

BEFORE THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA.

JOHN J. LENNON, et al.,

Complainants,

vs.

BAYSIDE LUMBER COMPANY,

Defendant.

ORIGINAL

Case No. 921.

.....

G. W. Hunter for complainants.
Sanborn & Roehl, by A. B. Roehl, for defendant.

THELEN, Commissioner.

O P I N I O N.

The complaint herein is signed by ten persons who own timber lands or the right to cut timber in what is known as the Jacoby Creek territory in Humboldt County, California. The complaint alleges, in effect, that Bayside Lumber Company is the owner of a lumber mill on Humboldt Bay, and is now and for more than ten years last past has been the owner of a steam railroad extending from tidewater, Humboldt Bay, south of the City of Arcata, in a southeasterly direction up Jacoby Creek, a distance of about six and one half miles; that along the route of said railroad are a number of property owners and residents who are engaged in farming and dairying, in the lumber industry and in operating a rock quarry; that said railroad crosses the public county road leading from Eureka to Arcata, and also crosses the tracks of Northwestern Pacific Railroad Company, leading from San Francisco Bay to Trinidad, in Humboldt County; that for several years past freight has been transported back and forth between Eureka and the Jacoby Creek region over the line of Northwestern Pacific Railroad Company and the railroad owned by Bayside Lumber

Company, over a switch between the tracks of Northwestern Pacific Railroad Company and Bayside Lumber Company; that during several years past Bayside Lumber Company has managed and operated said railroad as a common carrier, carrying shingles, spiling, railroad ties and other freight and products for the public for compensation; that more recently Bayside Lumber Company has refused to carry freight for parties having lumber products along said line of railroad unless such parties should first agree to sell said products to Bayside Lumber Company at a price satisfactory to said company, or to permit said company to handle said products on a commission basis; that on the line of said railroad there is a rock quarry located about five miles from the intersection of the lines of railroad of Northwestern Pacific Railroad Company and Bayside Lumber Company; that a reasonable charge for transporting ties, spiling, shingles and other lumber products over said distance over the railroad of Bayside Lumber Company would be 37 1/2¢ per 1000 feet, board measure; and that Bayside Lumber Company has heretofore contracted with parties to carry forest products over its line of railroad over said distance at said rate and has been paid said rate for such transportation. The complaint prays that the Railroad Commission direct Bayside Lumber Company to transport forest products over said company's line of railroad for said distance of five miles at a rate of 37 1/2¢ per 1000 feet, board measure.

The answer denies most of the material allegations of the complaint. The answer denies specifically that defendant has operated its line of railroad as a common carrier, and alleges that said railroad has been operated solely as an adjunct of defendant's lumbering operations. The answer admits that defendant has transported some freight for the general public as an accommodation, but alleges that such transportation was conducted with the distinct understanding that the service was rendered merely as

an accommodation and was subordinate to the business of the defendant. Defendant denies that it is a common carrier subject to the jurisdiction of the Railroad Commission.

Public hearings on this complaint were held in Eureka on March 16, and 17, 1916, and in San Francisco on March 28, 1916.

Bayside Lumber Company was incorporated under the laws of California on January 6, 1905. The company was granted power, among others, to deal in lumber and lumber products and "to buy, build, construct, own, sell, lease, let, equip, maintain and operate in connection with, and in carrying on said business of said corporation, railroads, vessels of all kinds, tram roads, skid roads, cable roads, "V" flumes, water ditches and conduits, and to equip, maintain and operate said means of transportation by steam, electricity or other power." In 1905 defendant acquired from Bayside Mill & Lumber Company timber lands, a saw mill in Eureka and the railroad referred to in the complaint herein. Defendant's manager testified that the railroad was bought as an adjunct to defendant's ~~xxxxx~~ timber business for the purpose of transporting logs and shingle bolts for defendant. Defendant's logs were transported over this railroad from the Jacoby Creek country to Humboldt Bay, where the logs were thrown into the bay. The logs were then towed a distance of about five miles to defendant's lumber mill in Eureka.

