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ORIGINAL

Decision No. 57893

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

CALIFORNIA PORTLAND CEMENT COMPANY, a corporation, Complainant, vs. UNION PACIFIC RAILROAD COMPANY, a corporation, Defendant.	Case No. 5614
Investigation on the Commission's own motion into the rates, rules, charges, classifications, contracts, practices, operations and services of UNION PACIFIC RAILROAD COMPANY.	Case No. 5789

Wallace K. Downey, for California Portland Cement Company, complainant in Case No. 5614 and interested party in Case No. 5789.

Marshall W. Vorkink, for Union Pacific Railroad Company, defendant in Case No. 5614 and respondent in Case No. 5789.

Lauren M. Wright, for Riverside Cement Company division of American Cement Corporation, interested party in Case No. 5789.

Mary Moran Pajalich, for the Commission's staff.

O P I N I O N

By complaint filed as Case No. 5614 on January 28, 1955, the California Portland Cement Company assails a rate maintained and charged by the Union Pacific Railroad Company for the transportation of iron ore from Basin to Colton as being unduly preferential, prejudicial and discriminatory in relation to a lower rate

which said railroad company maintains with the Southern Pacific Company and with The Atchison, Topeka and Santa Fe Railway Company for similar transportation from Dunn to Kaiser. In its complaint the cement company requests removal of the alleged preference, prejudice and discrimination, and reparation for alleged damages.

On December 5, 1955, after hearing on the complaint, the Commission issued its Decision No. 52331, holding that the allegations of undue preference, prejudice and discrimination had not been established as fact and dismissing the complaint. Subsequently, on December 15, 1955, the cement company petitioned the Commission for rehearing of the matter. The petition for rehearing was denied by Decision No. 52656, dated February 21, 1956. Although in denying the petition the Commission affirmed the holdings of its previous decision, it nevertheless stated that

> "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 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."

On June 26, 1956, the Commission issued its order in Case No. 5789 instituting on its own motion an investigation

> "into the rates rules, charges, classifications, contracts, practices, operations and service of Union Pacific Railroad Company for the purpose of determining whether said Union Pacific

> "Railroad Company has established or maintained or is maintaining any unreasonable difference or unlawful discrimination as to rates, charges, service, facilities, or in any other respect, for the transportation of iron ore as between the localities Dunn to Kaiser and Basin to Colton; for the further purpose of determining the amount of such discrimination or unlawful difference, if any, and to order its removal if such discrimination or unlawful difference is found to exist."

Following the denial of its petition to the Commission for rehearing on its complaint, the cement company petitioned the California Supreme Court for a writ of review in the proceeding. The petition to the Court was confined to the issue of whether the assailed rates of the railroad unduly discriminate between the localities of Kaiser and Colton. The petition was granted. After the close of its hearing on the matter the Court issued its order annulling the Commission's decisions in Case No. 5614 on the grounds of inconsistency between the effect of the decisions and the findings on the principal issue involved. (California Portland Cement Company v. Public Utilities Commission, 49 Cal. 2d 171). Thus, as to the issue stated, the matter has been remanded for the Commission's further consideration.

Further hearing on the complaint, and original hearing on the investigation in Case No. 5789, were held on a consolidated record before Commissioner R. E. Untereiner and Examiner C. S. Abernathy at Los Angeles on October 29, 1958. Evidence was presented by complainant through its assistant traffic manager and its production manager. Defendant submitted evidence through its general freight agent, rates. The matter is ready for decision on a more complete record.

As was indicated in Decision No. 52331, the gravamen of the cement company's complaint is that it has been charged a rate of $1.9824 per long ton for the transportation of iron ore from Basin to Colton whereas a rate of $1.736 per long ton concurrently applied for like transportation from Dunn to Kaiser. Complainant asserts that the maintenance of the lower rate to Kaiser constitutes unlawful discrimination against Colton; and that as a consequence of such unlawful discrimination it has been damaged to the extent that the transportation charges which it has paid exceed those that would have applied had they been computed at the lower rate.

