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Decision No. 45162

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Carnation Company, Complainant, vs. Southern Pacific Company, Defendant.	Case No. 5088

ORIGINAL

O P I N I O N

By complaint, filed June 4, 1949, Carnation Company, a corporation, alleges that effective June 10, 1946, Southern Pacific Company increased a rate on milk from Guadalupe to Los Angeles from 30 to 36 cents per 10-gallon can, subject to a minimum shipment of 2,000 cans per month, thereby exceeding certain authority granted by the Commission to increase rates; that from June 10, 1946, to and including July 23, 1947, complainant made numerous shipments of milk in 10-gallon cans from Guadalupe to Los Angeles, which exceeded a total of 2,000 10-gallon cans each month; that all of said shipments were assessed a rate of 36 cents per 10-gallon can; and that the charges made, demanded and received by defendant on said shipments were and are unreasonable in violation of Section 13(a) of the Public Utilities Act and violative of the purported authority under which defendant published the increased rate. The Commission is asked (1) to find that the charges made, collected and received by defendant were and are in violation of Sections 13(a) and 32(d)

of the Public Utilities Act[1] and in violation of the Commission's authority under Section 63 of the same Act, granting increases in certain rates, and (2) to award reparation in the amount of one cent per 10-gallon can, with interest, on the shipments described in the complaint.

Defendant in its answer asserts that the complaint does not state facts sufficient to constitute a cause of action, denies the essential allegations thereof and alleges that the rate in question was published under authority of the Commission.

By agreement of the parties, the matter was originally submitted upon written memoranda of facts and argument. However, it appearing that the issues raised important questions which made it desirable that the record be more fully developed, the submission was set aside and the proceeding reopened for public hearing. Complainant and defendant having subsequently indicated that they did not desire to present additional facts, the hearing was cancelled and the parties were asked to submit briefs. The briefs have since been filed and the matter is now ready for decision. The salient facts upon which the controversy arises are virtually undisputed.

Complainant shipped 64,099 10-gallon cans of milk from Guadalupe to Los Angeles in baggage cars of defendant's passenger trains during the period between June 10, 1946, and July 23, 1947. The individual consignments varied from 95 to 197 cans per shipment and the total number of cans shipped each month exceeded 2,000. Charges were collected at the rate of 36 cents per can, which

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(1) Section 13(a) provides that every unjust or unreasonable charge is prohibited and declared unlawful. Section 32(d) provides, in part, that it is the policy of the State in rate making to establish such rates as will promote the freedom of movement by carriers of agricultural commodities, including livestock, at the lowest lawful rates compatible with the maintenance of adequate transportation service.

represented an increase over a base rate of 30 cents per can applicable on minimum shipments of 2,000 cans per month.

The Commission having authorized increases in highway common carrier rates and less-carload rail rates, and in order that certain rail rates might be continued on a level with those authorized for truck transportation, applications were filed on behalf of defendant and other railroads seeking authority to increase by 18.72 per cent less-carload rates on certain articles, as well as to increase by 15.36 per cent rates on some articles when subject to minimum weights of 20,000 pounds. The articles to be subject to the 18.72 per cent increase were designated as "Note (a) commodities," while those on which the 15.36 per cent increase was proposed were described as "Note (b) commodities". The applications were granted by Authorities Nos. 63-18618 and 63-18619. Thinking that milk and cream had been included in both notes (a) and (b), defendant filed the 36-cent rate complained of.

The 30-cent base rate was unrestricted as to minimum weights. The application of the increase of 18.72 per cent resulted in the assailed rate of 36 cents, whereas an increase of 15.36 per cent would have produced a rate of 35 cents. The difference constituted the basis upon which the reparation sought by the complaint was arrived at. However, it is to be noted that, as hereinabove indicated, the base rate of 30 cents was not subject to the 15.36 per cent increase, because this rate applied on any-quantity shipments, the only restriction being that the aggregate monthly shipments amount to 2,000 cans.

By Decision No. 39785, dated December 23, 1946, in Application No. 27446 (47 Cal. P.U.C. 67), the Commission granted additional general increases in freight rates, excluding certain rates upon which increases had been previously authorized. According to defendant's assistant to mail and express traffic manager, these increases brought the aggregate authorized increases on milk and cream rates to 15.36 per cent when subject to a minimum of 20,000 pounds and to 18.72 per cent on less-carloads not restricted with respect to the weight of individual shipments. He asserted that defendant did not apply for the increase granted by Decision No. 39785 on less-carload rates on milk and cream, because of the belief that the increase had already been allowed and published under Authority No. 63-18619.

The State Constitution, Article XII, Section 20, provides that no railroad or other transportation company shall raise any rate of charge for the transportation of freight or passengers or any charges connected therewith or incidental thereto, under any circumstances whatsoever, except upon a showing before the Commission that such increase is justified. Section 63 (a) of the Public Utilities Act provides that no public utility shall raise any rate, fare, toll rental or charge or so alter any classification, contract, practice, rule or regulation as to result in an increase in any rate, fare, toll, rental or charge, under any circumstances whatsoever, except upon a showing before the Commission and a finding by the Commission that such increase is justified.

