

ORIGINALDecision No. 52656

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

CALIFORNIA PORTLAND CEMENT COMPANY,)
a corporation,)

Complainant,)

vs.)

Case No. 5614

UNION PACIFIC RAILROAD COMPANY,)
a corporation,)

Defendant.)

OPINION AND ORDER DENYING
PETITION FOR REHEARING

The petition of California Portland Cement Company, a corporation, for rehearing of Decision No. 52331 was filed in time to stay the effective date of the order. By the decision, the complainant was denied reparation for lack of a showing that it had suffered damage by reason of the difference in the rates of defendant for transportation of iron ore from Basin to Colton and from Dunn to Kaiser.

The briefs filed by both parties were carefully considered in arriving at the decision. The matters urged in the petition for rehearing and reply thereto have also been given close attention. Petitioner does not allege in its petition that it has any further facts which might be adduced on rehearing, and the law has been thoroughly briefed by both parties. Therefore, no useful purpose would be served by granting rehearing or oral argument, as sought by petitioner.

The basis of complainant's claim for reparation lies in the fact that both it and the steel mill at Kaiser are shippers of iron

ore over the line of defendant railway; that the physical transportation is performed by defendant over the same tracks in the same direction except that shipments consigned to Kaiser are turned over by defendant to a second carrier at Colton for delivery to Kaiser; that the distance from Basin to Colton is about ten miles longer than that from Dunn to Kaiser; that defendant maintains a net rate on iron ore Basin to Colton of \$1.9824 per long ton, with a minimum of 100,000 pounds per car and 1,000 long tons per shipment; that defendant maintains joint rates with Southern Pacific and Santa Fe on iron ore from Dunn (9.6 miles southwesterly from Basin) to Kaiser (a few miles west of Colton) of \$1.736 per long ton, subject to the same carload and shipment minima as apply from Basin to Colton. The rate Dunn to Kaiser was initiated by defendant and appears to be subject to its control. The question of the reasonableness of the rates was not involved, but only whether or not complainant was entitled to reparation by virtue of having paid defendant a rate which was alleged to be unduly preferential and discriminatory to complainant and to Colton, and whether the alleged discrimination should be removed.

Complainant made no claim or proof of damage other than asserting that it had suffered damage in the amount paid to defendant and borne by complainant on account of the movement of iron ore in excess of the rate applicable from Dunn to Kaiser.

There may be no discrimination between persons, or between places. (Article XII, section 21 of the Constitution of the State of California.) Section 453 of the Public Utilities Code prohibits a public utility from granting any preference or advantage or subjecting to prejudice or disadvantage any person or corporation. It

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C-5614, D-52331

also prohibits the establishment or maintenance of any unreasonable difference as to rates between localities.

Decision No. 52331 denied reparations, finding that since there was no competition between complainant cement company and the steel company, the maintenance of a lower rate to Kaiser than to Colton did not result in undue prejudice or discrimination to complainant or undue preference or advantage to the steel company. This finding and order are affirmed.

This Commission has since its earliest days regarded as an essential in proving damage in a reparations proceeding the existence of a competitive condition between the party claiming to be prejudiced and the party asserted to be preferred. In Pacific Fibre and Retarder Co. v. So. Pacific Co., 13 C.R.C. 61, it considered whether complainant, which sought reparation under Section 453 of the Public Utilities Code, had been subjected to prejudice or disadvantage and whether any preference or advantage had been granted to any person. It found (p. 62):

"The first sentence in the above section does not apply in this case, as the testimony shows that there is no other manufacturer of retarder west of Webster City, Iowa."

The existence or non-existence of competition has been implicit in the Commission's grant or denial of reparation in succeeding years. Scott Lumber Co., Inc. v. The A.T.S.F. Ry Co., et al., 48 Cal. P.U.C. 511. There the Commission found that there was no direct competition between complainant and the group assertedly preferred. On page 512 we find:

" * * * preference and prejudice is not undue unless shown to be a source of advantage to the parties or traffic alleged to be favored and a detriment to the other parties or traffic (citing cases) * * * *"

As stated in California Portland Cement Co. and Riverside Cement Co. v. Southern Pacific Co., et al., 35 C.R.C. 904, 906:

"1. Discrimination, or as sometimes stated undue prejudice or undue preference, is a question of fact to be determined by the Commission in the exercise of its administrative function, not arbitrarily but in the light of all relevant circumstances.

"2. Mileage is but one of the factors entering into a composite and intricate picture of railroad rates and is not to be given the predominant weight here contended for. The history of the construction of the rates, long acquiescence in their basis, market and competitive conditions, the effect of change on carriers and shippers concerned, and the tendency or effect of a change on rate structures long maintained and to which business has become adjusted, are to be considered." (Emphasis added.)

The cases of California Adjustment Co. v. Atchison, etc., Ry Co., 179 Cal. 140, and Southern Pacific Co. v. Superior Court of Kern County, 27 Cal. App. 240, are cited by complainant in support of its contention that the measure of its damages is the difference between the two rates. Those cases involved the assessing of charges of a nature specifically prohibited by the provisions of Article XII, section 22 of the Constitution, which make it unlawful for a railroad company to charge or receive any greater compensation in the aggregate for the transportation of a like kind of property for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance. They do not afford a basis for the measure of damages in the present circumstances, which do not involve such a violation.

However, upon reconsideration of the facts, the Commission is of the opinion that they present a situation which should not be allowed to continue. Therefore, the defendant is directed within sixty days from the date hereof to review the rates involved, looking toward the filing of rates which will not reflect an unreasonable

MGM
C-5614, D-52331

difference between the rates from Dunn to Kaiser as compared with those from Basin to Colton. The Commission staff is directed, within sixty days after the effective date hereof, to notify the Commission as to what action if any, has been taken by defendant, to the end that the Commission may take such steps as it may be advised.

O R D E R

Based on the conclusions and findings set forth in the above opinion,

IT IS HEREBY ORDERED that the petition of California Portland Cement Company, a corporation, for rehearing and oral argument herein be and it is hereby denied.

This order shall become effective twenty days after the date hereof.

Dated at San Francisco, California, this 21st day of FEBRUARY, 1956.

(John E. Dineen)
President
Justice J. Calmes
Paul F. Interim
W. H. Dool
H. Harty
Commissioners