Decision No. ✓

ORIGINAL

Decision No. 2626

BEFORE THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA

Phoenix Milling Company,
Complainant,
vs.
Southern Pacific Company,
Defendant.

Case No. 762.

George J. Bradley for complainant.
George D. Squires for defendant.

LOVELAND, Commissioner:

O P I N I O N

The complainant in this proceeding is a corporation engaged in the handling of grain, meal and flour, and its principal place of business is at Sacramento. In its petition filed January 25, 1915, the complainant alleges that during the period from December 6, 1912, to February 24, 1914, there was shipped to it at Sacramento via defendant's line certain less-than-carload shipments of meal from San Francisco, on which there was charged and collected by defendant a rate of 16¢ per 100 lbs. which was the fourth class rate then applying between San Francisco and Sacramento and which is still in effect. The complainant further alleges that at the time these shipments were made the defendant published and maintained a commodity rate of 13¢ per 100 lbs. on meal in less-than-carload lots from San Francisco to Perkins, a point beyond Sacramento on defendant's Placerville Branch, and the complainant contends that the charging of a higher rate to Sacramento than was contemporaneously in effect to Perkins subjected it to an undue discrimination and was

in violation of the provisions of the Constitution and the Public Utilities Act prohibiting a greater charge for the transportation of property for a shorter than for a longer distance over the same line or route in the same direction. Reparation in the sum of $8.17 is asked, together with interest from the date of its collection.

While it is admitted by the defendant that the rates alleged to have been charged were in violation of the long and short haul provision of the Constitution it avers that prior to the time of the movement of the alleged shipments that it had made application to the Commission, in pursuance to the provisions of Section 21 of Article XII, of the Constitution empowering the Commission upon application and in special cases after investigation to grant authority to deviate from the long and short haul rule, for a waiver of said provisions as to the rates from San Francisco to Perkins and other points on the Placerville Branch, and that until that application was acted upon by the Commission the defendant was protected in its violation of that provision and that reparation should not now be awarded therefor. This is true in part, but only in part, for the reason that while this Commission, under its Order of November 20, 1912, gave carriers permission to maintain the status quo existing at the time the Constitution was amended following the procedure of the Interstate Commerce Commission in similar matters, for practical reasons no guarantee was extended to the defendant by either the provisions of the Constitution or by Order of this Commission that it would be excused for violating the long and short haul rule if, upon investigation, such deviation was not found reasonable or permissible.

Defendant denies that this complainant received the shipments alleged to have been received by it, or that it paid the freight charges thereon, or any part thereof, or that any of the rates mentioned in the complaint discriminated against complainant, or that complainant was damaged by the payment of freight

charges alleged, or is entitled to an award of reparation.

Defendant's denial that complainant made the shipments alleged to have been made need not be considered seriously, as it was probably made on account of lack of information, and no testimony was offered at the hearing in support of such denial, whereas counsel for complainant at the hearing introduced a statement of shipments and stated that complainant had, in its possession, the paid freight bills as evidence that these shipments were made and the freight charges collected.

The questions whether the rates mentioned in the complaint discriminated against the complainant or whether complainant was damaged by the payment of freight charges alleged, and was consequently entitled to an award of reparation, are the questions which the Commission is called upon to decide in this case.

The rate of 13¢ per 100 lbs. on meal in less-than-carload lots from San Francisco to Perkins was originally published and filed, insofar as the record of the Commission indicates, in defendant's Placerville Commodity Tariff No. 1, CRC 113, which became effective on August 28, 1906, and was continued in effect in that or other publications as a non-intermediate rate until April 12, 1914, on which date it was made to apply as a maximum to intermediate points. During the entire period from December 6, 1912, to April 12, 1914, there was no commodity rate on meal in less-than-carload lots from San Francisco to Sacramento, and the class rate applying thereon was 16¢ per 100 lbs. Therefore, during the period in which it is alleged the shipments herein involved were made and until April 12, 1914, the rate from San Francisco to Sacramento, as compared with the rate from San Francisco to

Perkins, was in violation of the long and short haul provision prohibiting the charging of a greater rate for a shorter than for a longer haul over the same line or route in the same direction. The record also discloses that the defendant, in pursuance to an order of the Commission issued on October 26, 1911, in Case 214, the long and short haul investigation, filed with this Commission on December 30, 1911, an application (Southern Pacific No. 59 in Case 214) asking authority generally to continue rates for the transportation of property from San Francisco to Perkins and points on the Placerville Branch, as then shown in its Placerville Commodity Tariff No. 1, CRC No. 113, lower than the rates concurrently in effect from or to intermediate points. While the rate on meal to Perkins was not specifically mentioned or Sacramento specified in the application as an intermediate point to which it desired to continue a higher rate on meal than it concurrently maintained to Perkins, the terms of the application were general and the illustrations therein set out were merely typical of the general adjustments of rates from San Francisco to points on the Placerville Branch as to which it sought authority to disregard the long and short haul rule. Thus the application provided that the illustrations therein set out -

