

Decision No. 24035.

BEFORE THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA

SHELL OIL COMPANY, a corporation,

Complainant,

vs.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, a corporation,

PACIFIC ELECTRIC RAILWAY COMPANY, a corporation,

SOUTHERN PACIFIC COMPANY, a corporation,

LOS ANGELES & SALT LAKE RAILROAD COMPANY, a corporation, and

THE WESTERN PACIFIC RAILROAD COMPANY, a corporation,

Defendants.

ORIGINAL

Case No. 2911.

Sanborn, Roehl, Smith & Brookman, by A. B. Roehl, for complainant.

Gerald E. Duffy and Berne Levy, for The Atchison, Topeka and Santa Fe Railway Company, defendant.

W. H. Love and E. E. Bennett, for Los Angeles & Salt Lake Railroad Company, defendant.

W. G. Knoche and Frank Karr, for Pacific Electric Railway Company, defendant.

J. L. Fielding and J. E. Lyons, for Southern Pacific Company, defendant.

L. N. Bradshaw, for The Western Pacific Railroad Company, defendant.

F. W. Turcotte and B. H. Carmichael, for Gilmore Oil Company, intervener.

E. W. Hollingsworth, R. T. Boyd and Bishop & Bahler, by R. T. Boyd, for Schuckl & Company, California Rex Spray Company, W. S. Dickey Manufacturing Company, Peninsula Paving Company, and California State Highway Commission, interveners.

Robert Hutcherson, for Associated Oil Company, intervener.

BY THE COMMISSION:

O P I N I O N

Complainant, Shell Oil Company, is a California corporation with its principal place of business at San Francisco.

By complaint seasonably filed it is alleged that the rates assessed and collected during the two-year period immediately preceding the filing of the complaint for the transportation of numerous tank carloads of petroleum oil from Watson to Los Angeles and from Martinez and Valpico to San Jose were inapplicable in violation of the provisions of Section 22 of Article XII of the State Constitution and Section 17(a) of the Public Utilities Act. The Associated Oil Company by petition filed November 6, 1930, and by supplemental petition filed December 11, 1930, intervened and made similar allegations to those of complainant in connection with shipments moved from Nevada Dock to San Jose.

Reparation only is sought. Rates are stated in cents per 100 pounds.

Public hearings were held before Examiner Geary at San Francisco, and the case having been submitted on briefs is now ready for our opinion and order.

Watson is on the Atchison, Topeka and Santa Fe Railway Company 29 miles and on the Pacific Electric Railway Company 16 miles south of Los Angeles; Martinez is on the Southern Pacific Company 30 miles and Nevada Dock 28 miles northeast of Oakland; and Valpico is on the Western Pacific Railroad Company 65 miles east of Oakland. Complainant's shipments consisted of 388 cars moved from Watson to Los Angeles, of which 17 were routed "A.T. & S.F.", 1 routed "P.E.-A.T. & S.F. delivery", 20 routed "P.E.-L.A. & S.L. delivery" and 350 routed "P.E.-S.P. delivery"; 138 cars from Martinez to San Jose routed "S.P." and 352 cars from Valpico to San Jose routed "W.P." Intervener's shipments consisted of 526 cars covered by its petition in intervention filed November 6, 1930, and 653 cars covered by its supplemental petition filed December

11, 1930, moved from Nevada Dock to San Jose routed "S.P."

The sole question for determination is whether complainant's shipments came within the tariff description of petroleum fuel oil or petroleum road oil. The reasonableness of the rates per se is not in issue.

The shipments involved were invoiced as petroleum fuel oil, were so described in the bills of lading and were rated accordingly. At the time the shipments moved there were in effect lower rates on petroleum road oil. Complainant and intervenor, hereinafter jointly referred to as complainants, contend that there are no physical or other differences between fuel oil and road oil, and that these terms merely denote the uses to which the commodities are put. They maintain that the road oil rates when lower than the rates on fuel oil should be applied.

The terms petroleum fuel oil and petroleum road oil have been employed in defendants' tariffs since 1909. Prior to June 25, 1918, tariffs generally named the same carload rating for road oil as for crude oil, gas oil and fuel oil. Effective June 25, 1918, as a result of the first of the general war-time increases, the rates on fuel oil, which commodity was rated fifth class in the then current classification, were increased $4\frac{1}{2}$ cents per 100 pounds whereas the rates on road oil, a commodity rated at Class "D", were increased 25 per cent. This adjustment had the effect of disrupting the equality in the rates previously in effect, and in the case of long hauls results in higher rates for road oil than for fuel oil, but for the short hauls the road oil rates are lower. At the present time the road oil rates between points in California where the tonnage moves, are generally lower than those applicable to fuel oil.

Notwithstanding the fact that separate commodity rates in different tariffs are maintained on fuel oil and road oil, complainants insist that they are entitled to the lowest rates applicable to either of these commodities irrespective of under what name the oils are sold, the use to which they are ultimately put, or the description given on the bill of lading.

