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ORIGINAL

Decision No. 73519

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

PITTSBURGH PLATE GLASS COMPANY, a corporation, Complainant, vs. AMERICAN CARTAGE COMPANY, a corporation, Defendant.	Case No. 8572 (Filed December 27, 1966)

Robert S. Crossland and C. R. Looney, for complainant.
Handler, Baker and Greene, by Marvin Handler; William H. Kessler; Claude B. Allyn; for defendant.

O P I N I O N

By this complaint, as amended at the public hearing in this matter, Pittsburgh Plate Glass Company, a corporation (complainant), requests the Commission to find that a rate of 14.4 cents per 100 pounds was just and reasonable for the transportation of window glass for complainant by American Cartage Company, a corporation (defendant), between defendant's warehouse in the City of Fresno and complainant's plant outside of the Fresno city limits, a distance of eight miles, and between defendant's warehouse outside said city limits and said plant of complainant, a distance of 2.8 miles, during the period April 15, 1966 through November 23, 1966, and that defendant's common carrier rates of 17.5 cents per 100 pounds, minimum weight 40,000 pounds, through August 13, 1966, and 18 cents per 100 pounds thereafter, published in Western Motor Tariff Bureau Tariff No. 111 for said transportation were unjust and

unreasonable and in violation of Section 451 of the Public Utilities Code. The amended complaint points out that the total transportation charges based on the 14.4 cents per 100 pound rate would be $26,091.10; that complainant has heretofore paid defendant $18,626.10 in transportation charges; and that the amount due defendant, based on the 14.4 cents per 100 pound rate, would be $7,465. Defendant stipulated that payment of the additional amount of $7,465 would, in addition to the amount already paid, constitute fair and reasonable compensation to it for the transportation services it performed for complainant during the period of time in question.

Public hearing was held before Examiner Mooney in San Francisco on November 3, 1967. The matter was submitted on November 22, 1967, upon the filing of Memorandum in Support of Complaint by complainant. Counsel for defendant stated at the hearing that he would not file an answer to said memorandum.

The Manager of Freight Rates for complainant testified and introduced numerous exhibits in support of the sought relief. The facts surrounding the transportation in issue as outlined in the complaint and explained by complainant's witness are as follows: In April 1966, complainant opened a new plant in the Fresno area for the fabrication of glass; during the period of time here involved the plant was used for tempering glass only; the property on which the plant is located is bounded on the north by East North Avenue, on the east by South Peach Avenue, on the west by South Willow Avenue and on the south by a line midway between East Muscat and East Central Avenues; the entrance to the plant is on the eastern boundary of the property at 3333 South Peach Avenue (within approximately two miles of the southerly boundary of the city limits); prior to the opening of the plant, complainant made

arrangements with American Warehouse Company, Inc., which is an affiliate of defendant, for the storage of carloads of glass shipped from the east at said company's Fresno warehouse; defendant transported the glass from the warehouse to complainant's plant for tempering and returned a substantial amount to the warehouse; defendant holds a certificate of public convenience and necessity for the transportation of general commodities between Fresno and Tulare with a 25-mile lateral and also radial highway common carrier, highway contract carrier and city carrier permits; complainant and defendant were of the opinion that the transportation was within the rate exempt Fresno Metropolitan Area as described in paragraph (g) of Item 30 of Minimum Rate Tariff No. 2[1/] and that said exemption applied to common carriers as well as highway permit carriers subject to said tariff; based on this belief, agreed rates of ten cents per 100 pounds, minimum weight 30,000 pounds, between the plant and Fresno warehouse (8 actual miles) and five cents per 100 pounds for return shipments from the plant to warehouse made within two hours were negotiated by complainant and defendant; the first three shipments in April 1966 were transported at the agreed rate; it was then brought to the attention of the parties by a Commission representative during a routine investigation that the South Peach Avenue entrance to the plant is not within the Fresno Metropolitan Area; upon being so informed, a rate of 20 cents per 100 pounds was paid for the next 13 shipments and a rate of 17.5 cents per 100 pounds was paid for the remaining 53 shipments made between April 25 and May 27, 1966; South Willow Avenue, the western boundary

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1/ Item 30 provides in part that transportation within the Fresno Metropolitan Area described in paragraph (g) thereof is not subject to the rates named in Tariff No. 2. Said metropolitan area includes the City of Fresno and certain adjacent territory which is a part of the commercial and industrial area of Fresno (Exhibit 7).

