Decision No. 26372.

BEFORE THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA

ORIGINAL

CALIFORNIA PORTLAND CEMENT COMPANY, a corporation,
Complainant,
vs.
SOUTHERN PACIFIC COMPANY, a corporation,
Defendant.

Case No. 3046.

RIVERSIDE CEMENT COMPANY, a corporation,
Complainant,
vs.
SOUTHERN PACIFIC COMPANY, a corporation, and LOS ANGELES & SALT LAKE RAILROAD COMPANY, a corporation,
Defendants.

Case No. 3055.

MONOLITH PORTLAND CEMENT COMPANY, a corporation,
Complainant,
vs.
PACIFIC ELECTRIC RAILWAY COMPANY, a corporation, and SOUTHERN PACIFIC COMPANY, a corporation,
Defendants.

Case No. 3056.

MONOLITH PORTLAND CEMENT COMPANY, a corporation,
Complainant,
vs.
SOUTHERN PACIFIC COMPANY, a corporation,
Defendant.

Case No. 3057.

SOUTHWESTERN PORTLAND CEMENT COMPANY,
a corporation,
Complainant,
vs.

SOUTHERN PACIFIC COMPANY,
a corporation,
PACIFIC ELECTRIC RAILWAY COMPANY,
a corporation,
THE ATCHISON, TOPEKA AND SANTA FE
RAILWAY COMPANY, a corporation,
LOS ANGELES & SALT LAKE RAILROAD
COMPANY, a corporation,
Defendants.

Case No. 3060.

B. H. Carmichael, Call & Murphey and F. W. Turcotte, for California Portland Cement Company.
A. R. Sutton and T. A. L. Loretz, for Blue Diamond Corporation, Limited.
Waldo A. Gillette and W. D. Burnett, for Monolith Portland Cement Company.
O'Melveny, Tuller & Meyers, William W. Clary and O. T. Helpling, for Riverside Cement Company.
Chas. R. Boyer and Sanborn, Roehl & Brookman, for Southwestern Portland Cement Company.
James E. Lyons and Burton Mason, for Southern Pacific Company, defendant.
Berne Levy and G. E. Duffy, for The Atchison, Topeka and Santa Fe Railway Company, defendant.
A. S. Halsted and E. E. Bennett, for Los Angeles & Salt Lake Railroad Company, defendant.
R. E. Wedekind and W. G. Knoche, for Pacific Electric Railway Company, defendant.
Walter K. Tuller, for California Portland Cement Company and Riverside Cement Company.

BY THE COMMISSION:

OPINION ON REHEARING

By Decision No. 24871 of June 13, 1932, in the above entitled proceedings the Commission ordered defendants to establish reduced rates on cement, in carloads, from Colton, Crestmore, Victorville and Monolith to points beyond Ventura and Ravenna. Reparation was awarded on shipments to those points which moved on and after April 28, 1931. In all other respects the complaints were

dismissed.[1]

Petitions for rehearing were filed by complainants and defendants. Oral argument was granted on said petitions but solely for the purpose of further considering the question of reparation. Oral argument was had before the Commission en banc.

The above proceedings are a continuation of, and must be considered with relation to, Case 2663, California Portland Cement Co. et al. vs. Southern Pacific Co. et al., 34 C.R.C. 459 (affirmed 35 C.R.C. 904). In the proceeding just referred to, the Commission had for consideration the general level of rates on cement, in carloads, from Colton, Crestmore, Oro Grande, Victorville and Monolith to points in Southern California - National City and north thereof, and Monolith, Santa Barbara and south thereof.[2] These rates were attacked by all the cement mills as being unreasonable, and by the mills at Colton and Crestmore (inner mills) as prejudicial to them and unduly preferential of the mills at Oro Grande, Victorville and Monolith[3] (outer mills). The outer mills also attacked the rates to points beyond Los Angeles as unduly prejudicial to them and preferential of the inner mills to the extent that such rates exceeded for comparable distances the amounts contemporaneously added to the rates from Colton and Crestmore. The Commission held that the rates from Colton, Crestmore, Oro Grande, Victorville

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[1] The issues raised by the complaints are set forth in Decision No. 24871. Generally the rates from Colton, Crestmore, Victorville and Monolith to numerous destination points beyond Los Angeles, were alleged to be unlawful in violation of Sections 13 and/or 19 of the Public Utilities Act. Reparation was asked on all shipments moving two years prior to the filing of the complaints.

[2] The issues raised by complainants in Case 2663 were somewhat narrower than stated above, but were subsequently broadened by petitions in intervention filed by the other mills.