Complainant contends that, the increase from 30 to 36 cents not having been authorized, the charges collected on the shipments which moved between June 10, 1946, and December 31, 1946, were unjust and unreasonable to the extent of six cents per can. An award of reparation on this basis is urged, although the prayer of the

complaint is limited to an award of one cent per can or "such other sum .... as the Commission shall determine that complainant is entitled to as an award of damages...". It is also contended that the charges on shipments which moved commencing January 1, 1947, were unreasonable to the extent that they exceeded 35 cents per can. The latter contention is predicated upon the assertion that two other railroads did not increase their milk and cream rates, as did defendant, until January 1, 1947, and that the increase these railroads established on that date was from 30 to 35 cents. A further argument is made that the rates assessed on complainant's shipments were unduly burdensome to intrastate traffic in that they were higher than contemporaneously assessed on like shipments moving in interstate commerce. The record does not establish whether there were any such interstate shipments.

Defendant asserts that it applied the lawful tariff rate; that reparation is not awarded for a mere technical violation of the Public Utilities Act; that reparation may not be allowed in the instant proceeding because the 36-cent rate has not been shown to be unreasonable in violation of Section 13 of the Act, as alleged; and that consideration of claims for reparation arising from alleged unreasonable rates with respect to shipments delivered more than two years before the complaint was filed is barred by Section 71(b) of the Act. Defendant in stressing what it characterizes to have been a mere inadvertent technical violation of Section 63(a) contends that, in the absence of proof of damage, a violation of tariff publishing rules does not afford a basis for reparation, citing California-Portland Cement Co. v. Southern Pacific Co. (Decision No. 26725, Case No. 3124, decided January 15, 1934, not printed), which involved a violation of Section 15 of the Public Utilities Act. It is stated that a showing must be made that in equity and good conscience the

money sued for is really complainant's and defendant ought not to keep it (citing Atlantic Coast L. R. Co. v. Florida, 295 U.S. 301) and that no showing of this kind has been made in this proceeding.

According to complainant, it does not rely entirely upon the technicality that the 30-cent base rate was increased without authority, but also upon the theory that this rate was in effect for a considerable period, was established voluntarily and should be regarded as prima facie just and reasonable. It is argued that under the circumstances a higher rate established without authority is unjust and unreasonable.

The various contentions advanced by the parties in their briefs have been carefully considered. In our opinion, the essential question for determination depends upon whether the Commission has jurisdiction to award reparation under the circumstances disclosed by the record in this proceeding.

In cases where rates are published without complying with the requirements of the Constitution, Public Utilities Act or regulations of the Commission or are in other respects unlawful, remedies have been provided whereby aggrieved parties may seek redress. The Public Utilities Act contains two sections designed to accomplish this purpose. Section 71 (a),as amended, provides that upon complaint by an interested party and a finding by the Commission, after investigation, that a utility has charged an unreasonable, excessive or discriminatory amount in violation of any provision of the Act, including Sections 13, 17(a) 2 and 17(b), 19 and 24, the Commission may order the utility to make reparation, provided that no discrimination will result therefrom. Section 73 (a) provides that if any utility does any act prohibited or declared unlawful or omits to do

any act required by the Constitution, any law of the State or order or decision of the Commission it shall be liable to the person or corporation affected for all loss, damage or injury caused thereby and, if the court shall find that the act or omission was wilful, damages for the sake of example and by way of punishment may also be awarded. In this connection, it has been held by the Supreme Court of this State that the Commission is vested with jurisdiction in all reparation cases and that the courts have concurrent jurisdiction in those cases where no regulatory action is required (Atchison, T. & S.F. Ry. Co. vs. Railroad Commission, 212 Cal. 370).

However, under the provisions of Section 71(a), it is necessary that an award of reparation entered by the Commission be supported by a finding that defendant charged an unreasonable, excessive or discriminatory amount. In order to justify an award of reparation on the ground of unreasonableness, it must appear that the rate charged was unreasonably high. In a reparation case the burden of proof to establish unreasonableness is upon the complainant. In the instant case it has not carried this burden. The question of discrimination was not made an issue by the pleadings and cannot be considered in this proceeding; while the word "excessive", as used in Section 71 (a), has in certain cases been construed to mean in excess of the tariff, we are of the opinion, in view of the statutory requirements providing for securing Commission authority before making certain tariff publications, that the word has a broader meaning. We find that an increased rate published without the Commission's approval is an excessive rate within the meaning of Section 71(a).

We are accordingly of the opinion and find that the defendant, in exacting a charge of 36 cents per can, did so without lawful authority and that said charge was, therefore, excessive to the

extent that it exceeded 30 cents per can. We further find that complainant is entitled to recover from defendant reparation to the extent of the difference between the 30-cent rate and the 36-cent charge which defendant exacted.

The exact amount of reparation due is not of record. Complainant should submit to defendant for verification a statement of the shipments made and, upon payment of the reparation, defendant shall notify the Commission of the amount thereof. Should it not be possible to reach an agreement as to the reparation award, the matter may be referred to the Commission for further attention and the entry of a supplemental order should such be necessary.

O R D E R

Based upon the findings and conclusions contained in the foregoing opinion,

IT IS ORDERED that defendant, Southern Pacific Company, be and it is hereby ordered and directed to refund to complainant, Carnation Company, all charges collected on the shipments of milk here involved in excess of those which would have accrued on the basis of a rate of 30 cents per can, together with interest at six (6) per cent per annum.

The Secretary is directed to cause a certified copy of this decision to be served upon Southern Pacific Company in accordance with law and said decision shall become effective twenty (20) days after the date of such service.

Dated at San Francisco, California, this 19th day of December, 1950.

R. T. [illegible]

Justus F. Craemer

[illegible]

Harold P. Huls

Kenneth Potter

COMMISSIONERS