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Decision No. 23476.

BEFORE THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA

ORIGINAL

CALIFORNIA PORTLAND CEMENT COMPANY,
RIVERSIDE CEMENT COMPANY,
Complainants,

vs.

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

Case No. 2663.

Original Appearances

O. T. Helpling, P. H. Campbell, B. H. Carmichael and F. W. Turcotte, for complainants and for Riverside Cement Company, intervener on petition of Southwestern Portland Cement Company.
Sanborn & Roehl and DeLancey C. Smith, by Harvey H. Sanborn, for intervener, Southwestern Portland Cement Company and for affirmative relief.
W. D. Burnett, Coy Burnett, T. R. Larson and W. A. Gillette, for intervener, Monolith Portland Cement Company.
N. H. Keller, for Pacific Portland Cement Company.
W. G. Higgins, for Santa Cruz Portland Cement Company.
Robert Brennan, Platt Kent and Berne Levy, for defendant, The Atchison, Topeka and Santa Fe Railway Company.
James E. Lyons, Harry H. McElroy and J. L. Fielding, for defendant, Southern Pacific Company.
A. S. Halsted, E. E. Bennett and J. P. Quigley, for defendant, Los Angeles & Salt Lake Railroad Company.
C. W. Cornell, W. G. Knoche and R. E. Wedekind, for defendant, Pacific Electric Railway Company.

Additional Appearances on Rehearing

Call & Murphey, by Asa V. Call., for California Portland Cement Company.
C. E. Duffy, for The Atchison, Topeka and Santa Fe Railway Company.
O'Melveny, Tuller & Myers, by William W. Clary, for Riverside Cement Company, complainant.
Leroy M. Edwards, associated with Sanborn, Roehl, Smith & Brookman, for Southwestern Portland Cement Company.

CARR and HARRIS, Commissioners:

OPINION ON REHEARING

The original opinion and order in this proceeding is covered by Decision No. 22218, March 18, 1930 (34 C.R.C. 459). Upon petitions for rehearing by complainants and defendants, an order was entered April 23, 1930, reopening the case. Extensive hearings followed and the matter was submitted after oral arguments on February 6, 1931.

The complaint, filed March 4, 1929, alleged in substance that the rates maintained for the transportation of cement from Colton and Crestmore to Los Angeles and the territories west and north thereof were unjust and unreasonable, unduly prejudicial and discriminatory to complainants' mills at Colton and Crestmore, and were preferential to the competing mills at Monolith, Oro Grande and Victorville, in violation of Sections 13 and 19 of the Public Utilities Act and of Article XII Section 21 of the Constitution of the State of California.

Complainants on rehearing narrowed the issue as it affects rates from Monolith, Oro Grande and Victorville mills (herein designated the distant mills), and Colton and Crestmore mills (herein designated the nearby mills), to Los Angeles, to one of discrimination. While the carriers applied for a rehearing on two features of the original order, and some evidence was presented as to the grounds advanced for this, it is about the issue above referred to that days were spent in the presentation of evidence and argument. The carriers, perhaps through fear of offending shippers and further reducing their tonnage, studiously and laboriously sought to maintain a position of, as they expressed it, "neutrality".

By the nearby mills it was frankly conceded that an increase in the differential would tend to result in an increase

in the price of cement to the consuming public.[1] Representatives of the distant mills coincided with this view, although in the course of the argument the fear was expressed that it might result in the elimination of the distant mills. The nearby mills can ship by truck to Los Angeles more advantageously and under some conditions more cheaply than by rail. Approximately 57% of their product was transported by truck in June, 1930. The distant mills, on the other hand, are dependent upon rail transportation.[2]

The history and method of constructing the rates here attacked as discriminatory were fully detailed in the former opinion. Suffice it to say that the one cent differential had its origin in an order of the Commission in Golden State Cement Co. vs. A.T.& S.F.Ry.Co. et al., 6 C.R.C. 411, and has existed in substantially its present volume for fifteen years. Apparently the basis of this rate structure was generally acquiesced in by the industry affected. When rates were lowered, first temporarily and then permanently, to meet the competition of foreign cement, the rate relationship between the distant and the nearby mills was maintained.