[3] The undue preference and prejudice alleged by the Colton and Crestmore mills was due to the one cent differential long maintained by defendants in the rates between the inner and outer mills.

and [illegible] to Somis, [illegible], Ven[illegible]
ble. Reasonable rates were prescribed for [illegible] [illegible] also held that [illegible] [illegible] Oro Grande, [illegible] [illegible]

[illegible]

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4 The [illegible] points beyond [illegible] [illegible]ture were stated by the Commi[illegible] [illegible] the [illegible] tablish[illegible] rates to Ventura [illegible] [illegible] intermediate points [illegible] [illegible] Section [illegible] [illegible] relative adjust[illegible] [illegible] beyond [illegible] made [illegible] violation of the ment, [illegible] those made to avoid violation of the Act. [illegible] of Section 4(a), of [illegible] This failure of defendants [illegible] in incongruities which they should have eliminated. For [illegible] to [illegible] Commission prescribed a rate of [illegible] from Colton to [illegible] the latter [illegible] haul of 132 miles. From Colton to [illegible], defendants established a rate [illegible] located 17 miles beyond Ventura, defendants [illegible] cents or [illegible] cents [illegible]. At Ojai they maintain a rate of [illegible] cents or [illegible] [illegible] rate for an added haul of only 13 miles. Similar incongruities should [illegible] prevail in the rates beyond Ravenna. The Commission should [illegible] reasonable rates to points beyond Ventura and Ravenna [illegible] April [illegible], [illegible] [illegible]tion on shipments moving on and after April [illegible], [illegible].

and Monolith to Somis, Cavin, Ventura and Ravenna were unreasonable. Reasonable rates were prescribed for the future. The Commission also held that the rates from Oro Grande, Victorville and Monolith to points beyond Los Angeles were unduly preferential of the inner mills and unduly prejudicial to the outer mills to the extent such rates exceeded, for comparable distances, the amounts contemporaneously added to the rates from Colton and Crestmore. In all other respects the complaints were dismissed.

In Case 2663 complainants did not ask for reparation. The Commission's findings were therefore limited to the establishment of rates for the future.

After the decision in Case 2663 had become final the above entitled proceedings were filed. Although complainants requested rates for the future, their main purpose was to obtain reparation on shipments moving during the pendency of Case 2663 and subsequent thereto. Reparation was denied, however, on all shipments moving under the rates attacked in Case 2663 except to points beyond Ventura and Ravenna. Rates were also prescribed for the future to the same destination points.[4]

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[4] The reasons for awarding reparation on the shipments destined to points beyond Ventura and Ravenna and prescribing rates for the future were stated by the Commission as follows: "The Commission established specific rates to Ventura and Ravenna. Defendants reduced their rates to the intermediate points to avoid violations of the long and short haul provisions of Section 24(a) of the Public Utilities Act. But to the points beyond they made no relative adjustment, the only reductions being those made to avoid violation of the aggregate of intermediate provisions of Section 24(a) of the Act. This failure of defendants has resulted in incongruities which they should have eliminated. For example, the Commission prescribed a rate of 12½ cents from Colton to Ventura for a haul of 132 miles. From Colton to Carpinteria, the latter point located 17 miles beyond Ventura, defendants established a rate of 19.5 cents. At Ojai they maintain a rate of 22 cents or 2½ cents over the Ventura rate for an added haul of only 16 miles. Similar inconsistencies prevail in the rates beyond Ravenna. The Commission should prescribe reasonable rates to points beyond Ventura and Ravenna and award reparation on shipments moving on and after April 28, 1931.

The primary question raised by the argument on rehearing is whether or not the Commission, in view of its decision in Case 2663, is as a matter of law required to award reparation to complainants on shipments which moved during the pendency of Case 2663 and subsequent thereto.[5]

Two findings relative to the issue of reparation were made by the Commission in Case 2663. The first, made under Section 13 of the Public Utilities Act, related to the reasonableness of the rates. The second, made under Section 19 of the Act, found undue preference and prejudice in the rates to points beyond Los Angeles. These two findings were as follows:

> "That the present rates from Colton, Crestmore, Victorville, Oro Grande and Monolith are not unjust and unreasonable except to the extent they exceed the rates set forth below:
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> | | Rates in cents per 100 pounds | | |
> |---|---|---|---|
> | | From Colton Crestmore | From Victorville Oro Grande | From Monolith |
> | Somis | 11½ | 12½ | 12½ |
> | Cavin | 11½ | 12½ | 11½ |
> | Ventura | 12½ | 13½ | 12½ |
> | Ravenna | 11½ | 12½ | --- " |
>
> "That the rates from Victorville and Monolith to points beyond Los Angeles where the rates are based over the Los Angeles rates, are unduly preferential to Colton and Crestmore and unduly prejudicial to Victorville and Monolith to the extent that such rates exceed for comparable distances the amounts contemporaneously added to the rates from Colton and Crestmore."

