

ORIGINAL  
Decision No. 722

BEFORE THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA

GRAYSON-OWEN COMPANY, Complainant,  
vs. Case No. 356.  
SOUTHERN PACIFIC COMPANY, Defendant.

J. O. Bracken, for complainant;  
H. C. Booth, for defendant.

LOVELAND, Commissioner.

O P I N I O N

This is a case in which complainant asks to recover from defendant reciprocal demurrage in the sum of Eight Hundred and Eighty-five Dollars. The basis upon which the claim is made, as set forth in the complaint and supported by testimony at the hearing, is as follows:-

On August 24, 1912, complainant, Grayson-Owen Company, through its treasurer, J. C. Mitchell, ordered, from the defendant carrier, twenty-one cars to be delivered three cars per day, such delivery to begin August 26th. These cars were ordered by complainant of the agent of the defendant at Hamilton but were to be delivered at the non-agency station of Ford. There was some slight conflict in the testimony of Mr. Mitchell and that of defendant's agent at Hamilton as to whether the cars were ordered first by telephone and afterwards confirmed by Mr. Mitchell personally seeing the agent, or whether Mr. Mitchell saw the agent when he first ordered the cars and afterwards telephoned for information concerning them. However, that is not material, as the evidence of both these witnesses shows clearly that the cars were ordered on Saturday, August 24th.

The jurisdiction of the non-agency station at Ford does not lie with the agency station of Hamilton where these cars were ordered but with the agency station of Vina, and the agent at

Hamilton testified that, upon receipt of the order from Mr. Mitchell, or shortly thereafter, he telegraphed the order to the agent at Vina. Copy of this telegram was read into the record and disclosed the fact that he simply wired the agent at Vina to order, for J. C. Mitchell of the Grayson-Owen Company, twenty-one cars to be delivered three cars per day, but did not state when such delivery was to begin. The telegram discloses that the cars were to be loaded with hay destined to Stockyards, California.

Mr. Mitchell testified that he had arranged with the farmers to haul hay with which he proposed to load the cars in question to Nord station, such delivery by the farmers to begin August 26th; that he made arrangements to have sufficient hay delivered each day, commencing August 26th, to load the three cars which he had ordered per day, thereby enabling him to load the cars directly from the wagons at fifty cents per ton less expense than he would incur if the hay were first dumped on the ground and then loaded on the cars; that such deliveries of hay were made by the farmers to Nord but that the cars ordered were not furnished, the first cars not being available until August 30th and the total number of twenty-one not being finally furnished until the last of September; that as a result of such failure to deliver the cars ordered, it was necessary to unload the hay from the wagons to the ground and later load it on the cars when they were available; that such method of loading entailed an additional cost of fifty cents per ton and that, in addition to that, a rainstorm occurred by which a large amount of hay was greatly damaged.

In view of these alleged facts, all of which were testified to by complainant and most of which were not controverted by testimony of defendant, complainant asks in the complaint for reciprocal demurrage in the sum of Eight Hundred and Eighty-five Dollars.

At the hearing complainant admitted that the prayer for reciprocal demurrage comprehended demurrage for Sundays and legal

holidays which should be eliminated and asked that complaint be considered amended in that respect.

In its answer, defendant sets up three reasons why complainant cannot legally ask for reciprocal demurrage in this case: first, the answer alleges that the cars ordered by complainant were delivered at the non-agency station of Nord but as there was no one there to take charge of them the cars were appropriated by other shippers; second, that there was a car shortage during the period mentioned, to wit: August and September, 1912 to such an extent as to make it impossible for defendant to supply the cars in question; third: Defendant claims that complainant cannot legally ask for reciprocal demurrage without having first filed a bond with defendant as provided by demurrage rules and that complainant had been advised of the rule and of the necessity of filing such bond, the defendant having, on the 8th day of May, 1911, furnished complainant with a copy of Tariff CRC No. 2-C covering uniform demurrage rules, which rules set forth the necessity of shippers filing a bond with carriers if they expect to make claims for reciprocal demurrage.

