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ORIGINAL

Decision No. 73715

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

KENNETH KOVACEVICH and JAKE J. CESARE, Co-partners,

Complainants,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation,

Defendant.

Case No. 8643
(Filed June 7, 1967)

Granger & Moe by George W. Granger, for Kovacevich and Cesare, complainants.
Harold S. Lentz, Crowe, Mitchell, Humlbutt, Clevenger and Long by Robert P. Long, Thomas P. Kelly and Larry W. Telford, for Southern Pacific Company, defendant.
Kenneth G. Soderlund, for the Commission staff.

## O P I N I O N

On June 7, 1967, Kenneth Kovacevich and Jake J. Cesare, copartners engaged in the operation of a cold storage and grape packing shed in Richgrove, California, hereinafter called complainants, filed a complaint against Southern Pacific Company, hereinafter called defendant. Complainants alleged that defendant had terminated service on a spur track adjacent to complainants' packing shed in violation of the Commission's General Order No. 36B, because complainants had refused to pay defendant for the construction of said spur track and to enter into a written agreement with defendant setting forth the terms and conditions for the use of said

spur track. Complainants requested the Commission to issue a temporary order and upon final hearing a permanent injunction restraining and enjoining the defendant from denying complainants service upon said spur track and ordering that service be reinstated.

In its answer filed July 7, 1967, defendant alleged that the spur track in question is an industrial spur track constructed pursuant to an agreement by complainants that they would pay defendant the entire cost of construction of said spur track, with the defendant to repay to complainants the cost of the portion of the spur track from the point of the initial switch to the clearance point at the rate of $2.00 for each carload of freight yielding roadhaul revenue to defendant and delivered on and shipped from the spur track, which are the same terms and conditions available to defendant's other shippers and receivers of freight under similar circumstances. Defendant admitted that it removed the switch and terminated spur track service following complainants' refusal to accept the spur track service or to pay for the industrial spur track on the same terms and conditions as are available to defendant's other shippers and receivers of rail freight under similar circumstances. Defendant claims that the Commission's General Order No. 36B is only applicable to team tracks and not to industrial spur tracks, such as the one allegedly involved in this proceeding.

On July 14, 1967, defendant filed a motion to dismiss the complaint and a petition for a proposed report.

The matter was heard before Examiner Cline in Visalia on July 19, 20 and 21, 1967. At the conclusion of the hearing complainants' request for an interim order specifying the terms upon which service could be reinstated was taken under submission. The parties were requested to notify the Commission in the event a stipulation was reached whereby service was reinstated, in which case

there would be no need for an interim order. By letter dated August 17, 1967, the attorney for complainants submitted to the Commission a copy of the escrow agreement entered into between complainants and defendant and advised the Commission that the deposit pursuant to the escrow agreement had been made by complainants and that the spur track in question had been reconnected to the main line. Said letter and attachments are hereby made a part of the record as Exhibit No. 24.

The entire proceeding was taken under submission on September 28, 1967, the last date on which complainants could have filed an answering brief to the opening brief filed by defendant on September 13, 1967.

Upon a consideration of the record in this proceeding the Commission finds as follows:

1. Because of its design and location, the only practical access to rail cars placed upon the spur track which is the subject of this proceeding, for loading or unloading is upon and over the real property of complainants.

2. Complainants retain control over the use of their property by members of the public.

3. Complainants have reserved the right to charge members of the public for use of complainants' property.

4. Said spur track can be put to practical use by the public only with the permission of complainants.

5. Defendant already has a team track at Richgrove.

6. Said spur track is not a team track.

7. Said spur track is an industrial spur track.

8. The terms and conditions for construction and operation of industrial spur tracks which defendant regularly and uniformly extends to all corporations and persons are pursuant either to General

Order No. 15 of the former U. S. Railroad Administration or to Supplement No. 1 to said General Order No. 15.

9. Said General Order No. 15, which is used where the estimate of the first year's revenue from railroad cars handled on said spur track is at least ten times the estimated cost of constructing the portion of the track from switch to clearance point, provides that the railroad shall pay the construction cost of the portion of the track from switch to clearance point and that the industry shall pay the construction cost of the track beyond the clearance point.

