

BEFORE THE RAILROAD COMMISSION  
OF THE STATE OF CALIFORNIA.

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In the Matter of the Application of :  
CALIFORNIA WESTERN RAILROAD & NAVIGA- :  
TION COMPANY to refund to the Union :  
Lumber Company and the Irvine & Muir :  
Lumber Company charges collected in :  
excess of those agreed to by contract. :  
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Application No. 373.

C. W. Durbrow for Applicant.

ESHELMAN, Commissioner.

O P I N I O N .

The applicant herein is a common carrier and its stock is owned by the Union Lumber Company. A portion of the road of applicant was constructed by the Union Lumber Company as a logging road to be used in conjunction with its lumber business. Thereafter the applicant was incorporated as a common carrier and the stock reserved by the Union Lumber Company. Prior to such incorporation, of the applicant, on the 17th day of March, 1903, the Union Lumber Company entered into an agreement with Irvine & Muir Lumber Company, by the terms of which agreement it was provided that said Irvine & Muir Lumber Company should grant to said Union Lumber Company rights of way over its land, and in consideration for said grant of rights of way the Union Lumber Company agreed to transport 37,500,000 feet of lumber from Irmulco to Fort Bragg at a rate of \$1.75 per thousand feet B.M. In addition thereto the Union Lumber Company was to transport 1000 cords of tan bark at the same rate, to be estimated in thousand feet, and was to furnish wharfage and vessels at Fort Bragg for transportation of said forest products. The Irvine & Muir Lumber Company was to load all cars furnished it at its mills.

Should the Union Lumber Company subsequent to said agreement extend its railroad to the Town of Willitts, or any point easterly of the lands of Irvine & Muir Lumber Company, it was agreed that it would transport forest products for said Irvine & Muir Lumber Company from its mills to the Town of Willitts and intermediate points at rates not exceeding the most favorable rates granted to any other shipper or shippers over any part of said railroad.

Thereafter on the 30th day of March, 1907, after the incorporation of the applicant, a tri-partite agreement was entered into between the applicant and Union Lumber Company and Irvine & Muir Lumber Company, which as far as the matter before this Commission is concerned is merely a ratification of the former agreement between the Union Lumber Company and Irvine & Muir Lumber Company.

On the 18th day of June, 1912, applicant filed with this Commission its Local Freight Tariff No. 2-A, C.R.C. No. 3, effective June 20, 1912, which tariff provides for rates on forest products and lumber, between the points involved in the contracts heretofore referred to, higher than the contract rates of \$1.75 per thousand feet. A considerable portion of the specified amount of forest products ~~covered~~ covered by the contract has been moved before the applicant became a common carrier, but on all such commodities transported subsequent to the effective date of the tariff mentioned applicant has collected the regular tariff rate of \$2.50 per thousand feet, and now seeks authority to refund the difference to the Irvine & Muir Lumber Company, and likewise to be permitted to transport the remainder of the amount covered by the contract at the lower rate. Applicant likewise asks to make certain refunds, without specifying the amount thereof, to the Union Lumber Company, but I find nothing in the evidence or the contracts which at all warrants such application. The entire amount of forest products involved are the property of Irvine & Muir Lumber Company, but even were this not so it could not be urged

that there was any equity in a request of the Union Lumber Company to be given the advantage of a rate fixed by contract when the contract was with a common carrier entirely owned by said company.

Applicant bases its request on the provision of Section 17-4(b) of the Public Utilities Act, and particularly the proviso therein. Said subsection reads as follows:

"Except as in this section otherwise provided, no public utility, shall charge, demand, collect or receive a greater or less or different compensation for any product or commodity furnished or to be furnished, or for any service rendered or to be rendered, than the rates, tolls, rentals and charges applicable to such product or commodity or service as specified in its schedules on file and in effect at the time, nor shall any such public utility refund or remit, directly or indirectly, in any manner or by any device, any portion of the rates, tolls, rentals and charges so specified, nor extend to any corporation or person any form of contract or agreement or any rule or regulation or any facility or privilege except such as are regularly and uniformly extended to all corporations and persons; provided, that the commission may by rule or order establish such exceptions from the operation of this prohibition as it may consider just and reasonable as to each public utility."

It is not entirely clear to me just what the power of the Commission is under the proviso in this Section, but it certainly does not empower the Commission to approve discriminations, and I am clearly of the opinion that to permit this carrier to charge one rate to the Irvine & Muir Lumber Company by reason of a contract entered into heretofore between said Lumber Company and this common carrier, and another rate to other shippers similarly situated, would be a discrimination.

