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Decision No. _____ ORIGINAL

4123

BEFORE THE RAILROAD COMMISSION OF

THE STATE OF CALIFORNIA.

C. Swanston and Son, Complainant,	)	
v.	)	Case No. 997.
Southern Pacific Company, a corporation, Defendant.	)	

L. A. Bailey for complainant.
C. W. Durbrow and Frank B. Austin for defendant.
Sanborn and Rochl for Western Meat Company, intervener.
John S. Willis for Miller and Lux.

BY THE COMMISSION.

O P I N I O N

This case was brought by George Swanston, an individual conducting a wholesale butcher business under the firm name and style of C. Swanston and Son, who in his amended complaint alleges, among other matters,

that complainant has for some time past been shipping, over defendant's lines, fresh meat in carload lots in refrigerator cars under ice from Sacramento and Swanston, Sacramento County, to San Francisco, Oakland and Stockton; that such refrigerator cars have been initially iced by complainant at Swanston with sufficient ice to enable safe transportation under reasonable dispatch to the respective destinations without re-icing en route or receiving any other service in transit aside from the hauling of the car; that the lawful rate of transportation upon complainant's carload shipments of fresh meats from Swanston to Oakland or San Francisco is $3.60 per ton, and to Stockton $1.80 per ton; and that complainant's shipments have since March 15, 1915, been subjected to an additional charge by defendant for refrigeration services of $5.00 per carload, although no re-icing or inspection in transit has been requested by complainant.

The amended complaint proceeds to state that complainant has the right to ice refrigerator cars at point of shipment, delivering the cars so prepared to defendant with instructions to transport the same to destination without opening the bunkers or breaking the car seals, and that defendant has not the right to disregard such instructions when given; that complainant has protested against any additional charge in excess of said respective rates of $3.60 and $1.80 per ton, but without avail.

Complainant concludes by praying that this Commission find that the prevailing rates of $3.60 and $1.80 per ton, respectively, on minimum carload weights of 20,000 pounds cover the full transportation service rendered by defendant on shipments of fresh meat from Swanston and Sacramento to San Francisco and Oakland and to Stockton, or that the Commission fix and determine a reasonable and non-discriminatory charge for defendant's full service on such shipments; and furthermore, that defendant be required to pay complainant by way of reparation, for the alleged unlawful and discriminatory charges collected, the difference between the amounts collected and those which would have been collected under the charge or rate found reasonable and non-discriminatory on all shipments that have moved from and to the points complained of since March 15, 1915.

The answer in effect denies that defendant has made or collected any improper charges from the complainant upon the movements of fresh meat referred to in the amended complaint, and while stating that defendant has, when necessary, re-iced such shipments in transit and has assessed an additional charge for so doing, denies that said service has been or was unnecessary or that the charge therefor was or is excessive or unreasonable, and takes issue with most of the allegations of the amended complaint above set forth.

A public hearing was held in San Francisco

on November 13, 1916, before Examiner Bancroft.

At the close of the hearing the case was submitted upon briefs to be filed by the parties to the action and by the intervener. These briefs having been filed the case is ready for decision.

From the evidence it appears that for a number of years complainant has been making carload shipments of fresh meat to San Francisco, Oakland and Stockton from its place of business, which was first located in Sacramento and later at Swanston (about 4-1/2 miles east of Sacramento), all of which shipments were made in refrigerator cars, pre-iced by complainant. The shipments thus prepared have been moving under instructions from complainant on the bill of lading, reading "Car fully iced, refrigeration attention of any kind unnecessary", and have been, so far as the evidence shows, practically always carried to their respective destinations without being re-iced. These shipments moved under the rates above referred to, of $3.60 and $1.80 per ton, respectively, as set forth in the amended complaint, until March 15th, 1915, when defendant began to assess an additional charge of $5.00 per car for refrigeration services over and above the then existing rates.

Even when complainant's plant was located at Sacramento, where defendant had icing facilities, complainant had always done its own icing. Defendant has no icing facilities at Swanston and if it were to

perform the initial icing it would be necessary for this to be done either at Sacramento or at Roseville (some 13 miles east of Swanston), and it would probably be necessary for defendant, in addition, to have an emergency icing plant at Swanston. It further appears that complainant has installed facilities for icing cars at Swanston at an expense of about $10,000.

There was a slight conflict in the evidence as to whether the icing was performed by complainant in such a manner as to cause unnecessary damage to the cars, but in our opinion defendant entirely failed to prove its contention in this respect. It appears that the ice is broken on the upper floor of complainant's plant into pieces averaging about six inches in diameter and from there is conveyed by means of a chute into a bin or hopper-car, located slightly above and at the side of the refrigerator car bunker, where the fall of the ice is broken. The ice is then fed through a door in this hopper car by means of another chute into the adjacent refrigerator car bunkers. The car bunkers are thus loaded with broken ice to their capacity of about 4,000 pounds each, or 8,000 pounds in all, no ice being placed in the body of the car. The ice is never claimed by complainant at the end of the haul.

