Decision No. 26307

BEFORE THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA

ENCINAL TERMINALS, a corporation, HOWARD TERMINAL, a corporation, and STATE TERMINAL COMPANY, LTD., a corporation,

Complainants,

vs.

PARR-RICHMOND TERMINAL CORPORATION, a corporation,

Defendant.

ORIGINAL

Case No. 3324.

ENCINAL TERMINALS, a corporation and HOWARD TERMINAL, a corporation,

Complainants,

vs.

PARR-RICHMOND TERMINAL CORPORATION, a corporation,

Defendant.

Case No. 3325.

CITY OF OAKLAND, a municipal corporation of the State of California, acting by and through its Board of Port Commissioners,

Complainant,

vs.

PARR-RICHMOND TERMINAL CORPORATION, a corporation,

Defendant.

Case No. 3341.

CITY OF OAKLAND, a municipal corporation of the State of California, acting by and through its Board of Port Commissioners,

Complainant,

vs.

PARR-RICHMOND TERMINAL CORPORATION, a corporation,

Defendant.

Case No. 3342.

McCutchen, Olney, Mannon & Greene, by Allan P. Matthew, F.W. Mielke and John O. Moran, for Howard Terminal, State Terminal Company, Limited, and Encinal Terminals.

Morrison, Hohfeld, Foerster, Shuman & Clark, by F.C. Hutchens and Thelen & Marrin, for Defendant in Cases 3324, 3325, 3341 and 3342.

Markell C. Baer, for City of Oakland, Complainant in Cases 3341 and 3342.

Sanborn & Roehl, for Sunmaid Raisin Growers Association, the Sunland Co-operative Sales Association.

Milton D. Sapiro, for California Prune & Apricot Growers Association, in Cases 3341 and 3342.

Thomas M. Carlson, for City of Richmond, in Cases 3324, 3325, 3341 and 3342.

Tinning and De Lap by T.H. De Lap, for McCrone and Font.

J.C. Fogarty, for Alameda Chamber of Commerce, in Cases 3324 and 3325.

E.G. Wilcox, for Oakland Chamber of Commerce.

Hal Remington, for San Francisco Chamber of Commerce in Cases 3324, 3325, 3341 and 3342.

L.A. Bailey, for Warehousemen's Association of the Port of San Francisco in Cases 3324 and 3325.

Chickering & Gregory, by W.C. Fox, for Hunt Bros. Packing Company in Cases 3324, 3325, 3341 and 3342.

HARRIS, Commissioner:

O P I N I O N

This proceeding consists of four cases against Parr-Richmond Terminal Corporation, a public utility wharfinger at Richmond, California. Complainants Encinal Terminal, Howard Terminal and State Terminal Company are also public utility wharfingers at Alameda, Oakland and San Francisco, California, respectively. The complainant, City of Oakland, is a municipal corporation acting through its Board of Port Commissioners.

In Cases Nos. 3324 and 3341 (the car unloading cases) the defendant is charged with promoting or permitting car unloading practices which are claimed to be in violation of Sections 17(b) and 19 of the Public Utilities Act of California. In Cases Nos. 3325 and 3342 (the wharf demurrage cases) the complaints are directed against alleged inadequate charges for wharf demurrage and unreasonably liberal provisions for free time.

The California Prune and Apricot Growers' Association, The Sun-Maid Raisin Growers Association and Sunland Sales Co-operative Association, the City of Richmond and the Richmond Chamber of Commerce intervened as parties interested in behalf of defendant. The San Francisco Chamber of Commerce, the Alameda Chamber of Commerce, the Oakland Chamber of Commerce in like manner appeared on behalf of certain of the complainants.

The four cases were consolidated for hearing and disposition.

The Car Unloading Cases:

Complainants allege in these complaints that defendant has violated its tariff, violated the Public Utilities Act and particularly Section 17(b), that it is guilty of a device whereby tariff charges are remitted, has extended privileges to certain shippers which are not regularly extended to all, and has granted a preference in violation of Sections 17(b) and 19 of the Public Utilities Act. All of which defendant denies.

Complainants, by brief and oral argument, define the issue as follows:

> "May a public utility wharfinger participate in or permit a practice or arrangement whereby shippers may have their freight unloaded from cars at a charge lower than the published tariff rate of the utility and may thereupon obtain payment of the full tariff rate from the rail carriers under the terms of the latter's tariffs providing for the assumption of car unloading costs?"