Discrimination of a type which is prohibited as unlawful by the provisions of Section 453 of the Public Utilities Code and of Article XII, Section 21, of the State Constitution may be defined as the maintaining, by a common carrier, of an unreasonable difference as to rates, charges, service, facilities, or in any other respect, as between localities. The question to be resolved is whether the difference between the iron ore rates from Basin to Colton and from Dunn to Kaiser is a reasonable or an unreasonable difference in the light of all relevant circumstances and conditions applicable to the transportation involved.

It is complainant's contention that the transportation to Colton and to Kaiser is performed under virtually identical circumstances and that the difference between the rates is therefore an unreasonable difference. The evidence bearing on this point which was submitted by complainant is convincing that in both cases the operating conditions under which the transportation is performed are

substantially the same. The distance from Basin to Colton is 132 miles; from Dunn to Kaiser it is 133.5 miles. All of the transportation from Basin to Colton is over the line of the Union Pacific Railroad Company. Shipments from Dunn (about 9 miles west of Basin) to Kaiser move over the same line of the Union Pacific either to Colton and thence for a distance of 11½ miles over a line of the Southern Pacific Company or to San Bernardino and thence for a distance of 11 miles over a line of The Atchison, Topeka and Santa Fe Railway Company.

On the other hand it is the contention of defendant that the considerations which led to the rate that was established from Dunn to Kaiser included factors other than those relating solely to the aforesaid operating conditions. As was developed through defendant's general freight agent, rates, the principal other factors which were so considered are:

a. The volume of the traffic and the periods of movement.

b. Whether the rate would be conducive to an increasing movement of the article.

c. Competition between producing centers or markets.

d. Rates on similar articles moving under similar circumstances and conditions.

Each of these other factors clearly is a legitimate consideration in the determination of a proper rate, the first two because of their bearing upon the carrier's cost of service and the second two because of their bearing upon the obligations of the carrier to maintain reasonable and nondiscriminatory relationships with other established rates.

In the deliberations which resulted in the establishment of the rate of $1.736 per long ton for the transportation of iron ore from Dunn to Kaiser, defendant had under consideration representations by the steel company that there would be a trial movement of 50,000 tons of ore in shipments of 1,000 tons or more. This movement was to be made for test purposes in order that a determination might be made whether the ore is of a grade suitable for certain phases of the steel company's operations. Should the test show that the ore is of the desired grade, there would be further and regular movements of about 20,000 tons per month.

In view of these representations concerning the volume of the traffic, supported as they were by investments of the steel company in facilities to accommodate the contemplated movements, we find that defendant carrier had reasonable grounds for its action in establishing the rate. The establishment of the rate at a lower level than that of the rate for the transportation of iron ore from Basin to Colton we find to be reasonable in the circumstances shown. The anticipated volume was substantially greater than that being realized in the transportation to Colton. In comparison the trial movement was expected to be what prior experience indicated was the movement from Basin to Colton over a period of about three years. Moreover, the volume of the subsequent traffic per year, if the movement developed, would be for each year about five times the three-year movement to Colton. In addition, we find that the steel mill at Kaiser was not in competition with the cement mill at Colton, and that

the factor of competition was not an element that would limit or preclude the differential.[1] Furthermore, we find that there is merit in defendant carrier's argument that the level of the rate to Kaiser should correspond, in part at least, to the level of rates for other shipments to steel producing destinations, which rates assertedly are maintained in the lower ranges of reasonableness in view of the volume of traffic to and from said destinations.

For these reasons it is found that at the time that the rate from Dunn to Kaiser was established, and for a period of time thereafter, the differential between the rate of $1.736 per long ton to Kaiser and the rate of $1.9824 to Colton was not an unreasonable difference. It is concluded, therefore, that during such period the difference in the rates was not unduly discriminatory nor unlawful.