The longest shipment under consideration in this case is from Swanston to San Francisco, the cars moving via Benicia, leaving Swanston about 7:30 P.M. and consuming approximately 12 hours in transit.

It further appears that in spite of complainant's request, the cars are inspected by defendant at Sacramento, defendant claiming that this is done in order to prevent damage resulting from stoppage of the drains by impurities or improper icing, while complainant claims that the inspection is made for the purpose of ascertaining if defendant's equipment is in order. In any event the cars are transferred to defendant's icing platform for inspection and are then switched back to the main track.

The evidence further shows that throughout the entire course of complainant's shipping of fresh meat under ice, no claim has ever been made by it against defendant for damage to its meat in transportation, by reason of faulty or defective refrigeration.

Defendant introduced considerable evidence as to the deleterious effect upon all parts of its refrigerator cars caused by the salt which is mixed with the ice, but the evidence showed that salt is mixed with ice in the bunkers in practically all shipments of fresh meat in this state; and that this has been the practice in the past.

The evidence further shows that from 1905, when complainant first began car load shipping, to March 15, 1915, defendant charged complainant only the prevailing third class rate, Western Classification, but that since the last mentioned date defendant has been charging, in addition to the third class rate, $5.00 per car for refrigeration services, for which

no service is rendered by defendant which was not rendered prior to March 15th, 1915. No authority was obtained from this Commission for increasing the rates applicable to complainant's shipments.

The case at bar presents the following salient features for consideration:

1. Discrimination as between localities.
2. Lawfulness of refrigeration charge assessed by carrier in addition to freight rate.

which will be dealt with in regular sequence.

DISCRIMINATION

Plaintiff's shipments are chiefly to San Francisco and Oakland which, owing to a greater demand, afford a much better market than Stockton; San Francisco may therefore be taken as typical of the situation.

Shipments from South San Francisco to San

Francisco, pre-iced by shippers, are not subjected to refrigeration charge while on similar traffic from Sacramento a charge of this kind is made in addition to freight rate.

Viewed in another light, the freight rates from Swanston to San Francisco and from South San Francisco to Sacramento are equal, but a refrigeration charge is collected from the Swanston shippers while in the opposite direction this charge is not assessed, all of which is acknowledged by defendant to be discrimination.

Assuming the freight rates to be equitably adjusted a situation of this kind is apparently discriminatory and in violation of Section 17 of the Public Utilities Act. If the rate adjustment is not proper it should be corrected by a change in the freight rates and not by imposition of a refrigeration charge.

Lawfulness of Refrigeration Charge.

Before proceeding to discuss this point some enlightenment will be gained by review of the various tariffs appertaining thereto:

The first refrigeration tariff filed with this Commission was defendant's Local Refrigeration Tariff No. 79-B (C.R.C. No. 17) effective September

15, 1908, naming charges for refrigeration of perishable freight between points shown therein and carrying note on title page, "Refrigeration charges and charges for ice named in this tariff are in addition to the regular rates of transportation charged by carriers".

Local Tariff 79-B was superseded by Local and Joint Refrigeration Tariff 359-D (C.R.C. No. 1601) effective July 27, 1912. This tariff formerly applied to interstate traffic only and when Local Tariff 79-B was incorporated therein the local rates within California became subject to the general rules carried in the interstate tariff.

Tariff 359-D was canceled effective March 15, 1915, in so far as its application to intrastate traffic was concerned, such rates and regulations being concurrently published in defendant's Local and Joint Refrigeration Tariff No. 810 (C.R.C. No. 1874) which substantially continues in effect the items in Tariff 359-D, quoted above, and also contains Section No. 2, reading:

Section 2.

"CHARGES FOR REFRIGERATION SERVICE ON ALL CARLOAD SHIPMENTS OF

> Fresh Meat, Packing House Products, dressed Poultry, Butter, Butterine, Oleomargarine, Cheese, Eggs, Milk and Cream, in straight or mixed carloads, when cars are initially iced by shipper (see Note 1), between points in California, as described below:"

Then follows table of rates between the different group points in which appears the $5.00 refrigeration charge

subject of complaint:

Note 1.- alluded to above reads:

"NOTE 1.- Any car requiring reicing in transit will be accepted under above rates, only when shipper ices car to full capacity at point of origin. Any car requiring reicing in transit, NOT iced to capacity by shipper at point of origin will be subject to charges shown under Section 1 of this Tariff."