Subordinate to this primary use, defendant also transported over this railroad certain spiling, ties, shingles, shingle bolts and other forest products for persons owning lands on Jacoby Creek or the right to cut timber on such lands. Defendant also transported groceries, hay and certain other commodities up Jacoby Creek to persons engaged in lumbering operations or in quarrying along said creek. For these services defendant charged and received compensation. The testimony shows that defendant never carried passengers for compensation. The freight which defendant

transported was carried only after written or verbal arrangements had been made by the shipper with defendant, and in all cases in subordination to defendant's prior right to operate its railroad for its own business. The testimony shows that defendant never refused to transport freight for any person owning or operating on Jacoby Creek. Under contract dated November 18, 1911, defendant carried a considerable amount of rock for Hammon Engineering Company from a quarry located on Jacoby Creek, this rock being used on the Government jetty in Humboldt Bay.

Defendant's logging operations on Jacoby Creek ceased in 1913. During 1914, defendant transported rock, forest products and certain merchandise for shippers located on Jacoby Creek, all for compensation under the written or verbal arrangements hereinbefore referred to, and in part, defendant transported forest products which it purchased from persons operating in the Jacoby Creek territory. On December 12, 1914, defendant entered into a contract with Pacific Engineering & Construction Company, which company had secured the contract for supplying additional rock in the construction of "jetties and other harbor improvements" in Humboldt Bay. This rock was secured from the quarry on Jacoby Creek. Under this agreement, Bayside Lumber Company leased its line of railroad to Pacific Engineering & Construction Company, retaining, however, the right to operate its own trains or cars under control of the train dispatcher of Pacific Engineering & Construction Company. Pacific Engineering & Construction Company agreed to maintain the railroad tracks, road, equipment and appliances and to save Bayside Lumber Company harmless from all damages. The term of the contract was five years. During 1915, Bayside Lumber Company occasionally ran some of its own trains, but during the year the company gave notice to all persons operating on Jacoby Creek that the company would no longer run trains after the year 1915. In other words, after 1915, the sole operations over

defendant's line of railroad were to be carried on by Pacific Engineering & Construction Company, engaged in the business of transporting rock from a quarry or quarries on Jacoby Creek for use in improvements in Humboldt Bay. Pacific Engineering & Construction Company has never transported passengers, nor has it ever transported freight for any party other than itself.

This statement of facts is, I believe, sufficient for a discussion of the two principal issues in this case. These issues are:

- (1) Is defendant a common carrier?
- (2) If so, should the Railroad Commission direct defendant to transport lumber and other forest products for complainants?

On the first issue, defendant contends, at the outset, that, having leased its line of railroad and a considerable portion of its equipment to Pacific Engineering & Construction Company, defendant is no longer in a position to operate its railroad as a common carrier, if defendant ever was such common carrier. In my opinion, this position is without merit. If defendant was a common carrier, it could not legally escape its obligations to the public by the simple expedient of leasing its line of railroad and part of its equipment. Furthermore, defendant, if it was a common carrier, could not cease operations as such carrier unless the Railroad Commission's consent had first been secured. No application for such consent was ever made by defendant.

On the question whether defendant was a common carrier at the time it leased its railroad to Pacific Engineering & Construction Company, complainants draw attention to the fact that for a number of years, including two years subsequent to the cessation of defendant's own logging operations on Jacoby Creek, defendant transported lumber and other forest products and rock from Jacoby Creek, and merchandise of various kinds to operators on

Jacoby Creek, for compensation. Complainants further draw attention to the fact that although these operations were subordinate to defendant's own business, defendant, as hereinbefore pointed out, never refused to carry freight for outside parties, up to the end of 1915. Complainants also rely on a document headed "Bayside Lumber Company's Logging Railroad--Freight Tariff", which was handed by defendant to one of this Commission's rate experts and filed on August 29, 1913. This tariff stated rates for the transportation of rock, shingles and bolts in carload lots, the cars to be furnished by the shipper, with the exception of shingles for shipment to the wharf on Humboldt Bay.

