JLA

Decision No. 22401.

BEFORE THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA

ALBERS BROS. MILLING CO., Complainant, vs. SOUTHERN PACIFIC CO., Defendant.	Case No. 2845.

C. S. Connolly, for the complainant.
James E. Lyons and A. L. Whittle, for the defendant.
C. R. Schulz, for the Consolidated Milling Company, intervener.
R. P. McCarthy, for the Globe Grain and Milling Company.

BY THE COMMISSION:

O P I N I O N

Complainant is a corporation engaged in the buying, selling and manufacturing of grain and grain products. By complaint filed March 28, 1930, it is alleged that the demurrage charges assessed and collected on numerous carloads of freight delivered on complainant's spur track at Oakland during the two-year period immediately preceding the filing of this complaint, were and are unlawful, in violation of Section 17 of the Public Utilities Act. We are asked to require defendant to refund the alleged overcharges. The Consolidated Milling Company intervened in behalf of complainant.

A public hearing was held before Examiner Geary at San Francisco May 19th and 20th, 1930, and the case submitted on briefs.

The essential facts are not in dispute. Complainant maintains a grain mill and warehouse on a private siding connecting with the Southern Pacific rails at the foot of West Seventh Street, Oakland. The siding has a capacity of approximately 22 cars. Upon written instructions from complainant, defendant after receiving cars in its classification yard intended for delivery to complainant's spur, did not make immediate delivery but placed these cars upon a hold track in its West Oakland yard set aside for this purpose, where the cars were held until placement instructions were received, after which they were switched to complainant's spur.

Upon arrival of complainant's cars at Oakland defendant placed in the United States mail a written notice of each car received, which showed the car initials and number, contents and shipping points with a stamped endorsement as follows:

> "Notice of Constructive Placement. - Said car is held at destination and delivery thereof cannot be made by the carrier on account of the inability of the consignee to receive it."

Commencing on or before October 4, 1929, complainant mailed to defendant a daily statement of all notices which bore a United States postoffice cancellation, stamped, timed or dated on Sunday or other legal holiday or after 3 P.M. on other days, with a demand that five hours' additional free time be allowed on all cars covered by these notices.

Complainant has operated during the period of this complaint under the "average agreement" as authorized by Rule 9 of Pacific Car Demurrage Tariff No. 1-P, C.R.C. No. 15, or subsequent issues.

In computing detention under the average agreement plan, free time of 48 hours was allowed commencing with the first 7 A. M. after defendant sent the notices previously described, except on cars arriving between 11 P.M. and 7 A.M. the free time was not

commenced until the second 7 A.M. because of the probability that such cars would not be placed on complainant's track before the first 7 A.M. even though complainant was able to take delivery.

Complainant does not contend that defendant failed to render sufficient and proper switching service or that the cars were not placed promptly on complainant's track in the manner and at the time instructed by complainant, nor does complainant contend that the demurrage charges as assessed in and of themselves were unreasonable.

The foregoing facts are a summary of those stipulated to by complainant and defendant. The issue here involved is solely one of tariff interpretation as to the proper notices to be sent complainant and the computation of free time for unloading. The tariff provisions hereafter referred to are contained in Pacific Car Demurrage Bureau Tariff 1-P, C.R.C. 15, or succeeding issues.

Complainant interprets the tariff as requiring a written notice of arrival to be given and the 48 hours' free time to be computed starting with the first 7 A.M. after the day the notice is sent, and if the notice is sent on a Sunday or other legal holiday or after 3 P.M. on other days, an additional five hours' free time should be allowed. Defendant on the other hand interprets the tariff as not requiring a notice of arrival to be sent but only a written notice of constructive placement, and that the free time should be computed from the first 7 A.M. after such notice is sent.