I shall consider these three reasons advanced by defendant, why reciprocal demurrage should not be assessed in this case, in the order in which they are here mentioned: first, the allegation in the answer that the cars ordered were delivered at the non-agency station of Nord. This allegation of the answer was not supported by testimony at the hearing and, in my judgment, need not be considered in this Opinion and Order, as complainant testified that the hay was being delivered on August 26th, and that complainant's employees were there ready to load the cars; second: In support of this testimony, statements were filed showing that a car shortage did actually exist on the Sacramento Division, in which division the station in question is located. The testimony of defendant also showed that there was a shortage both of box cars and of stock cars, both of which are at times used to transport hay,

on the divisions adjoining the Sacramento Division, namely: the Stockton and Western Division. On the Pacific System generally the reports showed a slight surplus of cars, so slight, however, that defendant claimed that it was practically a shortage.

The fact that defendant claims car shortage as a part of its defense is worthy of notice when taken in connection with the allegation in the answer that cars ordered by complainant were delivered at Nord station and appropriated by other shippers.

I may say in passing, that, while one of the principal reasons for charging demurrage is to release equipment, it is quite as true that one of the principal reasons for charging reciprocal demurrage is to induce carriers to furnish sufficient equipment for ordinary demands. It is fair to assume that from the experiences of former years the defendant must have been aware that there was liable to be a car shortage at the period mentioned, and that it was aware of that fact and realized the necessity incumbent upon it to furnish equipment for ordinary demands is evidenced by the fact that, as shown by the testimony in this case, defendant had sought to prepare for such shortage by ordering six thousand new cars sometime previous to the period comprehended in this case.

The witnesses of the defendant, Southern Pacific Company, testified that to have compelled defendant to furnish the cars ordered by complainant at the particular time in question would probably have interfered with interstate commerce in that its ability to furnish cars ordered for interstate transportation would have been limited or reduced by the measure of the number of cars ordered by complainant.

Rule 3, paragraph (b) of the Uniform Rules for Demurrage and Reciprocal Demurrage, contained in Order No. 2 of this Commission, provides as follows:-

"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."

It may well be that instances will be presented to the Commission where the circumstances will justify the Commission in relieving either carrier or shipper from liability to demurrage or reciprocal demurrage but, in my judgment, the circumstances of this case do not warrant such action by the Commission, particularly in view of the allegation, above referred to, found in the answer of defendant, that the cars ordered were delivered and appropriated by other shippers. Each case of this kind presented to the Commission must necessarily depend upon and be judged by ~~the circumstances and~~ ~~facts~~ the facts surrounding it.

The third reason advanced by defendant why reciprocal demurrage should not be assessed against it comprehends, in my judgment, the basis upon which this Opinion and Order must rest. Both shippers and carriers are subject to the law and are supposed to understand what the law is and also to understand the effect of rules and regulations regularly made and adopted under the authority of the law. This Commission, while an instrument to be used to bring about the equitable enforcement of the law, is equally subject thereto with the shippers and carriers, and its Opinions and Orders must conform to the law and to such rules and regulations made under the law.

Section 45 (a) of the Public Utilities Act gives to the Commission the

"power to provide by proper rules and regulations the time within which all railroad corporations shall furnish, after demand therefor, all cars, equipment and facilities necessary for the handling of freight in carload and less than carload lots, the time within which consignors or persons ordering cars shall load the same, and the time within which consignees or persons to whom freight may be consigned shall unload and discharge the same and receive freight from the freight rooms, and to provide penalties to be paid for failure on the part of the railroad corporations, consignors and consignees to conform to such rules. Charges for demurrage shall be

uniform so that the same penalty shall be paid by both shipper or consignee and railroad corporation for an equal number of cars for each day for which demurrage is charged."

In the exercise of this power thus given to the Commission, General Order No. 2, superseding Order No. 1, approved March 28, 1911 and effective May 1, 1911, covering the question of demurrage and reciprocal demurrage in the state of California, was promulgated by this Commission. Rule 12 (c), page 4 of said General Order No. 2 reads as follows:-

"Reciprocal Demurrage Bond. 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 his 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, for the purposes herein set out, which forms shall be submitted to this Commission and shall bear the mark of its approval. When any shipper who does not have on file with such carrier a bond as provided herein, shall order a car or cars, it shall be the duty of the agent of such carrier receiving such order to notify such shipper of the provision of this rule, and only after such notification and the failure of the shipper to file such bond, shall the carrier be exempted from the payment to the shipper for failure to furnish cars as herein provided."

