

**ORIGINAL**

Decision No. 67181

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Investigation into the rates, rules, regulations, charges, allowances and practices of all common carriers, highway carriers and city carriers relating to the transportation of property within San Diego County (including transportation for which rates are provided in Minimum Rate Tariff No. 9-A).

Case No. 5439

Petition No. 28  
(Filed June 5, 1963)

William James Zumwalt and William R. Daley,  
for San Diego Unified Port District,  
petitioner.

Arlo D. Poe, J. C. Kaspar and James Quintrall,  
for California Trucking Association,  
protestant.

Ralph Hubbard, for California Farm Bureau  
Federation, interested party.

Charles C. Miller, for San Francisco Chamber of  
Commerce, for Oakland Chamber of Commerce,  
and for Port of San Francisco, interested  
parties.

E. J. Langhofer, for San Diego Chamber of  
Commerce, interested party.

M. J. Nicolaus, for Western Motor Tariff  
Bureau, interested party.

Don J. Glardon, for Harbor Transfer Co.,  
respondent.

John M. Graham, for San Diego Forwarding Express  
Company, respondent.

W. Ross Starkey, for Pacific Messenger Service,  
respondent.

Leonard Diamond, for the Transportation  
Division of the Commission's staff.

O P I N I O N

Petitioner, the San Diego Unified Port District, seeks exemption of foreign commerce of the United States from the minimum

rates, rules and regulations that are prescribed in Minimum Rate Tariff No. 9-A for the transportation of general commodities within the area described in said tariff as the San Diego Drayage Area.<sup>1/</sup> Minimum Rate Tariff No. 9-A applies to the transportation of property moving in foreign commerce within the San Diego Drayage Area by reason of the fact that the Commission has taken jurisdiction over said transportation in the absence of jurisdiction thereover by the Interstate Commerce Commission. Section 203(b)(8) of the Interstate Commerce Act exempts from regulation under that act the rates of motor carriers for the transportation of property wholly within a municipality, or between contiguous municipalities, or within a zone adjacent to and commercially a part of such municipality.

Public hearing on the petition of San Diego Unified Port District was held before Commissioner Mitchell and Examiner Abernathy at San Diego on October 24, 1963. Evidence was submitted by petitioner through its traffic manager. The petition was taken under submission subject to the filing of briefs on or before December 9, 1963. The time for filing briefs was subsequently extended to January 8, 1964. Briefs have been filed by petitioner and by the California Trucking Association. The matter is ready for decision.

Petitioner alleges that the rates in Minimum Rate Tariff No. 9-A unduly discriminate against transportation in foreign commerce within the San Diego Drayage Area. This allegation is

---

<sup>1/</sup> In general, the San Diego Drayage Area includes the cities of San Diego, National City, Chula Vista, Coronado, Del Mar, La Mesa, El Cajon, and adjacent communities.

based on the fact that the Commission has not made minimum rates applicable to transportation in foreign commerce within all port areas in California.<sup>2/</sup> Petitioner states that shippers and receivers of freight in the nonregulated areas can negotiate lower rates for the movement of their goods than can shippers and receivers whose shipments are subject to minimum rates.

The areas which petitioner claims enjoy an undue advantage over the San Diego area by reason of the absence of minimum rate regulation over transportation therein are as follows:

- a. City of Stockton, served by the Port of Stockton;
- b. City of Long Beach, served by the Port of Long Beach;
- c. The portion of the City of Los Angeles within the Los Angeles Harbor Commercial Zone (as defined by the Interstate Commerce Commission), served by the Port of Los Angeles;
- d. The City of Sacramento, served by the Port of Sacramento.

Petitioner's position in this matter is that the differences in minimum rate regulation between the San Diego area, on the one hand, and the Sacramento, Stockton, Long Beach and Los Angeles port areas, on the other hand, constitute discrimination against the

---

<sup>2/</sup> The minimum rates which are under consideration throughout this matter are rates which have been established for the transportation of the so-called "general commodities".