Defendant's definition is as follows:

> "Whether the car unloading practices at defendant's terminals, whereby shippers are permitted to have their unloading done by car unloaders, acting as their agents, for a compensation less than the unloading absorption allowed by the tariffs of the rail carriers, involve the payment by defendant of unlawful rebates or remissions of defendant's tariff charges.
>
> "Whether such car unloading practices constitute an unlawful discrimination or preference by the defendant."

Conceding the correctness of these definitions, it is nevertheless believed that the fundamental issues included in both but specifically stated in neither are as follows:

> (1) Can a public utility wharfinger which has in its tariff a charge for unloading at its terminal, but no provision reserving to itself the exclusive right of unloading, prevent the shipper, or a car unloader paid by the shipper, from going on its terminal and doing the unloading?
>
> (2) May a public utility wharfinger which has in its tariff a charge for car unloading at its terminal but no provision permitting shipper or car unloaders paid by him to go upon the terminal and do the unloading with a waiver in such event in whole or in part of the charge, lawfully extend such privilege and waiver to shippers desiring it?
>
> (3) May a public utility wharfinger permit a practice whereby shippers may have their freight unloaded from the cars upon its terminal without charge or for less than its tariff rate?

At this point it is desirable to state the facts developed in the hearing, following which the issues will be considered in their order.

Facts:

The defendant's tariff filed with the Commission contains provisions relating to the loading or unloading of cars and trucks at its terminals. The rate for such articles as canned goods and dried fruits is 40¢ per ton. There is no provision giving or reserving to defendant the exclusive privilege of loading or unloading at its terminals or extending to the

shipper the privilege of entering upon the terminals and doing his own unloading.

Prior to the summer of 1932, unloading of railroad cars at its terminals was performed exclusively by defendant at the charge named in its tariff.

In the summer of 1932, three large shippers of canned goods and dried fruits diverted their tonnage from other terminals to defendant, and for the first time, a professional car unloader, McCrone and Font was permitted to operate at defendant's terminals in unloading rail cars for the three shippers.

McCrone and Font received no payment from defendant and have no agreement with it. The only agreements were between the shippers and McCrone and Font for car unloading and were oral and terminable at will. These agreements were private in character and the rates for unloading were not made public and were unknown to defendant's officials until brought out in the evidence in this hearing.

The rate charged by McCrone and Font to one of these shippers was 15¢ a ton and to the other two, 20¢. Certain services not included in car unloading were, however, rendered the other two.

No other shipper or receiver of freight has had freight unloaded at defendant's terminals, whether by defendant or McCrone and Font at less than defendant's tariff rate.

When defendant unloads for shippers, it charges its tariff rate. When shippers arrange their own unloading, the defendant does no unloading work, collects no charge and pays no money to the shippers.

Defendant is ready and willing to unload for anyone at its tariff rates, but permits any shipper to perform his

own unloading by himself or his agent.

Tariff provisions of the railroads establish a flat absorption of 40¢ per ton on account of unloading at various points on San Francisco Bay regardless of the actual cost.

Each of the three shippers above referred to collected the 40¢ per ton from the rail carriers, thus realizing a net gain of 20¢ or 25¢ per ton in excess of his actual unloading expense.

At no place in the San Francisco Bay Area, with the exception of defendant's terminals, can a shipper have freight unloaded at less than the tariff rate and then collect the full tariff rate from the rail carrier.

These car unloading arrangements at Richmond have not created new traffic but have diverted traffic from competing terminals.

Defendant originated this plan for car unloading at its terminals by shippers with attendant tariff absorption and suggested same to McCrone and Font and the three shippers. Other shippers were solicited to use its terminals on the same basis. It made announcement of the plan at a meeting to the terminal operators and at a public meeting held by the Richmond Chamber of Commerce.

The Issues.

(1) Defendant as a public utility wharfinger operates and controls wharves and structures used by vessels in connection with or to facilitate the receipt or discharge of freight for compensation. (Public Utilities Act, 1-z-dd). Freight received in railroad cars for shipment by vessels is unloaded from the cars after they have been "spotted" in the terminal. When the car is thus spotted the freight passes from the custody of the railroad to that of the wharfinger or terminal

company. Generally speaking, the latter company unloads the freight and has custody of it until it leaves the terminal property. Its main functions in this connection are unloading of the cars and storage. Tariffs covering these and certain other services are filed with the Commission and in part define the extent and nature of the utility's dedication to public use of the property operated by it.

