Decision No. ✓. ORIGINAL

Decision No. 3055

BEFORE THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA.

THE JAMES MILLS SACRAMENTO VALLEY ORCHARD AND CITRUS FRUIT COMPANY, Complainant, vs. SOUTHERN PACIFIC COMPANY and THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY - Coast lines, Defendants.	Case No. 850.

W. D. Van Nostran and F. L. Gibson for complainant.
Geo. D. Squires for Southern Pacific Company.
E. W. Camp for The Atchison, Topeka & Santa Fe Railway Company.

BY THE COMMISSION.

O P I N I O N.

The complainant in this case seeks reparation upon the charge that defendants exacted unjust and unreasonable rates upon certain shipments of trees as hereinafter set forth.

A public hearing was held in the City of Los Angeles on December 3, 1915, and testimony having been introduced on all sides, the case was submitted upon briefs to be filed by the respective parties. The last of these briefs has been filed and the case is now ready for decision.

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The evidence clearly shows that complainant, during the months of February and March, 1913, had shipped to it at Hamilton, California, a number of carloads of citrus fruit trees from points in Southern California upon which complainant paid the freight charges. Seventeen of these carloads of trees were shipped from Alcrew, Riverside County, via The Atchison, Topeka & Santa Fe Railway Company, one of the defendants in this action, hereinafter referred to as the "Santa Fe". These shipments were, upon the advice of the Santa Fe's agent at Riverside, routed by the shipper via Stockton, at a rate which was in excess of the rate which complainant would have received if the shipments had been routed via Los Angeles. Complainant further shipped a number of carloads of citrus fruit trees from other stations in California by the defendant, Southern Pacific Company, hereinafter designated and referred to as the "Southern Pacific", without the customary release clauses of $5.00 per hundred pounds upon the bills of lading, which resulted in complainant being charged and paying a higher rate than it would have had to pay if the release clauses had been endorsed upon the bills of lading.

The entire reparation claimed upon the alleged misrouted shipments and upon the shipments which were not released amounted to the sum of $918.96.

From the evidence it further appears that Mr. James R. Mills, the general manager of the complainant, had a conversation prior to these shipments with the agent of the Santa Fe at Riverside, in which conversation said agent solicited the complainant's shipping business. Mr. Mills promised the agent, purely as a matter of business friendship, to give his company a portion of the freight provided the agent could get as good

a rate for complainant over the Santa Fe as that offered by the Southern Pacific. The agent gave Mr. Mills to understand that he could get him as low a rate as the Southern Pacific could make and Mr. Mills accordingly had his company make the shipments of seventeen carloads over the Santa Fe.

According to the agent's testimony, when discussing the matter with Mr. Mills he thought that he could obtain as low a rate as that made by the Southern Pacific, but later he found that he could not. Upon obtaining this latter information from his company's headquarters he apparently telephoned to the nursery company which was selling Mr. Mills the trees and which was loading them upon the cars for him, stating the rate which the Santa Fe Company had made for the shipments,, but not calling the nursery company's attention to the fact that this charge was higher than the rate via Los Angeles over the Southern Pacific.

There is little question in our minds but that the Santa Fe's agent at Riverside was led by his excess of zeal in behalf of his company to act with none too much frankness toward Mr. Mills and in a manner which we consider far from commendable, and we feel that complainant had ample cause to feel aggrieved at the treatment he received.

As to the sixteen carloads of trees which were shipped without the release clause it appears from the evidence that the trees were actually worth less than $5.00 per hundred pounds, and that, accordingly, complainant would certainly have been entitled to the lower rate if the shipments had actually been released.

According to the uncontradicted testimony of Mr. Mills, complainant's general manager, and Mr. A. N. Collins, the general manager of the nursery company who supplied the trees, neither

of them was informed by either of the defendants that they were entitled to a lower rate if they released the shipments than if they did not, and neither of them knew of this lower rate. Complainant contends that it was the duty of the railroad company accepting said shipments to inform the shipper of this lower rate, and that, accordingly, complainant is entitled to recover this excess.

There were several more or less intricate legal points involved in this case which were fully discussed in the briefs on both sides; but it will be unnecessary for us to consider more than one, as we are of the opinion that complainant has lost whatever remedy it might possibly otherwise have had by its failure to file its formal complaint with this Commission within two years from the time the alleged causes of action accrued.

