ORIGINAL

Decision No. 41705

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

THE COMMITTEE OF ALBANY NAVAL STATION VETERANS,

Complainant,

vs.

THE ATCHISCON, TOPEKA & SANTA FE RAILWAY COMPANY, WESTERN IMPROVEMENT COMPANY, and SANTA FE LAND IMPROVEMENT COMPANY,

Defendants.

Case No. 4891

Richard A. Perkins, for complainant.
Charles L. Ewing and Joseph H. Cummins, for defendants.

POTTER, Commissioner:

O P I N I O N

The complaint in this case, as amended, charges the Santa Fe Railway and its subsidiary land company with violation of statutory prohibitions against rebating and discrimination,(1) claimed to have resulted from the leasing of certain lands in Alameda County to Pacific Turf Club, Inc., a California corporation, for horse racing purposes, at an inadequate rental and partly in consideration of freight traffic. It is alleged that the rental reserved consists of a percentage of the money lawfully to be wagered at the races, "without any fixed or guaranteed rental" and that, since the track is a unique property, its fair rental value cannot be determined without competitive bidding free from the influence of freight traffic.

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(1) Cal. Const. Art. XII, Secs. 22, 23; Public Utilities Act, Secs. 17(a)2, 19.

The Commission is asked to order the Railway to desist from the practices alleged to be in violation of law, to terminate the lease and to negotiate further leasing only under Commission supervision. In the alternative, should the lease be permitted to stand, the Commission is asked to require all persons owning or controlling the Turf Club, or employed by it, who may control or influence freight traffic, to divest themselves of their interest in the Club and in any offices which they may hold, and to order the Railway to recover from the Turf Club the amount of any salaries, bonuses or dividends paid to anyone connected with the Club "who in any way controlled or influenced disposition of freight traffic to the Railway."

Defendants deny the material allegations of the complaint, and they allege that the lease provides for a guaranteed minimum rental in addition to a percentage of the legalized pari-mutuel wagering, that no competitive bidding was required, and that the Turf Club's offer was accepted because it was more favorable than others which were rejected. Defendants also moved to dismiss the complaint on the ground that the facts alleged, even if true, fail to state a cause of action under the transportation statutes. The motion to dismiss was renewed at the opening of the hearing and again, at the conclusion of complainant's evidence, upon the further ground that such evidence failed to show any discrimination or monetary advantage with respect to any present or prospective shipper. Defendants elected to submit the case on their motion to dismiss and offered no evidence at the hearing. Briefs have since been filed and considered.

The evidence shows that the premises in question (non-operative property) were leased by the Santa Fe Land Improvement

Company[2] to the Turf Club on January 1, 1947, following extensive negotiations during 1946 in the course of which some thirty other proposals were considered and rejected. One of the proposals rejected was that advanced by Richard A. Perkins, counsel for complainant.[3] Early in 1946, Perkins had approached R. G. Rydin, San Francisco representative of the Santa Fe charged with negotiating a lease of the premises, with a proposal on behalf of the veteran's group and others to raise from $100,000 to $400,000 to rehabilitate the property for horse racing. Rydin told Perkins he thought the project would take "all of a million dollars" and that the sums mentioned "would not get them to first base".

On April 15, 1946, Rydin issued invitations calling for proposals to lease the Albany race track. One of the invitations was addressed to E. R. Young, Los Angeles attorney and former Chairman of the California Horse Racing Commission, who with his associates was considering a lease of the track. On April 22, 1946, Perkins called on Young to discuss inclusion of the veterans group with Young and his associates in the financing and operation of the project. This visit was followed the next day by a letter from Perkins to Young outlining specific terms "as a reasonable basis of cooperation between our veterans group and any other responsible group which possesses the means to rehabilitate and operate the track successfully". The record does not show that Young ever responded to this letter.

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(2) No point has been made of the separate identities of the three corporate defendants. They will hereafter be referred to as "the Railway" or "the Santa Fe".

(3) Complainant is a committee of some fifty persons, including Perkins, who served during 1944-1945 as part of a naval detachment stationed at the Albany race track.

The evidence indicates that the Santa Fe was anxious to secure proposals from substantial persons who might be expected to operate the track successfully inasmuch as a previous inadequately-financed attempt to conduct horse racing on the property had spectacularly failed. The letter of invitation to prospective bidders states: "As we may participate on a percentage basis, we consider it important that the track be not only adequately financed but that there shall also be experienced and reputable men in charge."

Although Rydin's invitation to possible bidders mentioned a minimum term of five years at either (a) a flat rental or (b) a percentage of the legalized pari-mutuel wagering plus a minimum guarantee of at least $50,000 per year, Young's response, dated May 14, 1946, suggested rental based only on a percentage of the legalized betting, with other terms, including length of the tenancy and a flat rental figure, to be left to future discussion and negotiation. With the proposal there was submitted a list of 58 individuals having affiliations covering a wide range of business and professional activity throughout the State and who, according to Young, had expressed a desire to subscribe for more than $1,000,000 of common stock, at $5,000 per share, to be issued by a corporation to be formed by his group with a capitalization of $1,500,000. Included among the indicated business connections of the individuals named in the list are six corporations which counsel stipulated are shippers on the Santa Fe intrastate.

In the latter part of May, 1946, the Santa Fe decided to award the lease to the Young group and shortly thereafter notified the other interested people of the rejection of their proposals. The Turf Club was incorporated by Young and his associates on

December 5, 1946, and the lease was formally executed on January 1, 1947.