Defendant, on the other hand, insists that it has never been a common carrier. Defendant claims that it is a "logging railroad", as distinguished from a "commercial railroad", and that, consequently, it has never been a common carrier subject to supervision and regulation by public authority. Defendant relies on its written and verbal arrangements with intending shippers as showing that its transportation for outside parties was always rendered as an accommodation and not in accordance with any holding out to the general public. Defendant claims that the "freight tariff" hereinbefore referred to was not filed voluntarily but as the result of insistence from this Commission that defendant's rates be filed. Defendant also draws attention to the fact that it has never been taxed as a common carrier, that it has never exercised the power of eminent domain, that it has received no division of general rates from Northwestern Pacific Railroad Company, that it has had no per diem arrangement for the interchange of cars, as is ordinarily the case between common carriers, that it was charged for demurrage by Northwestern Pacific Railroad Company in the same manner in which industries and shippers are charged, and that it never maintained a regular train service.

The question whether defendant operated as a common

carrier is not free from difficulty. Nor does the answer to that question solve the problem here presented. If we assume, for the sake of the argument, that defendant is a common carrier, we are immediately confronted with the question whether, on the facts here presented, the Railroad Commission can consistently order defendant to resume operations and to handle the business reasonably to be anticipated from the complainants herein. In this connection, defendant asked that if it be declared a common carrier, it be authorized to discontinue operations on the ground that the business to be secured would not pay even operating expenses. In this connection, defendant presented exhibits to show the result of the operations of its railroad from 1912 to 1915, inclusive. These exhibits show a deficit of \$16,531.64 in 1912; a net earning of \$8.02 in 1913; a deficit of \$762.46 in 1914 and a deficit of \$386.85 in 1915. In these statements, operating and maintenance expenses only are considered and no allowance is made for depreciation or for return on the investment.

The complainants herein presented testimony to show the amount of freight which they would offer to the defendant if it operated its line of railroad during 1916. Defendant, accepting these statements at their full face value, presented its Exhibit No. 17, showing monthly income based on complainants' estimate of traffic and minimum monthly expenses for operation. This exhibit reads as follows:

REVISED EXHIBIT SHOWING MONTHLY INCOME BASED
ON COMPLAINANTS' ESTIMATE OF TRAFFIC AND
MINIMUM MONTHLY EXPENSES FOR OPERATION.

Income based on complainants' estimate of traffic
likely to move if road is made a common carrier.....\$1117.50

Revised expenses covering the minimum cost per month
of operation with the one locomotive available.....

Engineer	\$110.00	
Fireman.....	67.50	
Conductor.....	81.00	
Brakeman.....	70.20	
Superintendent (partial salary).....	50.00	
Watchman and Hostler.....	67.50	
Clerk hire - stationary - postage - trips by Manager, etc.....	50.00	
Fuel oil - 10 bbls. per day of 10 hours each for 12 days, 120 @ 89¢.....	106.80	
Upkeep - road and cars - 5 men @ \$55.00.....	275.00	
Supplies per month.....	40.00	
Taxes at 5% on Gross Earnings of \$1117.50.....	56.00	
Watchman at trestle terminal.....	<u>10.00</u>	\$ 984.00

If to these expenditures be added the amounts
which would be required to repair the locomotive and
cars necessary to handle this business, the result
would be as follows:

New crown-sheet for locomotive #1	50.00
\$600.00 - spread over 12 months	
Repairs to locomotive #1 - \$500.00-spread over 12 months.....	41.50
Repairs to 15 cars @ \$25.00 - \$375.00 spread over 12 months.....	31.25
Repairs to wharf terminal - \$500.00 - spread over 12 months.....	<u>41.50</u>
Total monthly minimum expense.....	<u>\$1148.25</u>
Deficit.....	31.75

The monthly income of \$1117.50 shown in the foregoing statement is based on complainants' own estimate of traffic to be offered by them, as follows:

J. J. Lennon, 450,000 board feet of forest products.
Robert L. Haughey, 300 cords shingle bolts.
H. S. Thompson, 300 " " " and 3,000,000 shingles.
M. Johnson, 3,000,000 shingles.

