

Decision No. 27241.

BEFORE THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Investigation
on the Commission's Own Motion into
the Lawfulness of the Rates, Rules,
Regulations, Contracts, Operations
and Practices of PARR-RICHMOND TERMINAL
CORPORATION and DRIED FRUIT SHIPPERS,
INC., etc.

Case No. 3708.

ORIGINAL

Thomas M. Carlson, City Attorney, for the City
of Richmond.
Morrison, Hohfeld, Foerster, Shuman & Clark, by
F. C. Eutchens, for Parr-Richmond Terminal, Ltd.
Markel C. Baer, for the Port of Oakland.
McCutchen, Olney, Mannon & Greene, by Allan F.
Matthew, for the Encinal Terminals, Howard
Terminals and State Terminal Company, Ltd.
Edwin G. Wilcox, for the Oakland Chamber of Com-
merce.
Milton D. Sapiro, for Dried Fruit Shippers, Inc.
Hal Remington, for the San Francisco Chamber of
Commerce.

HARRIS, Commissioner:

O P I N I O N

This proceeding was instituted by this Commission for the purpose of inquiring into the contracts, operations, practices, etc. of the respondent Parr-Richmond Terminal Corporation, Ltd., hereinafter called Parr, and Dried Fruit Shippers, Inc., hereinafter called Shipper, the essential issue as developed at the hearing being the legal propriety of a certain lease of terminal space at Richmond Inner Harbor from Parr to Shipper.

At the hearing Encinal Terminals, Howard Terminals, State Terminal Company, Ltd., and the City of Oakland, through its Board

of Port Commissioners, appeared as interveners for the purpose of attacking the validity of said lease. Respondents and interveners are terminal operators on San Francisco Bay.

Parr, at the time it entered into said lease, was operating four terminals at or near Richmond designated as Terminals 1, 2, 3 and 4. These terminals are all owned by the City of Richmond which has leased them to Parr for the purpose of developing commerce and shipping in the Harbor at Richmond.

The property involved in this case is a portion of Terminal No. 3, the entire area of which, except a small portion occupied by Felice and Ferrelli, was operated by Parr as a public wharfinger at the date of the lease. Parr had filed its tariff covering the same.

Terminal No. 3 consists of a transit shed extending along the shore line of the Inner Harbor of the City of Richmond, on the one side of which are railroad tracks and on the other the navigable waters of the Harbor with an open apron platform where ships may dock.

The lease in question is dated October 12, 1933, and covers the entire portion of this transit shed north of the concrete fire wall running through the center of said shed (exclusive of a small portion occupied by Felice and Ferrelli) together with the entire portion of the dock north of said wall. The leased area in the transit shed is approximately 45,000 square feet. The lessor reserves the free right of passage for trucks through and passage way down the center of the leased space in the transit shed and also the right to use and berth vessels at the southerly 200 feet of the leased portion of the dock when not required by the lessee. Lessor also has the privilege of using railroad tracks on the leas-

ed portion of the dock and the railroad tracks adjacent to the leased portion of the transit shed on the land side.

The rental is \$675 per month and in addition thereto 12½ cents per ton on all goods passing over the demised premises. The premises are to be used exclusively "for the trans-shipment and handling of dried fruit and canned goods and other food products and other by-products".

The term is 5 years commencing October 16, 1933, with the proviso that "in the event that if in 12 consecutive calendar months the total tonnage moving over, across or through said premises shall be less than 30,000 tons, it is agreed that lessor may at its option, upon giving 30 days' notice in writing to the lessee, terminate this lease". The lease contains the following recitals:

"WHEREAS, the Lessor is engaged in the operation of a certain public terminal known as Parr-Richmond Terminal No. 3 situated on the Inner Harbor of Richmond, California, which said terminal consists of a dock and transit shed immediately adjacent thereto and divided into two parts by a concrete fire wall with center doorway; and

"WHEREAS, Lessor does not require all of said dock or transit shed for the purpose of its own business, and, in particular, the premises hereinafter described and hereby leased to Lessee are not necessary or useful in the performance of the Lessor's duties to the public;"

On the date of the lease the directors of Parr adopted two resolutions, one of which declares the property involved in the lease to be non-operative property "not necessary or useful in the performance of the duties of this corporation to the public" and authorizes such an amendment to its Terminal Tariff No. 2 "as may be necessary or proper in order to show that such described property is not operative property to which said tariff shall be applicable" and among other recitals contains the following:

"WHEREAS, at the present time a comparatively insignificant amount of traffic is moving through said Parr-Richmond Terminal No. 3; and

"WHEREAS, any traffic which is now moving or could reasonably be expected to move through said Parr-Richmond Terminal No. 3, if the whole thereof were to be operated by this corporation as a public utility, may conveniently and easily be handled by this corporation through the southerly half of said Terminal No. 3, or at this corporation's Terminal No. 1, at Richmond Outer Harbor;"

The other resolution authorizes the execution of the lease and among other recitals contains the following:

"WHEREAS, by resolution of this Board of Directors adopted this day, the northerly portion of this corporation's terminal known as Parr-Richmond Terminal No. 3, at Richmond Inner Harbor, has been declared to be, and the same is, non-operative property of this corporation and property not necessary or useful in the performance of the duties of this corporation to the public; and

"WHEREAS, therefore, under Section 51(a) of the Public Utilities Act of the State of California, this corporation may properly make a lease of said portion of said Parr-Richmond Terminal No. 3; and

"WHEREAS, it has been represented to this corporation by representatives of Dried Fruit Shippers, Inc., a corporation, and California Prune and Apricot Growers Association, that if this corporation will lease to said Dried Fruit Shippers, Inc., the said northerly portion of said Parr-Richmond Terminal No. 3, upon terms and conditions satisfactory to said Dried Fruit Shippers, Inc., the latter will be able to obtain for said portion of said terminal practically all of the traffic of said California Prune and Apricot Growers Association moving through San Francisco Bay;"

Shipper is a corporation and is a subsidiary of and is controlled by California Prune and Apricot Growers Association. The latter is a large shipper, a considerable part of whose business Parr had formerly enjoyed but had lost not long prior to the making of this lease.

