Decision No. 579

ORIGINAL

Decision No. 579

BEFORE THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA.

SCOTT, MAGNER & MILLER, et al,

Vs.

WESTERN PACIFIC RAILWAY CO.,

Case No.283.

J. O. Bracken and Henry F. Marshall for complainants.
Allan P. Matthew for defendant.
E. W. Camp representing Atchison, Topeka & Santa Fe Railway Company.
H. C. Booth and George D. Squires representing Southern Pacific Company.
Seth Mann representing San Francisco Chamber of Commerce.
Thomas A. Thatcher representing various lumber companies.

O P I N I O N

BY THE COMMISSION.

This is an action to recover the sum of $139.58, being alleged overcharges on carload shipments of hay alleged to have been transported over the line of the defendant railway company between November 15, 1910 and May 27, 1912, from points west of Lathrop, California, to San Francisco. Complainants base their action on two distinct grounds:

1. They claim that the charges collected are in violation of long and short haul provisions found in the Constitution of this State, and also in the so-called Wright Act.

2. They claim that, entirely irrespective of long and short haul clauses, the charges collected were in and of themselves unjust and unreasonable.

The prayer is for an order directing the payment of reparation and commanding the defendants henceforth to desist from charging a rate in excess of $1.35 per ton applying to carload shipments of hay from points west of Lathrop to San Francisco. The defendant moved to dismiss the complaint on the ground that this Commission has no jurisdiction to award the relief prayed for.

In ruling on this motion, it becomes necessary to examine with care the constitutional and statutory provisions

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relating to the subject matter of this action, and in effect between November 15, 1910 and May 27, 1912. We assume that it is our duty to consider all these provisions, in so far as possible, to be constitutional. If any provision, either in the State Constitution or the statutes, is to be declared unconstitutional, it is for the courts and not this Commission to make the declaration. Our purpose will be to try to ascertain the meaning of these provisions and their applicability to the present proceeding, on the assumption that these respective provisions are not a violation of the State or Federal Constitution.

We shall first consider the claim under the long and short haul clauses, and then the claim as to the inherent injustice and unreasonableness of the rates.

I.

LONG AND SHORT HAUL CLAUSES.

1. Constitution of 1879.

Section 21 of Article XII of the Constitution of this State, prior to its amendment on October 10, 1911, read as follows:

> "No discrimination in charges or facilities for transportation shall be made by any railroad or other transportation company between places or persons, or in the facilities for the transportation of the same classes of freight or passengers within this State, or coming from or going to any other state. Persons and property transported over any railroad, or by any other transportation company or individual, shall be delivered at any station, landing or port, at charges not exceeding the charges for transportation of persons and property of the same class, in the same direction, to any more distant station, port or landing. Excursion and commutation tickets may be issued at special rates."

It will be noted that the long and short haul provision of this section differs materially from the provision generally found in present day statutes. The usual provision is that the carrier shall not charge a greater compensation for a transportation for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance. Hence, if a commodity is transported under the present usual rule from point A through point B to point C, the

case falls within the rule. The provisions of the Constitution of 1879, however, look only to the point of destination. The offense under those provisions was not complete unless other transportation was made for a lesser charge to some "more distant station, port or landing," i.e., to some point D beyond point C. In the present case, there was no point on defendant's line beyond San Francisco and no lesser charge to any more distant point beyond. Hence, under the facts of this case, no cause of action arose under the long and short haul clause of the Constitution of 1879.

2. Act of March 19, 1909. (Wright Act).

On March 19, 1909, the so-called Wright Act was approved. This act remained in effect until February 10, 1911, on which day it was repealed by what is known as the Stetson-Eshleman Act. During this period, a considerable number of shipments, referred to in the complaint in this proceeding, moved.

