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Decision No. 47162

ORIGINAL

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Bethlehem Pacific Coast Steel Corporation,
Complainant
vs.
Pacific Electric Railway Company, and The Atchison, Topeka and Santa Fe Railway Company,
Defendants

Case No. 5285

Appearances

Fred E. Pettit, Jr., for complainant.
E. L. H. Bissinger, for defendant.
P. J. Arturo, for Swift & Co., interested party.

O P I N I O N

Bethlehem Pacific Coast Steel Corporation, the complainant herein, seeks reparation from Pacific Electric Railway Company of demurrage charges in the sum of $4,174.50, and revision of the demurrage rules. Complainant alleges that the charges should not have been assessed under the particular circumstances involved herein, and that the demurrage rules, if applicable under such circumstances, are unjust and unreasonable. Defendant denies the essential allegations of the complaint.

Public hearing was held before Examiner Bryant at Los Angeles, and concurrent briefs have been filed. The matter is ready for decision.

Complainant's district traffic manager testified on behalf of complainant, and the manager of a car demurrage bureau testified

on behalf of defendant.[1] There is no material controversy concerning the facts.

Complainant manufactures iron and steel products at a plant located in the city of Vernon. In 1948 it leased a number of rail tank cars from two private car companies. The asserted purpose was to provide a reserve supply of fuel oil at its plant during a period of labor disturbance in the oil industry. Fifteen such cars are involved in this complaint. These cars were loaded with fuel oil at Santa Fe Springs, and were routed over the line of The Atchison, Topeka and Santa Fe Railway Company and the switching facilities of defendant Pacific Electric Railway Company to complainant's Vernon plant.[2] The cars were held under load at the plant, on private tracks wholly owned by complainant, for periods of time ranging from approximately 30 to 92 days. Demurrage charges were assessed by defendant, and were paid under protest by complainant.

The car demurrage rules and charges are set forth in a tariff of nationwide application.[3] The disputed demurrage charges were assessed because, assertedly, the tariff requirements were not met. Regardless of the matter of compliance with the tariff requirements, however, the preliminary question in this proceeding is whether such requirements govern the transaction herein involved. The tariff

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1 The bureau is Pacific Car Demurrage Bureau. Its function, it was explained, is to obtain uniform application and enforcement of the car demurrage rules and charges by the 31 western rail carriers which constitute its membership.

2 The Atchison, Topeka and Santa Fe Railway Company was originally named as a codefendant. The complaint was withdrawn as to that carrier because it had no part in the demurrage transactions.

3 Association of American Railroads Tariff Bureau Freight Tariff No. 4-Y, Cal. P.U.C. No. 56 of B. T. Jones, Agent.

specifies by general exception that the demurrage rules and charges are not applicable to "cars leased... for the storage of commodities, while held on tracks owned or leased by the lessee of the car, provided the use thereof is in no way connected with any transportation service for which a tariff charge is assessed, except switching charges." Complainant contends that its use of the cars for storage was not connected with the transportation of the cars to its plant, and that the cars therefore fall within the general exception. It pointed out that the line-haul charges were paid prior to and separately from the demurrage assessments.

Defendant argued to the contrary. It averred that the cars were leased primarily for the transportation of their contents to complainant's plant, and pointed out that the questioned demurrage occurred while the cars were being held at destination under their original load. Defendant declared that a transportation transaction cannot be considered terminated until the cars are unloaded and released to the carrier, and argued that demurrage charges are part of the transportation charges. It would be strained reasoning, defendant said, to find that a car which is leased primarily for line-haul transportation, and which is held after the free time for unloading, becomes upon expiration of the free time a car leased for storage not connected with the transportation.

Whether or not the cars were leased primarily for storage purposes, the foregoing tariff exception, it will be seen, applies only when the use of the cars is "in no way connected with" any transportation service for which a tariff charge is assessed. The quoted words unmistakably have the effect of excluding from the exception every use of the cars where there is any connection whatsoever with such a prior transportation service. It is incumbent upon

those who would invoke the exception to show that the use of the cars is in no way connected with any transportation service for which a tariff charge is assessed. In the instant case the cars were held under load at complainant's plant immediately following a transportation service of some 13 rail miles, and for this service the tariff charges were assessed. To find under such circumstances that the use of the cars for storage purposes was in no way connected with the prior transportation service would render the proviso devoid of any apparent meaning. If complainant's contention in this instance were correct, it would be difficult to conceive of circumstances under which leased cars held under load on the lessee's tracks would come within the scope of the tariff. Such cars may be exempt from demurrage charges under proper circumstances, but the cars involved in this proceeding cannot be held to fall within the foregoing general exception.

