Decision No. ✓

ORIGINAL

Decision No. 603

BEFORE THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA

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CALIFORNIA PACKING CORPORATION,

Complainant,

vs.

CASE NO. 1025.

SOUTHERN PACIFIC COMPANY, a corporation, and THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, a corporation,

Defendants.

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L. S. Beedy, for complainant.

C. W. Durbrow, for Southern Pacific Company.
E. W. Camp, for The Atchison, Topeka & Santa Fe Railway Company, defendants.

LOVELAND, Commissioner:

This is an action brought by the California Packing Corporation, organized under the laws of the State of New York, wherein reparation is demanded in the sum of $8202.65 against the Southern Pacific Company account charges paid on shipments moved between June 27, 1908 and March 1, 1916; also in the sum of $1309.64 against The Atchison, Topeka & Santa Fe Railway Company account shipments moved May 12, 1909 to March 1, 1916, both dates inclusive, as per exhibits A, B, C and D attached to and made part of the complaint.

The complainant contends that the rates as assessed and collected, which include class and commodity rates, covering consignments which moved to and from points in the San Joaquin Valley, were in excess of the rates in effect between San Francisco and Los Angeles, and, therefore, that the higher rates collected were in violation of Section 21, Article XII of the Constitution of the State of California prior to and subsequent to the date of its

amendment, October 10, 1911, and were unlawful. Complainant's testimony was not controverted and was to the effect that the alleged unlawful charges had all been paid, as evidenced by the original paid freight bills introduced as exhibits.

The complainant rests on the allegation that defendant carriers were not authorized by the Railroad Commission of the State of California to charge less for the transportation of shipments of the character specified for a longer distance than for a shorter distance and submitted the case without argument, filing as an exhibit a copy of the decision of the United States Circuit Court of Appeals in Case No. 2643, Southern Pacific Company (Plaintiff in error) vs. California Adjustment Company (Defendant in error).

Defendants introduced in evidence twelve exhibits, same being certified copies of orders and resolutions adopted by this Commission, and it was also stipulated (Transcript,page 12) that the Minutes of the meetings of the Commission (Transcript,page 15) and such tariffs on file with the Commission relevant to the case would be considered.

The shipments in question moved during two distinct periods of time; those moving prior to October 10, 1911, the date the constitutional amendment became effective, and those moving subsequent thereto.

I do not consider it necessary to pass upon the status of any of the claims covering shipments which moved before October 10,1911, for the reason that all are barred by the Statute of Limitations. As to the other shipments, moving subsequent to October 10, 1911, all are barred by Section 71(b) of the Public Utilities Act, except those moving within two years prior to the filing of these complaints, December 5, 1916, which would keep alive only such claims involving shipments moved on or after December 5, 1914.

Section 71(b) of the Public Utilities Act, effective March 23,1912, reads in part as follows:

> "All complaints concerning excessive or discriminatory charges shall be filed with the Commission within two years from the time the cause of action accrues."

It is, therefore, only necessary to determine whether the complainant is entitled to reparation on any of the shipments which moved on and after December 5, 1914. Both Sections 21 and 22 of Article XII of the Constitution were amended October 10.1911. The long and short haul clause in Section 21 was continued in effect and the express provision made therein for application by the carriers to the Railroad Commission for permission to deviate therefrom whenever the Commission, after investigation, authorized the carriers

> "To charge <u>less</u> for longer than for shorter distances for the transportation of persons or property."

It further provided that:

> "The Railroad Commission may from time to time prescribe the <u>extent</u> to which such company may be relieved from the prohibition to charge less for the longer than for the shorter haul."

By Section 22 of Article XII of the State Constitution the Commission was enlarged and was again vested with power to establish transportation charges and the Legislature was vested with full power to confer

> "upon the Railroad Commission additional powers of the same kind, or different from those conferred herein which are not inconsistent with the powers conferred upon the Railroad Commission in this constitution * * * *."

Section 22.Article XII,further provided:

> "The provisions of this Section shall not be construed to repeal in whole or in part any existing law not inconsistent herewith, and the 'Railroad Commission Act' of this State, approved February 10, 1911, shall be construed with reference to this constitutional provision and any other constitutional provision becoming operative concurrently herewith. And the said act shall have the same force and effect as if the same had been passed after the adoption of this provision of the Constitution and of all other provisions adopted concurrently herewith * * * ."

At the time the constitutional amendment became effective there was under consideration by the Railroad Commission the San Joaquin Valley Rate Case No.116, involving all Class rates between Los Angeles and San Francisco and all intermediate points via San Joaquin Valley routes, both as to their absolute and relative reasonableness, and in determining the questions raised in that proceeding it became necessary for the Commission to make an investigation of the competition of ocean carriers between San Francisco and Los Angeles and the effect of such competition upon the rates involved in the entire territory now under consideration; this investigation necessarily involving the consideration of the provisions of Sections 21 and 22 of Article XII of the state constitution.

The evidence introduced by defendants shows that immediately following the adoption of the constitutional amendment, the traffic officials of the defendants and other carriers, appeared before the Commission and requested a formal order of the Commission relieving the carriers from the violations of the long and short haul clause in cases where actual competition had brought about deviations from the constitutional provisions. These preliminary applications were made between October 15th and 20th, 1911.