Directing our attention to the classification it is found that Western Classification No. 51, (C.R.C. No. 75) effective February 14, 1913, contained Rule No. 29 which was republished under same number in succeeding issues and now appears as Rule 29 of Western Classification No. 54 (C.R.C. No.143) following:

Rule 29- "Refrigeration of freight in carloads.

Section 1- Unless otherwise provided, carload ratings do not include the expense of refrigeration. Charges for refrigeration, when furnished by the carrier, will be found in the carrier's tariffs.

Section 2- No allowance in weight will be made for ice or other preservative placed in the same package with the freight.

Section 3- When ice or other preservative is in bunkers of the car no charge will be made for its transportation; but if the ice is taken by consignee, charges shall be made on actual weight of the ice in bunkers at destination and at carload rate applicable on the freight which it accompanies; if not taken by consignee it becomes the property of the carrier.

Section 4- When ice or other preservative is loaded in body of car with freight, provided the rules of the carriers do not prohibit such loading, no charge will be made for its transportation; but if taken by consignee, charges shall be made on actual weight of the ice or other preservative in car at destination and

at carload rate applicable upon the freight which it accompanies; if not taken by consignee it becomes the property of the carrier".

Defendant relies upon Section 2 of its Refrigeration Tariff No. 810 for collection of refrigeration charge of $5.00 in addition to freight rate while complainant, placing its dependence upon Section 3, Rule 29, of Western Classification, contends that collection of refrigeration charge is unjustified where refrigeration is performed by shipper.

Section No. 2 of Refrigeration Tariff No. 810, above quoted, imposes a charge for refrigeration when cars are initially iced by shipper and, in determining whether carrier is justified in collecting refrigeration charge, we must first ascertain if it renders a refrigeration service for which it is entitled to make an additional charge.

It is shown that cars are pre-iced by shippers and transported to destination by carrier without re-icing. What service then is performed in the way of refrigeration ?

The Interstate Commerce Commission, in the matter of pre-cooled shipments, Arlington Heights Fruit Exchange v. Southern Pacific Company (20 I.C.C. 106), comments on what constitutes refrigeration service in the following manner:

"The question therefore is, Does the shipper in case of these precooled shipments demand of the carrier any refrigeration ser-

vice? Does the carrier in the case of such shipments render any service in addition to the naked transportation?

"Those cars are prepared by the shipper and are delivered to the carrier with instructions to transport to destination without opening the bunkers or breaking the seals. The entire duty of the carrier is discharged when it places that car in its train and hauls it to its destination.

"It is urged that the defendants can not stipulate against the consequences of their own negligence and that they ought not to be required to assume the responsibility unless they are allowed to discharge the service. But what responsibility is it that the carriers assumed in connection with the transportation of one of these precooled cars? Clearly there is no responsibility in the matter of refrigeration. The carrier is simply required to haul that car to its destination. That duty it must perform and it must perform it within a reasonable time and in a reasonable manner." (p.116).

and again in the same Case,

"The fact that refrigeration is required and the circumstances under which it is called for and furnished render it necessary to use a refrigerator car as a practical matter for the transportation of these citrus fruits at all periods of the year. In determining the freight rate this fact has been taken into account; that is, the rate applied on shipments under ventilation has been adjusted in view of the fact that a refrigerator car, more expensive than the ordinary box car, must, as a practical matter, be employed. Hence, in determining the additional sum which the shipper who has the benefit of refrigeration shall pay, nothing should be added by reason of the fact that a car of this type is used." (P. 108).

In I and S Docket No. 514, West Bound Trans-Continental Refrigeration Charges (34 I.C.C. 140), carriers proposed to establish charges for refrigeration on perishable commodites iced by shippers and delivered to the transportation companies with instruc-

tions not to re-ice in transit, this movement having previously taken place under the freight rates only without collection of refrigeration charge.

The situation there presented is directly in point, as the following excerpt illustrates:

> "The charges proposed here are not for a new service in transportation, but for an established service. Practically all of the perishable commodities shipped west from Missouri River territory always have been precooled, as they all require refrigeration as soon as possible in the course of their production, and detention in cold storage until transported. Many of the commodities are so cold when loaded into cars that but for the insufficient insulation of the cars no ice would be necessary. Their shipment under refrigeration with notice to the carriers not to reice them in transit is as old as their transportation. It can not be said, therefore, that respondents are entitled to furnish refrigeration in transit or that a new kind of transportation service is required.
>
> "*****the schedules involved provide that when ice or other preservative is in the bunkers of the cars, or is loaded in the body of the car with the freight shipped, no charge will be made for its transportation. These rules have been in effect for a long time and indicate plainly that the related freight rates always have included refrigeration charges, including compensation for hauling the ice used for refrigeration, damage to ice bunkers, and for supervision." (P. 142)

In view of the fact that these shipments had universally been moving under ice, mixed with salt, for a number of years prior to the establishment of the third class rate now under consideration, and giving due consideration to all the other

circumstances of this case, we find that any charges which defendant was entitled to make either for damage to its cars from ice or salt or for cost of hauling the ice or extra switching and inspection should have been, and presumably were, taken into consideration when the $3.60 and $1.80 rates were established by defendant.

