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Decision No. 21609.

BEFORE THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA

GEO. H. CROLEY COMPANY, INC., a corporation,
Complainant,

vs.

SOUTHERN PACIFIC COMPANY, a corporation,
WESTERN PACIFIC RAILROAD COMPANY, a corporation,
Defendants.

Case No. 2665.

C. R. Schulz, for the complainant.

J. E. Lyons, Morton G. Smith, and H. H. McElroy, for defendant Southern Pacific Company.

J. E. McCarthy, for Poultry Producers of Central California.

BY THE COMMISSION:

O P I N I O N

Complainant is a corporation engaged in the buying, selling and milling of grain and grain products. By complaint filed March 18, 1929, it is alleged that the rates assessed and collected by defendants for the transportation of approximately 118 carloads of grain during the period extending from January 5, 1925, to November 22, 1928, from wharves at San Francisco served by the State Belt Railroad to complainant's mill at San Francisco served by the Western Pacific Railroad Company, were, are, and for the future will be, inapplicable under the tariffs on file with this Commission, in violation of Section

17 of the Public Utilities Act.

We are asked to require defendants to cease and desist from collecting the alleged unlawful charges and to award reparation on past shipments.

A public hearing was held before Examiner Geary at San Francisco June 5, 1929, and the case having been duly submitted and briefs filed is now ready for an opinion and order.

Complainant's shipments, with the exception of five cars, originated at interstate points, were transported by vessel to the wharves at San Francisco, there transferred to rail cars, and subsequently moved to complainant's mill at San Francisco. Four cars originated at intrastate points in the Sacramento Valley, and as to these cars defendants admit that the charges assessed were inapplicable under the tariffs, resulting in a straight overcharge. One car was loaded at the Islais Creek Grain Terminal and was included in the complaint through error.

The rail movememt from the wharves to complainant's mill was a switching service performed by three carriers. The State Belt Railroad hauled the cars from the wharves to its interchange track with the Southern Pacific, the Southern Pacific transported the cars from there to its interchange track with the Western Pacific, and the Western Pacific delivered the cars to complainant's industry track. At the time the shipments moved there were two bases for assessing charges, dependent upon whether the traffic was intrastate or interstate. The intrastate charge was the lower of the two and was composed of a combination of separately established switching charges, viz., $3.50 per car for the State Belt service, $3.60 per car for the Southern Pacific movement, and $3.60 per car for the Western Pacific haul, making a total charge, regardless of the weight,

of $10.70 per car. The interstate charge of the State Belt Railroad and Western Pacific was the same as for intrastate traffic but the Southern Pacific charge for this traffic was 34 cents per ton, minimum $7.20 per car, resulting in a materially higher total charge than on intrastate traffic. The interstate charge was applied on the shipments at issue, but complainant contends that the traffic was in fact intrastate and it was therefore entitled to the lower charges. If the traffic was intrastate, defendants concede that the shipments were overcharged. The volume of the switching charges per se is not involved. Thus the sole issue before us is the determination of the character of the traffic.

Complainant's grain was purchased from brokers or dealers c.i.f. or f.o.b. the docks at San Francisco. The bulk thereof originated at interstate points in the Pacific Northwest and moved via vessel to San Francisco. Until the vessel arrived at the dock complainant had no concern with the lading, as it was not until the vessel's arrival, or in some instances shortly before its arrival, that complainant acquired an interest in the goods. At the time of purchase complainant did not know definitely the ultimate destination of the grain. Some was subsequently resold to other dealers at the dock and removed therefrom by auto truck, while other parcels were reshipped to various points in the state, including complainant's mill at San Francisco. The actual handling of the grain at the wharves was accomplished by stevedoring firms or by the steamship companies acting as complainant's agents. The wharves were thus used by complainant as a distributing point for the disposal of the grain. This was made possible by the use of the storage privileges allowed by the State Board of Harbor

Commissioners, consisting of five days' free time on the docks and additional time thereafter at a charge of 25 cents per ton for the next succeeding period of 5 days and 50 cents per ton for each 5-day period thereafter. Complainant has purchased and shipped grain in substantially this manner for the past 10 years and the record clearly shows that it was not done to obtain the lower intrastate charge.