A universal characteristic of the relationship of the public utility to the public is that the utility is to perform the service and use for that purpose the property, which service and property it offers or dedicates to the public. If it does not perform the service then it is not a public utility. If the property is not to be used in connection with the service then there is no dedication of the property. If it ceases to perform the service then it has abandoned its public utility function.

In these cases the defendant wharfinger by its tariffs and its conduct had dedicated its services and property, among other things, to receiving, unloading and storing freight delivered to it in cars spotted on its premises. The public, including the shippers directly involved, have no right on the wharfinger's property and no right to use it. Only by license of defendant could they lawfully come upon it.

The defendant can prevent the shipper from entering upon its property and from unloading cars spotted thereon. The answer to issue numbered (1) is, yes.

(2) The next question is could the defendant permit or license the shipper to enter upon the utility's property and do the unloading and thus save the unloading charges. As above stated, this defendant has filed its tariff fixing a

charge for this service and has made no provision in the tariff extending a privilege of this kind. It is clear that such a privilege would "affect or relate to" the rate filed by it.

> Under such rules and regulations as the commission may prescribe, every public utility other than a common carrier shall file with the commission within such time and in such form as the commission may designate, and shall print and keep open to public inspection schedules showing all rates, tolls, rentals, charges and classifications collected or enforced, or to be collected or enforced, together with all rules, regulations, contracts, privileges and facilities which in any manner affect or relate to rates, tolls, rentals, classifications, or service. (Public Utilities Act, Section 14(b).

It is equally clear that the granting of such a privilege is nothing, if not a "device", by which it is planned to "remit" the rates filed. The word "remit" is defined in the dictionary as meaning, "to refrain from exacting."

> 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. (Public Utilities Act, Section 17(b))

The sections of the Public Utilities Act above quoted make it clear that such privilege, if it may be extended at all, could only be extended by virtue of tariff provisions. And there are none to that effect. The answer to the issue numbered (2) is, no.

(3) Discussing the third issue it may be stated as a general truth that a public utility may not lawfully permit the public to use its facilities for the performance of an essential public utility function without charging therefor.

If such permission extend to all of its facilities then there is an abandonment of its functions, even though it is willing to perform the services itself. For it is not to be assumed that the public will pay for services which they can perform for themselves without charge. If, on the other hand, the permission extend only to a portion of its facilities, then the remaining facilities must carry an additional burden. Discrimination and preference inevitably result.

If a practice is permitted which enables all shippers to have their unloading done at a uniform rate less than the tariff rates, then there is a tariff change without the notice required by law. If the reduced rates are not uniform, as was the case here, then discrimination and preference appear.

In brief it may be said that any practice is to be condemned which opens the door, no matter how narrow the opening, to discrimination and preference. Furthermore any practice is to be condemned which prevents the enforcement of the tariff and the collection by the utility of the rate fixed in it.

One of the purposes of regulatory laws is to prevent favoritism and to place all shippers upon equal terms:

U.S. v. Union Stockyard & Transit Co. of Chicago, 226 U.S. 286.

The practices complained of here violate this purpose. The answer to the issue numbered (3) is, no.

In regard to this third issue it should be observed that car unloading comprises an essential and important portion of defendant's business and is by no means an incidental or ancillary service. The revenue derived from such service is a substantial part of its entire revenue. It would be against public policy and inimical to the public interest to permit defendant to amend its tariffs so as to open its facil-

ities to shippers or their agents for the performance of this essential public utility service, even if it were the desire of defendant to do so.

It is contended by the defendant that its plan in the unloading of freight cars has been a well established custom for many years at the docks on San Francisco water front. These docks are state owned. Under the law both the shipper and the car unloader have the right of access to them. The state does not undertake to perform the car unloading. Neither does it come into the custody of the freight upon the spotting or unloading of the cars.

The defendant also calls attention to the fact that the terminals generally, including the complainants, do not unload trucks bringing freight to their terminals although trucks are listed with cars in the tariffs and are subject to the charges for unloading as are cars. There is a well recognized distinction here in that the truck freight rates customarily include loading and unloading while under rail tariffs the shipper and receiver must do the loading and unloading.