The testimony shows that in 1915, 10,120 railroad ties were made on the lands of Lennon and transported over defendant's railroad. Mr. Lennon was not able to state how the 450,000 board feet of forest products would be divided as between ties and shingle bolts, but expressed confidence in his ability to secure a contract for 100,000 railroad ties from Northwestern Pacific Railroad Company. Mr. Haughey owns a shingle mill on Humboldt Bay. In 1910 he took up with defendant the matter of transporting shingle bolts and logs from his land on Jacoby Creek over defendant's line of railroad. Defendant quoted a rate for this service on the basis of the cars being furnished by Mr. Haughey. Defendant stated that this transportation would be done in connection with defendant's own work but that defendant was certain that it would have considerable time which would not be required for handling its own logs. Defendant stated that it would be glad to hear from Mr. Haughey soon with reference to his decision. Mr. Haughey testified that he had not gone further into the matter for the reason that he understood defendant's offer to be that "it might transport" his products and not that "it would do so." Mr. Thompson owns a shingle mill on Jacoby Creek, which mill he has operated for a number of years. He testified that the capacity of his mill was about three million shingles per month, that he had shipped during some months 300 cords of shingle bolts, during other months

200 and during other months none at all, and that he would ship "pretty close to three/^{million}shingles per month." Mr. Johnson owns two shingle mills near the lower portion of Jacoby Creek, which shingle mills have a capacity of about one and one-half million shingles each per month. Mr. Johnson has been shipping between one million and one million and a half shingles per month, which shingles have largely been transported by wagon. Mr. Johnson does not need the services of defendant's railroad, although he would prefer such service if the rates are not too high.

The revenue derived by defendant for the transportation of all freight except rock, and defendant's own logs, was \$606.59 in 1908; \$822.97 in 1909; \$3843.74 in 1910; \$2012.82 in 1911; \$4914.17 in 1912; \$3412.32 in 1913; \$3090.11 in 1914; and \$1761.79 in 1915.

The expenses shown in defendant's Exhibit No. 17 do not include allowances for liability or other insurance, any proportions of the salaries of general officers, any allowance for depreciation or any return on the investment. Defendant reports that its investment as of January 1, 1915, was \$128,605.97.

The only conclusion which I can draw from this evidence is that if this Commission should direct defendant to resume the operation of its line of railroad as a common carrier, assuming that it has been a common carrier, the revenue which could reasonably be anticipated would be far less than the bare cost of operating and maintaining defendant's line of railroad, with no allowances for certain items of operation or for depreciation or for return on the investment. Under these circumstances, and under the facts as shown by the record herein, I cannot recommend that this Commission order defendant to operate as a common carrier.

In response to a question from the presiding Commissioner, defendant's manager testified that he would be entirely willing to agree that Pacific Engineering & Construction Company should

transport the products of the complainants herein, provided that defendant received a rental for the use of its line of railroad for these purposes on the same basis on which Pacific Engineering & Construction Company is now paying rental. He also stated that he would be entirely willing to confer with the officers of Pacific Engineering & Construction Company to see whether they would be willing to transport the products of complainants herein, on receiving assurance from the Railroad Commission that Pacific Engineering & Construction Company would not be treated by the Railroad Commission as a common carrier. In accordance with this promise, a conference was held subsequent to the submission of this case between Mr. R. O. Wilson, defendant's manager, Mr. S. L. G. Knox, president of Pacific Engineering & Construction Company, and the presiding Commissioner herein, for the purpose of ascertaining the attitude of Pacific Engineering & Construction Company. Mr. Knox stated that he could not see his way clear, because of legal and practical difficulties, to undertake such service.

Mr. Wilson testified that at the expiration of the operations of Pacific Engineering & Construction Company at the quarries on Jacoby Creek, he would be entirely willing to lease defendant's line of railroad to the complainants herein on such terms as might be deemed fair.

While regretting that no way has been found by which the complainants herein can be served, I am satisfied that this Commission could not, either legally or in good conscience, direct defendant to operate its railroad as a common carrier under the facts shown in the evidence herein. It is unfortunate, from the point of view of complainants, that they did not develop their lands during the years in which defendant was transporting

forest products from Jacoby Creek, and that they have waited until after defendant has completed its own logging operations and no longer has an incentive to continue the operation of its line of railroad.

I submit the following form of order:

O R D E R.

The above entitled proceeding having been submitted and being now ready for decision, and the Railroad Commission being fully advised.

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

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 19th day of May, 1916.

Max Thelen
H. H. ...
Franz R. ...

Commissioners.