It was suggested at the hearing that the applicant publish a rate of \$1.75 instead of its present rate of \$2.50, and throw this rate open to all shippers. This the applicant is unwilling to do, and not having gone into the reasonableness of the charge, inasmuch as the same was not in issue in this case, we cannot at this time require that this be done.

As we said in the Cuyamaca Water Case, Decision No. 536, we believe that contracts between a utility and its patrons for a valuable consideration, entered into in good faith, should be approved by this Commission in so far as such approval will not

result in discrimination, but, as I have already said, an approval of this contract on the terms desired would amount certainly to a discrimination. This carrier has quite properly collected the tariff rate on the commodity involved since it became a common carrier, and it should be required to do so hereafter.

I have no doubt of the bona fides of the transactions and contracts between the applicant and the Irvine & Muir Lumber Company, and it clearly appears that the latter company gave valuable rights of way and other privileges to the applicant and its predecessor, in return for this special rate, and if a way can be found whereby the intent of the parties to these contracts can be effectuated without working a discrimination, it is my belief that this Commission should approve the same.

Our attention is called to the case of Welcetka Light and Water Company vs. Fort Smith and Western Railroad Company, 12 I.C. Report 505. In that case Commissioner Harlan, speaking for the Commission, in referring to an arrangement similar to the one here involved, says:

"In this connection it is proper to add that the Commission does not approve the practice of some carriers of repaying advancements made by a shipper for the construction of a switch track by making an allowance to him of a definite amount on each carload of freight shipped to or from his manufacturing plant. Such an arrangement presents too much the appearance of a purchase of property by the carrier with transportation, which is contrary to the principles of the Act. Undertakings of this nature ought to be evidenced by a written contract, a copy of which ought to be filed with the Commission. Although payments to be made by the carrier to the shipper under such contracts may properly be determined or based on the number of carload shipments made to or from the industry, such payments ought not to be made out of the rate as each car is moved, but ought to be made out of available funds at the end of definite intervals, say of six months or a year. When the entire cost has thus been refunded, a responsible officer of the company ought to file with the Commission a verified statement of the details of the entire transaction."

It cannot be doubted that a carrier should be permitted to pay an agreed price for rights of way which it has secured. The trouble with the present arrangement, however, is that it is difficult to determine the agreed price. If the entire amount of forest products covered by the agreement moves, and the rate of

\$2.50 per thousand feet now in the applicant's tariff is a reasonable rate, and there were no other covenants in the contract, it would be easy to determine that the amount agreed to be paid for the right of way was the difference between such reasonable rate of \$2.50 per thousand feet and \$1.75 per thousand feet multiplied by the number of thousand feet moving. We have a right to assume, however, that the \$2.50 per thousand feet is a reasonable rate, and if the officers of these companies are willing to file a verified statement with this Commission to the effect that under all the circumstances under which these contracts were executed the privileges granted by the Irvine & Muir Lumber Company to the California Western Railroad & Navigation Company and the Union Lumber Company and its predecessor, are reasonably worth the aggregate amount by which the freight rate at \$2.50 per thousand feet on the entire amount of commodity involved exceeds the amount which would be paid at the \$1.75 per thousand feet rate, or any less amount, specifying such amount, then I think the Commission should interpose no objection to the payment by the applicant to the Irvine & Muir Lumber Company of the amount so found less the amount which had already been in effect rebated before this applicant became a common carrier, and I recommend that such a procedure be approved. As far as the present application is concerned, however, it certainly should be dismissed, and whatever payment is made considered as independent of the rates but as a reasonable amount to be paid for what the applicant has received from Irvine & Muir Lumber Company.

I recommend the following form of order:

O R D E R .

CALIFORNIA WESTERN RAILROAD & NAVIGATION COMPANY having heretofore filed its application with this Commission asking to be permitted to charge the Irvine & Muir Lumber Company a rate of \$1.75 per thousand feet on forest products between Irmulco and

Fort Bragg, as provided in a certain contract referred to in the Opinion, instead of the rate of \$2.50 per thousand feet between the same points, as set out in its Local Freight Tariff No. 2-A, C.R.C. No. 3, effective June 20, 1912; and a hearing having been held and being fully apprised in the premises,

IT IS HEREBY ORDERED that the said application 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 11<sup>th</sup> day of April, 1913.

John W. Estelleman  
H. D. David  
Alfred S. Dow  
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Commissioners.