

ORIGINAL

Decision No. 11223

BEFORE THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA.

JOHN E. TSARNAS,
Complainant.

vs.

NORTHWESTERN PACIFIC RAILROAD
COMPANY, a corporation,
Defendant.

CASE NO. 1033.

Charles Kasch, for Complainant.

Stanley Moore, for Defendant.

LOVELAND and DEVLIN - Commissioners.

O P I N I O N

Complainant is in the fuel wood business at Willite, California. By complaint filed January 5, 1917, he alleges that in conformity with Section C of Rule 13 of Pacific Car Demurrage Tariff No. 2-E, C.R.C.No.7, a reciprocal demurrage bond was executed and filed with defendant and that during the months of September, October and November, 1916, defendant failed to furnish cars for consignments of wood at various points on its line. We are asked to award reciprocal demurrage in the sum of \$1552.00 as reparation.

Statement attached to and made part of the complaint shows that, due to the car shortage, consignments of wood were delayed, as follows:

<u>Destination</u>	<u>Cars</u>
Vallejo	1
Tiburon	6
Oakland	38
San Francisco	20
Berkeley	2
Petaluma	3
	<u>70</u>

The statement also indicates the number of days cars were overdue and the amount of reciprocal demurrage claimed in connection with each separate order, but it is unnecessary to here set forth details of the different transactions.

Section C of Rule 13, Car Demurrage Tariff No.2-3, upon which complainant relies for an award of reparation, reads:

"Any carrier that fails to place cars under the provisions of this rule, shall pay to the shipper \$3.00 per day for the number of cars in the shipper's order not so placed, until such time as such shipper's order shall be filled, unless released at the shipper's request; provided, however, that any shipper who desires to take advantage of this rule must file with the carrier from whom he desires to order cars a good and sufficient bond in the sum of twenty (20) dollars, if he desires to order but one car, and fifteen (15) dollars for each additional car. This bond shall be security for the payment on behalf of the shipper to the carrier for the use of any car or cars ordered by such shipper which shall be set out by the carrier and not used by the shipper, at the rate of \$3.00 per day, computed from the time the car is set out. Each carrier shall furnish, on request of any shipper, and shall keep at all of its agency stations, blank forms of bonds, as prescribed in the appendix to this order, for the purposes herein set out."

The testimony submitted by complainant is devoted principally to explaining the filing of bonds and car orders, the location of the wood, method of loading and unloading onto cars and the objections of certain consignees and also of complainant to the use of the gondola cars offered by the defendant.

Complainant submitted as exhibits three indemnity bonds, the first executed under date of September 20, 1916 for a period of thirty days, the second on October 19, 1916, for thirty days and the third on December 5, 1916, for a term of six months.

Cars were principally loaded at nonagency stations and

were ordered through the agent at Willits, many of the requisitions being first telephoned and afterwards confirmed in writing by complainant. but upon this point there is no controversy, defendant admitting that proper orders had been received. About forty percent of the consignments were destined to local stations on defendant's rails, the balance going to off line points.

Complainant urges that he could not use gondola cars to advantage because of the difficulty and expense incurred in loading the cars and, for the further reason, that some customers found it inconvenient to unload gondolas, therefore objected to their use.

A representative of a San Francisco wood firm testified on behalf of complainant and submitted as evidence copy of a letter written to complainant dated December 1, 1916, wherein the following language is used:

" * * * as we have quite a lot on hand for the present, and as said before, ship us only 2 cars per week, have them a day or so apart, when they all come together we generally have to pay demurrage on one or so cars. * * * Also we would request you to ship us wood only in Box, Flat or Stock Cars, because it takes 2 men to unload those gondolas. * * * "

The communication would indicate that this particular firm did not suffer because of the car shortage.

A statement rendered by the Car Demurrage Bureau, shows that this firm during the months of September, October and November, 1916, received from complainant thirty-one carloads of wood, including five gondolas. During the same period of time it received from two other shippers located on defendant's rails fifteen cars of wood, from six different stations, seven of which were gondola cars., thus indicating that gondolas were freely used for wood shipments to San Francisco.

Defendant, in its answer, denies that bonds were filed to cover all cars ordered and avers complainant refused to accept suitable and proper equipment tendered, also that the delays in furnishing the cars were due to causes entirely beyond its control.

The bonds heretofore referred to, filed September 20th and October 19th, 1916, each for thirty days, covered the period of time involved in these proceedings, with the exception of cars ordered and not furnished subsequent to November 19, 1916. Therefore only eleven days of the time involved are not covered by a reciprocal demurrage bond.

Much of defendant's testimony was in substantiation of the claim that gondola cars were tendered for the consignments and that such cars were adequate for the transportation of cord wood.

