Decision No. 27424

BEFORE THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA

ORIGINAL

In the Matter of the Application of PARR-RICHMOND TERMINAL CORPORATION, LTD., a corporation, and DRIED FRUIT SHIPPERS, INC., a corporation, for an order authorizing the lease of certain property.	Application No. 19568.

MORRISON, HOHFELD, FOERSTER, SHUMAN & CLARK, by F.C. Hutchens, for Applicant Parr-Richmond Terminal Corporation.

MILTON D. SAPIRO, for Applicant Dried Fruit Shippers, Inc.

McCUTCHEN, OLNEY, MANNON & GREENE, by Allan P. Matthew and F.W. Mielke, for Howard Terminals and Encinal Terminals, Protestants.

MARKEL C. BAER and ROBERT M. FORD, for the City of Oakland and Board of Port Commissioners of the City of Oakland, Protestants.

THOMAS M. CARLSON, City Attorney, for City of Richmond, interested party in support of the application.

EDWIN G. WILCOX, for the Oakland Chamber of Commerce.

HARRIS, Commissioner:

O P I N I O N

This is an application by Parr-Richmond Terminal Corporation, Ltd., a public wharfinger hereinafter called Parr, and Dried Fruit Shippers, Inc., a California corporation hereinafter called Shipper, for an order by this Commission authorizing Parr to lease to Shipper certain terminal property.

Parr operates four terminals on San Francisco Bay at or near Richmond known as Terminals Nos. 1, 2, 3, and 4. These terminals are owned by the City of Richmond which has leased them to Parr for the purpose of developing commerce and shipping at Richmond.

The proposed lessee Shipper is a subsidiary of and is controlled by California Prune and Apricot Growers Association which is a large shipper of fruits.

The proposed lease covers a portion of Terminal No. 3 which has heretofore been operated by Parr as a public wharfinger and grants the use of the transit shed, dock, railroad trackage and dredged channel. Parr had filed its tariff covering the same.

The application is made pursuant to Section 51(a) of the Public Utilities Act of the State of California which provides 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."

The application states that "apart from a lease, Lessor has no use, actual or prospective, for the premises sought to be demised."

At the hearing, the City of Richmond appeared as an interested party in support of the application. As protestants there appeared the City of Oakland, acting through its Port Commissioners; the Oakland Chamber of Commerce; Howard Terminals, a public utility wharfinger operating in Oakland; and Encinal

Terminals, a public utility wharfinger operating in Alameda; all except the Oakland Chamber of Commerce being competitors of Parr.

It is contended that the proposed lease would be unlawful: (1) as violative of Section 17(b) of the Public Utilities Act in that it is a device by means of which Parr would indirectly remit the rates, charges, etc., specified in its schedules on file with the Railroad Commission; (2) and would extend to a particular corporation a contract and facilities, etc., which are not regularly and uniformly extended to all corporations and persons; (3) as violative of Section 19 of said Act because it would grant a preference or advantage to a particular corporation as to rates, charges, services and facilities; and (4) as a device contrived for the purpose of defeating the Order made by this Commission in Decision No. 26307 (the car unloading cases).

An understanding of the issues above set forth requires a consideration of their origin and development, following which will be a further statement of the facts.

For a number of years the San Francisco Bay terminals have been competing vigorously for the tonnage of the California Prune and Apricot Growers Association, the Sun Maid Raisin Growers and other large shippers.

Prior to July 1932 practically none of this tonnage passed through Parr, the bulk of it being routed through the Howard and Encinal terminals and the piers of San Francisco; but in July of that year the California Prune and Apricot Growers Association diverted its tonnage to Parr, the inducement offered by Parr being a saving of from twenty to twenty-five cents per ton from car unloading arrangements. As a result of these arrangements, Cases Nos. 3324 and 3341 were filed with this Commis-

sion, in which various terminals attacked these arrangements as being in violation of Parr's tariff, of the Public Utilities Act, and as a device for remitting tariff charges. Decision No. 26307 of this Commission followed on August 28, 1933, in which Parr was ordered to cease and desist from permitting car loading and unloading without the collecting of its tariff charges therefor.

On August 29, 1933, California Prune and Apricot Growers Association diverted its tonnage to the San Francisco piers because Parr could no longer give it a profit or saving on its tonnage.

About October 15, 1933, the prune tonnage was again diverted to Parr. A few days prior thereto, on October 12, 1933, Parr and Shipper executed a lease practically identical with the lease at issue here. On the same date, two resolutions were adopted by Parr, one declaring that the leased property is "not necessary or useful in the performance of the duties of this corporation to the public," and authorizing the amendment of its tariff "to show that such described property is not operative property to which said tariff shall be applicable."

The other resolution authorized the execution of the lease and contained this recital:

> "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; * * *."

On October 16, 1933, Shipper filed a tariff with this

Commission which was suspended by the Commission and then withdrawn.