The Wright Act provided for the organization of the Railroad Commission, and defined its powers and duties and the powers and duties of transportation companies. Section 31-d contained a long and short haul provision differing from that contained in the Constitution of 1879, concurrently in effect, and reading as follows:

> "No common carrier subject to the provisions of this act, shall charge or receive any greater compensation in the aggregate for the transportation of passengers or of a like kind of property, under substantially similar circumstances and conditions, for a shorter than for a longer distance over the same line in the same direction, the shorter being included within the longer distance; but this shall not be construed as authorizing any such common carrier to charge and receive as great a compensation for a shorter as for a longer distance haul."

Under this section, the offense was complete if the longer haul for the lesser compensation was made <u>from</u> as well as <u>to</u> a more distant point than the shorter haul. This language would seem to apply to cases such as those now under consideration, in which shipments of hay are alleged to have been transported from Lathrop to San Francisco at rates less than those charged for similar shipments from Altamont, Goecken, Carbona and Livermore,

all of which places are intermediate between Lathrop and San Francisco. Counsel for the defendant, however, draws attention to the words "under substantially similar circumstances and conditions" and contends that the facts alleged do not fall within the statute, for the reason that the circumstances affecting the longer and the shorter hauls are not substantially similar, in that the defendant must meet water competition at Lathrop, the more distant point, and not in the shorter haule from points west of Lathrop, intermediate between that point and San Francisco.

Section 31(d) of the Wright Act is substantially the same as Section 4 of the Interstate Commerce Act as it stood prior to the amendment of June 18, 1910. Under the statute as it originally stood, it was repeatedly held that the carriers were relieved from the restraints imposed by the section whenever actual or potential competition operated to compel the acceptance of lower rates for the longer than for the shorter haul.

Atchison, Topeka & Santa Fe Railway Co. vs. Denver & New Orleans R.R.Co., 110 U.S.678, 683.

Interstate Commerce Commission vs.Alabama Midland Ry.Co., 168 U.S. 144.

Louisville & Nashville R.R.Co. vs. Behlmer,175 U.S.648.

Ex parte Koehler, 31 Fed. 315.

Interstate Commerce Commission vs.Atchison,Topeka & Santa Fe R.R.Co., 50 Fed. 295.

That the same construction will be given to Section 31(d) of the Wright Act, which section was apparently copied from the Interstate Commerce Act, is elementary. Whether the circumstances and conditions surrounding the longer haul in this case were or were not similar to those surrounding the shorter haul is a question of fact, as to which evidence must be taken in this proceeding if a right could arise and did arise under the Wright Act and if this Commission is now in a position to enforce that right.

If the circumstances and conditions surrounding movements from Lathrop to San Francisco and from intermediate points to San Francisco were substantially similar, it seems clear that a

right to be compensated for a loss sustained arose under the Wright Act, under the facts of this case. The solution of the problem would be less difficult if the Railroad Commission had actually established the defendant's rates of charges applying to the facts in this case. By the Provisions of Section 22 of Article XII of the Constitution of this State, as it stood prior to October 10, 1911, it was made the duty of the Railroad Commission "to establish rates of charges for transportation of passengers and freight by railroad or other transportation companies, and publish the same from time to time, with such changes as they may make." The rates and fares "established by said commission" were made "conclusively just and reasonable" in all controversies, both civil and criminal, and a railroad corporation or transportation company which failed or refused to conform to such rates as the Railroad Commission should establish or which should charge rates in excess of thereof, was subject to a fine not exceeding $20,000 for each offense.

Acting under this provision of the Constitution, the Railroad Commission on June 11, 1909, as shown by its minutes, established the rates of charges for the transportation of passengers and freight on what is known as the Tesla branch of the Western Pacific Railway Company, formerly owned by the Alameda and San Joaquin Railroad Company, between Stockton and Tesla. There is no record that the Commission ever established any other rates to be charged by defendant and particularly none covering the movement in question, while the Wright Act was in effect. On June 11, 1909, August 2, 1909 and November 9, 1909 the Commission established the rates then in effect on practically all the transportation companies of the State, but no action other than that of June 11, 1909, seems ever to have been taken during the period of the Wright Act as to any of the defendant's rates in this State.

