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Decision No: 37898

ORIGINAL

BEFORE THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA

THE COCA-COLA COMPANY, Plaintiff,	)	
vs.	)	Case No. 4706
SOUTHERN PACIFIC COMPANY, Defendant.	)	

CLARK, Commissioner:

OPINION ON REHEARING

In this proceeding, complainant sought an order authorizing the waiver by defendant of the collection of undercharges aggregating $9,824.70, which had arisen in connection with the transportation of 75 carloads of sugar from Crockett to Pinedale[1] and from Pinedale to Los Angeles. Assertedly, the charges assessed were unjust and unreasonable, in violation of Section 13, Public Utilities Act. By Decision No. 37537, rendered December 12, 1944, the complaint was dismissed. At complainant's instance, a rehearing was granted, limited, however, to oral argument on the record. The matter was argued before Examiner Austin at San Francisco on March 19, 1945, when it was resubmitted.

The facts are not disputed. These shipments moved to Pinedale for storage between April 4 and May 7, 1940 and were reshipped to Los Angeles between April 7 and June 13, 1941. Charges were assessed at the local rates of 15 cents from Crockett to Pinedale[2], and 25 cents from Pinedale to Los Angeles. When the shipments moved from Crockett,

(1) Crockett is situated on the main line 25 miles east of Oakland, and Pinedale is located on a branch line 15 miles north of Fresno.

(2) Rates are stated in cents per 100 pounds.

defendant's tariff provided that sugar originating at that point and others on its lines, where sugar refineries are located, could be stored in transit at Pinedale for a period of one year and reshipped to Los Angeles at the through rate from point of origin to Los Angeles, plus a charge of $5 per car. At complainant's request, defendant promised to extend the storage period from one year to eighteen months, but through inadvertance it failed to do so. Complainant was unaware of this oversight when these shipments were forwarded from Pinedale to Los Angeles. Had the extension been granted, the through charge of 25 cents plus $5 per car would have been applicable for the combined inbound and outbound movements. Reparation is sought to this basis.

The failure to extend the storage period of one year, complainant asserts and defendant concedes, resulted in the imposition of charges which were relatively unreasonable. There is no contention that the rates assessed were inherently unreasonable, nor that they were discriminatory.

The claim of relative unreasonableness rests upon the fact that, both prior and subsequent to the movement of the shipments in question, defendant extended the time limit for the storage of sugar at Pinedale under the through rates and $5 per car charge. Moreover, while these shipments were at Pinedale, defendant extended the transit period in four other instances, one of which involved sugar.

The Commission's power to award reparation is derived from Section 71, Public Utilities Act. It may be exercised only when the carrier has charged an unreasonable, excessive or discriminatory amount, and the complaint has been seasonably filed.(3) Where the facts

(3) Geo. H. Croley Co. v So. Pac. Co., 33 C.R.C. 565, 570; Re Los Angeles Gas and Elect. Corp., 40 C.R.C. 451, 455; Humboldt Malt & Brewing Co. v N. W. Pac. Rd. Co., 41 C.R.C. 107, 109; Krieger Oil Co. v Pac. Elec. Ry. Co., 41 C.R.C. 521, 522.

have been admitted by defendant and the sufficiency of the complaint conceded, thus leaving no issue between the parties, the proof, nevertheless, should meet the standards required where a real controversy exists.(4)

Ordinarily, a carrier is at liberty to establish transit privileges to the same extent as it would publish a subnormal rate to meet the competition of other carriers. However, as we have held, the Commission, in the absence of a showing of discrimination, should hesitate to require the establishment of such a practice.(5)

It is well settled that transit privileges will not be accorded any retroactive effect through an award of reparation, except to remedy discrimination, or where unreasonableness has been shown. Throughout a long line of decisions, this rule has been followed consistently by the Interstate Commerce Commission. That Commission has ruled that reparation would be awarded, where it would have such effect, only for the purpose of remedying discrimination.(6) In still other cases reparation has been denied in the absence of a showing of unreasonableness,(7) or of unreasonableness or discrimination.(8) The

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(4) Rosenberg Bros. & Co. v So. Pac. Co., 43 C.R.C. 301; Mettler v So. Pac. Co., 43 C.R.C. 469, 471.

(5) Pac. Rice Growers Assn. v A.T. & S.F. Ry. Co., 19 C.R.C. 248, 252; Albers Bros. Milling Co. v So. Pac. Co., 20 C.R.C. 723, 726; Calif. Hawaiian Milling Co., Inc. v So. Pac. Co., 31 C.R.C. 559, 561.

(6) Swift & Co. v Mobile & Ohio Rd. Co., 39 I.C.C. 701; Freeman v So. Ry. Co., 42 I.C.C. 736; Taylor v Dir. Genl., 61 I.C.C. 109; Capital Whse. Co. v Dir. Genl., 96 I.C.C. 293, 296; Waggoner-Gates Milling Co. v A.T. & S.F. Ry. Co., 147 I.C.C. 187, 197.

(7) Omaha Cold Storage Co. v C. B. & Q. Rd. Co., 219 I.C.C. 283; Great Atl. & Pac. Tea Co. v Alton Rd. Co., 226 I.C.C. 398, 408; Garin, Rec'r. v Ala. Great So. Rd. Co., 234 I.C.C. 797.

