JLA

Decision No. 18498.

BEFORE THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA

PACIFIC STATES BUTTER, EGG, CHEESE AND POULTRY ASSOCIATION,

Complainant,

vs.

SOUTHERN PACIFIC COMPANY, THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, THE WESTERN PACIFIC RAILROAD COMPANY, LOS ANGELES & SALT LAKE RAILROAD COMPANY, MODESTO AND EMPIRE TRACTION COMPANY, NORTHWESTERN PACIFIC RAILROAD COMPANY, PACIFIC ELECTRIC RAILWAY COMPANY, PETALUMA AND SANTA ROSA RAILROAD, SACRAMENTO NORTHERN RAILWAY,

Defendants.

ORIGINAL

Case No. 2230.

McCutchen, Olney, Mannon & Greene, by Allan P. Matthew, for complainant.

J. E. Lyons, for defendants.

CARR, Commissioner:

OPINION ON REHEARING

By Decision No. 18587, July 8, 1927, in the above entitled proceeding we found that the practice of defendant carriers in requiring the shippers of butter, eggs, cheese and dressed poultry, in carload lots under refrigeration, to pay either the Stated Refrigeration Charges as set forth in Section 2, or the car use and cost of ice and salt basis as set forth in Rule 241 of Protective Tariff No. 3, C.R.C. No. 2, to be unjust and unreasonable and in violation of Sections 13 and 19 of the Public Utilities Act. Defendants were directed to establish on or before September 1, 1927, for the refrigeration of

these commodities between all points in California charges not in excess of those provided for the services of icing and re-icing as per Section 4 of the said Perishable Protective Tariff, hereafter referred to as the cost-of-ice basis. Complainant's plea for reparation on past shipments was denied.

Defendants published the basis of charges effective September 1, 1927, in Supplement No. 12 to Perishable Protective Tariff No. 3, C.R.C. No. 2. Prior to the effective date thereof they petitioned for a modification of the order and for a rehearing and reargument thereon, which was denied by Decision No. 18967, dated October 25, 1927. Upon petition of complainant the proceeding was reopened solely for the purpose of reconsidering the issue of reparation and for oral argument thereon.

The matter was orally argued January 3, 1928, and the case submitted.

Reparation is sought both on the shipments moving under Stated Refrigeration Charges and on those moving under the so-called Rule 241 Charges. As explained in the original decision, the Stated Charges shown in Section 2 of the tariff are in amounts per car, varying from $30.00 to $55.00 according to the length of haul and the territory traversed. Under this form of refrigeration the carriers assume the entire burden of furnishing a complete service. The Rule 241 Charges are predicated on a modified form of refrigeration available to those shipments requiring an initial icing and no re-icing en route. The initial icing may be done by either the carrier at the cost-of-ice basis or by the shipper at his election, but in addition there is a charge of $5.00 per car if the journey is confined to a single origin group, $7.50 per car if confined to two contiguous origin groups, and in all other cases 20% of the Stated Charge.

Both complainant and defendants agree that the exact amount of reparation due cannot be determined on the shipments moving under stated charges, for there is no method to accurately determine the amount of ice and salt needed for each individual shipment. The record shows that the maximum amount of ice required for the safe refrigeration of these commodities is approximately 9000 pounds, and complainant suggests it would be equitable to accept this as the average amount used, and to award reparation in the difference between this amount and the stated charges paid. Although the evidence of complainant shows that shipments moved safely with a maximum of 9000 pounds of ice, defendants actually furnished more than this amount of ice and performed a completed service, paying in some instances approximately as much for the ice and salt used as they received under the Stated Charge. As illustrative, The Atchison, Topeka and Santa Fe in moving 44 cars of eggs from Groups C and D points to Los Angeles, Riverside and San Diego, used an average of 16,120 pounds of ice and 657.13 pounds of salt per car. The actual cost of the ice was $4.41 per ton and the salt 53 cents per 100 pounds, making a total cost of $39.04 per car. The average revenue on these shipments under the Stated Charge was $39.91 per car. The Stated Charges, per se, were not found to be unjust and unreasonable, the decision only condemning the practice of defendants in requiring shippers to accept either the Stated Refrigeration or the Rule 241 Charges. A full and complete service was here accorded complainant under the regular tariff rates, which for the service rendered have not been shown to be unreasonable; also shippers had the option of using the Rule 241 charges. I am of the opinion that reparation should not be awarded on shipments moving under the Stated Charges.

With respect to shipments moving under Rule 241

Charges, complainant seeks reparation in the amount of the charges of $5.00 per car, $7.50 per car, or 20% of the Stated Charge as the case may be, which are in addition to the cost of the ice furnished. These amounts can be accurately determined.