San Diego area that is unlawful per se, and that no further showing to substantiate its charges of undue discrimination is necessary. Nevertheless, petitioner's traffic manager undertook to amplify petitioner's position by opinion testimony to the effect that the San Diego area is being subjected to a substantial competitive disadvantage because shippers and receivers of freight therein do not have the same freedom to negotiate freight rates that shippers and ~~receivers of freight in the non-regulated areas do.~~ However, in this regard the traffic manager stated that he had no information relative to the rates which are being assessed in non-regulated areas or to the amount of traffic involved. He said that the level of the minimum rates for the San Diego area is not in issue, and he asserted that information as to the amount of the traffic is immaterial and irrelevant.

On brief petitioner argues that the alleged discrimination against foreign commerce in the San Diego area violates Section 453 of the California Public Utilities Code; that it violates Article 12, Section 21, of the California State Constitution; and that it also violates the national transportation policy as reflected in the Interstate Commerce Act and court cases interpretative thereof.

In an opposing brief which was filed by the California Trucking Association, that association argues that unlawful discrimination against foreign commerce within the San Diego Drayage Area does not result simply because minimum rates have not been made applicable within all of the other port areas within California; that petitioner has produced no facts showing, or tending to show, that the

Port of San Diego is suffering a disadvantage as a result of the minimum rates, and that granting of the exemption which petitioner seeks would be contrary to the public interest in that it would tend to break down minimum rate regulation in all metropolitan areas of the State.

Notwithstanding the emphasis which petitioner places on the differences in minimum rate regulation between transportation in foreign commerce in the San Diego area and like transportation in certain other port areas in the State, we do not conclude that the assailed differences necessarily result in undue discrimination against foreign commerce within the San Diego area. It is well established that mere differences in transportation rates or practices as between two or more areas do not constitute undue or unjust discrimination. To be undue or unjust the differences must be such as to be not justified by the attendant transportation circumstances. Whether undue or unjust discrimination is a result of the differences in minimum rate regulation is a question of fact, not of law. ✓

Petitioner's allegations of undue discrimination are mainly on the basis of how the absence of minimum rate regulation in the non-regulated areas may operate to afford such areas an advantage over the San Diego area. However, the significant considerations are whether and to what extent the non-regulated areas are actually realizing advantages as a result of the absence of regulation. Petitioner's showing does not provide this information. We do not accept the unsupported opinion of petitioner's witness as sufficient proof of the asserted discrimination, and we disagree with

petitioner's witness that information relative to the applicable traffic in the respective port areas is irrelevant in this matter. On this record it has not been established as a fact that the assailed differences in minimum rate regulation are unduly and unjustly discriminatory against foreign commerce within the San Diego Drayage Area, in violation of the Public Utilities Act, of the State Constitution, of Acts of Congress, or of the United States Constitution.

In connection with the action which petitioner seeks, namely, the exemption of foreign commerce within the San Diego Drayage Area from the minimum rates, it should be pointed out that a purpose of the action, in addition to the cure of the alleged discrimination, appears to be the attainment of freedom to negotiate rates which are less than the present minimum rates. The present minimum rates do not impinge upon petitioner's right to negotiate rates which are the same as, or more than, the minimum rates. There is no basis on this record for concluding that lesser rates than the minimum rates would be reasonable for the transportation involved. In the absence of such a basis it must be concluded that the lesser rates would be unreasonably low, since Minimum Rate Tariff No. 9-A sets forth the lowest rates that the Commission has found to be reasonable for the transportation of property within the San Diego area. We do not perceive that the correction of the asserted discrimination requires the approval of a course that would lead to rates that are unreasonably low and inconsistent with the general purposes of the minimum rates, namely the maintenance of adequate and dependable services by all necessary transportation agencies and the preservation of the full use of the highways to the public.

Upon full and careful consideration of the record in this matter, we find that petitioner has not established as a fact that, as applied to the transportation of general commodities moving in foreign commerce within the San Diego Drayage Area, the rates, rules and regulations in Minimum Rate Tariff No. 9-A unduly or unjustly discriminate against said transportation. We conclude that the exemption of said transportation from the minimum rates, rules and regulations in Minimum Rate Tariff No. 9-A has not been shown to be justified.