As before stated, defendant showed by testimony that it had previously notified complainant in writing of the necessity of filing a bond if complainant expected to exercise the right of claiming reciprocal demurrage, such notification having been given in May, 1911. But under the rule a further duty devolves upon the defendant, namely: to notify shippers who order car or cars at the time such orders are placed of the necessity of filing such bond if they expect to exercise the right of claiming reciprocal demur-

rage. In the language of the order above quoted: "only after such notification and the failure of the shipper to file such bond shall the carrier be exempted from the payment to the shipper for failure to furnish cars as herein provided."

Mr. Plank, agent for defendant, who received the order for the cars in question, testified that he did not think of this particular rule at the time these cars were ordered. Of the reciprocal demurrage law of California and of its operation under the rules made by this Commission under the authority conferred upon it by the Public Utilities Act, it may be said that it has admittedly had the effect of releasing carriers' equipment and in that way has been of decided advantage to carriers. Also, that the per diem demurrage charge is sufficient to recompense carriers for equipment held overtime, and reports of the Pacific Car Demurrage Bureau show that, in the exercise of their rights and privileges under the law and demurrage rules, carriers have collected such sums as were their due.

I am of the opinion that the circumstances of the case are such as to clearly entitle complainant to reciprocal demurrage, and I, therefore, find as a fact <sup>(1)</sup> that complainant, Grayson-Owen Company did, on August 24, 1912, order certain cars from the defendant Southern Pacific Company specifying the time at which said cars were to be delivered at Ford station: (2) that the agent of the defendant, Southern Pacific Company, did not, at the time when such cars were ordered, notify said Grayson-Owen Company, complainant, that it was necessary that it should file a bond with the defendant, Southern Pacific Company, as provided in Rule (c) of Uniform Rules for Demurrage and Reciprocal Demurrage: (3) that the defendant, Southern Pacific Company ~~company~~, did not deliver cars so ordered at the time specified or within the time to avoid this claim for reciprocal demurrage: (4) that complainant, Grayson-Owen Company, is entitled to recover from the defendant, Southern

Pacific Company, reciprocal demurrage in the sum of Six Hundred and Fifty-four (654) Dollars: (5) that the statement following shows the times at which the cars were ordered and the reciprocal demurrage accruing by reason of non-delivery:-

INDIVIDUAL CARS	AUGUST														SEPTEMBER														DEMURRAGE													
	Initial	Number	24	25	26	27	28	29	30	31	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22	23	24	25	26	27	28	29	days	Amount due	
TNO	10910								°																														3	\$ 9		
TNO	11603								°																															3	9	
UP	66814																																							4	12	
UP	72263																																							6	18	
SP	69690																																							6	18	
SP	70131																																							6	18	
SP	70541																																							5	15	
UP	67857																																							5	15	
SP	20760																																							9	27	
UP	73600																																							8	24	
SP	89408																																							8	24	
TNO	12970																																							13	39	
OWN	10765																																								13	36
TP	7313																																								13	39
UP	66487																																								13	39
StI&SP	121945																																								13	39
SP	80024																																								17	51
UP	68425																																								17	51
XOS	15030																																								19	57
TNO	12356																																								19	57
SP	76564																																							19	57	
																																									218	\$654.

LEONRD: # Day on which cars were ordered.  
 - Day on which cars were wanted.  
 x Day on which cars were due.  
 ° Day on which cars were furnished.  
 Sundays and legal holidays excluded in computing demurrage.

In determining the amount of demurrage to which the complainant is properly entitled, I have considered,- (1) the time the order for the cars was placed with the carrier; (2) the time from which the "free time", in which to place cars ordered, began to run; (3) the day on which cars were "placed" so as to be available for loading, and; (4) the time of the day at which cars were so placed.

It appears conclusive from the testimony that the cars were ordered on Saturday, August 24, 1912, and therefore the free time for furnishing the first three cars began to run from 7 o'clock A. M., Monday, August 26, 1912, Sunday being excluded, in accordance with the provisions of Rule No. 1 of General Order No. 2.