The record shows that the Commission made many investigations, the applications being handled principally by Mr. Commissioner Eshleman and myself and that we were in frequent conferences with reference to these matters.

It was as the result of these investigations, made immediately after and prior to the adoption of the constitutional amendment, that the Commission reached the conclusion that there was justification for continued relief from the provisions of the amended constitution and entered its orders, found in the record, granting the carriers relief.

The Commission's interpretation of the amended section is that the carriers are not required to make application for permission to charge higher rates to the intermediate points than to the further distant points, but that they are required to make application for permission to charge a less rate to the further distant point than to the intermediate point , and after the investigations made in October, November and December, 1911, and January and February, 1912, it permitted the carriers to continue such deviations.

In reaching these conclusions full consideration was given not only to the rights of the carriers, but to the interests of the shippers, for it was apparent that to deny the applications would have resulted in carriers attempting to raise rates applying between the competitive points, which would have deprived the shippers of the convenience of shipping by rail and diverted the traffic to the ocean competitors and that this adjustment would not have resulted in any lower rates to the intermediate points.

Carriers were required, by order of October 26, 1911, to present a complete list of the deviations and to justify such deviations in order that the Commission might, in future investigations

> "From time to time prescribe the extent to which such companies might be relieved from the prohibition to charge less for the longer than for the shorter haul."

This was the object sought to be accomplished by the Commission, and that its orders received the interpretation which I have placed upon them is shown by the statements made by Mr. Commissioner Eshleman, who presided at the first formal hearings.

Case 214.

January 2, 1912; Transcript, page 16.

> "Mr. Bradley: Just one more question: Do I understand now that in the meantime, until this investigation proceeds, the present adjustment continues and the Commission grants a temporary order.
>
> Commissioner Eshleman: Necessarily so, Mr. Bradley,- no other possible course open to us.

February 15, 1912; Transcript, page 11.

> Mr. Anewalt: We think we have but still would not like to be caught in the position of having failed to either ask for relief, or to protect ourselves, or to put ourselves in good standing with the Commission.
>
> Commissioner Eshleman: As long as the Commission is assured of the good faith of any carrier, it will not take advantage of its mistakes. That certainly is our attitude.

February 15, 1912, Transcript, page 19.

> Commissioner Eshleman: There can be no question in my mind as to that, as to the justification of those violations during the pendency of this order. I feel that absolutely."

By referring to the order of November 20, 1911, all question as to the intention to grant these defendants the relief for which they had applied, and that investigation justified such action, is set at rest. The title of the order reads:

> "Permission to carriers to continue present rate bases and adjustment of rates pending hearing on applications for relief from provisions of Section 21, Article XII, of the Constitution."

The order expressly recited that:

> "Permission is hereby granted to railroads and other transportation companies until January 4, 1912, to file for establishment with the Commission in the manner prescribed by law and in accordance with the Commission's regulations, such changes in rates and fares as would occur in the ordinary course of their business, continuing under the present rate bases or adjustments, higher rates or fares at intermediate points; Provided, that in so doing the discrimination against intermediate points is not made greater than that in existence October 10, 1911".

This order authorized carriers, until January 4, 1912, to deviate from the provisions of the amended section, provided that they did not increase the discrimination against the intermediate points, principally for the reason that therewas under consideration at the time the establishment of rates as reasonable per se at the intermediate points, and to further investigate the reasonableness of such rates before entering a final order in which the extent of the discrimination should be determined; that is, the Commission wished the carriers to understand that it intended to determine the extent of the discrimination which they recognized as justifiable at the time the order was entered.

The investigations as to the extent the carriers might discriminate against the intermediate points were not concluded until after many formal and informal hearings had been held which resulted in the final orders June 19, 1916, Decision Nos. 3436, 3437, 3440 and 3441. These orders definitely determined the extent to which the carriers might discriminate against the intermediate points, and it was the intention, expressed in the many orders to which I have referred, to permit the carriers to deviate from the provisions of the long and short haul clause to the extent indicated by the Commission in such orders.

The decision of the United States Circuit Court of Appeals in Case No. 2642, Southern Pacific Company vs. California Adjustment Company, supra, which decision, of course, was based upon evidence before that court and upon which counsel for complainant relies, is in conflict with this Commission's decisions and orders. The record is not before me and I am unable to determine just what facts were presented to the court, but it seems apparent that all the pertinent evidence presented in this proceeding was not presented to the Federal Court.

The constitution does not require the Commission to definitely determine the reasonableness per se of the rates to the intermediate points in granting applications for permission to charge a less rate to a further distant point. The Commission merely acted within the power granted by the constitution and permitted the carriers to charge less to the further distant point than they were at the time charging to the intermediate point.

The Supreme Court of the United States, in the case of United States of America et al., vs. Merchants & Manufacturers Traffic Association of Sacramento, No. 452, October term, 1916, decided December 4, 1916, and not yet reported, held, in construing the fourth section of the Interstate Commerce Act:

> "The orders here in controversy were confessedly based upon applications made by the carriers."