If the Railroad Commission had established the rates to be charged by this defendant for both longer and shorter hauls, it might well be held that the defendant could not thereafter, as

long as it conformed to the rates so established, be compelled to pay for a violation of the long and short haul clause. Otherwise, the defendant would have been compelled to pay damages if it charged the rates established by the Commission and also a fine up to $20,000 for each offense if it failed to charge those rates. It would be compelled to pay both if it obeyed and if it disobeyed the Railroad Commission's order. There would be much reason for holding that after the Railroad Commission had established the rates, as commanded by Section 22 of Article XII of the Constitution, the long and short haul clause of the Constitution would no longer avail a shipper except as a basis for an application to the Commission to change the rates established by it so as to conform to the long and short haul principle established by the Constitution. It becomes unnecessary, however, to consider this question further at this time for the reason, as heretofore stated, that the Railroad Commission did not during the period of the Wright Act establish the rates charged or to be charged by defendant on movements of hay transported between the points specified in the complaint in this case. Those rates were railroad-made rates and not state-made rates. As heretofore stated, if the circumstances and conditions surrounding the longer and the shorter haul movements were substantially similar, a substantive right to compensation arose under the Wright Act. A remedy for the enforcement of this right by the Railroad Commission was established by Sections 20 and 21 of the Wright Act, providing for an investigation by the Railroad Commission upon complaint as to any violation by a transportation company of any provision of the act or of the Constitution of this State. The Commission was specifically empowered to make its order awarding damages for violations of the act.

As no attempt was made to secure relief under the Wright Act on the shipments involved in the present proceeding, it becomes unnecessary to consider whether or not that act, in so far as it purported to confer on the Railroad Commission power to award reparation other than for a violation of its own orders, is in

violation of the provisions of Section 22 of Article XII of the Constitution of 1879. In the case of Edson vs. Southern Pacific Company, 133 Cal. 26, the Supreme Court of this State expressly held that under Section 22 of Article XII of the Constitution, the Commission had no power to make a determination in any cases except those arising from violations of its own orders establishing rates or systems of accounts. This is a matter affecting the remedy as distinguished from the right and is not material here, for the reason that up to the time of instituting the present proceeding, no attempt was ever made to apply a remedy to the causes of action alleged in the complaint.

Section 21 of the Wright Act also provided a statute of limitations as follows:

> "All complaints for the recovery of damages shall be filed with the Commission within one year from the time the cause of action accrues and not after, and the petition for the enforcement of an order of the Commission for the payment of money shall be filed in the Superior Court within six months from the date of the order and not after."

Defendant pleads the statute of limitations as to all rights which may have been created under the Wright Act, and particularly urges that the repeal of the Wright Act extinguished all such rights.

The Wright Act was repealed by the act of February 10, 1911, commonly known as the Stetson-Eshleman Act. Section 50 of the latter act by specific reference repealed the Wright Act in toto. Section 44 further expressly kept alive rights which might have been theretofore created. Said Section 44 reads as follows:

> "This act shall not have the effect to release or waive any right of action by the state or any person for any right, penalty or forfeiture which may have arisen, or may hereafter arise, under any law of this state; and all penalties arising under this act shall be cumulative of each other, and a suit for or recovery of one shall not be a bar to the recovery of any other penalty."

The present Public Utilities Act, which became effective on March 23, 1912, and superseded the Stetson-Eshleman Act, provides in Section 74(a) that rights then existing should not

be released or waived in the following language:

> "This act shall not have the effect to release or waive any right of action by the state, the commission, or any person or corporation for any right, penalty or forfeiture which may have arisen or accrued or may hereafter arise or accrue under any law of this state."

It thus appears that a right which arose under the Wright Act remained alive under the Stetson-Eshleman Act and also the present Public Utilities Act and may be enforced if a remedy for its enforcement now exists, applicable thereto, and if the bar of the statute of limitations has not fallen.

The remedy is found in Section 60 of the Public Utilities Act, reading in part as follows:

> "Complaint may be made by the Commission of its own motion or by any corporation or person, chamber of commerce, board of trade, or any civic,commercial, mercantile, traffic, agricultural or manufacturing association or organization or any body politic or municipal corporation, by petition or complaint in writing setting forth any act or thing done or omitted to be done by any public utility, including any rule, regulation or charge heretofore established or fixed by or for any public utility, in violation, or claimed to be in violation of any provision of law or of any order or rule of the Commission."

