JLA

Decision No. 19581.

ORIGINAL

BEFORE THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA

J. BROMBACHER, doing business under the trade name of "CALIFORNIA CAR BUILDING AND REPAIR COMPANY",

Complainant,

vs.

LOS ANGELES AND SALT LAKE RAILROAD COMPANY, THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, SOUTHERN PACIFIC COMPANY and PACIFIC ELECTRIC RAILWAY COMPANY,

Defendants.

Case No. 2283.

B. H. Carmichael, F. W. Turcotte and Paul Bateman, for complainant.

A. S. Halsted, J. P. Quigley and E. E. Bennett, for Los Angeles and Salt Lake Railroad Company, defendant.

E. W. Camp and C. K. Adams, for The Atchison, Topeka and Santa Fe Railway Company, defendant.

James E. Lyons, F. W. Mielke, L. C. Zimmerman, V. J. Andrus and C. W. Bell, for Southern Pacific Company, defendant.

Frank Karr and T. J. Day, for Pacific Electric Railway Company, defendant.

BY THE COMMISSION:

OPINION

Complainant, an individual operating under the fictitious name of California Car Building and Repair Company, is engaged, among other activities, in the rebuilding and repairing of freight cars at Vernon, California. By complaint filed October 8, 1926, and as amended February 25, 1927, it is alleged

that the charges published by defendants, effective June 17, 1926, for the switching of empty freight cars, privately owned, to and from complainant's plant, (a) were established in violation of Section 63 of the Public Utilities Act; (b) were, are and for the future will be unjust and unreasonable, in violation of Section 13 of the Act; and (c) were, are and for the future will be discriminatory and prejudicial to complainant and preferential to defendants, in violation of Section 19 of the Act.

Reparation and just, reasonable, non-discriminatory, non-prejudicial and non-preferential switching charges for the future are sought.

Defendants, Los Angeles and Salt Lake Railroad Company, The Atchison, Topeka and Santa Fe Railway Company, Southern Pacific Company and Pacific Electric Railway Company will hereafter be referred to as the Salt Lake, Santa Fe, Southern Pacific and Pacific Electric respectively.

Public hearings were held before Examiner Geary at Los Angeles December 8, 1926, and October 18, 1927, and the case having been duly submitted and briefs filed, is now ready for our opinion and order.

Complainant's car repairing plant is located on the rails of the Salt Lake within the Los Angeles terminal switching limits of that company, and a part of its facilities are devoted to the repair and maintenance of privately owned freight cars. Most of the work performed is of a relatively minor nature, the record indicating that the average contract price is from $60 to $70 per car. Defendants will also render similar services in their own car repair shops, although no effort is made to secure the business.

Complainant's plant was established in November, 1925, but through a misunderstanding in cardbilling the empty cars no

freight bills were issued for switching to and from the plant until subsequent to June 17, 1926, since which date defendants have assessed $3.60 per car for each movement over the individual lines, in accordance with Item 873 of the Salt Lake Terminal Tariff 200-E, C.R.C. 289, and similar items in the terminal tariffs of the other defendants, making a round trip charge of $7.20 per car if origin and destination are points on the rails of the Salt Lake, and $14.40 per car if on the rails of any one of the other three defendants. The record shows that the major portion of the cars involved a movement over two lines and were therefore assessed $14.40 per car for the round trip.

Previous to June 17, 1926, there was no specific charge in the tariffs applicable to the services in issue, nor did defendants prior to this date assess or collect any charges. Subsequently "balance due" bills were sent to complainant, based on a charge of 34 cents per ton, minimum $7.20 per car, for the service performed by the originating carrier, plus $3.60 per car to the delivering carrier, a minimum charge of $14.40 per car for the round trip when confined to the rails of the Salt Lake, and $21.60 per car if originating at and returned to points on the rails of either the Santa Fe, Pacific Electric, or Southern Pacific. The items naming these charges in the terminal tariffs of defendants were applicable on "freight, carloads, when not incident to line haul, local or foreign", defendants contending the tariff items were lawfully applicable to privately owned freight cars moving for repairs.