We would naturally prefer to be able to decide this case purely on its merits but the law seems to us clear upon this point. Section 71 of the Public Utilities Act reads in part as follows:

> "(a) When complaint has been made to the Commission concerning any rate, fare, toll, rental or charge for any product or commodity furnished or service performed by any public utility, and the Commission has found after investigation that the public utility has charged an excessive or discriminatory amount for such product, commodity or service, the Commission may order that the public utility make due reparation to the complainant therefor, with interest from the date of collection; provided no discrimination will result from such reparation.
> "(b) * * * * All complaints concerning excessive or discriminatory charges shall be filed with the Commission within two years from the time the cause of action accrues. * * * * *"

There may be some question as to whether in cases of this kind the cause of action accrues when the shipments are made or when they are received or when the excessive charges

have been paid; but, in any case, there can be no question but what the cause of action has accrued by the time that the excessive charges have been paid. In this case the last of the payments upon which reparation is requested was made the latter part of July, 1913, and the complaint was filed with this Commission on August 20, 1915.

Complainant proved that it did not know that it had been overcharged until the month of March, 1915, and it claimed that as the overcharges "were paid under a mistake of fact and under misrepresentation of the defendant company's agents and employees" the limiting clause in the Public Utilities Act should be interpreted in the light of Section 338, Clause 4 of the California Code of Civil Procedure, and that complainant accordingly had three years from the discovery of its mistake and overpayment in which to bring this action. We can not so construe the Public Utilities Act, for it states in so many words that all complaints concerning excessive ordiscriminatory charges shall be filed with the Commission within two years from the time the cause of action accrues. It makes no exception to this limitation and no provision for allowing further time in cases of fraud.

It is true that this legal bar was not pleaded as a defense by either of the defendants and that the Santa Fe has impliedly expressed its willingness to waive this defense if it can legally do so. We are of the opinion, however, that the provision of the Public Utilities Act above quoted is further distinguishable from the ordinary statute of limitations to the extent that it need not be affirmatively pleaded and can not be waived in a case of this kind by a carrier. The reasoning of the

Supreme Court of the United States in the case of A.J. Philips Co. vs. Grand Trunk Railway Co., 236 U.S. 662, is no less binding upon us than it is convincing. The Court was, it is true, construing the Federal Statute which might be considered as being somewhat stronger than ours, as that statute provides that "all complaints for the recovery of damages shall be filed with the Commission within two years from the time the cause of action accrues, and not after". The Court decides the question partly on the strength of this phrase, but its reasoning is such as to apply just as strongly to the present case and we feel that we can not explain our position better than by quoting the following language of Justice Lamar (p.667):

> "Under such a statute the lapse of time not only bars the remedy but destroys the liability (Finn v. United States, 123 U.S. 227, 232) whether complaint is filed with the Commission or suit is brought in a court of competent jurisdiction. This will more distinctly appear by considering the requirements of uniformity which, in this as in so many other instances must be borne in mind in construing the Commerce Act. The obligation of the carrier to adhere to the legal rate, to refund only what is permitted by law and to treat all shippers alike would have made it illegal for the carriers, either by silence or by express waiver, to preserve to the Phillips Company a right of action which the statute required should be asserted within a fixed period. * * * * To permit a railroad company to plead the statute of limitations as against some and to waive it as against others would be to prefer some and discriminate

against others in violation of the terms of the Commerce Act which forbids all devices by which such results may be accomplished. The prohibitions of the statute against unjust discrimination relate not only to inequality of charges and inequality of facilities, but also to the giving of preference by means of consent judgments or the waiver of defenses open to the carrier. The railroad company therefore was bound to claim the benefit of the statute here and could do so here by general demurrer. For when it appeared that the complaint had not been filed within the time required by the statute, it was evident, as a matter of law, that the plaintiff had no cause of action."

O R D E R.

A public hearing having been held in the above entitled case and the matter having been duly submitted upon briefs of the respective parties and it appearing that any claim for reparation which complainant might otherwise have had under the Public Utilities Act has become barred through its failure to file its complaint within two years from the time the cause of action accrued, as required by Section 71 (b) of said Act,

IT IS HEREBY ORDERED that said complaint be and the same is hereby dismissed.

Dated at San Francisco, California, this 22nd day of January, 1916.

Commissioners.