The Chief Train Dispatcher of the Northwestern testified as follows:

Q Now then, you distributed, did you not, the cars in question here and for this territory on the southern division?

A Yes sir.

Q And I will ask you ^{to} state whether or not you repeatedly communicated with Mr. Nelson upon the proposition of Mr. Tsarnas accepting gondola cars?

A I did.

Q If there is no objection, I would just like to read into the record these different messages. I think I can save time by asking him the blanket question, or perhaps you can read the writing better than I can, Mr. McMullan.

A Here is a wire on the 7th of October, 'Received 26 empty gondolas from S.P. today. Do you want that many a day. S.P. will keep sending them until advised to stop.' That is addressed jointly to Mr. Nelson and Mr. Hunter of the Northern division.

Q By whom was that wire sent?

A By Mr. Neff the superintendent.

- Q That is October 7th; isn't there a wire there of September 20th -- well that has already been read?
- A Yes sir.
- Q That is in evidence, the one about 25 gons going up there, that has already been in evidence, so you can go ahead and read any others there are there.
- A Here is one on October 2nd, 'Did you place cars on order 723. How about gons for Tsarnas, can you fill some of your orders for lumber, bark and wood with the gons, take a few each day from those that are billed to northern division.'
- Q Now did you receive any wire back from Mr. Nelson with respect to that matter of Tsarnas taking gons?
- A Here is the answer to it, 'Order 723 filled with A.T. 56,591 this A.M. Tsarnas advised several days ago couldn't use gons, will try him again as soon as possible and see if can get him to use gons. Will also see other wood shippers and advise.'
- Q Yes sir, did you receive any further --
- A On the 9th, a message to Mr. Hunter, copy to Nelson, 'S.P. delivered us 35 gons and 8 flats at Shellville, Sunday, extra will leave Tiburon at one P.M. today and pick up these empties for Willits.'
- Q Any others?
- A One to Williams the superintendent Oakland Pier, 'Received 35 gons at Shellville Sunday. Please do not deliver more than 15 gons any day. Would like to get some empty boxes.'
- Mr. Geary: What is the date of that?
- A That is on the 9th of October. He was giving us too many at a time, we couldn't use them, that is, we couldn't use so many per day. We were running about 15 a day and we wanted an average of 15 instead of sending us an extra supply at any one day.
- Mr. Moore: Who is Mr. Williams as referred to in that message that is sent to him at the Oakland Pier?
- A He is the superintendent of the S.P. We order the cars thru him.
- Q As a matter of fact if Mr. Tsarnas had been willing to have accepted gons, could you have supplied him with gons without running into this demurrage period?
- A Yes sir, I could.

The testimony of other witnesses for defendant on this

phase of the case was to the effect that gondola cars were freely used for cord wood and, in some cases, demanded by the shipper.

The Commission February 28, 1916, and again November 6, 1916, issued circular letters addressed to all shippers and receivers of freight, calling attention to the then existing car shortage and appealing to all concerns to cooperate in an effort to minimize the difficulty. In those circulars we referred to paragraph (b) of Rule No. 3, General Order No. 41, effective January 1, 1915:

"Whenever it shall appear to the satisfaction of the Commission that the failure of a railroad to furnish a car or cars for loading within the time fixed by these rules, or the failure of the shipper or consignee to load or unload the same was due to causes beyond the control of such carrier, shipper or consignee, no payment shall be required to be made on account of such delay."

The testimony indicates that defendant, in good faith, distributed whatever cars it could secure without discrimination and that it tendered to complainant gondolas, which class of cars was used by other shippers, not only for the transportation of cord wood, but also for other forest products, such as ties, split stuff, grape stakes and shingles. While complainant no doubt may have experienced some difficulty in using gondola cars it does not appear, under the circumstances, that he was justified in refusing to accept the only cars available.

While carriers can reasonably be expected to provide and maintain equipment sufficient to supply maximum demand under ordinary conditions even of heavy movement such as may be expected to and does usually occur annually at the time crops are being moved, during periods of unprecedented car shortage, especially where such shortage is due to causes beyond the control of the carriers, as at

the present time, shippers should be willing to contribute to the relief of the situation by recognizing the efforts of carriers to provide the best equipment available even though the use of such equipment entails some inconvenience.

In view of all the facts appearing in this case it is our opinion that the failure of defendant to furnish the particular kind of equipment preferred by complainant was due to causes beyond the control of defendant, and that under the circumstances complainant should have accepted gondola cars as other shippers did.

We 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 advised in the premises,

IT IS HEREBY ORDERED that said complaint 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 3d day of ~~March~~ ^{April} 1917.

May Thelen
at Los Angeles
Al. S. Gordon

Francis R. Parker

Commissioners.