It does not necessarily follow from these conclusions, however, that the rate differential may be deemed to be reasonable and nondiscriminatory under more recent conditions. It is well settled that a rate that may be reasonable or nondiscriminatory when established may become unreasonable or discriminatory because of changed circumstances. Such appears to be the case here.

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1 At the hearing of this matter on May 19, 1955, complainant stated that it was not in competition with the Kaiser Steel Company. At the further hearing on October 29, 1958, complainant presented testimony to the effect that its products are competitive with steel.

Briefly stated, it appears that defendant carrier has maintained the lower rate to Kaiser, as compared with the rate to Colton, beyond the point where it had reasonable expectations to realize the volume of traffic upon which the lower rate was based. The establishment of a rate as a result of carrier/shipper negotiations to accommodate an anticipated movement carries with it the implied commitment of the shipper that shipments will be made in conformity with conditions upon which the rate was based. Failing in this commitment, the shipper may not reasonably expect that the rate be maintained indefinitely; nor may the carrier escape the charge of discrimination where the rate is more favorable than rates which the carrier concurrently maintains and assesses for other and like transportation.

The evidence shows that since the lower rate to Kaiser was established in the early part of 1953 a total of 989 carloads of ore have been transported under said rate. During 1954, 729 carloads totaling 36,450 tons were transported. Thereafter, there was no further movement until April and May of 1958, when a total of 260 carloads (about 13,000 tons) of ore was shipped. Under the facts of record it appears that instead of the 50,000 tons contemplated as the initial movement in the establishment of the rate, the quantity of 36,450 tons which was transported in 1954 constituted the test movement. Inasmuch as the steel company did not thereafter undertake to make regular shipments of iron ore from Dunn to Kaiser, we find and conclude that since 1954, defendant carrier has had no reasonable basis to continue in effect the lower rate to Kaiser and that the continuation of this rate was, and has been since 1954, unlawful discrimination in favor of Kaiser as compared with Colton. Defendant

will be required to remove the differential which we find to be unreasonable and unduly discriminatory under the conditions which have prevailed since 1954.

We turn now to a consideration of complainant's claim for damages based on the unlawful discrimination. The measure of the damages, complainant asserts, is the differential between the rate which it paid on its shipments from Basin to Colton and the rate from Dunn to Kaiser. As grounds for its claim in this respect complainant relies on holdings in California Adjustment Company v. The Atchison, Topeka and Santa Fe Railway Company, 179 Cal. 140, in Southern Pacific Company v. Superior Court of Kern County, 27 Cal. App. 240, and in The Atchison, Topeka and Santa Fe Railway Company v. Railroad Commission, 212 Cal. 370. All of these matters involve violations of the so-called long-and-short haul provisions of the State Constitution (Article XII, Section 21) and of Section 460 of the Public Utilities Code (formerly Section 24(a) of the Public Utilities Act). In the last-referred-to case, violations of the long-and-short haul provisions are designated as a special form of the more general discrimination prohibited by the State Constitution. In the first two matters the measure of the damages or reparations to be awarded was held to be the difference between the rate charged and the lower rate to the more distant point. Complainant infers from these cases that upon a finding of a discrimination in charges the difference between the charges necessarily becomes the measure of the damages suffered by the one who has paid the higher charges.

We believe that the construction which complainant places upon the cited cases which involve a special form of discrimination does not apply in matters involving the more general discrimination such as is in issue herein. The long-and-short haul provisions of the Constitution and of the Public Utilities Code prohibit a railroad from charging or receiving "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 in the longer distance ...." As pointed out in the cited California Adjustment Company case, "the legitimate maximum charge for the shorter haul is the charge which the carrier makes for the longer one...." Thus a higher charge for the shorter distance is an unlawful and excessive rate. The measure of damages properly is the difference between the rate unlawfully charged and the rate lawfully applicable.[2]

