

ORIGINAL

Decision No. 58664

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the matter of the investigation and suspension by the Commission on its own motion of reduced rates published in Pacific Southcoast Freight Bureau, Agent, Tariff No. 252-D, M. A. Nelson, Tariff Publishing Officer, for the transportation of petroleum and petroleum products from and to certain California points.

Case No. 6147

Charles W. Burkett, Jr., and John MacDonald Smith, for Southern Pacific Company, respondent.
 Bertram S. Silver & Edward M. Berol, for Western Motor Tariff Bureau, Inc.; Gerald H. Trautman, for San Francisco Towboat Operators Association, Crowley Launch & Tugboat Company, Bay Cities Transportation Company, The Harbor Tug & Barge Company, LeBoeuf Dougherty Construction Company, The River Lines, Inc., United Towing Company, J. C. Freese Company and San Francisco Towing Company; C. J. Simpson and Raoul C. Vincillione, for Inland Boatmen's Union of the Pacific, protestants.
 Eugene L. Gartland, for Marine Engineers Beneficial Association #97, Inc.; E. C. Hurley and J. M. Connors, for Tidewater Oil Company; A. D. Carleton and M. E. Neuberger, for Standard Oil Company of California; W. Y. Bell, for A. E. Patton of Richfield Oil Corporation; interested parties.

O P I N I O N

By order dated July 8, 1958, the Commission suspended until November 13, 1958, reduced carload rates for the transportation of refined petroleum products in tank cars between San Francisco Bay area refineries, on the one hand, and points on the lines of the Southern Pacific Company located north of Redding, on the other hand.^{1/} This action was taken following receipt of protests from the Western Motor Tariff Bureau, Inc., the Inland Boatmen's Union of the Pacific, and

^{1/} The suspension was extended to May 13, 1959 by order dated November 3, 1958.

from the San Francisco Towboat Operators Association and its members. These protests alleged, among other things, that the proposed reduced rates are unjust and unreasonable in violation of Section 451 of the Public Utilities Code, are below the costs of competing carriers or of other means of transportation in violation of Section 452 of the Code, are unduly preferential and prejudicial in violation of Section 453 of the Code, and are otherwise unlawful within the meaning of Sections 728 and 731 of the Code.

Public hearings were held before Examiner William E. Turpen at San Francisco on October 1, 2, 3, 8 and 9, 1958. The filing of concurrent briefs, due 20 days after receipt of the transcript, was authorized. The matter was submitted upon filing of the briefs on November 28, 1958.

The general freight traffic manager of the Southern Pacific Company testified on behalf of his company as to the considerations that led to the publication of the reduced rates. He stated that since 1930 Southern Pacific Company has experienced a marked decline in the number of tank cars of refined petroleum products shipped intrastate over its lines despite an enormous increase in consumption of petroleum products in the State over the same period of time. Table I, below, shows the number of tank cars moved and the revenue received therefrom by Southern Pacific Company for representative years, as given by the witness:

TABLE I

REFINED PETROLEUM PRODUCTS TRANSPORTED BY
SOUTHERN PACIFIC COMPANY

<u>Year</u>	<u>Cars</u>	<u>Freight Revenue</u>
1930	35,000	\$3,135,428
1939	14,353	993,258
1940	13,156	922,110
1957	6,654	617,724

The witness explained that the railroads came to the conclusion that it would have to be in the longer-haul traffic that they could expect to be able to recover traffic. He said that they felt in the shorter hauls the convenience of truck service and relative cost levels between the two types of transportation presented a disadvantage to the rail lines which could not be overcome. As a result, according to the witness, the railroads decided to try to attract tonnage by reducing the rates applicable from the San Francisco Bay area oil refineries to the more distant points in northern California. He said that, following a study, it was determined to publish rates on the level of those established as minimum rates for common carriers by railroad by Decision No. 32608, in Cases Nos. 4246 and 4434 (1939). The reduced rates were also published to apply at certain intermediate points as maximum. The witness stated that these rates would provide a substantial return over out-of-pocket costs. The witness also said that the reduction in rates would amount to about one cent per gallon of gasoline.

A transportation analyst of Southern Pacific's Bureau of Transportation Research introduced in evidence a series of exhibits developing the out-of-pocket costs of providing the service.^{2/} Unit costs were first developed for various factors, such as maintenance of way and structures (not including depreciation), locomotive costs, both on the basis of mileage and fuel usage, and similar items. Most of these unit costs were developed on a system-wide average basis, and in many instances involve allocations from total expenses. From these unit costs as a basis, gross-ton-mile costs for through freight trains and local freight trains were developed for each engine district. In the development of the gross-ton-mile costs, specific costs were developed for the particular district involved, wherever such data could be secured. The use of system average costs included a

^{2/} "Out-of-pocket" costs was defined by the witness as those costs which vary with changes in the traffic handled.

weighting so as to give effect to the particular conditions existing in the district involved. Costs per carload were then developed by adding the various costs per thousand gross ton miles for each district traversed from point of origin to destination, and adding costs for switching, terminal costs, and loss and damage. When divided by the average weight of a tank car of refined petroleum products, the out-of-pocket cost per 100 pounds was obtained.