The court further held that if the Commission were empowered only to either grant or deny in toto the precise relief applied for it would make the long and short haul clause of the Federal Act unworkable and defeat its purpose and that such a construction

> "Is at variance with the broad discretion vested in the Commission and the prevailing practice of administrative bodies. It fails to give effect to the provision that the Commission may from time to time prescribe the extent to which such designated common carriers may be relieved from the operation of this section."

The court held that in granting such relief the order of the Commission "is permissive merely" that the carrier is the only necessary party to the proceeding; that the Commission represents the public and that if the rates shown in the tariffs filed under the authority granted by the Commission are believed to be unreasonable by shippers, or unjustly discriminatory, the shipper is afforded an ample remedy by a direct appeal to the Commission.

The same rules are applicable to the provisions of our constitution. The constitution and the statute have not undertaken to circumscribe the Commission's power in determining the form in which applications shall be made; have not undertaken to determine whether they shall be formal or informal, written or oral, what investigation shall be had, or whether the order granting an application must be made final, but, on the contrary, have expressly provided that the Commission may "from time to time" prescribe the extent to which carriers may be relieved from the provisions of the long and short haul clause, which is precisely what has been done with respect to these rates.

The decision of the Supreme Court of the United States is in accord with the decision of this Commission rendered in the Scott, Magner & Miller case, Vol. 2 Opinions and Orders of the Railroad Commission of California, P. 636, wherein it was held that:

> "If the shipper were dissatisfied (with the relief granted to a carrier, or if he believed the rates to the intermediate points to be unduly high, or the discrimination caused by our order granting relief to be unjustifiable) he could apply to the Railroad Commission to alter the rate ****".

It is apparent that the constitution does not contemplate that any permanent order shall be entered, but, on the contrary, expressly provides the continuing power to modify orders "from time to time" and "the extent" to which the carriers may be relieved.

The several orders herein referred to were the result of separate investigations and, in the light of these investigations, the Commission undertook to modify previous orders, just as it may now, upon further investigation, modify the latest orders, entered June 19, 1916.

The same principles involved in this case were considered by this Commission in the following cases:

> Case No. 283, Scott, Magner & Miller et al. vs. Western Pacific Railway Company, Vol. 2, Opinions and Orders of the Railroad Commission of California, 626-628.
>
> Case No. 376, W. C. Penoyer, et al, vs. Southern Pacific Company, Vol. 3 Opinions and Orders of the Railroad Commission of California, 576-579.
>
> Case No. 762, Phoenix Milling Company vs. Southern Pacific Company, Vol. 7 Opinions and Orders of the Railroad Commission of California, 677-682.
>
> Case No. 878, Fresno Traffic Association vs. Southern Pacific Company Vol. 8 Opinions and Orders of the Railroad Commission of California, 390.

In the latter case, decided November 8, 1915, it was held:

> "As this Commission has, after investigation, authorized the carriers, pending the further order of the Commission, to continue the deviations from the long and short haul clause herein involved, and as the question of the violations of the long and short haul clause is the sole basis for the claim of reparation herein, the complaint should be dismissed."

I hold that by our constitution this Commission has been vested with power equally as broad and comprehensive as the power vested in the Interstate Commerce Commission by the amended fourth section to prescribe the extent, from time to time, that carriers may be relieved from the long and short haul clause, as was decided by the Supreme Court of the United States in the case of United States vs. Merchants & Manufacturers Traffic Association of Sacramento, supra.

The findings may be summarized as follows:

1. That the Commission, after application by the carriers, and investigation, granted carriers permission October 26, 1911, to continue the lower charges at more distant points, thereby establishing such rates as required by the Stetson-Eshleman Act, and that its orders of November 20, 1911, January 19, 1912 and February 15, 1912 confirmed, among other things, the permission theretofore granted the carriers to charge less for the long than the short haul in all the cases mentioned in the complaint.

2. That subsequent hearings and investigations have been held for the purpose of investigating the intrinsic reasonableness of higher rates at intermediate points, but that these investigations did not affect the right of the carrier to charge less for the long haul under the permissions theretofore granted.

Regardless of what the courts may finally hold as to the sufficiency of the investigations made by the Commission and of the order relieving carriers from the long and short haul prohibitions of the Constitution and the Public Utilities Act, in my judgment there can be no question as to the carriers having been granted such relief by the investigations of the Commission leading up to the hearings in the San Joaquin Valley Rate Case, No. 116, decided March 28, 1912, Vol. 1, Opinions and Orders of the Railroad Commission of California, page 95, wherein the class rates between

San Francisco and Los Angeles were positively and definitely determined.

It follows that the complaint should be dismissed, and I therefore submit the following form of order:

O R D E R

The above entitled case having come on regularly for hearing and the Commission being duly apprised in the premises,

IT IS HEREBY ORDERED that the complaint in the above entitled case be and the same is hereby dismissed.

The forgoing 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 11th day of January 1917.

Max Thelen

H. Rosenand

Alex Gordon

Frank R. Dolan

Commissioners.