It will be noted that the section specifically includes complaints as to charges heretofore established or fixed by or for any public utility, and so supplies a remedy applicable to the present case. Section 71 of the Public Utilities Act specifically gives to the Commission the right to compel the making of reparation for excessive or discriminatory charges. Hence, where a substantive right to reparation heretofore arose from charges established by or for a public utility, there can be no reasonable doubt of the Commission's right to make an order compelling the making of the reparation, unless the bar of the statute of limitations had fallen. That a present day remedy can be applied to a right theretofore created, under the circumstances here disclosed, is no longer a matter for doubt in this State after the decision of our Supreme Court in the case of Chapman vs. State, 104 Cal.690. To the same effect see Teralta Land Company vs. Shaffer, 116 Cal.;

Melvin vs. State, 124 Cal., 16[illegible];

Denning vs. State, 123, Cal.,316, 319.

Admitting the creation of a right under the Wright Act and the existence of a remedy applicable thereto, if the bar of the statute of limitations has not fallen, we are brought to a consideration of the question of the statute of limitations. On this question, as on others argued before the Commission in this proceeding, there have been almost as many conflicting views as there were lawyers presenting them. The Wright Act, as heretofore stated, was repealed on February 10, 1911. The act contains a one year statute of limitations applying to proceedings before the Railroad Commission. Hence, all causes of action accruing prior to February 10, 1910, were barred by the provisions of the act. All the claims, if any, in this proceeding accrued subsequent to February 10, 1910, and were alive when the Wright Act was repealed. The Stetson-Eshleman Act, in Section 46 thereof, established a Statute of limitations of three years, but only for "violations of any provisions of this act." Manifestly, this section does not apply to violations of a preceding act. The repeal of the one year statute of limitations established by the Wright Act left rights created under that act without any statute of limitations running against them. The limitations prescribed by the Code of Civil Procedure were not applicable to such rights and no other limitations were established at that time.

Section 71(b) of the Public Utilities Act provides that "all complaints concerning excessive or discriminatory charges shall have been filed with the Commission within two years from the time the cause of action accrues." Assuming that the three year period of the Stetson-Eshleman Act does not apply to rights arising under the Wright Act, but that the two year period of the Public Utilities Act does apply, it is clear that the courts will not construe the two year period of the Public Utilities Act so as to take away the pursuit of a remedy on rights which had been created two years before, more or less, and against which no statute of limitations was running subsequent to the repeal of the one year period prescribed by the Wright Act. We are of the

opinion that the courts will follow the rule established in Culbreth vs. Downing, 121 N.C. 205, 28 S.E. 294, to the effect that when a statute is passed establishing a period of limitations applicable to rights theretofore created, a reasonable time must be given for the prosecution of an action before the statute works a bar. We are of the opinion that a reasonable time to commence proceedings before this Commission to enforce rights arising under the Wright Act and still alive, is two years subsequent to March 23, 1912, on which day the Public Utilities Act became effective.

We hold that defendant's point as to the statute of limitations is not well taken.

3. February 10, 1911 - October 10, 1911.

The Stetson-Eshleman Act was in effect from February 10, 1911 until March 23, 1912. It contained no long and short haul clause. Consequently, during this period the only effective long and short haul provision was that contained in the Constitution. The long and short haul provisions of the Constitution of 1879 we have already held to be inapplicable to the present proceeding. Consequently, no right of action arose out of the facts stated in this case on any long and short haul provision from February 10, 1911 to October 10, 1911.