I am of the opinion that the conductor's train report furnishes the more accurate date of placement of the cars than the bills of lading which were relied upon by the complainant as furnishing this information, and I have therefore accepted the statement of the conductor's report of cars placed, as furnished by defendant, as setting out the correct dates of placement, except as to one car- St. L. & S. F. 121945, which was set out at Ford, and had to be unloaded before being available for loading by the complainant. In this case, as the car was on hand loaded several days at Ford, and the date of its release uncertain, I have used the date of placement as furnished by the complainant.

The question of whether the day on which the car was placed should be considered in computing the demurrage, should, in my opinion, be determined by the time of the day the car is actually placed for loading. That is, if a car is placed prior to 7 A. M. and is available for loading at that time, demurrage should not accrue for that day. If, on the other hand, a car is placed after 7 A. M., as were the cars in this particular case, as shown by exhibits placed in evidence by the defendant, except St. L. & S. F. 121945, which is considered as having been available for loading at 7 A. M. on the day on which it is shown as

placed, then, in my opinion, it is proper to allow demurrage for the day on which the cars were so placed but were not available for loading until after 7 o'clock A. M.

I recommend the following Order:-

ORDER

The Grayson-Owen Company, a corporation, having filed complaint against the Southern Pacific Company asking for reciprocal demurrage on account of not having received cars as ordered, as explained in the foregoing Opinion; and the case having been regularly heard and considered; and it having been found as a fact (1) that complainant, Grayson-Owen Company, did, on August 24, 1912, order certain cars from the defendant, Southern Pacific Company, specifying the time at which said cars were to be delivered at Nord station: (2) that the agent of the defendant, Southern Pacific Company, did not, at the time when such cars were ordered, notify said Grayson-Owen Company, complainant, that it was necessary that it should file a bond with the defendant, Southern Pacific Company, as provided in Rule (c) of Uniform Rules for Demurrage and Reciprocal Demurrage: (3) that the defendant, Southern Pacific Company, did not deliver cars so ordered at the time specified or within the time to avoid this claim for reciprocal demurrage: (4) that complainant, Grayson-Owen Company, is entitled to recover from the defendant, Southern Pacific Company, reciprocal demurrage in the sum of Six Hundred and Fifty-four (654) Dollars: (5) that the statement following shows the times at which the cars were ordered and the reciprocal demurrage accruing by reason of non-delivery:-

Individual Cars		AUGUST											SEPTEMBER											Demurrage																	
Initial	Number	24	25	26	27	28	29	30	31	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22	23	24	25	26	27	28	29	days	Amount due	
TY	10910			-	x			o																															3	\$ 9	
TH	11603			-	x			o																															3	\$ 9	
UP	66314			-	x					o																													4	12	
UP	72363						x								o																								6	18	
SP	69690						x								o																								6	18	
SP	70131						x								o																								6	18	
SP	70541						x								o																									6	15
UP	67857						x								o																									6	15
SP	20760						x								o																									9	27
UP	73600						x								o																									8	24
SP	89408						x								o																									8	24
TNO	12970						x								o																									13	39
OWRN	10765						x								o																									12	36
UP	7313						x								o																									13	39
UP	66487						x								o																									13	39
STI&SP	121945						x								o																									13	39
SP	88024						x								o																									17	51
UP	68425						x								o																									17	51
KCS	15030						x								o																									19	57
TNO	12356						x								o																									19	57
SP	76564						x								o																									19	57
																																								218	\$ 654.

LEAD: ‡ Day on which cars were ordered.  
 - Day on which cars were wanted.  
 x Day on which cars were due.  
 o Day on which cars were furnished.  
 Sundays and legal holidays excluded in computing demurrage.

IT IS HEREBY ORDERED: That, within sixty (60) days from date hereof, said Southern Pacific Company pay to said Grayson-Owen Company the sum of Six Hundred and Fifty-four (654) Dollars, representing the amount of reciprocal demurrage arising from the failure of the Southern Pacific Company to furnish cars to the Grayson-Owen Company as ordered, as shown by the testimony in this case as set forth in the foregoing Opinion, the said sum of Six Hundred and Fifty-four (654) Dollars being computed and arrived at as heretofore in the Opinion specified.

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 17th day of June, 1913.

John M. Eshelman  
H. B. ...  
...  
Edwin O. Edgerton  
Commissioners.