JLA

Decision No. 21409.

BEFORE THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA

ORIGINAL

WESTERN CONCRETE PIPE COMPANY,
a corporation,
Complainant,

vs.

SOUTHERN PACIFIC COMPANY,
Defendant.

Case No. 2545.

B. H. Carmichael, F. W. Turcotte and A. E. Sederquist, for complainant.

H. H. McElroy and A. A. De Ayala, for the defendant.

BY THE COMMISSION:

OPINION

Complainant, a corporation organized under the laws of the State of California, with its principal place of business at Los Angeles, is engaged in the manufacture of drainage and sewer pipe. By complaint filed May 23, 1928, it is alleged that the demurrage charges assessed and collected on numerous carloads of freight as described in Exhibit "A" attached to and made a part of the complaint, and consigned to or in care of the Western Concrete Pipe Company at Aurant Siding, Los Angeles, during the period from May 6th to September 24th, 1926, were inapplicable and in violation of Section 17 of the Public Utilities Act. It is further alleged that if the charges or any of them be found applicable then the rules as published in Pacific Car Demurrage

Bureau Tariff C.R.C. No. 14 authorizing such demurrage charges were, are and for the future will be unjust and unreasonable and in violation of Section 13 of the Public Utilities Act. Reparation, or the return of claimed overcharges, is sought.

The complaint makes reference to the following rules published in Pacific Car Demurrage Bureau Tariff 1-0, C.R.C.No.14:

> Rule 7, Section A. - * * * "After the expiration of free time allowed, the following charges per car per day, or fraction of a day, will be made until car is released:
> For each of the first 4 days $2.00. For each succeeding day $5.00."
>
> Rule 2, Section A. - "Forty-eight hours' (two days) free time will be allowed for loading or unloading all commodities."
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> Rule 3, Section D. - "On cars to be delivered on other-than-public-delivery tracks, time will be computed from the first 7:00 A.M. after actual or constructive placement on such tracks. * * * "
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> Rule 5, Note. - "Under this rule the time of movement between hold point and destination, and any other time for which the railroad is responsible will not be computed against the consignee."
>
> Section A. - 1. "When delivery of a car consigned or ordered to an industrial interchange track or to other-than-a-public-delivery track cannot be made on account of the inability of the consignee to receive it, or because of any other condition attributable to the consignee, such car will be held at destination, or, if it cannot reasonably be accommodated there, at the nearest available hold point, and written notice that the car is held and that this railroad is unable to deliver will be sent or given to the consignee. This will be considered constructive placement."

The demurrage charges under attack total $2,331, and involve 484 cars. The cars in question were shipped from many points, the more important being Irwindale, Burbank, Colton, Duarte, Lompoc and El Monte. The commodities consisted principally of sand, rock, gravel, cement and iron bars.

The essential facts are not of controversy, the parties complainant and defendant having entered into a stipulation, filed as Exhibit 1. This stipulation is in part as follows:

ARTICLE V.

Upon arrival of each of the aforesaid cars at Los Angeles, defendant's agent sent to the Western Concrete Pipe Company a written notice, by postal card, sample attached as Exhibit No. 1, via United States mail, on which was shown the car initial and number, point of shipment and contents and which also bore a stamped endorsement reading "This is constructive placement notice as provided in published rules". Said notices were deposited in the Post Office at various hours of the day and were the only written notices purporting to be of constructive placement.

ARTICLE VII.

In addition to the aforesaid post card notices, defendant also sent to complainant, via United States mail, within twenty-four hours after the arrival of each car and waybill at Los Angeles, a copy of the freight bill made out on each car, said copy being designated as "Notice of Arrival", sample being submitted herewith as Exhibit No. 2.

ARTICLE VIII.

At the time the aforesaid written notices, as described in Paragraph V, were sent to complainant, defendant was fully aware of the prevailing congestion of cars that were awaiting unloading by complainant but had no means of knowing which, if any, of the said cars mentioned in these notices would actually be placed at request of complainant when switching service was performed.

ARTICLE X.

