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ORIGINAL

Decision No. 69499

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

CALIFORNIA CHEMICAL COMPANY, a corporation, Complainant, vs. SOUTHERN PACIFIC COMPANY, a corporation, PACIFIC ELECTRIC RAILWAY, a corporation, and THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, a corporation. Defendents.	Case No. 8092 (Filed December 28, 1964)
CALIFORNIA CHEMICAL COMPANY, a corporation, Complainant, vs. SOUTHERN PACIFIC COMPANY, a corporation, PACIFIC ELECTRIC RAILWAY, a corporation, and THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, a corporation. Defendants.	Case No. 8125 (Filed February 8, 1965)

Frank Loughran, for complainant.
Leland E. Butler and James J. Trabucco, for defendants.

O P I N I O N

California Chemical Company seeks reparation in amounts of $12,766 (Case No. 8092) and $9,981.14 (Case No. 8125), plus interest, in connection with freight charges it has paid to the defendant railroads for the transportation of 161 boxcar loads of crude sulphur, in bulk, from El Segundo to Richmond and Fresno, during the months of February through June, 1962. Complainant alleges that the charges

assessed and collected by the defendants were in excess of those specified in the applicable tariff and, therefore, in violation of Section 494 of the Public Utilities Code.

Southern Pacific Company (SP), Pacific Electric Railway (PE) and The Atchison, Topeka and Santa Fe Railway Company (AT&SF), in their respective answers, admit all allegations of material facts except that they deny that the freight charges assessed and collected from complainant were in excess of those specified in the governing tariff.[1/] The defendant railroads request that the complaints be dismissed.

The issues before the Commission in Case No. 8092 and Case No. 8125 are identical. The latter complaint merely supplements the former by the addition of 66 shipments which are also involved in the subject dispute. Public hearing in both proceedings was held on a common record before Examiner Gagnon at San Francisco on May 3, 1965. The matters were taken under submission subject to the filing of concurrent briefs, due on or before May 24, 1965.[2/]

The rates assessed and collected by the defendant railroads and the rate sought in lieu thereof by complainant are as follows:

TABLE NO. 1

Commodity: Sulphur, crude, in bulk, in boxcars.
Point of Origin: El Segundo

(Rates in Cents Per 100 Pounds)

Destination	No. of Carloads	Assessed Rate	Assessed Min. Wt.	Sought Rate	Sought Min.Wt.	Route
Richmond	32	46½	60,000	33	60,000	AT&SF
Fresno	27	44½	30,000	33	60,000	AT&SF
Richmond	36	46½	60,000	33	60,000	PE-SPCo.
Fresno	(1) 66	46½	60,000	33	60,000	PE-SPCo.-AT&SF

(1) Added by Case No. 8125

1/ AT&SF's answer to the complaint in Case No. 8092 was filed on January 13, 1965; SP and PE filed their answer on January 14,1965. The defendant railroads' joint answer in Case No. 8125 was filed on February 23, 1965.

2/ Complainant's brief was filed May 24, 1965. Defendants' brief was filed May 21, 1965.

Table I indicates a 46½-cent rate was assessed for all movements of crude sulphur, except for 27 boxcar loads destined to Fresno via the direct route of AT&SF. In this latter instance, a 44½-cent rate was assessed. The dispute arises purely as a result of conflicting interpretations as to the applicability of the assessed rate versus the sought rate of 33 cents. Should the Commission determine that the 33-cent rate is, in fact, correct, the resulting lower charges would prevail in all instances.

The rates of the defendant railroads applicable to the traffic involved herein are set forth in Item 6777 of Pacific Southcoast Freight Bureau Tariff 300 (Tariff 300), pertinent portions of which are set forth in the following table:

TABLE 2

Tariff 300 - Item 6777

Section 2 - Carload Rates in Cents Per 100 Pounds
(7th Revised Page 475-A, Effective February 12, 1962)

Commodity	From	To	Rate
Sulphur, crude Min. wt. 60,000 lbs., except as noted. In tank cars (R35), but not less than 100,000 lbs., except as noted.	Groups 5-10 incl. El Segundo	Groups 1,2,3 Richmond	46½ (4)33

(4) Min. Wt. as follows:
In tank cars (R35) but not less than 140,000 lbs.
In covered hopper cars which carriers are not obligated to furnish, 140,000 lbs.