of complainant's plant, is one of the boundaries of the Fresno Metropolitan Area named in paragraph (g) of Item 30 of Tariff No. 2; said paragraph states that the boundary "includes both sides of ... avenues ... named"; complainant improved an existing access road across its property from South Willow Avenue to the plant site so it could be used for truck traffic (Exhibits 2 and 3); the improvement was completed on May 30, 1966, and thereafter the agreed rates were again billed and paid; after said date, the South Willow Avenue entrance was available to defendant, and if it used the South Peach Avenue entrance at any time subsequent thereto, it did so for its own convenience; about June 1, 1966, American Warehouse moved its operation to its present location which although outside the Fresno city limits is within the metropolitan zone and much closer to the plant (2.8 miles); paragraph (g) of Item 30 of Tariff No. 2 was amended, effective November 5, 1966, by Decision No. 71322 in Case No. 5432 (Petition No. 432) to specifically include complainant's plant in the Fresno Metropolitan Area (Exhibit 8); it was not until after all of the transportation herein had been performed that the parties became aware that the Fresno Metropolitan Area exemption in Item 30 of Tariff No. 2 does not apply to highway common carriers and that defendant was required to charge its published common carrier tariff rate for said transportation; complainant discontinued using defendant's service on November 23, 1966, and now uses a permitted carrier not associated with defendant for this transportation.

Exhibits 4, 5 and 6 tabulate all of the loads transported by defendant for complainant. According to said exhibits, 414 separate shipments totaling 18,084,667 pounds were transported; the average number of shipments and pounds transported on each of the

134 days on which shipments were made was 3.1 and 134,960 pounds, respectively; and the average weight per shipment was 43,683 pounds.

Complainant's witness testified that the glass was packed in wooden boxes or crates generally of uniform size and weighing 2,700 pounds (Exhibit 1) which were handled quickly and easily by fork-lift trucks; that except for the first two months, during which complainant paid for helper and fork-lift service, all unloading was performed by complainant; that it was not necessary to weigh the shipments since the weights were known; that the routes traversed by the trucks were over streets, freeways and expressways which were not congested; that generally there was no waiting time at the plant; that to his knowledge, the same truck and driver performed most, if not all, of the transportation; that if it were not for the agreed rates, complainant would have utilized proprietary equipment; that complainant is the only producer of window glass west of Oklahoma; and that since there were no competitors in the Fresno Area with similar movements, no discrimination would result should the Commission grant the sought relief.

A number of comparisons were presented by the manager to show that the hourly rates in Tariff No. 2 for oil, water or gas well outfits and supplies, the hourly rates in City Carriers' Tariff No. 1-A and the monthly vehicle unit rates in Minimum Rate Tariff No. 15 would have produced less revenue than under the agreed rates. He pointed out that rail facilities were established at the plant shortly after the transportation commenced; that the rail rate was five and one-half cents per 100 pounds from the original warehouse and six and one-half cents per 100 pounds from the new warehouse, subject to a minimum weight of 100,000 pounds; and that defendant could have published these rates in his common carrier tariff.

The president of defendant testified as follows: He is the only stockholder of defendant and has been in business for ten years; defendant's warehouse is a public warehouse and was such during the period of time in issue; he negotiated the agreed rates with complainant; the revenue to be earned from warehousing glass for complainant was one of the factors considered in arriving at the agreed rates; the facts and circumstances surrounding the transportation were as described by defendant's witness.

Exhibit 13 which is a statement of revenues and expenses for each shipment was introduced in evidence by the president. The exhibit shows a revenue of $62.90 per trip based on an average load of 43,683 pounds and the sought rate of 14.4 cents per 100 pounds, a total expense of $43.96 per trip, a net operating revenue of $18.94 per trip and an operating ratio of 69.9 percent. The president testified that the operating ratio for this traffic was far more favorable than that experienced from defendant's other traffic. He stated that payment of the additional $7,465 by complainant would constitute adequate compensation for the transportation performed by defendant.

Complainant's Memorandum in Support of Complaint asserts that under the "both sides of the road concept" in paragraph (g) of Item 30 of Tariff No. 2, defendant's plant was at all times within the Fresno Metropolitan Area; that both the old and new locations of defendant's warehouse were likewise within said area; that transportation within this area is exempt from minimum rate regulation; that the transportation could have legally been performed by any permit carrier at the sought rate; that the Commission has not heretofore found the published rate in defendant's tariff for the transportation in issue to be reasonable; that there are no

other manufacturers of glass in the Fresno area and, for this reason, there would be no discrimination against other shippers if the relief is granted; that the Commission has in the past granted similar relief when special circumstances have been shown to exist; and that the "relief sought herein is within the equitable powers of the Commission and is available under Section 734 (reparation) and Sections 494 and 532 (waiver of undercharges)".

