Decision No. 954

BEFORE THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA.

Decision No. 954

ORIGINAL

W. C. PENOYAR, et al,
Complainants,
vs.
SOUTHERN PACIFIC COMPANY,
Defendant.

Case No. 376.

Frank H. Gould for complainants.
George D. Squires for defendant.

THELEN, Commissioner.

OPINION.

The complaint in this case was filed on March 12, 1913. It alleges, in effect, that the complainants are partners engaged in the business of manufacturing lumber at their mills in the town of Igerna, in Siskiyou county, California; that in this business complainants employed the defendant railroad company to transport their logs from Penoyar, Yanah and Kegg, to the complainants' said mills at Igerna, and that in compensation for such services, complainants paid to the defendant certain specified moneys during the seasons of 1908, 1909, 1910 and 1911; that during the same period, the defendant charged the Weed Lumber Company for hauling logs from the Weed spur to Weed, in the same county and partially in the same district, certain sums which were considerably less than those which would have been collected if the defendant had charged the same rate to the Weed Lumber Company which it charged the complainants; that the shipments transported by the defendant for the complainants were carried substantially the same distance as those which were carried by defendant for Weed Lumber Company; that defendant discriminated in favor of Weed Lumber Company and against complainants, in that it delivered for the use of Weed Lumber

Company certain short, wide cars specifically designed for the hauling of one tier of logs, xxx called the Russell logging cars, while it supplied for the use of complainants an inferior, narrow, long car, not designed for logging; that because of the old and decrepit condition of the cars supplied to complainants, the extra expense of loading the same and the extra labor required to handle the logs while loading said cars, the defendant discriminated against complainants to their damage in the sum of more than $10,000; and that because of said alleged discrimination against complainants in favor of Weed Lumber Company, complainants were compelled to operate their mills practically without profit and were finally compelled to close their mills and discontinue all work at Igerna.

The relief requested by complainants is of three kinds, as follows: (1) that defendant be enjoined from discriminating against complainants in the supply of cars and that the defendant make reparation to the complainants because of alleged discrimination in the supply of cars, in the sum of $10,000, with interest; (2) that defendant be ordered to make reparation to the complainants for alleged discriminations in rates heretofore collected, in the sum of $6,444.66; (3) that this Commission establish rates to be charged by defendant for transportation between points between which the complainants may desire to ship, said rates not to exceed those now charged for similar services to the Weed Lumber Company.

On June 17, 1913, the defendant filed its answer denying all the material allegations of the complaint. The answer also alleges that this Commission does not have jurisdiction to award reparation, either for the alleged discrimination in rates or the alleged discrimination in the character of the equipment supplied to complainants.

The hearing in this case was held on August 22, 1913. Complainants introduced evidence in support of each of the three

prayers of the complaint. It appeared at the hearing that the mills of the complainants at Igerna have been closed for more than a year. While the witness for the complainants stated that he might reopen the mills, there is no definite testimony to this effect in the record. At the close of the hearing complainants were given ten days within which to submit a memorandum of points and authorities, if they should desire. The complainants have now stated that they do not desire to submit such memorandum and the case is ready for decision.

I shall now consider the three prayers of the complaint in order:

1. Discrimination in supply of equipment.

Complainants introduced evidence to show that the defendant had supplied to complainants certain long and narrow cars for the transportation of logs, which cars complainants contend are inferior to cars of the Russell type, which the defendant during the same period supplied to the Weed Lumber Company. The Weed Lumber Company was moving its logs from Weed spur and vicinity, to Weed, while the complainants were moving their logs from points beyond Weed spur, through that point and through Weed to Igerna, which point is located some 2 1/2 miles south of Weed. Complainants also introduced testimony to show that by reason of the difference in the type of car, it had suffered considerable pecuniary loss as contrasted with the Weed Lumber Company. Defendant contended that the Russell type of car was supplied to the Weed Lumber Company because the grades in connection with bringing the logs of that company to Weed spur from the branch line were steeper than those in connection with the movement of complainants' logs and that the Russell type of cars was supplied to the Weed Lumber Company for the reason that their brakes were better. Defendant also contended that it was bound by contract to supply cars of the Russell type to the Weed Lumber Company. It becomes unnecessary to pass upon

the question of whether discrimination was, in effect, practiced by the defendant, for the reason that complainants' remedy, if any, is an action at law against defendant to recover the damages which they may have sustained. While this Commission has power to compel the railroad corporations operating in this State to supply good and sufficient equipment to all shippers and to treat all shippers alike in this respect, the facts being similar, the Commission has no power to award damages for failure in the past to treat shippers alike in the matter of the quality of the equipment supplied to them. Consequently, this portion of the complaint must be dismissed.