There remains the question whether the demurrage rules are unjust and unreasonable under the circumstances. The tariff provides that when a leased car is held for unloading "it shall not be exempted from demurrage unless the name of lessee is on the car and that fact is evidenced by a notation on the bill of lading or shipping order before the car leaves point of shipment, except that such notation will not be required when evidence of lease is painted or stenciled upon the car".[4] It is the application of this particular rule to which complainant objects.

The rule itself is clear. The parties are in agreement that its provisions were not fully met. The cars apparently carried cardboard placards stating that they were under lease to complainant, but the

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[4] Item No. 500-A, Rule No. 1 of the demurrage tariff.

evidence of lease was not painted or stenciled on the cars, and there was no notation on the bills of lading or shipping orders.[5]

Complainant pleads extenuating circumstances and contends that under such circumstances the rule is unjust and unreasonable. Complainant says that no one was in any way misinformed or under any misapprehension as to the leased status of the cars. The absence of notation on the shipping documents, it says, was merely a matter of excusable inadvertence on the part of the shipper. It argues that placarding is at least equally as conspicuous as painting or stenciling, and should serve every reasonable requirement. It points out that placarding is deemed adequate in case of shipment of explosives and other dangerous articles. Complainant contends that the demurrage penalty in this case of $4,174.50 for failure to comply with the conditions of the tariff is so grossly burdensome and oppressive as to render the tariff unreasonable in its application and, therefore, unlawful.

In summary, complainant asserts that the failure of the shipper to make the required notations on the shipping documents was an excusable oversight, that the carrier had practical notice of the leases, that all interested parties were at all times aware of the fact that the cars were under lease to complainant, and that the assessment of heavy demurrage charges for a failure to comply

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[5] Complainant's witness testified that he believed all of the cars were placarded prior to movement. He stated that some of the placards had apparently come off and that in those cases (after delivery) reference to the lease of such cars was at once stenciled thereon. Defendant argued "Whether or not the cars were carded is open to serious question. We have only the hearsay testimony of the witness, Wadsworth. We do know that the cars were not carded upon arrival and spotting on the industry tracks of the complainant. If they were accidentally removed in the course of transportation, the reason for the condition requiring notation on the billing becomes more apparent, thus, lending support to the testimony of Mr. DeAyala with respect to the reasons for the Rule."

precisely with technical rules of the tariff is so oppressive as to make the demurrage rules unreasonable. Complainant argues further that the payment of demurrage charges under these circumstances is unjust because defendant rendered no service whatever for such payment. Complainant asks that the demurrage rule be amended to make the bill-of-lading notation unnecessary when evidence of lease is shown on the cars by placarding.

Defendant contends that the rule was neither unjust nor unreasonable. It argues that the rule is neither impossible nor difficult to comply with, and that mistake, inadvertence, or hardship are unavailing to relieve complainant from a failure to comply with the tariff requirements. Defendant states that a uniform demurrage tariff applicable alike to interstate and intrastate traffic has been in effect since 1910. It presented in evidence an extract of a 1909 report of a committee on car service and demurrage of the National Association of Railway Commissioners proposing a uniform demurrage code which was subsequently approved but not prescribed by the Interstate Commerce Commission. That committee's report gave a background of its reasoning regarding demurrage on private cars. The committee contended that discrimination between shippers was the criterion by which the merits of any private car rule must be determined.

Defendant also asserted that the portion of the assailed rule requiring the boarding of leased cars and a notation on the bill of lading to show evidence of a lease prior to movement from point of shipment, was adopted and became effective February 20, 1936, pursuant to an informal request of the Interstate Commerce Commission.[6]

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[6] Association of American Railroads Tariff Bureau Freight Tariff No. 4-P, C.R.C. No. 36 of B. T. Jones, Agent, Supplement 3.

Complainant and defendant cited in support of their contentions numerous "conference rulings" and decisions of the Interstate Commerce Commission, and various decisions of the federal courts. In Indiana Harbor Belt R. Co. v. Jacob Stern & Sons, 37 Fed. Supp. 690 (1941) the carrier sued the consignee to collect demurrage charges which had been assessed under circumstances similar to those present herein. The court, in dismissing the complaint for failure to state a cause of action, held that a tariff requiring payment of demurrage under such circumstances was void as a matter of law, for want of consideration in the form of a carrier service, and that it was of the same legal effect as a freight rate paid on a shipment which was never transported. The other authorities have likewise been reviewed, but need not be discussed herein. None of them are controlling in the present situation.

