception to, and provides lower charges on California traffic than do Sections 2 and 3 of Rule 29 of the Western Classification No. 59, C.R.C. No. 347, the Western Classification rule providing for long or bulky articles loaded on open cars a minimum charge based on 7,500 pounds at the first-class rate and on articles loaded in 36-foot closed cars by the use of the end window a minimum charge based on 4,000 pounds at the first-class rate.

Respondents maintain the publication of Rule 85-A is primarily to clarify the present rule, which they allege is now subject to misinterpretation. They claim the changes contemplated are three-fold: first, to provide that the minimum charges on shipments loaded on open cars <u>at carriers' convenience</u> shall be the same as that applicable had it been possible

to load in a closed car; second, to restrict the size of end windows utilized in loading long and bulky articles in 38-foot cars to maximum dimensions of 2 feet 4 inches wide by 3 feet 2 inches high; and third, to specifically state that Rule 85 is an exception to Sections 2 and 3 of Rule 29 of the Classification. It is contended that the only increase created by the amended rule will be technical and will result in restricting the size of end windows to a maximum of 2 feet 4 inches by 3 feet 2 inches, which respondents claim is necessary because all closed cars owned by the rail carriers in this territory are fitted with end windows the maximum dimensions of which are as just stated.

Protestants state they have no objections to these changes but they claim that by the publication of Rule 85-A respondents have in addition to the changes outlined, removed for application on California intrastate traffic the provisions of Paragraph (b), Section 3 Rule 29 of the Western Classification. They contend this portion of Rule 29 is now applicable within this state and under its provisions shipments exceeding 22 feet in length and not exceeding 12 inches in diameter which cannot be loaded in a 36-foot car by the use of the end windows but could be loaded in a closed car of greater dimensions, should be assessed a minimum charge, based on 1,000 pounds at the first-class rate. As previously stated, the charge on shipments moving between points in California which could be loaded in a 36-foot closed car by the use of the end windows is assessed actual weight under the provisions of Rule 85 of the Exception Sheet, but on other traffic a minimum charge based on 4,000 pounds at the first-class rate is assessed under Rule 29 of the Western Classification.

Respondents admit that Rule 85-A will not permit the

application of Paragraph (b) Section 3 of the Western Classification Rule on shipments which cannot be loaded in a 36-foot car. They claim however this paragraph never applied, nor was it ever intended to apply, in connection with shipments other than those that are or could be loaded in a 36-foot car. Under respondents' interpretation of Paragraph (b), shipments consisting of articles exceeding 22 feet in length and not exceeding 12 inches in diameter which could not be loaded in a 36-foot car would come within the purview of Paragraph (a) of Section 3 and would be assessed a minimum charge based on 4,000 pounds at the first-class rate. Respondents agree with protestants that if shipments are or could be loaded in a 36-foot car by the use of the end window, charges would be assessed at actual weight in accordance with the Exception Sheet Rule.

For the purpose of clarity Section 3 Rule 29 of the Classification is reproduced below in its entirety:

Articles too long or bulky to be loaded through side door without use of end door or window in closed car.	SECTION 3. (a) Unless otherwise provided in separate description of articles, a shipment containing articles, of dimensions other than those specified in Section 3 (b) of this Rule, the dimensions of which do not permit loading through the center side doorway 6 feet wide by 7 feet 6 inches high, without the use of end door or window, in a closed car not more than 36 feet in length by 8 feet 6 inches wide and 8 feet high, shall be charged at actual weight and authorized rating, subject to a minimum charge of 4,000 lbs., at the first-class rate for the entire shipment.
Articles exceeding 22 feet in length.	(b) Unless a lower rate is otherwise provided, a shipment which contains an article exceeding 22 feet in length and not exceeding 12 inches in diameter or other dimension, see Section 3 (a) of this Rule for the minimum charge where greater dimensions are involved, shall be charged at actual weight and authorized rating, subject to a minimum charge of 1,000 pounds at the first-class rate for the entire shipment.

It is respondents' position that Paragraph (b) of the above section is a part of, and should be read in conjunction

with, Paragraph (a); that inasmuch as the latter refers to cars 36 feet in length the former should also be interpreted to apply on shipments that could be loaded in cars of the same length, and that Paragraph (b) is so obviously an exception to Paragraph (a) and solely for the purpose of providing lower minimum charges on articles of lesser dimensions than those coming under the provisions of Paragraph (a) that there should be no confusion as to its meaning.