It is our opinion that defendant has failed to establish the fact that it has rendered a refrigeration service on these shipments for which it is entitled to additional compensation.

Treating the question from a purely tariff standpoint, Section 3, Rule 29, of Western Classification authorizes free transportation of ice in bunkers of car. Defendant contends this rule should be read in its entirety and that Section 1 permits modification of the item by provisions of Refrigeration Tariff 810. The Western Classification is filed with this Commission for defendant by F. W. Gompf, acting as Agent under power of attorney.

Rule 9-B of the Commission's Tariff Circular No. 2 specifies that "A carrier may not by its individual tariff cancel, amend or modify a tariff filed by a duly authorized agent, except when corresponding amendment to such agent's tariff is filed at the same time and as per paragraph (a) of this rule." Therefore, the rule in Western Classification cannot be lawfully amended except by supplement to the Classification itself.

Furthermore, Section 63(a) of the Public Utilities Act provides that

> "No public utility shall raise any rate, fare, toll, rental or charge or so alter any classification, contract practice, rule or regulation as to result in an increase in any rate, fare, toll, rental or charge, under any circumstances whatever, except upon a showing before the Commission and a finding by the Commission that such increase is justified."

Evidence discloses that no charge for refrigeration had ever been made on complainant's shipments prior to March 15, 1915, but on that date defendant, by application of Section 2 of its Refrigeration Tariff 810, commenced to assess such charge. This section is symbolized as a reduction but in reality it is an increase and was not supported by application required under Section 63(a) of the Act; nor were Rules 1 and 6 of the preceding Tariff, No. 359-D, authorized under 63 application.

Defendant should so amend its Refrigeration Tariff 810 as to make it perfectly clear that the refrigeration rates named therein are not applicable to shipments pre-iced by shippers and not re-iced in transit, moving under Rule 29 of the Western Classification.

It is our opinion, after reviewing the evidence in this case, that charges assessed by defendant for refrigeration service on carload shipments of fresh meat from Swanston and Sacramento to Stockton, Oakland and San Francisco are discriminatory as between localities.

In view of the fact that carrier is not according a refrigeration service to these shipments for which it is entitled to make an additional charge, and has failed lawfully to set aside the provisions of Section 3, Rule 29 of Western Classification, we are of the opinion the refrigerator charge of $5.00 per car is unsupported by tariff publication and therefore in violation of Section 17 of the Public Utilities Act. Furthermore, that the lawful rates on fresh meats, carloads, pre-iced by shipper and not re-iced en route, are from Swanston and Sacramento to Stockton $1.80 per ton and to San Francisco and Oakland $3.60 per ton, subject to Rule 29 of Western Classification No. 54 (C.R.C. No. 143).

We find that complainant was overcharged on its pre-iced shipments of fresh meat forwarded from Swanston and Sacramento to Stockton, Oakland, and San Francisco, beginning March 15, 1915; that it paid and bore the charges thereon and that it is entitled to reparation with interest.

O R D E R

C. SWANSTON AND SON having complained to the Commission that charge of Five Dollars ($5.00) per car assessed by the Southern Pacific Company for refrigeration service on carload shipments of fresh meats, pre-

iced by shipper, from Swanston and Sacramento to Stockton, Oakland and San Francisco, is unreasonable, excessive, unjust and discriminatory,

And a public hearing having been held and the Commission being fully apprised in the premises and basing its order upon the findings of fact which appear in the opinion preceding this order,

IT IS HEREBY ORDERED that the Southern Pacific Company cease from the collection of charges under Section 2 of its Refrigeration Tariff No. 810 (C.R.C. No. 1874) where cars are initially iced by shipper and tendered to carrier with instructions not to re-ice en route and no re-icing is performed.

IT IS FURTHER ORDERED that the Southern Pacific Company refund to C. Swanston and Son within sixty (60) days from date of this order a sum equal in amount to the charges unlawfully collected, with interest at rate of seven per cent. per annum from date of collection.

IT IS ALSO FURTHER ORDERED that if C. Swanston and Son and Southern Pacific Company cannot agree upon amount of refund due under this order, said parties, or either of them, may appear before this Commission and submit proof, whereupon the Commission will determine amount to be paid.

Dated at San Francisco, California, this 21st day of February, 1917.

Max Thelen

H. D. Loveland

Frank R. Gerdon

Commissioners