Demurrage is primarily a penalty imposed to prevent the unnecessary detention of common carriers' cars and to insure prompt return of such cars to public service. It also serves to compensate the carriers for the use of their cars or tracks, or both, when used for storage purposes.

It is undisputed that the cars involved herein were private cars, as defined in the demurrage tariff; that they were under oral lease to complainant prior to the dates of shipment and during the period for which demurrage was assessed; and that the cars were delivered to, and were spotted and held by complainant on its private tracks.

The Official Railway Equipment Register, to which reference is made in the demurrage rule here in issue, shows that the numbers of the cars involved herein are also the reporting marks referred to in the rule, and that such cars are tank cars of the type listed in

Item No. 120 of the mileage tariff, reference to which is also given in the assailed demurrage rule. By reason thereof the lease of the cars by complainant is equivalent to the ownership thereof. The Official Railway Equipment Register also shows that these cars were owned by private-car owners, one of which was designated as an "owner (shipper)" and four were designated as "owners (non-shippers)."

There was no contention on the part of defendant that it incurred any additional expense in the detention of these cars. It is a fair presumption that if such additional expense had been incurred defendant would have shown the extent thereof. But we need not rely on this presumption. The assailed demurrage rule refers to the mileage tariff, wherein it is provided that carriers, over whose lines private cars are operated, will pay to car "owners (shippers)" for the use of such cars on a mileage basis for the loaded and empty movements. Payments to "owners (non-shippers)" of private cars are also governed by the provisions of the mileage tariff, which are adopted, by reference, in Rule 18 of the "Code of Per Diem Rules-Freight," published in The Official Railway Equipment Register.[7] Thus, there was no liability on the part of defendant to pay for the use of these cars on any other than a mileage basis, whether the cars were detained by the consignee only one day, or, as in the present case, as much as ninety-two days. The mileage, of course, was not affected by the detention.

These cars were not railroad-owned nor regularly in the service of the railroads. Their availability and use depended then and depends now upon the willingness of shippers and owners to enter into lease arrangements. These arrangements result from the voluntary action of the parties and present a situation very different from that encountered in connection with railroad-owned cars dedicated to a

[7] Brombacher vs. L.A.& S.L.R.Co., 31 CRC 504 (1928); Keith Ry. Equipment Co. vs. AAR, 268 ICC 759, 762 (1947).

public use which anyone has the right to demand.

Neither the cars nor the tracks involved herein were owned by the defendant nor by any other railroad. Defendant furnished no cars or other facilities, and performed no services after delivery of the cars.

Upon careful consideration of all the facts and circumstances of record, we are of the opinion and find that the assailed demurrage rule as it affects the shipments here involved was, is, and for the future will be unjust and unreasonable to the extent that it provides for the assessment and collection of demurrage charges on leased private cars held on private tracks where the lessee of the cars is also the owner of the tracks. Defendant will be required to amend its tariff in conformity with these findings and conclusions. We further find that complainant is entitled to recover from defendant reparation in the amount of $4,174.50, together with interest at 6 percent per annum.

O R D E R

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

IT IS HEREBY ORDERED that defendant, Pacific Electric Railway Company, be and it is hereby ordered and directed to refund to complainant, Bethlehem Pacific Coast Steel Corporation, demurrage charges collected on the cars here involved in the amount of $4,174.50, together with interest at six (6) percent per annum.

IT IS HEREBY FURTHER ORDERED that, within sixty (60) days after the effective date of this order, said defendant shall amend

its tariff in accordance with the findings and conclusions set forth in the foregoing opinion.

The Secretary is hereby directed to cause a certified copy of this decision to be served upon, Pacific Electric Railway 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 13th day of May, 1952.

President

Commissioners

I dissent.

The foregoing majority decision needlessly disturbs a tariff rule which serves a necessary purpose and which has withstood the test of time. Furthermore, by awarding reparation it makes the disturbance retroactive. The underlying objective of the decision, apparently, is to relieve the complainant from any penalty for its neglect or failure properly to mark the cars or the bills of lading in accordance with the tariff rule.

It may be regrettable that complainant should suffer for its failure to comply with the rule. However, it is more regrettable that the door should be opened to the possibility of all kinds of manipulations, special concessions and discriminations. Regardless of individual cases of inadvertence, honest mistake or hardship, it is in the greater interest of the greater number that the tariffs of common carriers be applied uniformly and without exception. It is the duty of the carrier and of this Commission to enforce rigorously and without favor the terms of published tariffs and rules against all carriers and shippers alike in order to prevent special concessions and discrimination in railroad traffic. (See, Turner, Dennis & Lowry Lumber Co. v. Chicago, Milwaukee & St. Paul Ry. (1926) 271 U.S. 259). It is well settled that the terms of a lawfully published and filed tariff must be strictly observed. (Davis v. Henderson, 266 U.S. 92.)