Protestants maintain that Paragraph (a) refers to articles that cannot be loaded in a 36-foot car without the use of the end doors or windows, and to place language in Paragraph (b) by implication which makes the latter apply only on shipments which can be loaded in a 36-foot car with the use of the end window is placing a strained interpretation on the tariff. They contend there is nothing in Paragraph (b) at the present time to limit its application to shipments loaded in 36-foot cars; that Paragraphs (a) and (b) are not correlated, as evidenced by the fact that they are separately indexed in the Classification and that it would be unreasonable to accept respondents' interpretation for the reason that practically all the closed cars of the carriers in this territory are 40 feet or over, there being relatively few 36-foot closed cars in actual use.

The theory upon which minimum charges are assessed on unusually long or bulky articles such as those contemplated in Rule 85 of the Exception Sheet and Rule 29 of the Western Classification is to compensate carriers for the difficulty and additional expense involved in handling this type of commodity. Neither protestants nor respondents have on this record submitted evidence to show what a reasonable charge for this service should be. In fact, the issues presented for determination have been narrowed to the question of whether or not, under a tariff

interpretation of Paragraph (b) Section 3 Rule 29 of the Western Classification, articles over 22 feet in length and not exceeding 12 inches in diameter which cannot be loaded in a 36-foot closed car but could be loaded in a closed car of greater length, should be assessed a minimum charge based on 1,000 pounds at the first-class rate or upon 4,000 pounds at the first-class rate.

It is in evidence that when Paragraph (b) was first published in Western Classification No. 54, effective September 1, 1916, in compliance with an order of the Interstate Commerce Commission in Case No. 5239 (38 I.C.C. 257), it was specifically limited to apply only on shipments that could be loaded in cars as described in Paragraph (a), i.e., 36-foot closed cars. A witness for respondents testified that at the time the Official, Southern and Western Classifications were consolidated into one issue (effective December 30, 1919), the Official and Southern Committees thought the definite limitation of Paragraph (b) to apply only on shipments that could be loaded in 36-foot cars was unnecessary from a tariff publication standpoint, and upon their recommendation the restriction was removed. Since the elimination of this definite restriction Paragraph (b) has undoubtedly become ambiguous and is susceptible of two interpretations. If it were respondents' intention to restrict the application of Paragraph (b) to apply only in connection with articles that could be loaded in a 36-foot car, the tariff should have so stated in unequivocal and definite terms. This it fails to do, for even if construction is given to Section 3 as a whole, the language used therein leaves the exact meaning of Paragraph (b) obscure. It is a well recognized principle in tariff publication that the intention of the framers cannot be given controlling weight and an ambiguity should be construed against the framer provided it does not result in placing an absurd con-

struction on the tariff. (Golden Gate Brick Company vs. Western Pacific Railroad, 2 C.R.C. 607; Pacific Coast Shippers Association vs. A.C. & Y.R.Co., 112 I.C.C. 527.) We do not believe from the facts presented in this proceeding that the interpretation placed by protestants upon Paragraph (b) Section 3 Rule 29 to the effect that it applies on shipments containing articles that are or could be loaded in closed cars over 36 feet in length results in a distorted construction of the tariff.

After careful consideration of all the facts of record we are of the opinion and find that respondents have not justified Rule 85-A of Supplement No. 7 to Pacific Freight Tariff Bureau Tariff No. 1-K, C.R.C. 384, in so far as its publication removes the application of Paragraph (b) Section 3 Rule 29 of the Western Classification No. 59, C.R.C. No. 347. An order will be entered requiring the cancellation of the said Rule 85-A without prejudice to the filing of a new rule containing changes not inconsistent with our findings herein.

O R D E R

It appearing that by order dated April 11, 1927, the Commission entered upon a hearing concerning the lawfulness of the publication of Rule 85-A of Pacific Freight Tariff Bureau Exception Sheet 1-K, C.R.C. 384, and ordered the operation of the said rule suspended;

It further appearing that a full investigation of the matters and things involved has been had, and that this Commission on the date hereof has made and filed its opinion containing its findings of fact and conclusions thereon, which said opinion is hereby referred to and made a part hereof, and has found that respondents have not justified Rule 85-A in its entirety,

IT IS HEREBY ORDERED that respondents be and they are hereby notified and required to cancel on or before October 15, 1927, upon not less than five (5) days' notice to this Commission and to the public, Rule 85-A, published on page 2 of Supplement No. 7 to Pacific Freight Tariff Bureau Exception Sheet No. 1-K, C.R.C. No. 384, such cancellation to be without prejudice to the filing of a new rule containing changes not inconsistent with our findings in the opinion which precedes this order.

IT IS HEREBY FURTHER ORDERED that this proceeding be and the same is hereby discontinued.

Dated at San Francisco, California, this 14th day of September 1927.

Commissioners.