Decision No. 31293

BEFORE THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA

HUMBOLDT MALT & BREWING COMPANY, a corporation,

Complainant,

vs.

NORTHWESTERN PACIFIC RAILROAD CO., SOUTHERN PACIFIC COMPANY,

Defendants.

Case No. 4218

ORIGINAL

BY THE COMMISSION:

OPINION ON REHEARING

In this proceeding Humboldt Malt and Brewing Company seeks reparation on numerous carload shipments of beer in bulk in barrels and in glass in cases, transported from Eureka to San Francisco, Oakland, Stockton and Fresno by the Northwestern Pacific Railroad Company and the Southern Pacific Company during the period April 20 to September 19, 1935. It alleges (1) that the charges assessed and collected on said shipments were in excess of those which would have accrued under the lawful tariff rates, in violation of Section 17 of the Public Utilities Act and (2) that the charges assessed and collected on said shipments were in excess of those which defendants had intended to establish for the transportation involved and were applicable only through defendants' oversight and inadvertence in making the tariff publication. This opinion is based upon evidence adduced at a rehearing held before Examiner P.W. Davis at San Francisco on September 12, 1938.[1]

---

[1] By the original and first amended complaints in this proceeding complainant sought reparation as to shipments from Eureka to San Francisco and Oakland only. It alleged that the charges assessed and collected were unreasonable, discriminatory and in excess of those which would have accrued at the lawful tariff rates, in violation of Sections 13, 17 and 19 of the Public Utilities Act. After a public hearing was had the Commission issued its decision finding that the

Charges on the shipments from Eureka to San Francisco and Oakland were assessed at a rate of 17 cents plus a 7 per cent emergency charge.[2] Reparation is sought to the basis of a rate of 17 cents, the only issue being as to the propriety of the 7 per cent emergency charge. The record does not show definitely what charges were assessed on the shipments destined to Stockton and Fresno; however, it was indicated by complainant's counsel at the rehearing that such charges were based on a combination of the Eureka to San Francisco rate of 17 cents, plus the 7 per cent emergency charge, and the local rates of the Southern Pacific Company beyond, and that these shipments were included in the complaint upon the assumption that the propriety of the 7 per cent emergency charge on the Eureka to San Francisco factor was similarly involved.

The question as to the applicability of the 7 per cent emergency charge arose over a provision in the Tariff of Emergency Charges reading as follows:

---

1 (Continued)

charges assailed had not been shown to be unreasonable, discriminatory, or inapplicable, and dismissing the proceeding (Decision No. 30601 of February 7, 1938). Thereafter, upon the representation of complainant that it was prepared to present additional evidence in support of the allegations of its complaint, a rehearing was granted. Prior to the holding of the rehearing, however, complainant filed a second amended complaint, adding shipments from Eureka to Stockton and Fresno to those originally involved, abandoning its allegations of unreasonableness and discrimination, retaining its allegation of tariff deviation and adding the alternative allegation of oversight and inadvertence in tariff publication.

2 Rates are in cents per 100 pounds. The 17-cent rate was published in Item No. 217 series of Northwestern Pacific Tariff No. 38-J, C.R.C.No. 393, and in Item No. 860 series of Pacific Freight Tariff Bureau Tariff 16-P, C.R.C. No. 565. The 7 per cent emergency charge was provided in Part 1 of the Tariff of Emergency Charges No. 237, C.R.C. No. 567 of F.W.Gomph, Agent, and was made applicable to rates published in Northwestern Pacific Tariff No. 38-J by Special Supplement No. 26 and in Pacific Freight Tariff Bureau Tariff 16-P by Special Supplement No. 3, both effective April 18, 1935.

"No emergency charge will be assessed in connection with carload rates established to meet truck or water competition (and so indicated in tariffs) if no emergency charge would be applied under Tables 1,2 or 3 of Part 2 on less-than-carload shipments between the same points."

The parties were agreed that the 17-cent rate was in fact established to meet water competition and, moreover, that no emergency charge would be applied under Tables 1, 2 or 3 of Part 2 of the Tariff of Emergency Charges on less-than-carload shipments between Eureka and San Francisco or Oakland. The controversy, therefore, was as to whether the former fact was indicated in the tariff in such a manner as to satisfy the parenthetical requirement in the provision quoted.