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5 The complaint in Case 2663 was filed on March 4, 1929. Extended hearings were had and the proceeding submitted on briefs. On March 18, 1930, the Commission rendered its decision thereon, holding, as previously stated, that certain rates were unreasonable and others prejudicial and preferential. Upon petitions for rehearing filed by complainants, interveners and defendants the proceedings were reopened for further consideration. Thereafter, on March 9, 1931, the Commission's original decision, with certain immaterial modifications, was affirmed.

The Commission in the original decision in the instant proceedings held that the first finding should not be construed as a formal finding that the rates under consideration were reasonable rates except with respect to the prescribed rates to Somis, Cavin, Ventura and Ravenna. On further review of the decision in Case 2663, in the light of the oral argument on rehearing, a different conclusion should be reached.

The Commission had before it in Case 2663 a comprehensive record fully setting forth the measure of reasonable rates on cement within California and elsewhere throughout the country, including rates prescribed by this Commission in Pacific Portland Cement Co. et al. vs. A.T.& S.F.Ry.Co. et al., 33 C.R.C. 300, and by the Interstate Commerce Commission between Scale IV territory in Kansas, Nebraska, South Dakota, Colorado, Montana and Wyoming, between Kansas and Oklahoma (Western Cement Rates, 69 I.C.C. 644, 87 I.C.C. 451), and from Oklahoma and Kansas to Texas (Oklahoma Portland Cement Co. vs. D.& R.G.W.R.R., 129 I.C.C. 63).[6] Thus a literal interpretation of the decision in Case 2663, together with the recital therein of the evidence of record, leads to the conclusion that in addition to finding that the rates from Colton, Crestmore, Victorville and Oro Grande to Somis, Cavin, Ventura and Ravenna were unreasonable, the decision also held that all other rates in the territory under review were reasonable.

The second finding of the Commission is clear in meaning.

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[6] In commenting upon these comparative rates the Commission said: "It is apparent from the above that the proposed rates (proposed by complaints) are not only too low for maximum reasonable rates but that the present rates except those from Colton, Crestmore, Victorville and Oro Grande to Somis, Cavin, Ventura and Ravenna and from Monolith to Somis, Cavin and Ventura are not unreasonable per se. However, from and to the points just mentioned the present rates are out of line and will be adjusted to the basis hereinafter prescribed."

What then is the Commission's power and duty in respect to awarding reparation in these proceedings?

The order of the Commission in Case 2663 was prospective in nature, contemplating only the establishment, for the future, of reasonable rates and rates free from preference and prejudice. It was issued as a legislative act for the benefit of the public. There was no issue presented in Case 2663 which called upon the Commission to exercise its judicial function and right a private wrong, if any existed, by awarding reparation to complainants. The Commission in its original decision in the instant proceedings denied these complainants reparation on rather broad grounds.[7] It was not felt that it was in the public interest for shippers to resort to what may well be termed piece-meal litigation (see Rule 3(s), Interstate Commerce Commission Rules of Procedure). The Commission still adheres to this position but nevertheless it must be conceded that complainants have now directly raised the issue of reparation, and in the absence of a statute, or rule of the Commission, to the contrary, are entitled to a determination thereof.

To determine if complainants should be awarded reparation it is essential first to test the lawfulness of the rates during the

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7 In denying reparation the Commission stated: "These complainants were before us in Case 2663 and elected to ask the Commission for relief for the future. They did not then seek reparation. The relief they sought was granted in part and denied in part. They now request reparation on shipments which moved during the pendency of Case 2663 and subsequent thereto. If they were being damaged by the exaction of unlawful rates at the time Case 2663 was before the Commission, they should have asked for reparation. It is true that the cause of action on some of the shipments accrued after Case 2663 was filed, but complainants and interveners were aware that there was a steady movement of cement from the mills and they had the right to ask for reparation on shipments moving pendente lite."

two-year period immediately preceding the filing of these complaints,[8] a test which rests upon the findings of the Commission in Case 2663.[9]