There were no joint rates between the water and rail lines, nor were there any diversion, reconsigning or milling in transit privileges accorded the shipments. The grain was transported on a separate bill of lading from the points of origin to the wharves at San Francisco and where a rail haul followed, under a separate bill of lading from the wharves to the rail destination.

The foregoing facts are somewhat analogous to those considered by the United States Supreme Court in Atlantic Coast Line Railroad vs. Standard Oil Co., 275 U.S. 257. The court there had for determination the question of whether shipments of petroleum products transported from storage tanks at Tampa, Port Tampa or Jacksonville, Fla., to bulk stations in Florida after having been received at the points of storage from interstate destinations, were intrastate or interstate commerce. The court in holding that they fell within the former designation said:

> "The question whether commerce is interstate or intrastate must be determined by the essential character of the commerce, and not by mere billing or forms of contract, although that may be one of a group of circumstances tending to show such character." * * *
>
> "The important controlling fact in the present controversy, and what characterizes the nature of the commerce involved, is that the plaintiff's whole plan is to arrange deliveries of all of its oil purchases on the seaboard of Florida so that they may all be there stored for convenient distribution in the state to the 123 bulk stations and to

fuel oil plants in varying quantities according to the demand of the plaintiff's customers, and thence be distributed to subordinate centers and delivery stations, and this plan is being carried out daily. * * * The seaboard storage stations are the natural places for a change from interstate and foreign transportation to that which is intrastate and there is nothing in the history of the whole transaction which makes them otherwise, either in intent or in fact. There is nothing to indicate that the destination of the oil is arranged for or fixed in the minds of the sellers beyond the primary seaboard storages of the plaintiff company at Tampa, Port Tampa, Jacksonville, or the St.Johns river terminal. * * * "

The court likewise held to the same effect in Seaboard Air Line vs. Lee, 14 Fed. (2d) 439, aff. 276 U.S. 591. This proceeding involved the character of shipments of nitrate of soda ex vessel from Chile and distributed from wharves at Wilmington, N.C., to various points in North Carolina. Reshipment from the point of storage was held to be intrastate commerce. In stating the facts the court said:

"Nitrate is shipped in bags or in bulk, and in some instances partly in both. When the vessel arrives at Wilmington, the cargo is discharged by a stevedore, at the expense of the vessel, upon the docks of the Wilmington Compress Company, with whom the importer has also a continuing agreement to use its docks for this purpose. Where the charter party so requires, the cargo is also weighed at the vessel's expense. After its discharge from the vessel, it is delivered to the importer upon the dock. * *

"Wilmington, on the facts of this record, is the importer's distributing point, at which the cargo is restored to his possession, having come definitely to rest, in accordance with his original and continuing intention. * *

"To create a distributing point, the one essential fact is distribution. Whether it be made from premises owned, leased, or merely used for this purpose, under a continuing agreement, is unimportant. In the instant case, * * * the important considerations are that, at Wilmington, there is an interruption of the movement, new billing, a breakage of the bulk, and a resumption of possession by the owner, not for some purpose purely incidental to the transportation, * * * but for the real bona fide purpose of the importer, in order to enable him to break the bulk and sell the commodity, or to deliver it pursuant to contracts heretofore made. * * * "

Defendants attempt to distinguish these cases from the case at bar upon the theory that while there may have been a change in the ownership of the goods at the docks there was

no delivery made by the steamship company to the initial consignee, or to a party in privity with it at the original billed destination; that the contract of carriage entered into at the original point of origin placed upon the water carrier not only the duty to carry but also to deliver and until the shipment was delivered at the ultimate point of destination at complainant's mill or elsewhere, the continuity of the shipment was unbroken and the shipments retained their original interstate characteristics. In support of this contention defendants rely upon the language of the court in Gulf C.& S.F.R.Co. vs. Texas, 204 U.S. 402, wherein it was said:

> "It is undoubtedly true that the character of a shipment, whether local or interstate, is not changed by a transfer of title during transportation. * * *
>
> "The control over goods in process of transportation, which may be repeatedly changed by sales, is one thing; the transportation is another thing, and follows the contract of shipment, until that is changed by the agreement of owner and carrier."