The lease provides for a term of 25 years, subject to lessor's option to terminate the tenancy after 10 years, on one year's notice, should the property be desired for railroad or industrial use. In addition to an annual rental based on graduated percentages of the legalized pari-mutuel wagering, the lease provides for a minimum annual guarantee or fixed rental of $200,000, of which $50,000 is payable on January 1 and $150,000 not later than September 1 in each year. Other terms bind Turf Club to pay all taxes, fees and licenses assessed or levied against the premises in connection with racing or legalized pari-mutuel wagering, to procure Workmens' Compensation Insurance and to insure against fire, casualty, public liability and property damage covering the interest of lessor and lessee. Turf Club further agrees to expend not less than $1,000,000 on improvements and construction within three years from the date of delivery of the premises and to provide a $500,000 mechanic's lien bond in a form and with sureties satisfactory to Santa Fe. Other provisions of the lease require no special comment. There is no language in the document directly or indirectly relating to freight traffic.

Rydin's testimony indicates that, while he knew several individuals in both the Young group and among the rejected bidders had substantial shipping connections, his primary purpose was to secure a responsible tenant in order to avoid a repetition of the previous "fiasco", as he put it, and to assure substantial returns based on a percentage of the amounts wagered. He testified that he was not interested in the freight traffic, also that he had made no study or investigation of the tonnage involved in connection with any bidder for the lease.

Complainant introduced two exhibits designed to show the speculative value of Turf Club stock and the value of the premises. One of the exhibits shows that on November 4, 1947, the stock was quoted at $6,000 bid - $7,000 asked, and that during 1946-1947 the price ranged from a high of $10,500 to a low of $4,900. The other exhibit indicates an assessed valuation of the premises for 1946-1947 of $352,470, covering the land and improvements.

The only issue for determination is whether the complaint and the evidence in support thereof make out a case of violation of any provision of law administered by this Commission. The purpose of legislation forbidding rebates and discrimination is to prevent unfair dealing between shippers and carriers in respect to transportation. With respect to their non-carrier property, however, common carriers enjoy the same freedom of action accorded to private business, except that they may not deal with such property so as to transgress, directly or indirectly, the laws governing their public utility activities.

Under the statutes administered by this Commission, like those enforced by the Interstate Commerce Commission, our authority over leases of non-operative property from carriers to shippers or other persons is wholly indirect, and comes into being only where the lease results in some violation of those statutes. Violations may occur when the terms of the lease are so favorable to the lessee that it is clear that the real consideration for the lease must in part be found elsewhere; as an example, in the freight the lessee ships over the lines of the lessor carrier. In other words, when a carrier permits a shipper to use valuable property to which the carrier has title, without charge or without reasonably adequate charge the practical effect is to reduce the shipper's transportation

charges, so that there results what amounts to a refunding or remission of some portion of the published rates. (Andrews Bros. Co. Inc. v. Penn. R. Co., 123 I.C.C. 733,740 (1927)). The standard by which to judge a transaction involving the lease of property by a carrier to shippers or others is whether the carrier has received fair value therefor. (Union P. R. Co. v. U. S., 313 U.S. 450 (1941); B. & O. R. Co. v. U. S., 305 U.S. 507 (1939)).

In the cases cited by both parties which discuss the foregoing rules the transactions under scrutiny had as their primary purpose the development of freight traffic for the carrier. That objective was either clearly disclosed by the terms of the lease or by the very nature of the facilities made available to the shippers and the active interest of the carrier in securing their promotion or construction. And in every case a decisive fact was that in return for specified freight traffic the shipper received either what amounted to an outright gift or else was accorded valuable facilities at less than fair value.

The record before us in this case compels the conclusion that the complaint should be dismissed. The facts developed at the hearing were wholly at variance with the allegations in the complaint. The evidence reveals that the defendant carrier, including its affiliated companies, solicited offers for the lease of its race track property from a number of persons who were thought to be interested in utilizing the property for racing purposes. All were advised of the basic terms upon which a lease would be made. There is no indication that the carrier sought to utilize the lease of this property for the purpose of controlling the freight traffic of the members of the successful bidding group.

Nor is there any evidence that the consideration received under the lease agreement actually consummated with the Turf Club group is any less than might have been obtained from other financially responsible persons, or less than the fair rental value of the property. For these reasons it cannot be found that the making of the lease complained of violates any provision of law respecting the relationship between shipper and carrier.

The following form of order is submitted.

O R D E R

Public hearing having been held in the above entitled and numbered proceeding, complainant having introduced evidence in support of its complaint, defendant having moved to dismiss the complaint upon the ground that neither said complaint nor the evidence adduced by complainant in support thereof is sufficient to establish, prima facie, a violation of law, briefs having been filed and considered, the matter having been submitted for decision, the Commission now being fully advised, and it having been determined that complainant has failed to establish grounds for the relief, or any part thereof, demanded in the complaint, as amended,

IT IS ORDERED that the complaint herein, as amended, be and it is hereby dismissed.

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

The foregoing opinion and order are hereby approved and ordered filed as the opinion and order of the Public Utilities Commission of the State of California.

Dated at San Francisco, California, this 8th day of June, 1948.

R. E. Mitchell
Justus F. Craemer
Sherman Powell
Harold P. Hulse
Everett C. Potter
COMMISSIONERS