The relief sought herein is in effect a request for reparation under Section 734 of the Public Utilities Code which provides in part as follows:

> "When complaint has been made to the commission concerning any rate for any ... service performed by any public utility, and the commission has found, after investigation, that the public utility has charged an unreasonable, excessive, or discriminatory amount therefor in violation of any of the provisions of this part the commission may order that the public utility make due reparation to the complainant therefor, with interest from the date of collection if no discrimination will result from such reparation. No order for the payment of reparation upon the ground of unreasonableness shall be made by the commission in any instance wherein the rate in question has, by formal finding, been declared by the commission to be reasonable ...."

Based on the applicable rates in defendant's common carrier tariff, the additional amount due is $14,930.05 (Exhibit 5). Defendant has asserted its demand for said amount in its answer to the complaint. Complainant has not paid any part of said amount. In considering the question of whether complainant must pay the total amount based on the assailed rates as a condition precedent to seeking reparation from charges demanded but not paid, the Commission has held as follows:

> "To require a customer who has been charged an excessive or discriminatory rate to first pay the charge before he can apply to the Railroad Commission for relief would seem to be an unnecessary and useless burden which the statute will not be assumed to intend unless clearly required by its language, which is not the case here.
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> "The reference in section 71 [now Section 734 of the Code] to payment of interest by the utility refers to cases in which the excessive or discriminatory charge was paid." Palo Alto Gas Co. v. Pacific Gas and Electric Co., 15 C.R.C. 618, 621 (1918).

The parties stipulated that complainant agrees to pay defendant the additional sum of $7,465 and that defendant agrees, upon receipt of said payment, to discharge complainant from any further liability in connection with the transportation in issue. The parties requested that, in the event the Commission has no objection to said stipulation, the complaint be dismissed.

From a review of the entire record, we concur that the payment of $7,465 by complainant to defendant would, in addition to the amount already paid, constitute just and reasonable compensation for the transportation services performed. In view of the aforementioned stipulation by the parties, the complaint has been satisfied. Since no affirmative action on the part of the Commission is required, the complaint will be dismissed.

The Commission finds that:

1. The transportation in issue was performed under defendant's common carrier operating authority and the applicable tariff was Western Motor Tariff Bureau Tariff No. 111.

2. Both the original and new locations of the warehouse at which complainant's glass was stored are located within the Fresno Metropolitan Area, as described in paragraph (g) of Item 30 of

Tariff No. 2. Said warehouse is operated by the American Warehouse Company, an affiliate of defendant.

3. Complainant's property is bounded on the west by South Willow Avenue which is one of the boundaries of the Fresno Metropolitan Area named in paragraph (g) of Item 30 of Tariff No. 2. Said paragraph states that the boundary "includes both sides of ... avenues ... named". At all times herein involved there was a private road on complainant's property connecting South Willow Avenue with the plant site. The private road was improved to accommodate truck traffic and was available for use by defendant after May 30, 1966. If defendant did not use the South Willow Avenue entrance after said date, it did so for its own operating convenience.

4. All of the transportation in issue performed subsequent to May 30, 1966, was within said Fresno Metropolitan Area.

5. The Commission has not established minimum rates for transportation within said Fresno Metropolitan Area and has not heretofore found any rates published in defendant's common carrier tariff for the transportation of glass within said area to be reasonable.

6. Transportation charges for substantially all of the shipments transported prior to June 30, 1966, were based on rates equal to or greater than the applicable rate published in defendant's common carrier tariff.

7. For all transportation subsequent to June 30, 1966, which was approximately 85 percent of the total performed, the rates agreed upon between complainant and defendant prior to the commencement thereof (ten cents and five cents) were assessed.

8. The transportation herein was essentially a shuttle service between complainant's plant and warehouses located a short distance away. The warehouses were owned by an affiliate of defendant. Practically all shipments were in truckload quantities, and the frequency was substantial. The conditions surrounding the transportation were extremely favorable.

9. The sought rate of 14.4 cents per 100 pounds would produce an operating ratio of 69.9 percent for defendant for the transportation services it performed for complainant. This is a substantially more favorable operating ratio than defendant experienced in connection with traffic handled by it for other shippers during the period involved herein.

10. Based on the sought rate of 14.4 cents per 100 pounds, the total charge for the transportation in issue would be $26,091.10. Complainant has heretofore paid defendant the sum of $18,626.10 for said transportation.

11. In view of the particular circumstances herein, the amount of $26,091.10 is just and reasonable to be charged for the transportation in issue, and charges in excess of said amount would be excessive and unreasonable.

12. No discrimination would result should the sought relief be granted.

13. Based on Finding 11, there is an outstanding undercharge of $7,465 in connection with the transportation in issue.

The Commission concludes that Case No. 8572 should be dismissed.

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O R D E R

IT IS ORDERED that Case No. 8572 is hereby dismissed.

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

Dated at San Francisco, California, this 19th day of December, 1967.

President

Commissioners

Present but not participating:
Commissioner A. W. GATOV
Commissioner FRED P. MORRISSEY