It is further argued by counsel on brief that there could be no delivery made by the steamship company at the wharves in San Francisco as the wharves are owned and operated by the State Board of Harbor Commissioners as facilities of transportation upon which complainant had no private right to transact its business.

These contentions however find no support in the record. Complainant's method of transacting its business, which has been followed for many years, resulted in a definite break in the continuity of the shipments at the wharves. The sale of the goods to complainant at the docks was more than a mere transaction between the buyer and seller, for it also ended the water transportation and relieved the steamship company of any obligation to effect a delivery at a point beyond. The only concern the steamship line had with the shipments after they came to rest upon the dock was to effect delivery, and although very often a rail transportation service followed immediately after the water haul

this has been held to be without controlling force in determining the essential character of the shipments. (Gulf C.& S.F.R.Co. vs. Texas, supra. C.M.& St.P.Ry.Co. vs. Iowa, 233 U.S. 334. Ohio Railroad Commission vs. Worthington, 225 U.S. 101.) Complainant's whole plan was to use the docks as a distributing point and this it was enabled to do, as we have already stated, by availing itself of the five days' free storage time on the docks and for an indefinite period thereafter upon the payment of a nominal charge.

The facts of record surrounding the shipments at issue lead us to the conclusion, and we so find, that there was a definite break in their continuity at the wharves at San Francisco and that the subsequent rail movement to complainant's mill was intrastate traffic. We also are of the opinion and so find that any charges assessed on complainant's shipments in excess of $10.70 per car were inapplicable under the tariffs and were collected in violation of Section 17 of the Public Utilities Act.

Complainant asks us to require defendants to refund the overcharges. With the exception of approximately 45 cars the cause of action on all of the shipments here involved accrued more than two years prior to the filing of the complaint. Our power to award reparation is derived solely from Section 71 of the Public Utilities Act and can only be exercised when a utility has charged an unreasonable, excessive or discriminatory amount and the complaint is filed within two years after the cause of action accrues. (Golden State Milk Products Co. vs. Southern Sierras Power Company, 33 C.R.C. 83, 86.) The term "excessive" used in Section 71 has been construed to mean a rate in excess of the tariff. (S.F. Artichoke Assn. vs. Ocean Shore R.Co., 8 C.R.C. 519. Mills S.V.O. & C. Fruit Co. vs. Southern Pacific Co., 9 C.R.C. 80.) Our order therefore will require defendants to cease and desist from collecting the unlawful charges and to refund the overcharges on those

shipments here involved on which the cause of action accrued within two years prior to the filing of the complaint.

The amount of reparation due cannot be determined on this record. Complainant will submit statement of shipments to defendants for check. Should it not be possible to reach an agreement as to the amount of reparation the matter may be referred to the Commission for further attention and the entry of a supplemental order should such be necessary.

O R D E R

This case being at issue upon complaint and answer on file, 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 defendants, Southern Pacific Company and Western Pacific Railroad Company according as they participate in the transportation, be and they are hereby directed to cease and desist and thereafter to abstain from applying, demanding and collecting for the transportation of complainant's shipments of grain described in the opinion which precedes this order, any charge greater or less or different than that contained in the tariffs on file with this Commission and applicable on intrastate traffic.

IT IS HEREBY FURTHER ORDERED that defendants, Southern Pacific Company and Western Pacific Railroad Company, according as they participated in the transportation, be and they are hereby authorized and directed to refund to complainant, George H. Croley Company, Incorporated, all charges collected for the transportation of the shipments of grain involved in this proceeding

in excess of those contained in the tariffs on file with this Commission and applicable on intrastate traffic, provided that this reparation award shall apply only to shipments of grain on which the cause of action accrued within two years prior to the filing of the complaint.

Dated at San Francisco, California, this 26th day of September, 1929.

Thos. E. Louttit

C. L. Seavey

Ezra W. Decoto

Leon O. Whitsell

M. B. Harris

Commissioners.