A private car may have either the status of freight or may be an instrumentality of commerce. (Proctor and Gamble vs. C.H.& D.Ry.Co., 19 I.C.C. 556, and Pacific Engineering and Construction Co. vs. C.R.I.& P.Ry.Co., 56 I.C.C. 247.) If of the latter status it must be employed in the carrier's service and is in fact a railroad car for which the carrier pays the owner

or lessee thereof for each mile it travels in line haul service both when under load and when empty, subject to certain rules for the equalization of the loaded and empty mileage, as provided in Agent B. T. Jones Mileage Tariff No. 7-E, C.R.C. No. 15. If the car is not in the carrier's service it reverts to a private car and becomes subject to the applicable freight charges. (McCloud River Ry.Co. vs. S.P.Co., 56 I.C.C. 287.)

In Proctor and Gamble vs. C.H.& D.Ry.Co., supra, the Federal Commission, in considering a rule governing demurrage on private cars, quoted with approval the following:

> "When a private car is employed by a carrier in lieu of its own equipment as an instrumentality of transportation, it is thenceforth not a private car but a railroad car; it does not regain its status as a private car until after transportation is concluded it leaves the carrier's service."

We are of the opinion from the facts of record in this proceeding that the cars here at issue at the time of their movement were not in the carrier's service as instrumentalities of commerce but were actually tendered to defendants and moved as ordinary articles of freight, hence the charges on "freight" were properly applicable prior to June 17, 1926. It follows therefore that complainant's allegation that the charge of $3.60 per car effective June 17, 1926, was established in violation of Section 63 of the Public Utilities Act, is not sustained.

Defendants admit that the charges prior to June 17, 1926, were too high, and contend that the present $3.60 per car charge for each movement is just and reasonable considering the extent of the service rendered and the difficulties of performing the operations in the congested metropolitan terminal districts. Cars originating on the Santa Fe, Pacific Electric and Southern Pacific are handled through two classification yards, involving a haul of 12.17, 6.54 and 10.50 miles respectively, and the cars originating on the Salt Lake pass through one classification yard, involving a haul of 3.33 miles. Thus the round

trip haul will vary from 6.66 to 24.34 miles, and these distances do not include the hauls necessary before reaching the classification yards of the respective carriers. Cost figures were submitted by operating witnesses for defendants purporting to show the average out-of-pocket cost of handling the cars here at issue from the Southern Pacific classification yard to complainant's plant is $7.79 per car, or an average of $3.89 for each movement. The unit cost on which this figure is computed is the average direct cost for performing a switching service on revenue earning cars in the Los Angeles terminal district on the rails of the Santa Fe, Salt Lake, and Southern Pacific.

Complainant contends the present charge is unreasonable to the extent it exceeds $1.35 per car for each movement, on the theory that defendant's switching charge from and to industry tracks when incidental to a line haul of a connecting carrier is $2.70 per car and the service performed in connection therewith usually involves a round-trip movement. However it was shown this charge is a reciprocal arrangement between carriers and only applies when line haul revenue is received, and it is therefore not comparable with the local services here involved, the charge for which is not predicated on the defendants' receiving a subsequent line haul.

Both complainant and defendants refer to switching charges maintained for the movement of empty freight cars at Chicago, Ill., Coffeyville, Kansas, and other points in the Middle West. In some cases these charges are lower than those here at issue and in other cases the converse is true, but the record is devoid of any showing as to the operating conditions prevailing in the terminal districts where applicable, or that the rates are intended to cover a movement comparable with that from or to complainant's plant. We have repeatedly held that such a showing is of little probative value.