> "outlines in a general way the adjustment of rates covered by tariff CRC No. 113 and is in the nature of an explanation of the general features where rates do not conform to Section 21, Article XII of the Constitution of California as amended October 10, 1911;"

also that -

> "there are instances other than those specifically mentioned in this petition in which the charges are greater in the aggregate for the transportation of like kinds of property for the shorter than for the longer distance over the same line or road in the same direction, the shorter being

"included within the longer distance but it is not practicable to state them all in detail in this petition andit is the desire of your petitioner to continue such rates in force as in said tariff provided reference hereby being made to said tariff for further details and particulars as to said rates."

In view of the terms of the application it is my opinion that it should be construed as a general application for relief from the long and short haul provision of the Constitution as to all rates in defendant's so-called Placerville Commodity Tariff CRC No. 116, and which included the less-than-carload rate on meal from San Francisco to Perkins.

In defense of this adjustment, the Southern Pacific Company, in the long and short haul investigation, contended that the rates from San Francisco to points on the Placerville Branch were made lower than the rates to intermediate points because of the competition of carriers by water operating between San Francisco and Sacramento. In the case at bar, the same justification was offered and it was also said that the competition of boat lines between San Francisco and Sacramento, and of teams thence to points on the Placerville Branch, forced the defendant to maintain to these points lower rates than to intermediate points. While there might have been sufficient reason on these grounds for the non-observance of the long and short haul rule as to rates from San Francisco to intermediate points south of Sacramento not located on navigable waters, it is obvious that such a reason would not justify a higher rate from San Francisco to Sacramento than from San Francisco to Perkins or other points on the Placerville Branch, as the competition of the carriers by water, if there was any, was between San Francisco and Sacramento, and it was that very competition which was reflected to the points on the Placerville Branch that induced the carrier to establish to those points lower rates than it would have established had it not existed. This being so, there appears no reason why the rail rates from San Francisco to Sacramento should not have been as low, if not lower, than the rail

rates from San Francisco to Perkins, and, in my opinion the conclusion that Sacramento was discriminated against by the adjustment is unavoidable. Nor is it seriously contended by the defendant that the maintenance of lower rates from San Francisco to points on the Placerville Branch than to Sacramento was justified by the dissimilarity of the transportation conditions at the more distant points, and Mr. Butler, Assistant General Freight Agent of defendant, stated at the hearing (See transcript, page 19) that he did not defend the Placerville tariff and the fact that defendant, on April 12, 1914, cancelled the non-intermediate application of the rate to Perkins shows that defendant agrees with the Commission in this view.

As to team competition from Sacramento to points on the Placerville Branch, which probably did exist at one time, owing to the fact that teams came into Sacramento loaded and would be willing to take a load back, it was not seriously urged that such competition now exists, and even if there were such competition today, it would seem to justify a lower rate from Sacramento to Perkins on shipments originating at Sacramento as well as on shipments originating at San Francisco; The complainant made no showing that the rates charged were unreasonable per se or discriminatory in any other respect than that they were violative of the long and short haul rule.

There is no doubt in my mind that such rates violated the long and short haul rule and were discriminatory under that rule.

The Commission's order of October 26, 1911, in the long and short haul proceeding (Case 214) issued under authority of Section 21, Article XII of the Constitution as amended on October 10, 1911, and in pursuance to which the defendant's application was filed, directed the carriers to remove all violations of the long and short haul provisions then existing or in the event it was desired to justify the same or any of such violations, to file applications specifying the particular violations they desired to continue. By this order

the carriers were impliedly granted permission, for practical reasons, to maintain the status quo until the Commission passed upon such application. By a subsequent order issued on November 20, 1912 in the same proceeding, express permission so to do was given. The Commission did not, however, by these orders sanction or approve any of the rates covered by the defendant's application which were in violation of the long and short haul provision. In fact, it expressly withheld its approval of such rates. Therefore, in my opinion, the filing of the application for relief from the long and short haul provision and the permission of the Commission to maintain the status quo did not operate to extend to the carrier immunity from reparation during the pendency of said application if the higher rates charged to the intermediate points were thereafter found to be unreasonable or discriminatory and if, in the Commission's opinion, reparation was due. In this respect the rates covered by the application were no different from rates filed in tariffs and which are subject to complaint and the Commission's power to award reparation.