This Commission then instituted an investigation of the operations, practices, etc., of Parr and Shipper (Case No. 3708), the essential issue being the legal propriety of the lease above referred to. On July 30, 1934, the Commission in Decision No. 27241 held the lease to be void because unauthorized by the Commission.

The following is an excerpt from that decision:

> "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.'"

On August 4, 1934, the pending application to lease was filed by Parr and Shipper. As stated above, the lease proposed is practically identical with the lease held void in Case No. 3708, the rental in each case being the same.

It is not disputed that Shipper operated for about seven

months under the lease declared void during which time it made a profit or saving of about twenty-five cents per ton on all tonnage handled. Nor is it disputed that Parr could not get the California Prune and Apricot Growers Association tonnage in competition with equal rates with other terminals on the Bay. Nor is it disputed that Shipper will be better off financially operating under the lease than it would be if it handled its tonnage through Parr as a public utility.

As already stated, Shipper is a subsidiary of California Prune and Apricot Growers Association which controls Shipper and holds eighty-five per cent (85%) of its stock.

Parr has not adequate facilities to enable it to make similar leases to other shippers applying for same and has not offered to do so.

Applicants contend that they have a clear right to make and that it is the Commission's duty to approve the proposed lease; that the mere leasing of property not accompanied by the furnishing of public utility service is not a public service, but is merely the exercise of a proprietary right and is not subject to the requirements of non-discrimination and tariff publication; that the making of the lease would not impair Parr's ability to render service to the public; that the leasing of property is not the exercise of a public utility function and is, therefore, not affected by the prohibitions of Section 17(b) and Section 19 of the Public Utilities Act.

Section 17(b), in so far as applicable here, is as follows:

"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; provided, that the Commission may by rule or order establish such exceptions from the operation of this prohibition as it may consider just and reasonable as to each public utility."

Section 19 is as follows:

"No public utility shall, as to rates, charges, service, facilities or in any other respect, make or grant any preference or advantage to any corporation or person or subject any corporation or person to any prejudice or disadvantage. No public utility shall establish or maintain any unreasonable difference as to rates, charges, service, facilities or in any other respect, either as between localities or as between classes of service. The Commission shall have the power to determine any question of fact arising under this section."

These provisions of our Public Utilities Act are the direct outgrowth of the underlying purpose of public utility regulation which is to prevent discrimination between persons and localities, to require fair and equal treatment of shippers, and to compel public utilities as public agents to give equal terms to all. So determined is the law on protecting shippers in their right to equal treatment that it denies the right to use "any device" by which any refunds or remissions of any portion of rates and charges may be accomplished and denies the right to extend to any person "any form of contract" or "any facility or privilege except such as are regularly and uniformly extended to all cor-

porations or persons."

If this lease is permitted, one large shipper will use a portion of the facilities of Parr making a profit or saving out of the use, while smaller shippers using the remaining facilities will be required to pay more for an equivalent service than Shipper, to-wit, the usual tariff charges. Shipper under the proposed lease will procure terminal services at a cost less than if the goods were shipped over Parr's facilities at its tariff charges.

From the facts recited, it is clear that the sole purpose of this lease is to accord to Shipper charges different from and less than those contained in Parr's lawfully filed tariff and by this device extend to Shipper advantages and preferences which are not extended to others. We find this to be in violation of both Sections 17(b) and 19 of the Public Utilities Act.

Nor is it an answer to say that by the lease Parr has divorced itself of the facilities leased and what results thereafter is not attributable to Parr and is not in any way the act of Parr. Parr, under the lease, provides complete public utility wharfinger facilities at a rental instead of tariff rates and the rent is less than the return would be from its tariff rates on Shipper's tonnage.

Nor does this view deny Parr the proprietary right to dispose of its property. It may dispose of it but not on such terms or in such manner as to work discrimination between shippers.

Nor may it be rightly said that the making of this lease is not to the detriment of the shippers using the remainder of Parr's facilities. They are put at a competitive disadvantage with the shipper who has the lease. Nor may these shippers regain their lost equality by entering into similar leases; Parr has not offered to make similar leases and has not the facilities to provide additional leases.

The practical effect of this lease is to reduce Shipper's transportation charges. The Interstate Commerce Commission has had to deal with similar matters and in the matter of leases and grants of property by carriers to shippers (73 I.C.C. 682) uses this apt language:

> "When a carrier permits a shipper to use valuable lands to which the carrier has title without charge or without reasonably adequate charge, the practical effect is to reduce that shipper's transportation charges so that there results what amounts to a refunding or remission of some portion of the published rates."

And again in the same matter it is said:

> "Where it clearly appears that the traffic of the lessee is in part the consideration for the lease, the conclusion follows almost inevitably that the transaction amounts to a concession to the shipper-lessee in violation of the Elkins Act and of Sections 2 and 6 of the Interstate Commerce Act."