On October 16, 1933, Shipper filed a tariff with this Commission which was suspended by the Commission. After the suspension, permission was asked to withdraw the tariff.

Parr could not spare space for lease to other shippers or other subsidiaries upon terms similar to those in the lease under consideration.

At the date of the lease Parr was using the leased property and said property was useful to Parr in the performance of its duties to the public.

At the date of the lease Parr had sufficient space in the southerly portion of the No. 3 Terminal and in its No. 1 Terminal to care for all the public utility business it then enjoyed at these terminals.

There was evidence and argument as to whether the rental reserved in the lease is reasonable. Upon this question we make no finding as it is not needed in disposing of the issues here involved.

Parr has at no time asked this Commission for permission to abandon operations on the leased property or for authority to lease the property.

It is contended that the lease is void on several grounds, among which are the following:

First, the prior consent of the Commission was not secured as required by Section 51(a) of the Public Utilities Act.

Second, the lease violates Section 17(b) of said Act by extending a contract and facility to one shipper, which are not uniformly extended to all.

Third, it violates Section 19 of said Act by granting a preference to one shipper.

Section 51(a) of the Public Utilities Act declares that "no public utility shall henceforth sell, lease, assign, mortgage or otherwise dispose of or encumber the whole or any part of its * * * plant, system or other property, necessary or useful in the performance of its duties to the public * * * without first having secured from the Railroad Commission an order authorizing it so to

do. * * * Every such sale, lease * * * made other than in accordance with the order of the Commission authorizing same shall be void. * * * Nothing in this sub-section contained shall be construed to prevent the sale, lease or other disposition by any public utility of property which is not necessary or useful in the performance of its duties to the public."

Was the leased property at the date of the lease necessary or useful to the lessor in the performance of its duties to the public? Prior to that time lessor had dedicated this property to public use; it had filed with the Commission a tariff covering the "performance of its duties to the public" in the use of its property, which tariff was in effect at the date of the lease; it was actually using the property at said time in the performance of these duties; it had reserved in the lease the right to use portions of the leased property including the "right to use and berth vessels at the southerly 200 feet of the leased portion of the dock, when not required by lessee". The word "useful" is defined as meaning "serviceable for any need or object, or advantageous" or "capable of any beneficial use". That Parr was using the property and had reserved a use in it is conclusive as to the property being useful. The disjunctive statement "necessary or useful" clearly implies that the property may be "useful" without being "necessary" and contributes to the view that if the property is susceptible or capable of use by the utility "in the performance of its duties to the public" then it may not be leased "without first having secured from the Railroad Commission an order authorizing it so to do."

The Commission has several times decided cases involving Section 51(a). The following is from the syllabus in the case of L. Stein vs. Excelsior Water and Mining Company and Thomas Mulcahey, 15 C.R.C. 167:

"It is in violation of the provisions of section 51 of the Public Utilities Act for a public utility water company to lease its system or any portion thereof without first securing an order of the Railroad Commission permitting such action. An individual or company purporting to take over the operation of a utility or a portion thereof under an agreement not so authorized is merely acting as the agent of the utility, which is still responsible for the operation of its system."

In the case of Re Ontario Investment Company, 20 C.R.C. 311, the Commission in effect held void for lack of prior authorization by it, the transfer by a public utility of property dedicated to the public use and constituting part of the property used by it in its operation.

The Supreme Court of this State in Henderson vs. Oroville-Wyandotte Irrigation District, 213 Cal. 514, 529, held as follows:

"No sale of property burdened with the public use is legal, or of any validity whatever, unless the authority to make such sale is first given by the Railroad Commission."

Furthermore, the lease of this property amounts to an abandonment by Parr of its public utility service over and upon the same and to an attempted withdrawal or cancellation of the dedication of said property to public use.

May such an abandonment be consummated by the mere ipse dixit of Parr? The principle suggested in Re Southern Pacific Company to abandon, etc., Decision No. 9428, 20 C.R.C. 445, applies, namely, that no right exists by which Parr can at its own convenience select for reasons of its own a specific portion of its property and proceed to abandon the use of such property and withdraw it from public use unless it is determined by competent public authority that such abandonment is required and justified under all the circumstances.

For the above reasons the lease by Parr to Shipper should be declared void. This determination renders it unnecessary to pass on the other points above referred to and which interveners

have argued in their briefs with much force.

The following form of order is recommended:

O R D E R

The Railroad Commission having instituted an investigation as entitled above and the matter having been heard, the Commission hereby adopts as its findings the statements and findings of fact set forth in the preceding opinion.

Pursuant to said findings, IT IS HEREBY ORDERED:

1. That said lease dated October 12, 1933, between Parr-Richmond Terminal Corporation, Ltd., and Dried Fruit Shippers, Inc., is hereby declared void.

2. That Parr-Richmond Terminal Corporation, Ltd., cease and desist from transferring by lease or otherwise property necessary or useful in the performance of its duties to the public unless authorized to do so by this Commission.

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 30th day
of July, 1934.

C. S. Seavey
Leon Whitely

M. J. Lee
W. B. Harris

Commissioners.