The tariff item in which the local rate of the Northwestern Pacific Railroad Company from Eureka to San Francisco was published carried reference to a note reading as follows:

"Published under authority of the Railroad Commission of the State of California, No. 24 (A)-3669 of July 16, 1934."

The tariff item containing the joint rates from Eureka to San Francisco and Oakland was flagged subject to a similar note referring to the Commission's file 24 (a)-3421 of August 14, 1933. It was shown by complainant that the files referred to in these notes were special docket authorities granting permission to defendants under Section 24 (a) of the Public Utilities Act to maintain the 17-cent rate non-intermediate in application. It was shown further that such docket authorities were based upon informal applications of the carriers alleging that water competition influenced the maintenance of lower rates from Eureka to San Francisco and Oakland than were maintained from and to intermediate points.[3] Complainant's counsel argued that

[3] Special docket authority 24 (a)-3669 involved a miscellaneous change in packing requirements. However, the application upon which it was based shows that the 17 cent rate was originally authorized by special docket authority 24 (a) 3406 of July 24, 1933, in which the existence of water competition is alleged in justification.

the reference to the Commission's special docket authorities had the effect of incorporating those authorities, as well as the applications upon which they were based, into the tariffs themselves, just as though the applications and docket authorities had been set forth in the notes in haec verba. He contended that, therefore, the 17-cent rate was "indicated in the tariffs" as being water-compelled and that, under the quoted provision of the Tariff of Emergency Charges, the 7 per cent emergency charge was not properly applicable.

Complainant did not introduce any evidence to show that the tariff items involved were improperly flagged through oversight or inadvertence but cited the decision of the Interstate Commerce Commission in Holcomb-Hayes Company vs. Illinois Central Railroad Company, 12 I.C.C. 129, as authority for the proposition that reparation may be awarded where a rate higher than that intended by the carrier is published by mistake.

Defendants, while admitting that the 17-cent rate was published to meet water competition, denied that this fact was indicated in the tariff to the extent contemplated by the Tariff of Emergency Charges or that there was an oversight or inadvertence in tariff publication. Defendants' counsel argued that the references to the Commission's special docket authorities were merely for the purpose of showing that permission to maintain the 17-cent rate on a non-intermediate basis had been obtained, and that such references did not serve as indications of the reason underlying the granting of such permission. He pointed out that competition of a long rail line with a shorter one and various other factors in addition to water and motor truck competition may, on occasion, justify the granting of permission to depart from the requirements of Section 24 (a) of the Public Utilities Act.

There is no doubt but that the maintenance by a rail line of a non-intermediate rate between two ports such as Eureka and San Francisco ordinarily indicates that such rate may have been water-compelled. However, it does not indicate in and of itself that such rate was in fact water-compelled, which in our opinion is the quality of "indication" required by a reasonable interpretation of the controversial provision in the Tariff of Emergency Charges. The reference to the Commission's special docket authorities did not, in our opinion, have the effect of incorporating the wording contained in those authorities and in the informal applications into the tariffs. Such references merely served to show that appropriate authority had been obtained to publish the rates non-intermediate in application, as required by Rule 65 (g) of the Commission's tariff Circular No. 2. Complainant's construction would have the effect of incorporating material into the tariff which was not filed with the Commission as a tariff and which was not available for public inspection in the manner required by Section 14 of the Public Utilities Act. It appears, therefore, that the 17-cent rate from Eureka to San Francisco and Oakland was not indicated in the tariff as being water-compelled, that the 7 per cent emergency charge was properly applicable in connection therewith and that complainant's allegation of tariff deviation has not been sustained.

As before stated, complainant introduced no evidence in support of its allegation of oversight and inadvertence. The above entitled complaint, as amended, will be dismissed.

O R D E R

A rehearing having been had in the above entitled proceeding, and based upon the evidence received at the rehearing and upon the con-

clusions and findings contained in the preceding opinion,

IT IS HEREBY ORDERED that the above entitled proceeding be and it is hereby dismissed.

Dated at San Francisco, California, this 26th day of Sept., 1938.

Commissioners