4. October 10, 1911 to Date.

On October 10, 1911, Section 21 of Article XII of the Constitution was amended to read in part as follows:

> "It shall be unlawful for any railroad or other transportation company to charge or receive any greater compensation in the aggregate for the transportation of passengers or of like kind of property for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance, or to charge any greater compensation as a through rate than the aggregate of the intermediate rates; provided, however, that upon application to the Railroad Commission provided for in this constitution such company may, in special cases, after investigation, be authorized by such commission to charge less for longer than for shorter distances for the transportation of persons or property and the railroad commission may from time to time prescribe the extent to which such company may be relieved from the prohibition to charge less for the longer than for the shorter haul."

Substantially the same provisions are found in Section 24(a) of the Public Utilities Act. Acting under the authority granted xxxxxx by Section 21 of Article XII of the Constitution as amended, the Commission heretofore, on February 15, 1912, issued its order in Case No.214, authorizing the carriers of the State to continue their deviations from the long and short haul clause until the Commission could determine definitely the instances, if any, in which it will permit deviations to continue to be made. While the Commission's order authorizing the temporary continuance of the deviations remains in effect, no cause of action can arise from alleged violations of the long and short haul provision of the Constitution.

It follows that the only period of time during which rights may have accrued to complainants under a long and short haul clause between November 15, 1910 and May 27, 1912, was the period from November 15, 1910 to February 10, 1911, during which period the Wright Act was effective. Whether any rights arose during that period will depend on whether or not facts adduced at the hearing will show that the conditions and circumstances surrounding the shipments from points west of Lathrop to San Francisco were substantially similar to those surrounding shipments from Lathrop to San Francisco.

II.

UNJUST AND UNREASONABLE RATES.

We come now to complainants' claim that the rates charged by defendant were inherently unjust and unreasonable, entirely irrespective of any alleged violation of the long and short haul provisions.

At the common law a shipper who is compelled by a carrier to pay an unjust or unreasonable rate could sue to recover the excess which he had paid above a just and reasonable rate. The framers of the Constitution of 1879, however, provided in Section 22 of Article XII that the rates should be established and published by the Railroad Commission and not by the carriers, and

that the rates so established and published should be deemed in all proceedings, both civil and criminal, to be conclusively just and reasonable. It could hardly be held that a shipper could recover from a carrier for charging a conclusively just and reasonable rate—a rate, moreover, which the carrier was compelled, under heavy penalties, to charge. If the shipper were dissatisfied, he could apply to the Railroad Commission to alter the rate, but it would certainly be entirely at variance with such a system of state-made rates to hold that the Commission, in addition to making an order as to the just and reasonable rates to be thereafter charged, should also compel the carrier to pay remuneration for having charged the rate which the Railroad Commission compelled it to charge, and which, under the Constitution, became a conclusively just and reasonable rate. We are accordingly of the opinion that if the Railroad Commission had established defendant's rates, as it was its duty under the Constitution to do, no right to reparation could have arisen, on the theory of unjust or unreasonable rates on the facts as stated in this complaint, prior to October 10, 1911. The shipper's remedy would be to petition the Commission to alter the rate and then to sue the carrier if he failed to conform to the rate so established. The United States Supreme Court, in the cases of

Texas & Pacific Ry. Co. vs. Abilene Cotton Oil Co., 204 U.S. 426,

and Robinson vs. Baltimore & Ohio R.R.Co., 226 U.S. 506,

has expressed its views with reference to the relation between the Interstate Commerce Commission and the courts in entire harmony with the views herein expressed as to the effect which the establishment of a system of state-made rates had on the common law right to sue for damages by reason of the collection of an unjust or unreasonable rate.

We are convinced that if the Railroad Commission had established the rates in controversy here, there could have been no right to reparation, except for the collection of rates charged in excess of those so established, up to October 10, 1911, at which time the entire system was changed. We refer here not to

the remedy but to the right itself. No substantive right to reparation could arise under such circumstances except as indicated, and there would be at present no right to which a remedy could attach. A statute today can not create a right out of transactions which happened yesterday.