The fuel oil and road oil here involved is a refinery residuum, which is a general term applied to that product remaining after the lighter oils such as naphtha, gasoline, kerosene and gas oils have been taken from the crude oil by distillation. This commodity is susceptible of many uses and varies according to the nature of the crude oil from which it is derived and to the extent of the refining processes. The principal difference in refinery residuum lies in the percentage of asphalt contained in the oil.

The standard specifications of the Department of Public Works, Division of Highways of the State of California, for the year 1929, as reproduced in Exhibit No. 4, sets forth for bidding purposes three classes of refinery residuum classified respectively as "50-60 fuel oil 'light' ", "60-70 fuel oil 'heavy' " and "90-95 asphaltic road oil". The figures denote the minimum and maximum quantities of asphalt required to be contained in the class of oil designated. It is to be deduced from these specifications issued from a source which undeniably is the largest single consumer of road oil in the State of California and also a substantial user of fuel oil, that residuum containing a high percentage of asphalt is more suitable for use in road making than are the lighter residuums containing a lesser amount of asphalt. The request for bids issued by the Division of Highways (Exhibit No.4) further re-

quires that the price for road oil shall be based on the unit per ton and for fuel oil on the unit per barrel.

The evidence shows that the primary function of "road oil" is to act as a binder of other materials and for this purpose an oil of high viscosity is best. Fuel oil on the other hand is valuable solely for its heat content. It is thinner than road oil and will flow at normal temperatures, although in some instances with special heating equipment the heavier oils may be successfully used for fuel.

During the two years preceding the filing of this case the freight charges, according to complainants' description of the oil transported as shown by the bills of lading, were collected at the petroleum fuel oil rates.

Commodity rates for fuel oil and for road oil are published in separate tariffs. Southern Pacific tariffs are illustrative. Its Local, Joint and Proportional Tariff No. 333-G, C.R.C. 2496, contains the rates for fuel oil, and Tariff No. 1010, C.R.C. 2678, the rates for road oil. Tariff No. 333-G describes in Item No. 70 the oils included in the fuel oil group as follows:

Petroleum Crude Oil (See Note 1)

Petroleum Fuel Oil, viz.: Refinery Residuum
(See Note 1)

Petroleum Gas Oil (See Note 1)

Note 1. - Will not apply on Petroleum Road Oil, Petroleum Refined Oil (illuminating or burning), Engine (Naphtha) Distillate, Gasoline, Benzine or Naphtha.

There is no description or definition of Petroleum Road Oil in Tariff No. 1010.

For more than twenty years fuel oil and road oil have been separately classified in the Western Classification, and

within the State of California at the present time the classification of fuel oil is fifth and that of road oil Class "D". Since 1918 commodity rates have been in effect in a separate tariff covering road oil, and apparently during all of these years the shippers and carriers had no difficulty in distinguishing the two commodities for transportation purposes and applied proper rates.

Both complainants and defendants have made reference to Application No. 6780 of F. W. Gomph, Agent, our Decision No. 9886 of December 20, 1921 (20 C.R.C. 1024), but this proceeding was an application by carriers for authority to include petroleum road oil in the asphaltum grouping. The change would have materially increased many road oil rates and was strenuously opposed by a large number of shippers. The record in that proceeding showed that the protestants successfully demonstrated that road oil was a distinct commodity, and the application of the carriers was denied.

In Case No. 2672, Hunt Bros. Packing Company vs. Southern Pacific Company (33 C.R.C. 428), complainant contended that because table grapes could be used for the same purpose as wine grapes, the lower wine grape rates must apply to the more valuable article. We there held that although table grapes might be used for other purposes, there was substantial proof of differences in the commodities to justify different rates.

Many cases might be reviewed but the principle is well established that although there may be a similarity in commodities, such similarity is not a finding that the same rates should be applied to both commodities. Complainants contend that rates cannot be made on the theory of the use to which the commodity is put. This principle is recognized and it has not been violated

in the publication of rates applicable to fuel oil and to road oil. All commodities cannot be individually described, and in interpreting the tariffs the commercial names, the use to which the commodity is put and the generally accepted understanding of its species must frequently govern the allocation of the rate. In this situation the record is clear that the cars against which reparation is demanded were forwarded as fuel oil by the shippers, these complainants, and the material actually shipped was described as fuel oil on the bill of lading. It is the duty of the shipper to truthfully describe the commodity for transportation purposes and the equal duty of the railroad to know that the commodity transported was that described on the bills of lading and the freight bills. We have no proof that the carloads embraced in this action did not consist of commercially recognized fuel oil. Defendants applied the tariff to the commodity understood and commercially recognized as fuel oil. We find that the applicable tariff rates were charged and 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 preceding opinion,

IT IS HEREBY ORDERED that Case 2911 be and it is hereby dismissed.

Dated at San Francisco, California, this 14th day of September, 1931.

W. J. Leary
Leon A. ...
W. J. ...
W. B. ...
Fred G. ...
Commissioners.