It is evident that the majority of the Commission rely strongly upon the principle and reasoning of the Jacob Stern decision. They emphasize the fact that neither the cars nor the tracks were owned by defendant, and that defendant "performed no services after delivery of the cars". What they (and the Stern decision) overlook is that demurrage is not a payment for

services. It is a penalty for failure to return cars to service within the allotted free time. It matters not that the facilities are so-called "private" cars. These cars have as their reason for existence the movement of property from point to point over the lines of common carrier railroads. As it is the carriers' duty to furnish the facilities of transportation, either directly or through arrangements with others, privately owned or leased cars must have the same standing as carrier-owned cars when such cars are in railroad service. A common carrier cannot permit the presence of any equipment upon its line to work a discrimination as between shippers. When privately owned or leased cars move upon the facilities of a common carrier they take on the attributes of the facilities of a public utility, and are necessarily subject to the same tariff rules and regulations.

The demurrage rule in issue in this proceeding is itself a concession to private facilities. It is essential that the application of this exception be contingent upon a strict adherence to conditions specified in the tariff. Counsel for complainant, in his brief, makes the self-serving statement that the assessment of demurrage charges in this case was unreasonable and unlawful because it was "based on a hypertechnical application of the tariff provisions". The record, however, is devoid of any evidence which would disclose in what manner or to what extent the demurrage rule involved here is unreasonable. There is no contention by complainant or by the majority of the Commission that the rule is impossible or even difficult with which to comply. As the majority opinion states: "The rule itself is clear. The parties are in agreement that its provisions were not fully met." The rule requires only that the leased cars be appropriately stenciled or that the fact of lease be stated

on the bills of lading. This requirement, in essentially its present form, was adopted many years ago, after mature deliberation and consideration by the railroads of the nation, by the Interstate Commerce Commission, and by other regulatory agencies.[1] It has long applied generally throughout the nation on both interstate and intrastate traffic. It appears to have worked in practice in a satisfactory manner. We have had no previous complaint concerning it. It is entitled to a presumption of reasonableness.[2]

Nevertheless, the foregoing majority decision relieves the complainant of any penalty for its failure to comply with the rule. Going further, it orders the defendant to amend the tariff "to the extent that it provides for the assessment and collection of demurrage charges on leased private cars held on private tracks where the lessee of the cars is also the owner of the tracks." Since such cars are already free from demurrage charges whenever the lease is properly evidenced in accordance with the tariff rule, the majority decision has the effect of ordering the defendant to withdraw every requirement that the cars be marked or that the fact of lease be stated on the bills

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1 For example, in 1910 a Committee on Car Distribution and Car Shortage reported to the annual convention of the National Association of Railway Commissioners as follows: "Your Committee is agreed that the carriers' regularly published tariffs should set forth in detail the terms under which private cars will be employed; and they should expressly stipulate that private cars, while in railroad service, shall be subject to the same demurrage rules as the carriers' regular equipment". (See Exhibit No. 9 in the instant proceeding.)

2 Within recent months the Interstate Commerce Commission considered a complaint similar in many respects to the present one. It found the rule to be not unreasonable, denied reparation, and dismissed the complaint. (Federal Chemical Co. v. L. & N.R.R. Co., Docket No. 30722 (1952).)

of lading. Such requirements, developed over a period of years to prevent discriminations, manipulations and abuses, should not be lightly withdrawn. If the majority order stands, the demurrage rules of the defendant will be at variance with those of other railroads in this and other states, and with those which the defendant and other carriers will be required to apply in connection with interstate traffic. More important, it is only through proper marking of the cars and proper execution of shipping documents in accordance with the tariff provisions that regulatory bodies or the public can have an opportunity to determine the regularity of the transaction. Unfortunately, the record in this case does not disclose how many shippers may have been deprived of the use of these cars. Demurrage rules are designed to serve all shippers alike.

Complainant has placed great emphasis upon the fact that the cars involved here are "private" cars. The tariff defines a "private" car as one not owned by a railroad. This should not be construed to mean that "private" cars as thus defined are free from common carrier status. There is nothing in this record to support the contention that the status of these cars was other than that of a common carrier. The Public Utilities Code defines the term "common carrier" to include every "car loaning, car renting...and every other car corporation or person operating for compensation within this State". (Sec. 211 (a).)

I cannot agree that the assailed rule has been shown

to be unjust or unreasonable. The complaint should have been dismissed.

COMMISSIONER

I concur in the foregoing dissent.

COMMISSIONER