Note: El Segundo is a Group 6 point and Richmond is a Group 1 point. Rates from El Segundo to Richmond also apply at Fresno under the provisions for intermediate application of rates set forth in Item 60 of the tariff.
Reference to (R35) refers to Rule 35 of the governing classification. (Not involved in subject complaints.)

The record discloses that during the time of movement Seventh Revised Page 475-A of Tariff 300 was continuously in effect and Item 6777 set forth thereon contained the rates here in issue.

Reference is also made in the record to Item 360 of the tariff which, in effect, provides that the rates named in the tariff do not apply to shipments in tank cars except where specifically provided for in the individual rate items.[3/]

It is the position of complainant that the circle 4 footnote reference of Item 6777 does not restrict the application of the 33-cent rate to transportation of crude sulphur in tank cars or covered hopper cars, minimum weight not less than 140,000 pounds.[4/] Complainant argues that the basic tariff provision which authorizes transportation in boxcars, minimum weight 60,000 pounds, is a part of the 33-cent rate and that this application has not been excepted by the language of the circle 4 footnote reference.

A traffic consultant testified in support of the tariff interpretation urged by complainant substantially as follows:[5/]

1. The basic provision of Item 6777 set forth on Seventh Revised Page 475-A of Tariff 300,

"Sulphur, crude.

Min. Wt. 60,000 lbs., except as noted.
In tank cars (R 35), but not less than 100,000 lbs., except as noted." ...,

must be considered to be a part of and read into every rate set forth in the item unless an exception is stated which modifies this basic tariff language.

2. The circle 4 footnote reference on Seventh Revised Page 475-A of the tariff alters the basic provision of Item 6777 only to the extent that it provides a special minimum weight when crude sulphur is transported in tank cars or covered hopper cars. The

3/ The provisions of Item 360 were actually set forth in Item 370 of Tariff 300 at time of movement.
4/ The circle 4 footnote reference is set forth in Table 2 hereof.
5/ The testimony of the traffic consultant was, in turn, supported by two other rate witnesses.

footnote contains no language which could be construed to except the application of the 33-cent rate to the transportation of crude sulphur in boxcars, minimum weight 60,000 pounds.

3. To interpret the circle 4 footnote reference as excluding the application of the 33-cent rate to the transportation of crude sulphur in boxcars, minimum weight 60,000 pounds, requires that words be read into the circle 4 footnote reference.

Complainant argues on brief that it is well established that a tariff must be construed and read according to its terms, giving those terms their usual and generally accepted meaning. "Tariffs are written by the carriers. It is presumed that they have used all the words necessary to protect their own interest. Therefore, it is the rule, ... in doubtful cases, to adopt that interpretation of the tariff which is most favorable to the shipper ..." (Indiana Harbor Belt R. Co. v. Jacob Stern & Sons (1941), 37 F. Supp 690,691.) The foregoing cited rule of tariff interpretation, the complainant argues, prohibits the restricted application of the 33-cent rate suggested by defendants.

In further support of complainant's argument that the basic tariff language of Item 6777 is controlling, our attention is directed to the ruling of the Interstate Commerce Commission in Louisiana Red Cypress Co. v. M.L. & T.R.R. & S.S. Co. (1924) 95 I.C.C. 159, 160, wherein it is stated, in part, that: "... irrespective of the intentions of their framers, tariffs will be construed according to their language .... Any ambiguity or uncertainty in a tariff will be resolved against its makers..."[6/] Finally, in support of complainant's contention that defendant's alleged intent was not

6/ Complainant also makes reference to similar rulings of the Interstate Commerce Commission in J. Hungerford Smith Sales Co. Inc. v. Pennsylvania R. Co. (1938), 226 I.C.C. 740; and Amber Furniture Co. v. C. & N.W. Ry. Co. (1926), 115 I.C.C. 640.

expressed in the provisions of Item 6777, as published on Seventh Revised Page 475-A of Tariff 300, our attention is directed to the assertedly well established principle that the intended effect of the language used by the tariff publisher does not change the plain meaning of the language actually used. (National Candy Co. v. P.R.R. Co. (1925), 101 I.C.C. 43; Murray-Egan-McLeod Co. v. P.R.R.Co. (1925), 101 I.C.C. 233; Louisiana Red Cypress Co. v. M.L. & T.R.R. & SS., supra.