Under the demurrage tariff cars consigned to an industry track or to other than a public delivery track, are either actually or constructively placed for unloading. Actual placement is made when a car is spotted in an accessible position for unloading or at a point previously designated by the consignor or

consignee. Constructive placement is defined in Rule 5 Section A-1 as follows:

> "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 tariff also contains rules requiring notification to be given consignee. In Rule 4 Section A it is stated:

> "Except as otherwise provided in Section ***, C *** of this rule, notice of arrival shall be sent or given consignee or party entitled to receive same by this railroad's agents, in writing, or, in lieu thereof, as otherwise agreed to in writing by this railroad and consignee, within 24 hours after arrival of car and billing at destination ***."

Section C referred to in Rule 4 is an exception to the general requirement that "notice of arrival" be sent to consignee if cars are to be delivered upon other than public delivery tracks. This section provides:

> "Delivery of cars upon other than public delivery tracks * * *, or written notice sent or given to consignee or party entitled to receive same, of readiness to so deliver will constitute notification to consignee * * *."

Rule 3 of the Demurrage Tariff provides for the computation of time after the notice of arrival is sent or the cars actually or constructively placed. There are two sections of this rule here in dispute, namely, Section B-1 and Section D. Complainant relies upon Section B-1 as requiring the computation of time from the first 7 A.M. after the day the notice of arrival is sent. This section reads as follows:

> "On <u>cars held for orders</u> (except cars subject to Sections D and E of this rule) * * * time will be computed from the first 7 A.M. after the day upon which notice of arrival is sent or given to consignee or party entitled to receive same (See Rule 4 - Notification)."
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> (Underscoring supplied.)

Section D, upon which defendant relies as authorizing

the computation of the free time from the first 7 A.M. after the notice is sent, provides:

> "On cars to be delivered on other than public delivery tracks time will be computed from the first 7 A.M. after actual or constructive placement on such tracks. Time computed from actual placement on cars placed at exactly 7 A.M. will begin at the same 7 A.M., actual placement to be determined by the precise time the engine cuts loose.
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> "NOTE 1. 'Actual placement' is made when a car is placed in an accessible position for loading or unloading or at a point previously designated by the consignor or consignee. If such placing is prevented by any cause attributable to consignor or consignee and car is placed on a private or other than public delivery track serving the consignor or consignee, it shall be considered constructively placed without notice.
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> "NOTE 2. Any railroad track or portion thereof assigned for individual use will be treated as 'other than public delivery tracks'. "
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> (Underscoring supplied.)

It seems manifest from an analysis of these rules that complainant's contention that a written "notice of arrival" must be given and time computed from the first 7 A.M. after the day such notice is sent, can be sustained only if its cars were those actually embraced within the term "cars held for orders" used in Rule 3, Section B-1.

The tariff does not define this term, although in the sense in which it is used and in view of other provisions of the rule it reasonably implies that such cars are those held for a change in the original billing, requiring a diversion, reconsignment or subsequent movement before delivery or tender of delivery. The cars here considered do not come within this category as they were merely placed upon defendant's hold track, for complainant's convenience, to avoid having cars arrive promiscuously on complainant's industry tracks. Had it not been for complainant's instructions to hold the cars defendant would have immediately delivered them to complainant. This would have constituted "actual placement" and no written notice of any description would

have been required, and the free time would have started to run from the first 7 A.M. after placement. But in lieu of actual placement complainant elected to have its cars held short of its spur track. This it was permitted to do under Rule 2 Section A-1 which states:

> "If a consignee wishes his car held at any break-up or a hold yard before notification and placement, such car will be subject to demurrage. That is to say, the time held in the break-up yard will be included within the 48 hours of free time * * *."