The reasonableness of the unloading charge fixed in defendant's tariff is not here involved and nothing in this decision may be taken as indicating an opinion thereon.

The defendant should be required to cease and desist from the car unloading practices complained of and should be required to collect its tariff charges for all freight unloaded from railroad cars at its terminals.

As heretofore stated in the wharf demurrage cases (Nos. 3325 and 3342) it is alleged that (a) defendant's tariff charges for wharf demurrage and/or storage are unduly and unreasonably low and insufficient to afford adequate compensation for the services furnished thereunder and (b) that the

free storage time of twenty-one days allowed by defendant is unduly and unreasonably long resulting in unreasonable preference as between shippers.

Wharf Demurrage.

Wharf demurrage is defined as the charge assessed against merchandise which remains on the terminal beyond the free time period.

The principal cause of complaint is the lower rate of 3/4 cents per ton per day charged by defendant as against complainants' rates of 1-1/4 cents per ton per day on such major commodities as canned goods, dried fruit, beans; ten cents per ton per month as against two cents per ton per day on steel sheets; and a rate of one cent per case per season as against two cents per case per season on tomato puree, which commodities constitute the bulk of the tonnage.

With respect to other commodities the rates are either on a parity or vary by different amounts according to the particular classification.

Both complainants and defendant submitted cost data relating to the compensatory character of the 3/4 cent wharf demurrage applicable on typical major commodities. Complainants' analysis was based upon the cost of storing freight at the Port of Oakland Outer Harbor Terminal, Port of Oakland Terminal Building "C", Parr-Richmond Terminal No. 3 and Encinal Terminals reflecting the estimated capital investment per square foot of floor area for buildings, roadways, tracks and wharf and for land occupied. The estimated revenues at the 3/4 and 1-1/4 cent wharf demurrage bases, exclusive of free time allowance, were computed against the annual cost and expenses including fixed charges of interest at 6%, depreciation at 1% and insurance, without allowance for taxes. Alternate

calculations based upon 75% and 50% average fills or utilization, both with and without terminal car work, based at 1, 3 and 6 turnovers, of tonnage at normal and higher pilings, reflected substantial losses pointing to the inadequacy of the lower rate.

Defendant's cost figures centered on storage operations in the so-called back warehouse situated to the rear of its transit Terminal No. 1 where substantially all of said defendant's storage business is done. Two railroad tracks separate these terminal units and the revenues and costs are estimated upon canned goods, dried fruits, beans, sugar, steel and barley as of December 1, 1932 and allocated to floor and ground areas (exclusive of trackage serving the back warehouse) at an average fill of 80%, allowing for passage-ways. Comparative average demurrage revenues were based alternatively on estimates of approximately eight, eleven and fourteen thousand tons at one and three turnovers upon pilings of canned goods, for example, of 15, 20 and 25 high, respectively, with deduction for free time of 13 to 15%, and reflecting a net profit of approximately four thousand dollars.

Complainants refute this showing and contend that defendant's attempt to confine the determination of wharf-demurrage costs to the so-called back warehouse of its Terminal No. 1 is wholly unjustifiable owing to its being the cheapest of the corporation's terminal properties; that the building is not used at all for transit tonnage but is virtually a warehouse operation where relatively larger percentages of floor usage and higher stacking can be employed than would normally be practicable for wharf demurrage in transit sheds. In this, they further contend that defendant's estimates include no allowances for the abnormally high stacking, breaking and restacking of said storage piles; that nothing was included to cover cost of transferring storage freight between Terminals 1 and 3 in

either direction at both of which costlier transit terminal units wharf demurrage would occur; that the terminal areas computed do not include spur tracks or the ground space used in front of the warehouse; that defendant's allocation of general overhead expense upon the basis of the percentage relationship of wharf-demurrage revenue to total revenue rather than upon a tonnage basis was insufficient and improper and that upon consideration of the necessary factors of correction defendant's cost figures should reflect a loss of $8,000 instead of the $4,000 profit shown.

In other words, that defendant's centering of wharf-demurrage costs exclusively over the limited facility of the back warehouse of its Terminal No. 1 constitutes an improper showing as to wharf-demurrage expense at all of the defendant's terminals and indulges in assumptions which are insupportable alleging that defendant's set-up of wharf demurrage costs assumes the economic utilization of available space in far greater measure than can reasonably be anticipated.