We are somewhat uncertain as to the effect which the failure of the Railroad Commission to establish the rates here affected has on the right to reparation prior to October 10, 1911, but have reached the conclusion that the system of state-made rates established by the Constitution of 1879 could not have contemplated a right to reparation except in case the carrier charged a rate in excess of that established by the Commission. In a scheme providing that the state itself establishes rates which shall be conclusively just and reasonable, there is no room for the doctrine of reparation except as indicated. The fact that the Commission may have failed in its duty can not change the law or create a new system. We are accordingly of the opinion that on the facts as stated, there being no allegation that the defendant charged rates in excess of those established, no right to reparation on the theory of unjust or unreasonable rates arose prior to October 10, 1911.

In the case of the long and short haul provisions of the Constitution and of the Wright Act, we find specific affirmative provisions to which effect must be given, if possible. As hereinbefore indicated, it is difficult to reconcile an inhibition based on the theory of railroad-made rates with the provisions of Section 22 of Article XII of the Constitution, providing for state-made rates. On familiar principles of statutory and constitutional construction, effect should be given to all these provisions if possible. The only way we know to give effect to both the long and short haul clause and to the provisions of Section 22 of Article XII of the Constitution is to hold that the long and short haul clauses, both of the Constitution and of the Wright Act, are

operative until the state establishes the rates as provided, and that thereafter the long and short haul principle shall govern the Railroad Commission in establishing the rates. We have accordingly held that until the Railroad Commission established defendant's rates for the movements involved in this complaint, the long and short haul provisions of the Wright Act were operative on the defendant.

By amendment to Section 22 of Article XII of the Constitution, adopted October 10, 1911, the entire system of making the rates to be charged by carriers was changed. The provision making it the duty of the Railroad Commission to establish all the rates for common carriers was stricken from the Constitution. In lieu thereof, a new system was established, by which the carriers make and filed their own rates, with power in the Railroad Commission, on complaint or on its own initiative, to alter the rates so established. As the carriers now establish their rates, they should be liable to make reparation if these rates are unjust and unreasonable. Accordingly, Section 21 of Article XII of the Constitution, as amended on October 10, 1911, apparently in view of the old system, under which reparation could not be awarded except for departures from established rates, was amended to read in part as follows:

> "Nothing herein contained shall be construed to prevent the Railroad Commission from ordering and compelling any railroad or other transportation company to make reparation to any shipper on account of the rates charged to said shipper being excessive or discriminatory; provided, no discrimination will result from such reparation."

The Public Utilities Act, in Section 71(a) thereof, finally prescribed the machinery by which the Commission may award reparation in case the charges have been excessive or discriminatory. When the theory of conclusively just and reasonable state-made rates was discarded on October 10, 1911, the substantive right to reparation for an unjust and unreasonable rate revived. While the remedy for enforcing the right was not established until

March 23, 1912, we hold that the right existed since October 10, 1911, that on March 23, 1912, the remedy met the particular existing right and that the remedy may be applied to any right to reparation arising since October 10, 1911.

Whether the rates complained of are unjust and unreasonable so as to give a cause of action on rates collected since October 10, 1911, is a question of fact as to which evidence will be received.

This Commission has heretofore decided several reparation cases without a full presentation by attorneys for defendants of the points involved and without knowledge of the action taken by our predecessors in office in establishing or failing to establish rates. The questions have been complicated by conflicting provisions in the State Constitution and by doubts as to the constitutionality both of provisions of the State Constitution and of the Wright Act. After a full argument made at our request and a careful study both of the law and the facts involved, we have reached the conclusions herein expressed. In so far as this decision may be at variance with this Commission's decisions in earlier cases, we desire the views herein expressed to be taken to represent our matured thought on the subject.

O R D E R.

The above entitled proceeding having come on regularly for hearing, and defendant having moved to dismiss the complaint on the ground that this Commission has no authority to grant the relief prayed for,

IT IS HEREBY ORDERED that said motion be granted except

as to those portions of the complaint which are based on the long and short haul provision of the Wright Act and on the collection of alleged unjust and unreasonable rates since October 10, 1911, on which points a hearing will be had on a day hereafter to be set.

Dated at San Francisco, California, this 15th day of April, 1913.

John M. Eshleman

H. D. Bland

Max Thelen

Commissioners.