While the situation as thus outlined carries little appeal for the complainants' contentions, yet if the complainants are correct in their position that they are legally entitled to what they term the advantage of location, it is the duty of this Commission to recognize it. And this leads to the consideration of the contention here advanced that mileage must be

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1. The testimony of two witnesses showed that the nearby mills established the maximum price of cement, which was generally followed by the other mills, and if the differential between the nearby mills and the distant mills was increased, it was their opinion that the price of cement to the consumer would likewise be increased.

2. Representatives of the Monolith Company claimed that cement from Monolith could be shipped to Los Angeles by truck. The evidence however cannot be said to have borne out this claim.

accorded great, if not paramount, consideration in order that discrimination does not result, for this is the very basis and the foundation of complainants' position.

Discussion of the theory and grounds of the construction of rates and of the ever present conflict between the principle of mileage rates and blanketed rates might be carried on ad infinitum. No useful purpose may be accomplished by this, and it is enough to state briefly the conclusions reached:

1. Discrimination, or as sometimes stated undue prejudice or undue preference, is a question of fact to be determined by the Commission in the exercise of its administrative function, not arbitrarily but in the light of all relevant circumstances.[3]

2. Mileage is but one of the factors entering into a composite and intricate picture of railroad rates and is not to be given the predominant weight here contended for. The history of the construction of the rates, long acquiescence in their basis, market and competitive conditions, the effect of change on carriers and shippers concerned, and the tendency or effect of a change on rate structures long maintained and to which business has become adjusted, are to be considered.[4]

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3. Texas & P.R.Co. vs. Interstate Commerce Commission, 162 U.S.,197-219. Interstate Commerce Commission vs. Alabama Ry., 168 U.S. 144, 170. Interstate Commerce Commission vs. Delaware, L.& W.R.Co., 220 U.S. 235, 255. United States vs. Louisville & N.R.Co., 235 U.S.,314,320. Pennsylvania vs. United States, 236 U.S.,351,361. Manufacturers R.Co. vs. United States, 246 U.S.,457,482. Nashville C.& St.L.R.Co. vs. Tennessee, 262 U.S. 314.

4. Phipps vs. Railway Co., 2 Q.B. 242. Texas & Pacific Railway vs. Interstate Commerce Commission, 162 U.S. 197, 219. Interstate Commerce Commission vs. Louisville & N.R.Co., 73 Fed.409. Kansas City Transportation Bureau vs. A.T.& S.F.Ry., 16 I.C.C. 195, 203. Waukesha Lime & Stone Co. vs. C.M.& St.P., 26 I.C.C. 515, 519. Calloway Coal Co. vs. A.G.S.R.R., 40 I.C.C. 311, 320 and cases therein cited. Eastern & Western Lumber Co. vs. O.W.R.& N.Co., 41 I.C.C. 545, 549. The New York Harbor Case, 47 I.C.C. 643, 736. Humphrey Brick & Tile Co. vs. P.R.R., 50 I.C.C. 457, 464. Perry County Coal Corp. vs. St.L.& S. Ry.Co., 80 I.C.C. 711, 715. Indiana State Chamber of Commerce vs. A.A.R.R.Co., 115 I.C.C. 650, 657. Humble Oil & Refining Co. vs. B.S.L.& W., 126 I.C.C. 717, 722. Appalachian Power Co. vs. N.& W. Ry.Co., 144 I.C.C. 333, 342. St.Louis Coal Case, 161 I.C.C. 371. Union Rock Company vs. A.T.& S.F.Ry., 32 C.R.C. 288, 290.