As previously stated, Case 2663 was filed on March 4, 1929. Hearings were had on July 11, 1929, and on August 20, 21 and 22,1929. The original decision containing the two findings heretofore referred to was rendered on March 18, 1930, and affirmed on rehearing on March 9, 1931. Sound logic compels the conclusion that if the Commission was of the opinion that from the evidence developed on a record finally consummated on August 22, 1929, and its judgment later affirmed, the rates found to be unlawful were obviously unlawful on August 22, 1929, and subsequent thereto, unless it were shown that changed conditions would warrant a different conclusion. There is no showing in the instant proceedings of changed conditions material enough to justify a reversal of our decision of March 18, 1930. It may be that the rates were unlawful prior to August 22, 1929, but the record in Case 2663 is not before us in this proceeding.

Approaching the matter from this viewpoint, the following conclusions naturally flow:

1. That the rates from Colton, Crestmore, Oro Grande and Victorville to Somis, Cavin, Ventura and Ravenna and from Monolith to Somis, Cavin and Ventura were unjust and unreasonable on and after August 22, 1929, to the extent they exceeded the rates prescribed by the Commission in Case 2663.

2. That the rates to points intermediate to Somis, Cavin,

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[8] Case 3046 was filed on April 21, 1931, Case 3055 on May 5, 1931, Cases 3056 and 3057 on May 6, 1931, and Case 3060 was filed on May 11, 1931.

[9] On brief complainant in Case 3060 aptly states its position: "In the present case, complainant relies upon the decisions and findings of the Commission in Case No. 2663, in which this complainant intervened and asked for affirmative relief."

Ventura and Ravenna were unjust and unreasonable on and after August 22, 1929, to the extent such rates may have exceeded the rates found reasonable to Somis, Cavin, Ventura and Ravenna.[10]

3. That the rates to points beyond Ventura and Ravenna were unjust and unreasonable on and after August 22, 1929, to the extent such rates exceed the rates found reasonable by Decision No. 24871 in the above entitled proceedings.[11]

4. That the record does not sustain the allegations of the complaints that the rates from and to the points named in Paragraphs 1, 2 and 3 were, prior to August 22, 1929, unjust and unreasonable, in violation or Section 13 of the Public Utilities Act.

5. That all other rates involved in this proceeding, based upon the decision in Case No. 2663, were just and reasonable and not in violation of Section 13 of the Public Utilities Act.

6. That on and after August 22, 1929, rates from Victorville and Monolith to points beyond Los Angeles, where the rates were based over the Los Angeles rates, were unduly preferential to Colton and Crestmore and unduly prejudicial to Victorville and Monolith to the extent that such rates exceeded for comparable distances the amounts contemporaneously added to the rates from Colton and Crestmore.

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[10] This finding is made to bring the rates into harmony with the long and short haul provisions of Section 24(a) of the Public Utilities Act. Violations of the long and short haul provisions were voluntarily eliminated by defendants when they complied with the Commission's order in Case 2663.

[11] This finding is made to bring the rates into harmony with the aggregate of intermediate provisions of Section 24(a) of the Public Utilities Act and to correct a maladjustment of rates. The maladjustment of rates for the future has been corrected by the Commission's Decision No. 24871, supra. Violations of the aggregate of intermediate provisions were voluntarily eliminated by defendants when they complied with the Commission's order in Case 2663.

7. That the record before us in the instant proceeding does not show that the rates referred to in the preceding paragraph were unduly preferential or unduly prejudicial prior to August 22, 1929.

Based upon the foregoing findings, the amount of reparation which should be awarded to complainants, if any, may be considered in three parts: first, reparation on shipments to Somis, Cavin, Ventura and Ravenna based upon the grounds of unreasonableness; second, reparation to points beyond Los Angeles based upon the grounds of undue preference and prejudice; and third, reparation to points intermediate to Somis, Cavin, Ventura and Ravenna and to points beyond Ventura and Ravenna based upon the grounds of unreasonableness.

Shipments to Somis, Cavin, Ventura and Ravenna

A shipper who has paid an unreasonable rate is damaged thereby and is entitled to reparation in the amount of the difference between the freight charges paid and borne and the rates prescribed as reasonable (Darnell Tanzer vs. Southern Pacific Co., 245 U.S. 531); provided, however, that the Commission has not by formal finding declared the higher rates to be reasonable (Section 71 of the Public Utilities Act). The record shows that complainants made certain shipments on and after August 22, 1929, from Colton, Crestmore, Victorville and Monolith to Somis, Cavin, Ventura and Ravenna, on which they paid and/or bore[12] the charges. On all such shipments

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12 On some shipments to agency stations the freight charges were actually paid by the consignees and the amount so paid deducted from complainants' invoices. Defendants contend this constitutes an assignment of a reparation claim (see Section 71(a) of the Public Utilities Act). We are of the opinion that this is not an assignment of a reparation claim, and if complainants ultimately bore the charge they have been damaged thereby and are entitled to reparation.

they are entitled to reparation in the amount of the difference between the charges paid and those found reasonable in Case 2663, together with interest at six per cent. per annum.