The instructions of complainant prohibited defendant from delivering the cars. However, as the cars could not actually be placed due to a cause attributable to complainant, it was permissible under Rule 5 Section A-1 quoted above for defendant to constructively place the cars. (Burns Bros. vs. P.R.R.Co., 92 I.C.C. 615.) This defendant did and in compliance with the tariff so notified complainant in writing. Constructive placement includes tender and is but a fiction for actual placement. (Union Bag and Paper Corporation vs. Director General, 69 I.C.C. 711. Nassau Lumber Co. vs. L.I.R.R.Co., 144 I.C.C. 267, 271. Nichols & Cox Lumber Co. vs. Toledo S.& M.Ry.Co., 153 I.C.C. 793, 795.) While under the tariff a written notice that the cars had been constructively placed was required, it was not also necessary, as complainant contends, to send a notice of arrival, as under Rule 4 Section C an actual delivery or a written notice of a readiness to deliver obviates the necessity of sending a written notice of arrival. (Ebersbach Construction Company vs. Louisville & N.R.Co., 147 I.C.C. 99, 101. John Wroe vs. L.& N.R.R.Co., 144 I.C.C. 21. Reed Dawson Co. vs. Florida East Coast Ry., 152 I.C.C. 627.)

Cars constructively placed are allowed 48 hours' free time. Under Rule 3 Section D quoted above, the free time begins from the first 7 A.M. after written notice of constructive place-

ment is sent to the consignee. Complainant however attacks this section as being inapplicable to its shipments upon the theory the first sentence of the Section and Note 1 thereof confines its application only to cars to be delivered on other than public delivery tracks actually serving the consignor or consignee. Rule 3 of the Demurrage Tariff is the only rule in the tariff relating to the computation of time. The rule is divided into seven sections, viz., Sections A to G inclusive. These sections relate to the computation of time for loading of cars on public delivery tracks and other than public delivery tracks (Section A); cars held for orders, surrender of bill of lading, or the payment of lawful charges (Section B); unloading of cars on public delivery tracks (Section C); cars delivered on interchange tracks of industrial plants performing the switching service (Section E); cars received from switching lines (Section F); and cars held in transit because of any condition solely attributable to consignor, consignee or owner (Section G). This leaves Section D to cover the computation of time on cars to be unloaded on other than public delivery tracks after actual or constructive placement. If complainant's construction of Section D were given effect, this provision would be entirely nullified as to cars constructively placed unless they were so placed upon tracks directly serving the consignor or consignee, leaving no rule in effect for the computation of time on other cars constructively placed within the meaning of Rule 5, Section A-1. Obviously the rule in so far as it refers to constructive placement on tracks directly serving the consignee is only intended to relieve defendant from sending consignee written notice to that effect. This however does not nullify its application on cars constructively placed in accordance with Rule 5 Section A-1. Complainant's construction rests upon a narrow interpretation of

a single portion of the rule. In construing provisions of this nature effect should be given to all the pertinent rules rather than to an isolated part thereof. (Sensel Motor Company vs. K.C.S.Ry., 151 I.C.C. 170. Western Concrete Pipe Company vs. Southern Pacific, 33 C.R.C. 414.)

Complainant's plea that it is entitled to five hours' free time on those notices of constructive placement mailed by defendant on Sundays, legal holidays or after 3 P.M. on other days rests entirely upon the following provision of Rule 8, Section D-3:

> "When a notice of arrival (See Rule 4, Section 1), is mailed by this railroad on Sunday, a legal holiday, or after 3:00 P.M. on other days (as evidenced by the postmark thereon), consignee shall be allowed five hours' additional free time provided he shall send or give to this railroad's agent within the first twenty-four hours of free time, written advice that the notice had not been received until after the free time had begun to run; in case of failure on the part of consignee so to advise this railroad's agent, no additional free time shall be allowed."
> (Underscoring supplied.)

It may be noted from the above the extension of five hours' free time may only be made when "notices of arrival" are required to be given consignee. Inasmuch as we have already held that defendant was not required to send "notice of arrival" as defined in Rule 4 Section 1, Rule 8 Section D-3 is not here applicable.

After consideration of all the facts of record we are of the opinion and so find the demurrage charges involved in this proceeding were assessed in accordance with the tariff and were not in violation of Section 17 of the Act.

The complaint will be dismissed.

O R D E R

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 the complaint in this proceeding be and it is hereby dismissed.

Dated at San Francisco, California, this 16th day of December, 1930.

Commissioners.