The Rule 241 Charges were established by order of the Director General February 28, 1920, just prior to the termination of federal control of railroads. Complainant contends that their establishment at the time when the federal controlled lines were not under the jurisdiction of any regulatory body, was contrary to the previously expressed views of both this Commission and the Interstate Commerce Commission in so far as they were applicable to dairy and poultry products. In The Matter of Private Cars, 50 I.C.C. 652, and the Perishable Freight Investigation, 56 I.C.C. 449, the Federal Commission approved the cost-of-ice basis for the refrigeration of dairy products. The latter proceeding was instituted at the request of the Director General of Railroads prior to the publication of the National Perishable Protective Tariff, and in considering the cost-of-ice basis and the Stated Charge the Interstate Commerce Commission said:

> "The situation is complicated by the fact that the proposed tariff does not contemplate the abandonment of the cost-of-ice basis, but retains it in Section 4 in the case of such important commodities as fresh meats, packing house products, dairy products, fish, shell fish, cereal beverages, bananas, and cocoanuts. Moreover, so far at least as fresh meats, packing house products and dairy products are concerned, this basis of charging was approved by us In The Matter of Private Cars, supra, after an investigation in which the respective merits of the stated charge and cost-of-ice basis were considered."

A somewhat similar finding was made by this Commission with respect to shipments of eggs moving from Petaluma to Los Angeles, initially iced and not re-iced en route, Klein-Simpson Fruit Company vs. The Atchison, Topeka and Santa Fe Railway Company et al., 4 C.R.C. 1001 (May 16, 1914). Complainant also

maintains that the transportation characteristics and refrigeration requirements of dairy and poultry products are not materially different from those of fresh meats and packing house products, and with respect to these commodities both this Commission and the Interstate Commerce Commission have uniformly held that the Rule 241 Charges were unjust and unreasonable; C. Swanston and Sons vs. S.P.Co., 12 C.R.C. 590; Western Meat Co. vs. S.P. Co. et al., 23 C.R.C. 219; Westbound Transcontinental Refrigeration Charges, 34 I.C.C. 140; and Frye & Company vs. Great Northern Railway et al., 88 I.C.C. 477; also In The Matter of Private Cars and Perishable Freight Investigation, supra, approved the cost-of-ice basis. All of these decisions, it is contended, have placed the carriers on notice that the Rule 241 Charges applicable to such commodities as dairy and poultry products were unjust and unreasonable.

Defendants, on the other hand, maintain that following the principles of many decisions reparation should not be awarded where an adjustment is made covering an extensive territory such as here involved and where the charges have been in effect for a long period of time and will affect shippers not of record in this proceeding. The record however shows that approximately 90 per cent. of the dairy and poultry products tonnage moving in California is on behalf of members of complainant's organization to the central primary markets.

After reconsideration of the entire record in this proceeding in the light of the oral argument, I am of the opinion that reparation should be awarded on shipments moving under Rule 241 Charges within two years prior to the filing of the complaint. I am further of the opinion that members of complainant's association and intervener Simon Levi Company

paid and bore the charges on the shipments in question and have been damaged in the amount of the difference between the charges paid and those accruing under the Section 4 cost-of-ice basis. Reparation should also be paid on shipments moving subsequent to the filing of the complaint.

Complainant should submit statements of the shipments to defendants for check. Should it not be possible to reach an agreement the matter may be referred to this Commission for further consideration and the entry of a supplemental order should such be necessary.

I recommend the following form of order:

O R D E R

This case having been duly argued and submitted, full investigation of the matters and things involved having been had,

IT IS HEREBY ORDERED that defendants, Southern Pacific Company, The Atchison, Topeka and Santa Fe Railway Company, The Western Pacific Railroad Company, Los Angeles & Salt Lake Railroad Company, Modesto and Empire Traction Company, Northwestern Pacific Railroad Company, Pacific Electric Railway Company, Petaluma and Santa Rosa Railroad and Sacramento Northern Railway, according as they participated in the transportation, be and they are hereby authorized and directed to refund, with interest at six per cent. per annum, to members of complainant's organization and to intervener Simon Levi Company according as their interest may appear, who paid and bore the charges on the shipments in question, consisting of butter, eggs, cheese and dressed poultry moving within two years prior to the filing of this complaint and subsequent thereto, initially iced and shipped with instructions do not re-ice en route, all charges collected under the provisions of Rule 241 of Perishable Protect-

ive Tariff No. 3, C.R.C. No. 2, of R. C. Dearborn, Agent, or prior and subsequent issues thereof, which are in excess of those accruing under Section 4 of said Perishable Protective Tariff No. 3, C.R.C. No. 2 of R. C. Dearborn, Agent.

IT IS HEREBY FURTHER ORDERED that in all other respects Decision No. 18587, dated July 8, 1927, shall remain in full force and effect.

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 3rd day of ~~February~~ March, 1928.

Leon O. Whitsell

C. L. Seavey

Paul S. Smith

W. J. Carr

Commissioners.