On April 12, 1914, the defendant made the rate to Perkins applicable to all intermediate points and thereby presumptively established that rate as a just and reasonable rate to Sacramento. This resulted in a discontinuance of the deviation from the long and short haul rule and removed the discrimination theretofore appearing in the rates complained of. The question for the Commission to decide is, shall the defendant be required to pay reparation in this case.

I have no hesitation in declaring my conviction that reparation should be awarded where complainants can show that the application of rates, violative of the long and short haul rule, has resulted in damage to complainants. I do not believe that the carriers should be required to pay reparation to a complainant who has not been damaged when it is evident that such reparation cannot be passed on to those who are entitled to it, but rather, that complainant will keep it as additional profit.

There may be instances where complainants will be able to show that their selling prices, in cases of this kind, were not based upon cost and carriage, but were directly affected by competition from points enjoying rates violative of the long and short haul rule. In such cases it may be possible to show damage and that reparation should be awarded. In the case at bar no testimony was offered to show that the rate from San Francisco to Perkins, discriminatory as it clearly was when compared with the rate from San Francisco to Sacramento, and violating the long and short haul rule as it did, had any effect upon the price made by complainant in selling his merchandise to customers in Perkins, and it is therefore fair to assume that complainant based his selling price upon cost and carriage and made his profit, in which event reparation if due to anyone is due to the people to whom complainant sold his wares and they, in turn, in equity should pass it on to those to whom they sold the merchandise. Such is, of course, impossible, and the State is put to the expense of putting the machinery of this Commission in motion to collect petty reparation from the carriers who are not entitled to retain it, or see that it is paid to shippers as clearly not entitled to it, often under circumstances which indicate that such claims for reparation would never have been filed had it not been for the activities of Claim Agents who usually receive fifty per cent of the amount recovered, while the consumer, to whom the reparation is due in the last analysis, gets nothing. I do not believe that such was the aim or intent of the law. Undue discrimination must be removed wherever and whenever found; deviation from the long and short haul rule must be justified or discontinued; reparation should be awarded where damage is shown, but I do not believe the time of this Commission should be occupied to the neglect of more important matters in helping to collect reparation for people not entitled to it.

The criticism as to the manner in which such claims are

sometimes brought does not apply to this case, which was instituted by Mr. Bradley who is regularly employed by the members of a large and important association to look after their interests, ~~and~~ if complainant in this case can show, that his selling price was not based upon cost and freight, and that he was damaged, he should be permitted to do so, and reparation awarded for damages shown.

The conclusions herein reached are in accord with the opinion of the Interstate Commerce Commission in Appalachia Lumber Co. vs. L. & N.R.R. Co., 25 I C C 193. In that case the Commission said:

> "It would be inconsistent to grant reparation for a disregard of the rule of the fourth section during that period within which the lawmaking authority had expressly sanctioned existence of such disregard."

and that:

> "No damages can be given up to the time when the Commission passes upon these fourth section applications unless possibly a case is made out under the third section which carries with it an award of damages or unless under the first section the rate to the intermediate point has been found unreasonable."

The facts in that case, however, and the provisions in Section 4 of the Interstate Commerce Act are essentially different from facts in this case and the provisions of the Public Utilities Act applicable in this proceeding. It does not appear that the defendant in the Appalachia Case, subsequent to the filing of its application for relief from the fourth section of the Interstate Commerce Act, removed the discrimination against the intermediate points by establishing the rate to the more distant point as a maximum to the intermediate point and thereby admitted the reasonableness of that rate for the shorter haul.

This case, like all others heard and decided by the Commission, must rest upon the peculiar statement of facts applicable to it and under all the circumstances of the case I find that the application for an award of reparation must be denied.

I submit the following form of order:

O R D E R

This case being at issue upon complaint and answer duly filed, and a public hearing having been held, and the matters and things involved in the case thoroughly considered, and the Commission having found that the rate herein complained of was discriminatory and violative of the long and short haul rule, but that such discrimination has been removed, and such deviation from the long and short haul rule discontinued, and that under the circumstances of the case the application for an award of reparation should be denied,

IT IS HEREBY ORDERED that such application for an award of reparation be, and it is hereby denied, and the case dismissed, without prejudice.

The foregoing opinion and order are hereby approved and ordered filed as the opinion and order of the Railroad Commission.

Dated at San Francisco, California, this 22nd day of July, 1915.

Max Thelen

A. B. Leveland

Alex Gordon

Edwin O. Edgerton

Frank R. Devlin

Commissioners.