3. Haulage at noncompensatory rates is not of course to be permitted, for this would burden other shippers. The determination however of whether the differential between the nearby and distant mills represents a volume of compensation such as not to burden other shippers is not easy of ascertainment. Cost of transportation is subject to such a variety of factors that it cannot be determined with any certainty or precision. Small though the differential here involved is, it cannot be said from the evidence that it represents haulage at a noncompensatory figure. The cost estimates presented were far from satisfactory and at best were mere approximations. In those presented by complainants road expense was favored in allocations over yard or terminal expenses. Some of the results thus obtained were such as to greatly weaken, if not to destroy, the effect of the evidence.[5] Heavier allocations of terminal expense result in an entirely different showing.[6] Complainants made no attempt to show that the revenue received by the carriers for the entire haul from the distant mills to Los Angeles was not compensatory.

4. Competition of foreign cement has been a factor in effecting a lowering of rates to their present level, and is pertinent in so far as the reasonableness of the rates is concerned. It is not of particular or any consequence on the issue of discrimination as between the nearby and distant mills.

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5. One witness for complainants estimated that the yard cost from Colton to Los Angeles via the Santa Fe would be approximately $4.11 per car but from Victorville on the Santa Fe the yard expense would be $9.95 per car. Another witness computed the yard expense from Colton to Los Angeles as $3.65 per car and from Victorville as $6.21 per car if the shipment were hauled via Fullerton and $5.63 per car if hauled via Pasadena. In both computations the expense increases with the length of haul, which obviously is a fallacious theory.

6. In its petition for rehearing the California Portland Cement Company claimed it was prepared to show that the terminal expense would be about 40 cents per ton, or approximately $17.20 per car.

5. Comparison of group and differential adjustments existing elsewhere does not indicate that the differential under attack is unreasonable or unlawful, but rather the contrary.[7]

6. The burden of proof to establish as a fact the existence of discrimination rests upon the complainants, a burden which they have not here met. Here the rate structure represents a modified form of blanketing, which under all the circumstances disclosed by the record has not been established to be unduly prejudicial to the nearby mills nor unduly preferential of the distant mills.

The original decision as to this, the main feature considered on rehearing, should not be modified.

Referring to the carriers' petition for rehearing, a careful review of the testimony and exhibits fails to show either in the original record or that on rehearing, that the rates ordered into effect are erroneous. The order will not be changed in this regard. However the carriers, while not seriously contending that the rates to points beyond Los Angeles should be any greater in volume over the Los Angeles rates when the tonnage originated at Monolith, Oro Grande and Victorville, than when it originated at Colton and Crestmore, do object to the use of the word "arbitraries" in the original decision. This objection has some merit, for the word "arbitrary" is ordinarily used to designate a separately established factor which when added to a specific basing rate, makes up a total through charge. The word "arbitrary"

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7. The record shows that extensive origin groups are maintained on lime from points in Arizona, Nevada and California to points in Southern California; on lumber from producing points in Northern California and Oregon to the San Joaquin Valley and Southern California, and on petroleum products from the refineries in the San Francisco Bay region and Southern California to all destinations in the state. In some of these adjustments there is a more pronounced disregard of distance than in the case before us.

will be eliminated and where it is used in the opinion it may be changed to the word "difference". The finding as reported in 34 C.R.C. at page 465 will be changed to read:

> "That the rates from Victorville and Monolith to points beyond Los Angeles where the rates are based over the Los Angeles rates, are unduly preferential to Colton and Crestmore and unduly prejudicial to Victorville and Monolith to the extent that such rates exceed for comparable distances the amounts contemporaneously added to the rates from Colton and Crestmore."

The following form of order is recommended:

O R D E R

Upon consideration of the various petitions filed in the above numbered proceeding, of the record made upon further hearing and of the oral argument had thereon,

IT IS ORDERED that this order, with the exception of the changes involving the use of the word "arbitraries" as set forth in the preceding opinion, 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 9th day of March, 1931.

C. L. Seavey

Leon O. Whitsell

H. M. Gibson

M. B. Harris

Fred E. Stevenot

Commissioners.