2. Discrimination as to rates.

As hereinbefore stated, complainants base a portion of their claim to relief on alleged discrimination in freight rates on logs practised by the defendant in favor of the Weed Lumber Company and against the complainants. It appears from the minutes of the Board of Railroad Commissioners, under date of November 10, 1908, that on that day the tariffs of the Southern Pacific Company containing the rates of charges which were collected respectively from the complainants and from the Weed Lumber Company were formally established as the lawful tariffs to be charged for these respective services, in accordance with the provisions of Section 22 of Article XII of the Constitution of this State as it existed prior to October 10, 1911. This section provided, in part, that it should be the duty of the Board of Railroad Commissioners to establish rates of charges for the transportation of passengers and freight and to publish the same from time to time, with such changes as they might make. The section also provided, in part, that in all controversies, civil or criminal, the rates of fares and freights established by said Board should be deemed "conclusively just and reasonable." As the Board of Railroad Commissioners established the rates charged by the defendant both to the complainants and to the Weed Lumber

Company, and as those rates were, by the Constitution itself, made conclusively just and reasonable, it would seem to follow that it was not legally possible for discrimination to exist as between these rates so long as the action of the Board of Railroad Commissioners remained in effect. The system of rates provided by the Constitution prior to October 10, 1911, was a system of state made rates as distinguished from the present system of railroad made rates under public supervision. If the Board of Railroad Commissioners prior to October 10, 1911, established rates which, in fact, were discriminatory, the remedy was an appeal to the Board of Railroad Commissioners to change those rates and to remove the discrimination. If the Southern Pacific Company could be held liable under these conditions for discrimination in charging the rates established by the Board of Railroad Commissioners, it is evident that that company would be in a position which the law never could have contemplated. If the Company charged the rates prescribed by the Board of Railroad Commissioners it could be held liable on complainants' theory for discrimination: on the other hand, if the Company disobeyed the order of the Board and charged rates different from those prescribed, so as to remove a discrimination in fact, the Company would be liable to the penalties prescribed in Section 22 of Article XII, as follows:

> "Any railroad corporation or transportation company which shall fail or refuse to conform to such rates as shall be established by such commissioners, or shall charge rates in excess thereof, or shall fail to keep their accounts in accordance with the system prescribed by the commission, shall be fined not exceeding twenty thousand dollars for each offense."

It cannot be that the Company would be liable for discrimination if it obeyed the Board's order and penalized in the sum of $20,000/if, for each offense in order to remove discrimination in the rates, it disobeyed the Board's order. This Commission heretofore, in Case No. 265, Scott, Wagner and Miller vs. Western Pacific Railway Company, held in a matter involving the reasonableness of rates as distinguished from discrimination in rates, that the rates established by the Board of Railroad Commissioners prior to October 10, 1911, must be held as

provided by Section 22 of Article XII of the Constitution, to be conclusively just and reasonable and that no right of action arose on the doctrine of reasonableness or unreasonableness against any railroad company which collected the rates actually established by the Board of Railroad Commissioners. The same reasoning would seem to apply to the doctrine of discrimination if, in fact, there be any difference between these two doctrines as applied to this situation. If injustice arose by reason of these constitutional provisions and the action of the old Board of Railroad Commissioners thereunder prior to October 10, 1911, the only answer is that it was an injustice which was caused by the Constitution and the dormant public sentiment of those times. The people of this State by amending their Constitution and enacting the Public Utilities Act and providing for the appointment of the Railroad Commission as at present constituted, have remedied these conditions for the future. It follows that the complaint, in so far as it relies on this cause of action, must be dismissed.

3. Establishment of rates for the future.

Complainants also ask that rates be established for the future between the points between which complainants formerly shipped logs and that these rates shall not exceed those accorded to the points between which the Weed Lumber Company makes its shipments. The evidence in this case seems to show that the rates accorded the Weed Lumber Company have been more favorable than those made applicable to movements between points between which the complainants in this case formerly shipped their logs. The defendant contends that the relatively lower rates enjoyed by the Weed Lumber Company are a part consideration for the contract by which the Weed Lumber Company sold to the California and Northeastern Railway Company, the predecessor of the Southern Pacific Company, the line of railway extending from Weed northeasterly, over which shipments were made both for the complainants and the Weed Lumber Company.

There is no evidence, however, to show to what extent, if at all, these relatively lower rates entered into the consideration of the contract. Prima facie, the Southern Pacific Company ought to accord to persons shipping between points between which the complainants used to ship the same relative rates which it accorded and still accords to the Weed Lumber Company. It becomes unnecessary, however, to establish new rates in this proceeding, for the reason that complainants are not at present operating their mill, and there is no positive evidence as to when, if at all, they will resume operations. The request for the establishment of new rates seems to have been made in the complaint merely as incidental to the main relief asked by the complainants, which was the award of damages for xxx discrimination ~~xx~~ resulting from the practices of the defendant in the past, both as to rates and as to equipment.

If the complainants hereafter proceed to re-establish their business at Igerna, they may then come before this Commission and ask the Commission to establish the rates which shall govern their movements of logs and other freight.

I find that the complainants are not entitled to relief, at present, on either of their three prayers. I am accordingly constrained to recommend that the complaint be dismissed.

I submit herewith the following form of order:

O R D E R.

The above entitled proceeding having come on for a public hearing on August 22, 1913, and evidence having been introduced by both parties, and the case having been submitted, and the Commission finding that the complaint states no ground for relief,

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 19th day of September, 1913.

John M. Eshleman

H. D. Loveland

Alex Gordon

Max Thelen

Commissioners.