A comparison of the present rates and reduced rates, along with the costs developed by Southern Pacific, is shown in Table II:

TABLE II
PRESENT AND REDUCED RATES AND COSTS
(In Cents Per 100 Lbs.)

<u>Destination</u>	<u>Present Rate</u>	<u>Reduced Rate</u>	<u>Cost</u>
Dunsmuir	41½	34	19
Mount Shasta	44½	35	19
McCloud	47½	36	
Macdoel	51	39	
Dorris	55	39	24
Weed	47½	36	20
Montague	51	37	22
Yreka	51	37	

Respondent also pointed out that the present interstate rate to Medford, Oregon, is 41½ cents per 100 pounds, and that a tank car of gasoline destined from the Bay Area refineries to Medford moves along the same line of railroad through Montague (where the present rate is 51 cents) and a further distance of 67 miles.

Counsel for protestant Western Motor Tariff Bureau, Inc., took issue with the railroad's cost study in that it did not include provision for such items as overhead expense, ad valorem taxes, income taxes, passenger deficits, less-than-carload deficits, fixed charges, return on investment or dividends. It is clear, however, that the items enumerated by protestant are not a necessary part of the out-of-pocket costs, as used in a proceeding of this kind.

Before discussing the evidence of the various protestants, it will be best to dispose of an issue raised at the initial hearing. One of the protestants moved that the tariff filing here in issue be revoked and that this case then be dismissed. The other protestants joined in the motion. The grounds stated for this motion are that the reduced rates involved are lower than the minimum rates established by the Commission and that, therefore, respondent should have sought authority from the Commission prior to publication of the rates. Protestant stated that respondent followed such procedure in 1953 when it filed Application No. 34857 in which authority was sought to publish reduced rates (although higher than those involved in this proceeding) between some of the same points.^{3/} Respondent states that at the time Application No. 34857 was filed, it was under the misapprehension that the minimum rates originally established in Decision No. 32608 for railroad transportation had been amended by subsequent decisions and that such authority was necessary. Upon subsequent examination of the various decisions of the Commission, respondent came to the conclusion that the minimum rates prescribed for the railroads in Decision No. 32608 are still in effect.

Decision No. 32608 established minimum rates applicable to common carriers by railroad in one appendix and minimum rates applicable to highway carriers in a separate appendix. Careful examination of subsequent decisions amending Decision No. 32608 shows that although the highway carrier scale has been amended many times, the railroad scale has not been changed. Therefore, the minimum rates set forth in Decision No. 32608 applicable to the railroads are still in effect. Accordingly, as the reduced rates filed by the railroads are not less than the minimum rates, the procedure followed was proper. Protestants' motion will be denied.

^{3/} Although hearings were held in Application No. 34857, and the matter submitted, a decision has not yet been issued.

Protestants also raised the point that the cost study introduced by Southern Pacific in Application No. 34857 showed costs slightly higher per 100 pounds than shown in the cost study introduced in this proceeding.^{4/} Respondent argued that the two studies were made independently and that many conditions have changed during the five year interval between the two studies. Among the changed conditions cited were the exclusive use of diesel power now compared to steam power at that time, increases in the length of trains, and an increase in average weight in loading tank cars. Even if we were to accept the prior cost study, the rates involved in this proceeding are considerably above the level of costs shown in the 1953 study.

The common carriers by water operating on San Francisco Bay and its tributaries were some of the protestants in this proceeding.^{5/} At the present time they barge some petroleum products from the different refineries to Sacramento and Colusa, from which points the petroleum products are transported to other destinations, including points involved in this proceeding. These protestants were fearful that the reduced rail rates would result in a substantial loss of their business. They presented evidence to show that their costs of operation would prevent them from reducing their present rates. The record does not show what proportion of the total petroleum products transported by the protestant common carriers by water is ultimately destined to the territory that would be affected by rates here involved.

^{4/} The previous study, Exhibit No. 4 in Application No. 34857, was incorporated by reference in the record in this proceeding.

^{5/} This group of protestants included the following: San Francisco Towboat Operators Association and its members, Crowley Launch and Tugboat Co., Bay Cities Transportation Company, The Harbor Tug and Barge Company, LeBoeuf Dougherty Construction Company, The River Lines, Inc., United Towing Co., J. C. Freese Company and San Francisco Towing Company.