(8) Meeds Lumber Co. v Ala. Cen. Ry. Co., 39 I.C.C. 337; S. B. Locke & Co. v Dir. Genl., 88 I.C.C. 487; Globe Grain & Milling Co. v So. Pac. Co., 156 I.C.C. 635, 638; Fed. Fruit Distrs. v So. Pac. Co., 157 I.C.C. 343; Dingfelder v Seaboard A. L. Ry. Co., 194 I.C.C. 263.

proof of unreasonableness, it has been said, must be clear and convincing.(9) And where the rates to and from the transit point were found unreasonable for the future, reparation upon past shipments has been denied.(10)

The application of this rule has not been confined to situations involving the initial establishment of a transit privilege. Where the outbound movement was delayed beyond the expiration of the period prescribed by the tariff, and there is no showing that the rates or rules are unreasonable, reparation, it has been held, will be denied. To award reparation under these circumstances, the Interstate Commerce Commission pointed out, would be equivalent to sanctioning the retroactive application of a transit arrangement; this it consistently has refused to do, except to accomplish the removal of unlawful discrimination.(11) In the Wilson case, cited below, it appeared that complainant's failure to reship stored coal within the transit period was occasioned by inaccessibility of the coal to a moveable crane, due to weather conditions. Holding that this was insufficient to justify a finding of unreasonableness, the Commission

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(9) Parkersburg Rig & Reel Co. v B. & O. Rd. Co., 88 I.C.C. 49, 51; Chicago Bridge & Iron Works v L. & N. Rd. Co., 203 I.C.C. 588, 590.

(10) Thomas Keery Co., Inc. v N.Y., Ont. & W. Ry. Co., 211 I.C.C. 451, 456.

(11) A. W. Burritt Co. v Canadian Pac. Ry. Co., 45 I.C.C. 195 (Here, the ten-day transit period assertedly was too short and hence, unreasonable.); Eagle Pass Lumber Co. v G. H. & S. A. Ry. Co., 48 I. C.C. 693 (Owing to revolutionary conditions in Mexico, complainant was unable to avail itself of a reconsignment privilege within the period prescribed by the tariff, and thus secure the benefit of a lower proportional rate to the international border. It did not appear that the rates assailed were unreasonable per se.); Wilson & Co., Inc., v C. M. St. P. & Pac. Rd. Co., 172 I.C.C. 347 (Here, the inability to reship within the time allotted was occasioned by unfavorable weather conditions); National Lbr. & Creosoting Co. v Tex. & F. S. Ry. Co., 42 I.C.C. 35.

said:

> "It is well established that a tariff rule can not be waived and as complainant failed to reship the coal within 12 months as required by the tariff it was not entitled to the benefit of transit. The combination rate charged was applicable. Although the weather conditions imposed a hardship upon complainant, such conditions are insufficient to prove that the applicable rate was unreasonable."

As stated, no issue has been presented regarding the reasonableness of the rates per se. Assertedly, however, it was relatively unreasonable, during the period in question, to observe a horter period of permissible transit, i.e., one year, than the longer period of eighteen months, which was in effect both prior and subsequent to that time. It is conceded that when these shipments moved, a transit period longer than one year was available on shipments which originated prior to those involved, and was still available when the transit period had expired as to the instant shipments.

A rate may be relatively unreasonable, in the sense that it is higher than other rates which may afford a standard of reasonableness.(12) But the rate sought to be used as a criterion should itself be reasonable, and should properly be comparable with that which has been challenged. That the latter "...appears to be out of line with a few other rates with which it is closely related does not ordinarily afford a basis for finding the rate attacked unreasonable."(13) Such a finding should not be substituted for one of discrimination.(14)

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(12) Sugar from Gulf Coast Port Groups to Northern Points, 234 I.C.C. 247, 282; Crowley's Milk Co., Inc. v Erie Rd. Co., 204 I.C.C. 30, 31.

(13) Lakawanna Steel Co. v Dir. Genl., 87 I.C.C. 383, 384; City Coal Co. v N.Y., N.H. & H. Rd. Co., 123 I.C.C. 609, 611; Endicott Forging & Mfg. Co. v Erie Rd. Co., 171 I.C.C. 785, 789.

(14) Pressed Steel Car Co. v Dir. Genl., 109 I.C.C. 75, 78, 79; Curtis Leather Co. v Penn. Rd. Co., 156 I.C.C. 604, 605; Maryland Glass Corp. v B. & O. Rd. Co., 176 I.C.C. 569, 571; Carthage Marble Corp. v Mo. Pac. Rd. Co., 185 I.C.C. 201, 202; Swift & Co. v N.Y. Cent. Rd. Co., 220, I.C.C. 171, 179.

Here it appears that on a few occasions the transit period of one year, prescribed by the tariff, had been extended at the shipper's request. From this record it cannot be found that the extended periods, rather than that fixed by the tariff, represent the normal standard that should guide us in determining a reasonable transit period.

In our judgment the charges collected have not been shown to be unreasonable, and, accordingly, the decision originally rendered in this proceeding will be affirmed.

O R D E R

Argument having been had upon complainant's petition for rehearing, the matter having been submitted, and good cause appearing,

IT IS ORDERED that Decision No. 37537, rendered herein December 12, 1944, be and it hereby is affirmed; and that in all respects said Decision No. 37537 be and it hereby is adopted as the decision of the Commission in the above entitled proceeding.

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.

The effective date of this order shall be twenty (20) days from the date hereof.

Dated at San Francisco, California, this 15th day of May, 1945.

Harold Anderson

Justus F. Craemer

Richard Sachse

Franck R. Havenner

Ira H. Rowell

COMMISSIONERS