During the period of this complaint, complainant was engaged in the manufacture of a large amount of drainage and sewer pipe and received an unusually large number of carload shipments of material, so that its normal facilities were congested and it was impossible to unload all of such cars within the free time or without there being considerable delay in unloading same. Complainant, however, unloaded cars to the utmost of its ability and as fast as it was physically possible with its limited facilities for manufacture of the aforesaid pipe.

ARTICLE XI.

Complainant's industrial tracks had a total capacity for 14 cars but its capacity for unloading varied from day to day, due to practice of unloading different commodities at different spots, or locations, on said tracks, and because it selected cars containing preference materials for placement on said tracks, as its manufacturing needs or storage or other facilities permitted.

ARTICLE XII.

The usual hour for switching cars at complainant's plant was between 12:30 P.M. and 2:00 P.M. of each day, and each day when defendant's switching crew arrived at complainant's plant the said crew and complainant's yard foreman conferred and the foreman informed the crew which cars of those awaiting placement should be spotted on the complainant's spur, and at what spot on said spur, and the crew accordingly placed the cars as desired. No specific instructions were given as to the disposition to be made of the cars not placed and the crew then left such remaining cars on tracks designated as Nos. 1, 2 and 3 on said Exhibit No. 4.

ARTICLE XIII.

Complainant had no standing instructions with defendant for the placement of cars on its tracks and defendant did not place any cars for complainant except upon the aforesaid individual and specific instructions on each car as received from complainant. Had defendant placed cars upon complainant's tracks without first securing placement instructions it would have been necessary, in most cases, to subsequently reswitch such cars to the spot desired for unloading.

ARTICLE XIV.

In all cases cars were placed by defendant at approximately the exact date and time ordered, as defined in Section XII hereof, by complainant and there was no delay on part of defendant in placing any cars after receipt of such orders.

ARTICLE XV.

This practice, as above said, of defendant holding cars consigned to complainant's plant until receipt of placement instructions from complainant existed ever since the plant was opened Sept. 1, 1924.

ARTICLE XVI.

Defendant stored the cars which could not be placed on complainant's tracks after arrival at Aurant account awaiting complainant's placement instructions, in so far as facilities permitted, in proximity to their plant, using defendant's lead and drill tracks, also the private or assigned tracks of other industries in that vicinity. Complainant's representative inspected and ascertained the grade of the commodity in each car stored as aforesaid before giving defendant placement instructions.

The complaint may properly be divided into three major allegations: First, that there was no tariff authority for computing the free time prior to delivery of the cars on complainant's industry tracks; second, that the time consumed by the defendant in moving the cars from the hold tracks should be deducted from the time cars were charged demurrage; third, that the tariff rules and charges were unjust and unreasonable. No evidence was specifically directed to the reasonableness of the demurrage charges assailed, and apparently the only question for determination is whether the demurrage charges as collected were applicable and legal.

Public hearings were held before Examiner Geary on March 1 and April 18, 1929, and the case having been submitted and briefs filed is now ready for an opinion and order.

Complainant's Exhibit No. 2 shows that its unloading facilities were located on two tracks, with nine different locations for the receipt of freight commodities, and that these tracks had a spotting capacity of 14 cars; and since the carload commodities had to be placed at the proper points before unloading could commence, there was much delay because the switching crews were not given advance instruction as to the particular place where each car could be set. There appears to have been no systematic effort made prior to the month of September, 1926, for the furnishing of advance information to the railroad switching crews, and the setting of cars appears to have been left to the best judgment of the parties in the yard at the time the cars arrived. Also, cars were shipped when complainant's yards were congested. Exhibit No. 6 illustrates this situation very clearly. Of all the cars received in the month of May, 1926, 64% were held for demurrage, in June 77%, July 64%, August 57%, and September 34%. In the month of September, 1926, the record shows that this complainant changed its methods of handling the cars, and also put into effect the average agreement privilege authorized by Rule 9 of the Demurrage Tariff. The situation immediately changed, and in October, 1926, only 4% of the cars were held overtime, in November 11%, and in December 9%, and because of the average agreement no demurrage charges at all were assessed. It might here be stated that the charges paid prior to October, 1926, were substantial: in May the total was $726, in June $664, July $760, August $371, and September $166. The total demurrage charges assessed since September, 1926, amounted to only $192. Of this sum $60 accrued in February 1927, $30 in April 1927, and $102 in December, 1927. As stated by witness, the average demurrage assessed prior to the end of September, 1926, was $2.72 per car handled, while subsequent to September, 1926, the average paid was but 12 cents per car.