Representatives of the unions of the employees of the barge lines also protested the reduced rates on the grounds that the resultant loss of business to the barge lines would deprive many of their members of work. Respondent moved that part of the testimony of one of the two union witnesses, where he stated that about 30 of the total of 60 employees would be thrown out of work, be stricken from the record as no foundation had been laid. As stated above, the evidence does not show how much traffic would be lost to the barge lines. The motion to strike will be granted.

Western Motor Tariff Bureau, Inc., represented highway common carriers and petroleum irregular route carriers operating in the territory here involved. This protestant contended that the highway carriers would be forced to meet the rail rates and consequently would perform the transportation at a loss. Several carriers presented operating result statements and studies showing hauls made into the territory involved. A careful study of the exhibits and testimony by the highway carrier witnesses indicates, however, that only a very minor part of their revenues are derived from the transportation of refined petroleum products into the area here involved, even to off-rail points.

A witness for this protestant introduced in evidence a study he had made of average truck costs for the transportation of petroleum products between the points here involved. This study showed that the cost of tank truck transportation as developed by the witness was considerably higher than the reduced rail rates. The cost and operating evidence was introduced by protestants in support of their position that Section 452 of the Public Utilities Code prohibits a common carrier from establishing a lower than a maximum reasonable rate which is less than the charges of competing carriers or the cost of transportation which might be incurred through other means of

transportation, except upon such showing as is required by the Commission and a finding by it that the rate is justified by transportation conditions.

A tariff expert testified for protestants that rates to points located off-rail would also be affected, as a lower combination rate would then be available for the shipper to use. This witness introduced exhibits comparing the reduced rates with refined petroleum rates between other points of comparable distance, both intrastate and interstate. However, the witness did not show that transportation and other conditions are the same for the comparisons he made and for the rates here in question. This witness also compared the proposed rates to those of black oils. The record does not support his contention that the black oil rates should always be lower than the rates for refined petroleum products.

Many other points were brought up by the various protestants. It would unduly lengthen this opinion to discuss them all in detail. All such points have been considered and carefully weighed in reaching our decision.

The first question to be settled is whether or not the reduced rates here in issue are unreasonable. It has long been recognized that there is a zone of reasonableness within which common carriers may exercise discretion in establishing their rates. The lower limits of that zone are fixed, generally, by the point at which the rates would fail to contribute revenue above the out-of-pocket cost of performing the service.^{6/} Table II, supra, shows that the reduced rates are above the costs developed by the Southern Pacific by a considerable margin. The question thus resolves itself into the acceptability of the railroad's cost estimates.

It may well be that some adjustments in the estimated costs might be justified. However, the Commission is of the opinion that

^{6/} See Investigation of Reduced Rates on Cement, 50 Cal. P.U.C. 662, 632 (1950).

the magnitude of such adjustments would not be sufficient to change our conclusion that the reduced rates would still be above the out-of-pocket costs of transporting petroleum by a comfortable margin. The Commission therefore finds and concludes that the rates under investigation in this proceeding are above a minimum reasonable level, and therefore are not unreasonable nor unjust.

The next point at issue is the contention of protestants that under Section 452 of the Public Utilities Code, the reduced railroad rates are unlawful because they are below the cost of transportation by other means of transportation. That section of the Code permits the authorization of such rates if, after a showing, the Commission finds that the rates are justified by transportation conditions. The evidence is clear that the Southern Pacific Company has lost ground in the competition for this traffic. The evidence plainly leads us to the conclusion that, under the rates in effect prior to those involved in this proceeding, the railroads have been unable to compete on an equal basis with other forms of transportation. It is also apparent that the reduced rail rates will provide the railroads an opportunity to halt the decline in traffic and probably increase the amount of its petroleum shipments. As the reduced rates are clearly above the out-of-pocket costs, no burden will fall on other traffic. In fact, any increase in tonnage will help contribute towards the rail overhead burden. The public may benefit from the lower cost of shipping gasoline.

In regard to assertion that the trucking costs are higher than the reduced rail rates, we have said before:

"Although the statutory policy of this state is clearly against the continuation of destructive rate cutting practices, it is plainly not intended that this Commission should prevent the railroads from according the public the benefit of reduced rates when they have shown that they can operate

more economically than other carriers; that the Commission should base rail rates upon truck costs; or that it should fix minimum rates for all carriers based upon the costs of the highest cost agency of transportation. Neither truck nor rail carriers are entitled to have an 'umbrella' held over them if it appears that their services do not fill an essential public need." (Re Alcoholic Liquors, 43, CRC 25, 36) ^{7/}

Shippers and receivers usually can use either rail or truck service. Trucks are often preferred because of convenience, speed of transit, or other reasons. When the truck and rail rates are the same, these factors favor the truck. If the truck service is considered more desirable, the trucker may charge, and the shipper may pay, a higher rate. The highway carrier is not required to charge the same rates as the railroad. We therefore find and conclude that the reduced rail rates are justified by transportation conditions.