Complainant asserts that the rate which was applied to its shipments to Colton was excessive by reason of the application of the lower rate to Kaiser. However, there is no contention, nor does it appear, that the rate to Colton was itself unlawful or excessive. On the contrary, we find that the rate Basin to Colton was and is a reasonable rate. In this, the instant matter differs from the long-and-short haul cases referred to above in that it appears that in this matter the rate which was assessed for the transportation from Basin to Colton was itself lawful and that to the extent, if any, complainant suffered damages, such damages arose out of defendant's maintaining and assessing an unlawfully low rate on shipments of iron ore transported from Dunn to Kaiser since 1954. In these circumstances it appears that for complainant to sustain a claim for damages it must establish that the unlawful discrimination in favor of

2 It further appears and we find from the evidence that the provisions of the State Constitution and the Public Utilities Code relating to long-and-short hauls have no application to the instant case for the reason that the route Basin to Colton is not within the route Dunn to Kaiser.

Kaiser has been, and is, the proximate cause of the damages sought. This basis for an award of damages or reparation is consistent with the provisions of Section 2106 of the Public Utilities Code:

> "Any public utility which does, causes to be done, or permits any act, matter, or thing prohibited or declared unlawful, or which omits to do any act, matter, or thing required to be done, either by the Constitution, any law of this State, or any order or decision of the commission, shall be liable to the persons or corporations affected thereby for all loss, damages or injury caused thereby or resulting therefrom. ...."

(Underscoring supplied)

Such basis is consistent with holdings of the United States Supreme Court in discrimination cases brought under the Interstate Commerce Act after which the Public Utilities Act, to a large extent, was patterned.

The record in this matter is not persuasive that defendant's action in maintaining and charging an unlawful rate for the transportation of iron ore from Dunn to Kaiser since 1954, has been a proximate cause of loss or injury either to Colton or complainant. Complainant was entitled to a lawful rate on its shipments and such a rate was assessed. It does not appear that the maintaining and charging since 1954, of the unlawful rate to Kaiser has been a source of detriment to complainant, and we so find. We find and conclude that complainant has not shown a cause for which damages or reparation should be awarded under the provisions of the Public Utilities Code or of Article XII, Section 21, of the State Constitution. The complaint in this respect should be dismissed.

Reference is made to the adjustment to be made in the rate from Dunn to Kaiser to remove the unlawful discrimination in favor of Kaiser which we have found to exist. Complainant contended at the further hearing that the same rate should be made to apply for the delivery of its shipments to its plant at Colton as the rate which applies for the delivery of the ore shipments to the steel company at Kaiser. Complainant's plant is located on a line of the

Southern Pacific Company in Colton. The handling of its inbound shipments of ore from Basin necessitates a switching operation in Colton from the line of the Union Pacific Company to the line of the Southern Pacific Company for which service a switching charge of about $6 per car currently applies. On the other hand no switching as such is required in the handling of inbound shipments of iron ore from Dunn to Kaiser. The steel plant at Kaiser is located on lines of both of the rail carriers that would participate in the line haul of said shipments. Notwithstanding the fact that complainant now assails the switching charges at Colton in addition to the difference between the line-haul rates to Colton and Kaiser, it appears that the propriety of the switching charge is not in issue, inasmuch as the aspect in which this matter has been presented for reconsideration involves only discrimination between places. As to the differential between the rates from Dunn to Kaiser and from Basin to Colton, we take official notice of the fact that on November 27, 1958 (since the close of the further hearing in this matter), the Union Pacific Company has eliminated the differential by reducing the rate to Colton to the same level as that of the rate from Dunn to Kaiser. Since this action results in the elimination of the unlawful discrimination for the future, no order with respect thereto is necessary herein. The complaint will be dismissed and the Commission's investigation in Case No. 5789 will be discontinued.

O R D E R

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

IT IS HEREBY ORDERED that the complaint in Case No. 5614 be and it is hereby dismissed.

IT IS HEREBY FURTHER ORDERED that the Commission's investigation in Case No. 5789 be and it is hereby discontinued.

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

Dated at San Francisco, California, this 20th day of January, 1959.

President

Commissioners