Shipments to Points beyond Los Angeles

On the shipments to points beyond Los Angeles, where we found the undue preference and prejudice to exist, the complainants in order to recover must prove the fact and the amount of the damages, if any, caused by the preferential and prejudicial rates. Interstate Commerce Commission vs. U.S., 77 Law Ed. (Adv.Op.), 781, decided May 8, 1933. Penn. R.R.Co. vs. International Coal Co., 230 U.S. 184. Los Angeles County vs. Pacific Electric Railway, 27 C.R.C. 337, 28 C.R.C. 143. Croley vs. A.T.& S.F.Ry., 31 C.R.C. 625. Albers Bros. Milling Co. vs. Sou.Pac.Co., 34 C.R.C. 743. The record before us, however, does not show complainants suffered damages by reason of the rates found to be preferential and prejudicial. Reparation therefore will be denied.

Shipments to Points Intermediate to Somis, Cavin, Ventura and Ravenna and to points beyond Ventura and Ravenna

The Commission's power to award reparation on these shipments must be determined by Section 71(a) of the Public Utilities Act. This section of the Act gives the Commission the power and authority to award reparation if a public utility has charged an unreasonable, excessive or discriminatory rate. Following this general grant of authority there is an express provision reading as follows:

> "and provided further that no order for the payment of reparation upon the ground of unreasonableness shall be made by the Commission in any instance wherein the rate, fare, toll, rental or charge in question has by formal finding been declared by the Commission to be reasonable."

We have already held that a literal interpretation of the Commission's decision in Case 2663 should be construed as a finding by the Commission that the rates, with the exception of those to Somis, Cavin, Ventura and Ravenna, were reasonable. It thus follows as a matter of law that the Commission is divested of power to award reparation on any shipments transported to points intermediate to Somis, Cavin, Ventura and Ravenna and to points beyond Ventura and Ravenna.

The anomaly of awarding reparation on shipments to Somis, Cavin, Ventura and Ravenna and not awarding reparation on shipments to the intermediate points, where charges higher than those found reasonable to the more distant points were collected, and to points beyond Ravenna and Ventura where the rates were maladjusted, is apparent. But the anomaly is complainants' own creation by asking the Commission, as an administrative body, to prescribe rates only for the future, and in subsequent proceedings asking it to retrace its steps and, as a judicial body, award damages. Obviously when the Commission is called upon to act in a judicial capacity its findings are more meticulous than is necessary where rate adjustments are prescribed for the future.

O R D E R

Oral argument on petitions for rehearing having been had, and a full investigation of the matters and things involved having been made,

IT IS HEREBY ORDERED that defendants Southern Pacific Company, Los Angeles & Salt Lake Railroad Company, Pacific Electric Railway Company and The Atchison, Topeka and Santa Fe Railway Company, according as they participated in the transportation, be and

they are hereby authorized and directed to refund, with interest at six (6) per cent per annum, to complainants California Portland Cement Company, Riverside Cement Company, Monolith Portland Cement Company and Southwestern Portland Cement Company, as their interests may appear, all charges collected in excess of the rates found reasonable by the Commission in Case 2663, California Portland Cement Co. et al. vs. Southern Pacific Co. et al., 34 C.R.C. 459 (affirmed 35 C.R.C. 904) for the transportation of carload shipments of cement, on which the cause of action accrued on and after August 22, 1929, from Colton, Crestmore, Victorville and Oro Grande to Somis, Cavin, Ventura and Ravenna, and from Monolith to Somis, Cavin, Ventura and Ravenna.

IT IS HEREBY FURTHER ORDERED that Decision No. 24871, dated June 13, 1932, in the above entitled proceedings, in so far as it is inconsistent with the findings and conclusions contained in the opinion which precedes this order, be and it is hereby annulled and set aside.

IT IS HEREBY FURTHER ORDERED that in all other respects Decision No. 24871, dated June 13, 1932, shall remain in full force and effect.

Dated at San Francisco, California, this 2d day of October, 1933.

Commissioners.