

Decision No. 41

Before the Railroad Commission
of the
State of California.

F. Comes Co., et al,
Complainants,

vs.

Southern Pacific Company,
Defendant.

No. 226.

Decision No. 41

J. O. Bracken and L. G. Burnett for Complainants,
George D. Squires for defendant.

DECISION.

Gordon, Commissioner.

This is a complaint to recover alleged overcharges on carload shipments of horses, cattle, sheep and hogs between points within the State of California over the lines of defendant Southern Pacific Company, moving between May 1, 1906, and September 10, 1911. The complaint alleges that the defendant applied through commodity rates on these shipments instead of class B on horses and cattle and 80% of class B on sheep and hogs, or a combination of class and commodity rates, the shipper having suffered thereby to the extent of the difference between the rates charged and those which ought to have been charged as so alleged: also that discrimination will result unless this Commission directs the payment of reparation as claimed, for the reason that defendant has paid to certain other shippers claims for reparation on the basis of the lower class rate, which rate defendant has refused to apply for the benefit of complainants. The complaint does not raise any question as to the justice or reasonableness of the rates complained of, other than that they were in excess of what were at the time the established rates. The questions

presented by the pleadings go simply to the rate actually in effect when the shipments moved.

Defendant's answer alleges that it has collected the lawful rates on all shipments affected and also sets up that the statute of limitations has run on the claims in question and also that the Commission has no jurisdiction to award reparation on any cause of action accruing prior to October 10, 1911.

This Commission has already decided in the case of Scott, Wagner and Miller vs. Southern Pacific Company, No. 222, that the provisions concerning the power of the Commission to award reparation, found in Section 21 of Article XII of the Constitution of this state, do apply to claims which were still alive on October 10, 1911. The Constitution simply provided the new remedy of proceedings before the Commission for the enforcement of an existing right.

Certain of the shipments in question, however, have been barred by the Statute of Limitations. As we decided in the case of Scott, Wagner and Miller vs. Southern Pacific Company, supra, the effect of the so-called Wright Railroad Commission Act, approved March 19, 1909, was to bar all claims for reparation accruing prior to February 10, 1910. All claims in this action accruing before that date are accordingly barred.

The principal point at issue with reference to those claims which were not barred, namely, those accruing after February 10, 1910, is as to whether or not the rate to be applied is, on the one hand, a commodity rate, as contended for by defendant, or, on the other, a class rate, or a combination of class and commodity rates, as contended for by complainants. U.R.C. 134, effective January 1, 1894, and governed by exceptions to the Western

Classification, carried a provision calling for the application of class B rate to horses and cattle and of 80% of class B rate to sheep and hogs when "not otherwise provided for." Complainants contend that the phrase "not otherwise provided for" means "not otherwise provided for in this tariff," and that, as no other rate was provided in these tariffs, the class rate must govern. This contention has been decided by this Commission adversely to complainant in the case of B. J. McCullough v Southern Pacific Company, Case 225, which decision is a determination of the same points in so far as raised in this case. We pointed out in that case ^{that} live stock was as to most movements "otherwise provided for," namely, in defendant's live stock tariffs, where specific commodity rates were made applicable. In all such cases, the commodity rate was applicable and must govern.

Complainant, however, contend further that even if a commodity rate be thus in effect between two given points, they are nevertheless entitled to a combination of class and commodity rates if they can find such combination between the termini of the movements and such combination makes lower than the through commodity rate. For the purpose of considering this contention, we shall have to consider first the period prior to November 21, 1910, and then the period subsequent to said date.

Rule 7 (a) of C.R.C. Tariff Circular No. 1 became effective on May 15, 1909, and continued in effect until November 21, 1910, in the following language:

"7 (a) In every instance where a commodity rate is named in a tariff upon a commodity, and between specified points, such commodity rate is the lawful rate and the only rate that can be used with relation to that traffic between those points, even though a class rate or some combination may make lower. The naming of a commodity rate on any article or character of traffic takes such article or traffic out of the classification and out of the class rates between the points to which such commodity rate applies."

On November 21, 1910, Rule 7a was changed so as to read as follows:-

"7a In every instance where a class or commodity rate is named in a tariff between specified points, the lowest of such rates is the lawful rate; provided, that if some combination of class or commodity rates or class and commodity rates is found to be lower than the through rate, the lower combination of rates shall apply and the carrier shall immediately make its through rate correspond to the lower combination of rates. It being the intention to give the shipper the advantage of the lowest possible rate."

It follows that between May 15, 1909, and November 21, 1910, wherever defendant had established a commodity rate on live stock between two given points that rate must govern, even though some class rate or some combination of rates might make lower. As to all shipments, however, moving subsequent to November 21, 1910, Rule 7a in its amended form will govern, and the shipper will be entitled to the lowest possible rate applicable to the movement, whether class or commodity or some combination. It must be borne in mind, however, in this connection that even after November 21, 1910, a class rate on live stock does not exist, under the language of defendant's exceptions to Western Classification, in case defendant has in its live stock tariffs "otherwise provided" a commodity rate.

The complaint further alleges in effect that the Southern Pacific Company has paid certain claims to other shippers by applying a class rate, while it now insists on applying a higher commodity rate as against the complainant in this case and reaches therefrom the conclusion that a discrimination will result in case the commodity rate is now ordered applied as against these complainants. If the defendant, by applying the wrong rate, has paid claims which it should not have paid, it becomes the duty of the defendant to take steps at once to recover the moneys which have been so paid: otherwise,

the defendant will be liable to prosecution for rebating. The fact that the defendant may have violated the law in one case certainly cannot be held to justify the commission in directing the violation of the law in other cases. We find no merit in the claim that the doctrine of discrimination will prevent this Commission from ordering a compliance with the law either as to claims for overcharges which have been wrongfully paid or as to other claims for overcharges which may wrongfully have been rejected by the defendant. That doctrine can not be used to prevent the Commission from compelling obedience to the lawful rate.

The complaint further contains certain allegations concerning violations of the long and short haul clause of Section 21 of Article XII of the Constitution, but there is no allegation and no proof that any shipments moved over the longer distance under the alleged lower rate. Neither the allegations of the complaint nor the evidence in the case justify any finding by the Commission with reference to this point. When a proper case is presented, the Commission will decide the question of reparation growing out of alleged violations of the long and short haul clause.

The Commission finds on the facts presented in this case that claims accruing before February 10, 1910, have become barred by the statute of limitations: that between February 10, 1910 and November 21, 1910, wherever a commodity rate was published between specified points, that rate was the lawful rate: and that after November 21, 1910, the shipper is entitled to the advantage of the lowest possible rate, whether class or commodity or

a combination: but, as before stated, it must be remembered in this connection that there are no class rates in existence on live stock on the defendant's lines in California when a commodity rate is published between any two points affected.

It was agreed between the parties at the hearing that they would get together upon the rendition of the decision and would agree upon the claims as to which reparation might be due under the terms of this decision. The parties will be expected to follow this procedure. In case they can not agree, it is directed that they come before the Commission again, whereupon the Commission will make a supplemental order specifically designating the claims on which reparation is to be awarded under this decision.

The above decision is hereby approved and ordered filed as the decision of this Commission.

John M. Eshleman
H. D. Loveland
W. J. Gordon
Commissioners.

San Francisco, California.
January 29th 1912.