From a careful consideration of these studies we are not persuaded that the defendant's showing as to its so-called back warehouse storage has proven the reasonableness of said defendant's tariff rates for wharf demurrage.

From the entire record we are convinced that the 3/4 cent rate is unduly low and are somewhat uncertain as to the adequacy of the 1-1/4 cent rate, bearing in mind that other major Pacific Coast terminals are uniformly 2 cents. The disparities as to steel sheets and tomato puree are infinitely greater than on canned goods, dried fruits and beans. On the

other hand the merchandise N.O.S. rates of complainants and defendant, which would apply to all commodities not otherwise specifically rated, are uniformly 2 cents per ton per day while the rates on iron or steel pipe as between complainants' and defendant's tariffs vary but 1/4 cent per ton. It is to be noted that the rates on all of these commodities at North Pacific Coast terminals are materially higher than either complainants' or defendant's, being uniformly 2 cents per ton per day. Upon extensive experience it was testified that "in all these ports the rates are very reasonable, because they have been hammered down and hammered down to the very last limit."

Furthermore it is shown that any substantial differences in terminal rates divert traffic from complainants' to defendant's terminal and that should the former establish lower rates than the latter by any such amounts as here involved, the traffic would, in turn, go to whatever terminal maintained the lowest charges.

It follows, therefore, that whatever the basis to be maintained by either complainants or defendant, the higher will meet the lower in competition for the traffic.

For the present, however, I find that defendant's rates are unjust and unreasonably low to the extent that they vary from the following rates:

Canned Goods	1½	cents per ton of 2000 lbs. per day
Dried Fruit	1¾	" " " " " " "
Beans	1¾	" " " " " " "
Steel Sheets	2	" " " " " " "
Tomato Puree	2	" per case, per season (defined).

Free Time:

As regards allowance of "free time", after which wharf demurrage begins to accrue, complainants' tariffs generally

provide for ten days (exclusive of Sundays and holidays) compared to defendant's twenty-one days (including Sundays and holidays).

It was testified that the purpose of free time allowance is to permit a reasonable opportunity to assemble cargo for a steamer without the imposition of any charge by way of penalty or compensation. There are no shipper complaints against the ten day period as to either inbound or outbound tonnage and the contention is made that the granting of any longer period is merely a traffic inducement to influence routing and equivalent to the extension of free storage.

Defendant claims that the longer free time is necessary because of earlier sailing schedules from Richmond than from other terminals about the Bay. Defendant's own appraisal of its actual operation, however, was summarized in the following testimony: "That item of 21 days is a fine soliciting argument, but as a practical matter very few people take advantage of it, except when grain goes into storage * * * *."

With minor exceptions the ten-day rule customarily applies at other major Pacific Coast ports and from the record appears adequate for the San Francisco Bay region and we so find herein.

O R D E R

These cases being at issue upon complaints and answers on file, full investigation of the matters and things involved having been had, and basing this order on the findings of fact and the conclusions contained in the preceding opinion;

IT IS HEREBY ORDERED that defendant, Parr-Richmond Terminal Corporation, cease and desist and thereafter abstain from permitting the car loading and unloading of freight in

connection with freight cars without assessing and collecting the charges contained in its tariffs lawfully on file with this Commission.

IT IS HEREBY FURTHER ORDERED that defendant, Parr-Richmond Terminal Corporation, be and it is hereby ordered to cease and desist and thereafter to abstain from applying, demanding or collecting wharf demurrage rates which differ from those found proper in the opinion which precedes this order.

IT IS HEREBY FURTHER ORDERED that defendant, Parr-Richmond Terminal Corporation, be and it is hereby ordered to cease and desist and thereafter to abstain from the allowance of free-time period, before wharf demurrage begins to accrue, different than the ten-day rule found proper in the opinion which precedes this order.

IT IS HEREBY FURTHER ORDERED that defendant, Parr-Richmond Terminal Corporation, be and it is hereby ordered to publish and file effective on or before September 5, 1933, the said wharf demurrage rates and the said free-time rule hereinbefore found proper in the opinion which precedes this order.

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 28th day of August, 1933.

COMMISSIONERS.