Southern Pacific Terminal Company vs. Interstate Commerce Commission, 219 U.S. 498, is a case strikingly similar to this. It must be read in its entirety to appreciate it and space does not permit either quoting it in full or outlining it here. Suffice it to say that the case relates to a lease of wharfage facilities by a terminal company where similar leases could not be made to other shippers and which gave the lessee an advantage over competitors. The lease was held unlawful as constituting an undue preference. The following are excerpts from the decision:

> "* * *A direct advantage to Young is manifest. A direct detriment to other exporters is equally manifest.
>
> "The situation challenges attention. Appellants find in it nothing but the natural and legal result of the sagacity which could see an opportunity for profit, and the enterprise which could avail of it. It was the simple matter on the part of Young, it is contended, of bringing his business to the ship's side and cutting out intervening expenses. And it is said that the terminal company had an equally lawful inducement. It

had an idle property, it is contended, over which it had absolute control, and which it turned to use and profit by the arrangement with Young. And this, it is insisted, was a simple exercise of ownership. If the elements of the controversy are correctly stated, the justification may be considered as made out."

* * * * * *

"It is next contended that the lease to Young, under the facts proven, does not constitute an unlawful or undue preference under the interstate commerce act.

"To a certain extent we have considered this contention. An absolute advantage to Young cannot be denied. A facility that has enabled him to acquire practically all the export of cottonseed products must have something in it of advantage which other shippers do not receive, and it would seem to proclaim a power working for his benefit which is not working for others."

"* * *But it is also agreed that neither the Galveston Wharf Company nor the terminal company has space enough to afford facilities to 'all exporters doing business at Galveston', such as Young. And the Commission found that as a practical matter other shippers could not be given the same facilities on the same conditions as those granted to him, nor could such facilities be secured on the bay front. It was further found that the terminal company had indicated that it is not willing to accord shippers generally such facilities, and that the situation of its docks with respect to space was such that it cannot do so even if it should be willing. It may be contended that the patrons of a railroad are not obliged to seek or compete for extraordinary facilities in its terminals. But, be that as it may, all shippers must be treated alike.

"Appellants bring forward the same argument to support the contention under consideration which they advance to support their first contention, to wit, the right, as owner of the property, to make a lease of its 'unused property,' subject only to the limitation that there shall be no interference 'with the use of adjacent navigable waters.' It would seem that, if the argument have any force at all, it would extend the rights of ownership to used as well as unused property, and be exercised in any form of preference, even to the exclusion of some shippers from the wharves. However, as appellants do not press the argument so far, we need not dwell upon it, and will only add that the terminal facilities contemplated by the ordinance of the city of Galveston and the act of the legislature of

Texas confirming it were public terminal facilities, not those which might be granted or withheld in preferences or discriminations."

The case of Youghiogheny & Ohio Coal Co. vs. Erie Railroad Co., 24 Ohio Cir. Ct. R. 289, also relates to a lease of public utility facilities. The court held as follows:

"We cannot hold from this evidence that this plant, by the transaction of April 16, was withdrawn from public use to which it had been for several years devoted by the railroad company. The dock, the trestles, tracks and foundations of this plant are terminal facilities of the railroad company, the exclusive use of which it could not rightfully grant to one shipper of coal and refuse to another without an unlawful discrimination."

Shipper is a mere agency or instrumentality of the owning company and in such case the Commission will not be blinded by mere forms but, regardless of fictions, will deal with the substance of the transaction involved as if the corporate agencies did not exist and as the justice of the case may require.

Chicago, M. & St. P. R. Co. vs. Minneapolis C. & C. Assn., 247 U.S. 490.

The proviso at the end of Section 17(b) of the Public Utilities Act is invoked as justifying an approval by this Commission of the lease. The proviso is as follows:

"* * *provided, that the Commission may by rule or order establish such exceptions from the operation of this prohibition as it may consider just and reasonable as to each public utility."

The Commission has expressed itself on this proviso in an Opinion written by Commissioner Eshleman as follows:

"It is not entirely clear to me just what the power of the Commission is under the proviso in this section, but it certainly does not empower the Commission

to approve discriminations, and I am clearly of the opinion that to permit this carrier to charge one rate to the Irvine & Muir Lumber Company by reason of a contract entered into heretofore between said lumber company and this common carrier, and another rate to other shippers similarly situated, would be a discrimination." In the Matter of the Application of California Western Railroad and Navigation Company to Refund to the Union Lumber Company and the Irvine & Muir Lumber Company Charges Collected in Excess of those Agreed to by Contract, (1913) 2 C.R.C. 564, 586.

O R D E R

Basing this Order upon the findings and statements of facts in the preceding Opinion,

IT IS HEREBY ORDERED that the application herein be and the same is hereby denied.

Dated at San Francisco, California, this 8th day of October, 1934.

Leon O. Whitsell

Will A. Carr

M. B. Harris

Justin Steinhart

Commissioners.