The defendants, through the testimony of two of their traffic officers, take the position that the sought 33-cent rate is restricted to transportation in tank cars or covered hopper cars, minimum weight not less than 140,000 pounds, and hence not applicable to complainant's shipments of crude sulphur when transported in boxcars. The defendant railroads presented testimony relative to the historical background of the 33-cent rate, which assertedly was originally established as a rate reduction for shipments of crude sulphur when loaded in tank cars only, subject to a minimum weight of 140,000 pounds, in lieu of the otherwise applicable rate of 46½ cents, subject to a minimum weight of 100,000 pounds (60,000 pounds when shipment is transported in boxcars). Thereafter, the record discloses, upon the request of the California Chemical Company, the scope of application of the 33-cent rate was broadened to cover movements in covered hopper equipment (Seventh Revised Page 475-A of Tariff 300.). During the period when the 33-cent rate was in effect on Seventh Revised Page 475-A of the tariff, the record also shows, complainant requested the rail carriers to establish reduced rates of 30 and 38 cents per 100 pounds, minimum weight 100,000 pounds, for boxcar movements of crude sulphur from El Segundo to Fresno and Richmond, respectively, in lieu of the otherwise applicable 46½-cent

rate, minimum 60,000 pounds.[7] Defendants argue that such action by the complainant is in direct conflict with the present sought application of the 33-cent rate.

The defendant railroads argue on brief that their interpretation is in harmony with the established principle of tariff interpretation that tariffs should be given the fair and reasonable construction which expresses their plain intent. Sunshine Biscuits, Inc. v. Atchison, T & S.F. Ry. (1949), 49 Cal. P.U.C. 155, 158. See also San Francisco Milling Co. v. Southern Pacific Co. (1926), 28 C.R.C. 870, 873, wherein the Commission quoted with approval E. E. Forbes & Son Piano Co. v. Alabama G.S.RR. (1925), 101 I.C.C. 74, 76, as follows:[8]

> "...in interpreting a tariff the terms used must be taken in the sense in which they are generally understood and accepted commercially, and neither carriers nor shippers can be permitted to urge for their own purposes a strained and unnatural construction. Complainant relies entirely upon a literal interpretation of the intermediate rule, but ... all of the pertinent provisions of the tariffs must be considered together, and if those provisions may be said to express the intention of the framers under a fair and reasonable construction, that intention must be given effect."

The defendants further argue on brief that this Commission has consistently held that when the sought interpretation of a tariff is contrary to the plain intent of the tariff, relief should be denied. Golden Gate Brick Co. v. Western Pacific Ry. (1913), 2 C.R.C. 607, 609.[9]

7/ Requested rate reductions established in Item 6777, effective September 26, 1962, on Eighth Revised Page 475-A of Tariff 300.

8/ Similar holdings are set forth in Consolidated Vultee Aircraft Corporation v. AT&SF Ry., SD & AE Ry. (1945), 46 Cal. P.U.C. 147.

9/ Defendants refer to similar holdings of the Commission in: Weyl-Zuckerman & Co. v. Southern Pacific Co. (1917), 14 C.R.C. 17, 20; San Francisco Milling Co. v. Southern Pacific Co., supra; Application of F. W. Gomph, Agent (1927), 29 C.R.C. 582, 584; Sunshine Biscuits, Inc. v. Atchison, T & S.F. Ry., supra, at 158.