O R D E R

IT IS ORDERED that Petition No. 28 in Case No. 5439 be, and it hereby is, denied.

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

Dated at San Francisco, California, this 5th day of MAY, 1964.

William W. Bennett  
President

Robert E. Smith  
Robert W. P.

George A. Grover

Commissioners

*I dissent.*

Frederick B. Halbach

DISSENTING OPINION OF COMMISSIONER HOLOBOFF

The issue here is whether the rates prescribed in Minimum Rate Tariff No. 9-A unduly discriminate against the Port of San Diego with respect to transportation in foreign commerce. As I understand the petitioner's claim, such undue discrimination exists by reason of the fact that this Commission has not prescribed minimum rates for such transportation in the Ports of Stockton, Long Beach, Los Angeles and Sacramento; that because of the absence of such minimum rates shippers and carriers are free to and do negotiate rates which are less than those prescribed in Minimum Rate Tariff No. 9-A and thereby divert traffic from the Port of San Diego. Petitioner has been denied relief primarily upon the ground that it has failed to show as a fact that undue discrimination results from these circumstances.

The record here shows, and it is otherwise generally known, that there is vigorous competition between the ports in this state for all kinds of traffic, including traffic here in issue. This traffic is very sensitive to changes in the rates and charges applicable thereto; that is, even minor changes in rates if they produce a competitive advantage will determine the port which such traffic will patronize. It seems clear, therefore, that if shippers and carriers in San Diego are required to adhere to Minimum Rate Tariff No. 9-A, while shippers and carriers in ports elsewhere are free to negotiate rates which are less than those prescribed in Minimum Rate Tariff No. 9-A, then the least that can be said is that the Port of San Diego cannot even start competing on an equal footing with the other ports mentioned.

In view of the fact that the Commission has assumed jurisdiction over such traffic, the issue is controlled by Article XII, Section 21, of the California Constitution. This constitutional provision is a broad declaration that it shall be the policy of this



state to avoid discrimination in charges for the transportation of property as between places. It is, of course, true that our courts have held that the discrimination contemplated in Article XII, Section 21, must be undue or unreasonable and that this is a question of fact and not of law. But I suggest that such holdings involved cases where the assailed rates or charges were at least known or ascertainable. Here, the evidence shows that there is no reasonable way of ascertaining either the level of the negotiated rates elsewhere or the volumes of traffic moved thereunder. In short, the issue cannot be resolved by resorting to factual proof. To require petitioner to prove undue discrimination as a matter of fact, therefore, is to require it to assume an impossible burden.

In the absence of such factual proof, can the Commission nevertheless assume that undue discrimination does not result from this situation? I think not. As previously mentioned, the mere fact that the Port of San Diego does not have available to it the same competitive tools (negotiated rates) as do the other ports places it <sup>TDK</sup> ~~in~~ at some competitive disadvantage; this much has been demonstrated. In another context this fact might not be enough. It must be remembered, however, that the situation here is not caused by a private transportation entity, but rather by this Commission, the very agency which under the law is required to enforce the provisions of Article XII, Section 21. Under these circumstances, it seems to me unreasonable for the Commission to create a situation which on its face is proscribed by Article XII, Section 21, and then dispose of a claimed prejudice resulting therefrom by resorting to narrow, technical grounds.

The Commission is moving to establish minimum rates in the cities served by the other ports. This effort is of long standing and the time of its fruition, due to man power limitations and budgetary considerations, is uncertain. Until that task is accomplished, however, petitioner's claim will not be without substance and the Commission

cannot rest assured that it will not be aiding in the frustration of the public policy stated in Article XII, Section 21. Accordingly, I would grant the sought relief for a period of one year subject to review and extensions until the Commission can establish minimum rates applicable to all port areas in the state.

Frederick B. Holcroft  
Commissioner