The situation as to the payment of demurrage in the years 1924 and 1925 and the first five months of 1926 was similar to the five months' period covered by this complaint. It seems very clear from the records and exhibits that this complainant ordered more cars than its yards could accommodate, thus forcing the defendant carrier to stop cars at a storage yard, which action is authorized under the provisions of Section A-1 of Rule No. 5, reading as follows:

> "SECTION A. - 1. When delivery of a car consigned or ordered to an industrial interchange track or to other-than-a-public-delivery track cannot be made on account of the inability of the consignee to receive it, or because of any other condition attributable to the consignee, such car will be held at destination, or, if it cannot reasonably be accommodated there, at the nearest available hold point, and written notice that the car is held and that this railroad is unable to deliver will be sent or given to the consignee. This will be considered constructive placement."

Complainant contends that when defendant stored the cars it was done without previous tender of delivery, and that when delivery was finally taken, the time consumed in moving the cars from the hold yards to the industry tracks should be deducted from the total time under which the demurrage charges were assessed. It is not denied that defendant knew of the condition of complainant's yards and cars were not offered at the interchange tracks because receipt could not be accepted. Under the circumstances it would appear that the cars were constructively placed, and Rule 3 Section D contains the following provision:

> "On cars to be delivered on other-than-public-delivery tracks, time will be computed from the first 7:00 A.M. after actual or constructive placement on such tracks."

The inability of the complainant to receive the cars because its track capacity was completely employed, justified the action of the defendant in mailing postal card notices containing the rubber-stamp quotation: "This is constructive placement notice as provided by published rules". Apparently there were no written orders issued by complainant for the actual or constructive placement, neither does the record reveal that any regular verbal orders were given by the employees of the complainant.

The evidence clearly indicates that defendant by the mailing of arrival notices, which also included notice of constructive placement, did everything possible under the circumstances to advise complainant of the cars in its possession. It is complainant's contention that the constructive placing of cars did not constitute actual tender for delivery, but this contention is without merit, for the demurrage tariff does not require actual tender of the cars when circumstances have placed the constructive placement rule into effect.

When we review this record and give consideration to the fact that for a period of almost three years this complainant allowed demurrage to accrue, and then suddenly discontinued the practice, it is clearly indicated that no practical effort was made on its part to overcome the demurrage liabilities until September, 1926. The Interstate Commerce Commission aptly reviews the situation in American Wholesale Lumber Association vs. Director General, 66 I.C.C. 405, 407:

> "If a shipper habitually delays cars for unloading at destination the carriers may place an embargo against

> freight consigned to him and thus prevent further detention of equipment; if the shipper habitually delays loading cars the carrier may refuse further supply and thus prevent detention and accumulation of cars at the loading point. Defendants urge that it is not feasible to deal with cars at the reconsignment point by embargo or refusal to furnish further cars, and that the only effective means of dealing with detention at the reconsignment point is by applying a penalty charge."
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> "A railroad's function is to move traffic. The furnishing of storage is not a primary function. The free time provided for loading, unloading and reconsignment has been fixed as the reasonable time within which cars should be released and made available for further movement. The shipper has no inherent right to detain a car beyond the free time and thus prevent it from being used for transportation by other shippers. Car shortages have resulted in incalculable loss in the past both to the carriers and the shipping public as a whole, and when it appears that shippers detain cars for purposes other than those necessary for proper transportation the carriers are justified in taking steps to prevent such abuses."

Under the circumstances here present there is no construction to be placed on the rules in the tariff to relieve this complainant of the liability for the demurrage charges assessed. The terms of the demurrage tariff cannot be waived and its provisions must be considered in their entirety and given a fair and reasonable construction.

We find that the demurrage charges assessed were not inapplicable or otherwise unlawful. The complaint will be dismissed.

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 contained in the preceding opinion,

IT IS HEREBY ORDERED that the complaint in this proceeding be and it is hereby dismissed.

Dated at San Francisco, California, this 31st day of July, 1929.

Thos S Louttit

Leon O Whitsell

Commissioners.