Discussion, Findings and Conclusions

The principles of tariff interpretation, together with the authorities cited in support thereof, as submitted by the complainant and defendants, respectively, are completely compatible and represent well established criteria recognized by the Commission. Further discussion as to the merits of such standards is, therefore, unnecessary. We question, however, complainant's analysis of certain facts of record in order to reach the position it advances.

Upon careful consideration, we find the following facts to be determinative:

1. The shipper's initial request for, and the subsequent establishment of, the 33-cent rate by the defendant railroads did not include transportation of crude sulphur in boxcar equipment.

2. Complainant's historical rate negotiations with defendants clearly indicate that the rate of 33 cents was considered by complainant to be restricted to its tank car movements of crude sulphur; and this understanding was not altered until a post-audit of its freight bills was performed by a traffic consultant, sometime during the year 1964, approximately two years after the time of movement.

3. The language relied on by complainant resulted from its own request of October 23, 1961, which the defendant railroads subsequently approved, to broaden the scope of application of the then uncontested 33-cent tank car rate to include like shipments in covered hopper cars. Publication of complainant's request necessitated a change in the format and wording of the circle 4 footnote reference as set forth on Sixth Revised Page 475-A of the tariff. This revision was accomplished on Seventh Revised Page 475-A of the tariff and is the crux of the tariff controversy now before us. The aforementioned tariff adjustment is shown below:

Tariff 300

6th Revised Page 475-A Effective September 25, 1961	7th Revised Page 475-A Effective February 12, 1962
"(4) Applies only in tank cars." "(140) Min. Wt. (R 35) but not less than 140,000 lbs."	"(4) Min. Wt. as follows: In tank cars (R 35) but not less than 140,000 lbs. In covered hopper cars which carriers are not obligated to furnish, 140,000 lbs."

Complainant now contends that the circle 4 reference on Seventh Revised Page 475-A alters the basic minimum weight provision of the rate item only to the extent that it provides a special minimum weight when crude sulphur is transported in tank cars or covered hopper cars but contains no language which would except the application of the 33-cent rate to transportation of crude sulphur in boxcars, minimum weight 60,000 pounds, as provided in the basic tariff language. We do not find this conclusion to be in consonance with the facts of record.

In order to find for complainant, we would first have to determine that, over and above complainant's request and defendants' expressed efforts to comply therewith, the revision of the circle 4 footnote reference by Seventh Revised Page 475-A of the tariff inadvertently broadened the scope of application of the 33-cent rate so as to include transportation of crude sulphur in boxcars, minimum 60,000 pounds, as well as covered hopper cars, in lots of not less than 140,000 pounds. Such an approach would do violence to the facts of record and will not be followed here.

The Commission further finds that:

4. A fair and reasonable construction of the entire context of the circle 4 footnote reference, as set forth on Seventh Revised Page 475-A of Tariff 300, clearly indicates that the minimum weight provisions contained therein are all-inclusive and that the 33-cent rate is not applicable to movements of crude sulphur in boxcar

equipment as sought by complainant.

5. Complainant's sought relief is premised upon a strained and unnatural construction of the tariff, at variance with the history of Seventh Revised Page 475-A.

Under generally recognized rules of tariff interpretation, the tariff should be given a fair and reasonable construction and not a strained or unnatural one. All the pertinent provisions of the tariff should be considered together, and if the provisions may be said to express the intention of the framers under a fair and reasonable construction, that intention should be given effect; constructions which render some provisions of the tariff a nullity and which produce absurd or unreasonable results should be avoided. (Consolidated Vultee Aircraft Corporation v. AT&SF Ry., SD & AE Ry., supra.)

Upon careful consideration of the above findings, we conclude that the charges assessed and collected by defendants did not exceed those applicable under the tariff lawfully in effect at the time of movement. Accordingly, the complaints should be denied.

O R D E R

IT IS ORDERED that the complaints in Case No. 8092 and Case No. 8125, be, and they are hereby, denied.

The effective date of this order shall be twenty days after the date hereof.

Dated at San Francisco, California, this 3rd day of AUGUST, 1965.

Frederick B. Holoboff
President

Commissioners

Commissioner George G. Grover, being necessarily absent, did not participate in the disposition of this proceeding.