Upon this record we conclude and find that the present switching charge of $3.60 per car for each movement as published in Salt Lake Tariff No. 200-E, C.R.C. 289, Item No. 873, and similar tariffs of other defendants, reading as follows:

Los Angeles, Cal.	Between industry or private side tracks and depot, industry, private side tracks or interchange tracks of connecting lines within switching limits.	Empty privately owned railway freight cars, on their own wheels, to be repaired or that have been repaired	$3.60 per car.

is not shown to be either unjust or unreasonable. We are of the further opinion and find that the charge of 34 cents per ton, minimum $7.20 per car, for the originating carrier, plus $3.60 per car for the delivering line, was unjust and unreasonable to the extent it exceeded the charge of $3.60 per car established June 17, 1926. The record indicates defendants have not collected for the services rendered prior to June 17, 1926, therefore corrected freight bills should be rendered but not to exceed the charges accruing on the basis of $3.60 per car for each movement.

There now remains for consideration complainant's plea that the assailed tariff charges were and are unduly discriminatory, preferential and prejudicial.

The record shows that from October 3, 1925, to June 16, 1926, complainant repaired 40 cars, while during the period from June 17, 1926, to October 31, 1926, only 13 cars were repaired and the plant is now entirely closed, but the record does not indicate that this situation is attributable to the exaction of the switching charges. As previously stated, defendants do not solicit repair work on privately owned freight cars but they do occasionally accept this work when offered, and to this extent they are in direct competition with complainant.

Private cars moving empty to and from defendants' respective plants for repairs when not in carrier's service are subject to regular switching charges under the tariff provisions regardless of the named consignee, and if any movements of this character have taken place the tariff charges should be assessed and collected. The failure of defendants to assess tariff switching charges against privately owned cars moving to and from their repair shops has placed complainant at a disadvantage and resulted in unlawful discrimination and prejudice to complainant and undue preference to defendants, in violation of Section 19 of the Public Utilities Act. An order will be entered requiring defendants to cease and desist from such unlawful violations of the Public Utilities Act and the tariffs.

Complainant seeks reparation, but since the charges assessed for the cars moved during the period from November, 1925, to June 17, 1926, were not actually collected on the basis of the published rate of 34 cents per ton, with a minimum of $7.20 per car for the initial carrier and $3.60 per car for each subsequent carrier, amended freight bills to the basis of the flat rate of $3.60 per car for the services rendered by each carrier will eliminate the claimed excessive amounts.

ORDER

This case having been duly heard and submitted, 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 opinion which precedes this order,

IT IS HEREBY ORDERED that defendants, The Atchison, Topeka and Santa Fe Railway Company, Pacific Electric Railway Company, Los Angeles & Salt Lake Railroad Company and Southern Pacific Company, be and they are hereby directed to cease and desist

within thirty (30) days from the date of this order and thereafter to abstain from demanding, receiving or collecting from complainant, J. Brombacher, charges for the switching of privately owned freight cars moving on their own wheels from and to complainant's plant which are greater than the charges concurrently made for a like movement of privately owned freight cars moving on their own wheels from and to the repair plants of The Atchison, Topeka and Santa Fe Railway Company, Pacific Electric Railway Company, Los Angeles & Salt Lake Railroad Company and Southern Pacific Company.

IT IS HEREBY FURTHER ORDERED that defendants, The Atchison, Topeka and Santa Fe Railway Company, Pacific Electric Railway Company, Los Angeles & Salt Lake Railroad Company and Southern Pacific Company, be and they are hereby authorized to waive collection of undercharges from complainant, J. Brombacher, for the switching of privately owned freight cars moving on their own wheels from and to complainant's plant in the amount of the difference between the charges lawfully applicable and those established effective June 17, 1926, in Item 873 of Los Angeles & Salt Lake Railroad Company's Terminal Tariff No. 200-E, C.R.C. No. 289, and similar items in the terminal tariffs of The Atchison, Topeka and Santa Fe Railway Company, Pacific Electric Railway Company, and Southern Pacific Company.

Dated at San Francisco, California, this 10th day of April, 1928.

Leon O. Whitsell

C. L. Seavey

Ezra W. Decoto

Thos. D. Harriott

W. J. Carr

Commissioners.