It was the contention of the barge lines that Section 727 of the Code prohibits the reduced rates proposed herein.^{8/} This section of the Code which was enacted in 1933 and amended in 1939, has never been interpreted by the courts. There are no legislative materials to assist the Commission in construing this statute. This section is sui generis as water carriers are specifically excluded from the provisions of Section 726, which is the general policy declaration on rate regulation by the Legislature.

^{7/} See also Southern Pacific Co. v Railroad Commission, 13 Cal. 2d 89, 103.

^{8/} Section 727 provides:

"It is the policy of the State that the use of all waterways, ports and harbors of this State shall be encouraged, and to that end the commission is directed in the establishment of rates for water carriers applying to business moving between points within this State to fix those rates at such a differential under the rates of competing land carriers that the water carriers shall be able fairly to compete for such business. In fixing the rates there shall be taken into consideration quality and regularity of service and class and speed of vessels. 'Competing land carriers' includes all land carriers as defined in this part, and includes a highway contract carrier and a radial highway common carrier as defined in the Highway Carriers' Act."

On its face, Section 727 is a clear mandate from the Legislature that it is in the public interest that this Commission give rate-making preference to water carriers.

It was the position of respondent that Section 727 was not applicable in a proceeding involving the rates of a land carrier and did not apply to water carriage in conjunction with the land carriage involved herein.

This section gives the Commission specific directions in the "establishment of rates for water carriers." Was it the Legislature's intent in using these words to thus narrowly circumscribe the authority of the Commission so that it would be powerless in a case where it is alleged that if the proposed rates of another carrier are allowed to go into effect, that water carriers will be unable fairly to compete. A literal interpretation of the clause above quoted would strongly suggest this, yet such an interpretation is completely incompatible with the expressed intention of the Legislature. Therefore, this Commission in carrying out the legislative mandate must imply the power to prohibit a "land carrier" from reducing its rates where the water carrier would be unable to establish a rate differential which would permit it fairly to compete for the affected business. To do otherwise would be a clear disregard of the intention of the Legislature as expressed in Section 727.

In Section 727 the Legislature directed the Commission to establish rates which would permit water carriers fairly to compete for "business moving between points within this State." What is the significance of the Legislature's choice of this particular language. If it is merely a statement of the Commission's jurisdiction, it would be superfluous. Since it is an elementary rule of statutory construction that idle acts will not be ascribed to the Legislature, it

obviously has an independent significance. The significance is this: the Legislature has not restricted the water carrier's preference only to the transportation of commodities originating or destined to points on water. If the Legislature had intended this it could have stated "business moving between on water points within this State." This the Legislature did not do, because to do so would be to deprive the water carriers of much of the value of the preference which the Legislature found to be in the public interest to give them. If it is reasonable to conclude that the Legislature intended that water carriers be extended a preference on all of their business, it necessarily follows that the Legislature was aware that other carriers would furnish ancillary services. Proprietary and for-hire land common carrier services are an integral part of a complete water carriage transportation service. It is ridiculous to suggest that the Legislature intended that water carriers be deprived of their preference because merchants bring their wares to the dock by truck and use trucks or rails to pick the goods up at dockside.

It is the Commission's conclusion that Section 727 is highly pertinent to the present proceeding. The critical question, however, is have the water carriers presented facts which would permit the Commission to conclude that the reduced rates will prohibit the water carriers from being able to fairly compete for the business?

The record in this proceeding is utterly devoid of probative evidence as to the economic impact of the proposed reduced rates on the business of the water carriers. Therefore, this Commission is unable to conclude that Section 727 prohibits the reduced rates proposed herein.

Several of the protestants objected to the same rates applying from Sacramento as from the refineries. Respondent offered to reduce the rates applicable from Sacramento to the levels prescribed in Decision No. 32608 if requested. Respondent will be expected to make such reductions promptly upon request of any shipper..

Upon careful consideration of all of the facts and circumstances of record, we hereby find and conclude that the reduced rail carload rates here involved are not unreasonable, discriminatory nor in any other respect unlawful, and that they are justified by transportation conditions. Our order of suspension will be vacated and the investigation discontinued.

O R D E R

Based upon the evidence of record and upon the findings and conclusions set forth in the preceding opinion,

IT IS ORDERED that the Order of Suspension in Case No. 6147, dated July 3, 1958, as extended by Order dated November 3, 1958, be and it is hereby vacated and set aside, and that Case No. 6147 be and it is hereby discontinued.

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

Dated at San Francisco, California, this 23rd day of June, 1959.

*I Concur in the order
by a dissent as to the
dicta on pages
11 and 12.
P. Lynn Fox*

(Signature) President
Theodore H. Jensen
Ernest W. Rye