10. Said Supplement No. 1 to General Order No. 15, which is used where the estimate of the first year's revenue from railroad cars handled on said spur track is less than ten times the estimated cost of constructing the portion of the track from switch to clearance point, provides that the industry shall pay the entire construction cost of the spur track but shall be repaid by the railroad for the construction cost of that portion of the spur track from the point of initial switch to the clearance point at the rate of $2.00 for each carload of freight yielding roadhaul revenue to the railroad and delivered on or shipped from the spur track.

11. The estimate of the number of such cars to be handled on said spur track during the first year of its operation was 60 and the estimate of the revenue to be received for handling said cars was $21,000.

12. The average revenue reasonably estimated to be received from cars handled over said spur track is $360 per car for Southern Pacific cars and $500 per car for Santa Fe cars.

13. Approximately 70 cars were handled over said spur in 1966 of which 52 were Southern Pacific cars and 18 were Santa Fe cars producing an estimated revenue of $27,720.

14. All of the cars handled over said spur track to date have been shipped in interstate commerce, but cars shipped in intrastate commerce may be handled over said spur track in the future.

15. The estimated cost of constructing the portion of said spur track from switch to clearance point, prior to actual construction was $5,040.00.

16. The actual cost of constructing the portion of said spur track from switch to clearance point was $4,571.81.

17. The estimated cost of constructing the entire said spur track, prior to actual construction was $8,740.00.

18. The actual cost of constructing the entire said spur track was $7,962.70.

19. Defendant does not, and for many years has not, offered or extended industrial spur track service to any corporations or persons under circumstances comparable to that of complainants upon any terms or conditions other than its standard form of industrial spur track agreement based on said Supplement No. 1 of General Order No.15.

20. Defendant does not construct industrial spur tracks on any basis other than its Supplement No. 1 to General Order No. 15 standard agreement unless the estimate of first year's revenue from railroad cars handled on said spur track is at least ten times the estimated cost of constructing the portion of the track from switch to clearance point.

21. Defendant offered to complainants to construct the spur track in question and provide service thereon upon the same terms and conditions as it regularly and uniformly extends to all corporations and persons under comparable circumstances.

22. Exhibit No. 4 is the Supplement No. 1 to General Order No. 15 standard form of agreement offered by defendant for the construction of industrial spur tracks to all corporations and persons under circumstances comparable to that of complainants.

23. Paragraph 7 of said Exhibit No. 4 reads as follows:

> "Railroad shall have the right to disconnect the said track or refuse to operate over the same, and in either case this agreement at the option of Railroad shall terminate, in the event that (a) Industry shall cease to do business on said track in an active and substantial way for a continuous period of one (1) year, unless prevented from so doing by law, strike or any causes beyond the control of the Industry; (b) Industry shall fail to observe and perform each and every of the covenants and promises herein contained which are by Industry to be observed and performed, or (c) Railroad is required or authorized by law, ordinance or police regulations, or orders of any lawfully constituted public authority having jurisdiction in the premises, to discontinue operation of said track, or to change its tracks in such manner as to render it impracticable, in the judgment of Railroad, to continue to operate said track."

24. Prior to the construction of said spur track, complainants were advised by defendant that the only basis on which defendant would consent to construction of said spur track would be on the basis of a Supplement No. 1 to General Order No. 15 agreement.

25. On September 7, 1965, complainant Cesare requested defendant to proceed with construction of said spur track.

26. On September 7, 1965, complainant Cesare requested an extension of credit to avoid making a deposit of the full estimated cost of said track in advance of construction.

27. Defendant extended the requested credit to complainants and constructed said spur track on the understanding and in the belief that complainants had agreed to pay for said spur track on the basis of a Supplement No. 1 to General Order No. 15 agreement.

28. Said spur track was constructed at the request and urging of complainants who knew that construction was being performed and on the understanding and in the belief that complainants had agreed to pay for said construction on the basis of said Supplement No. 1 of General Order No. 15.

29. Complainants knew at all times that defendant expected them to pay for the construction of the spur track on the basis of said Supplement No. 1 of General Order No. 15.

30. Complainants paid defendant for relocation of telegraph poles located on defendant's property which was necessary prior to the construction of said industrial spur track.

31. Complainants permitted defendant to proceed with the construction of said spur track and thereafter made use of said spur track without and before advising defendant that they did not intend to pay for the construction of said spur track.

32. Permitting complainants to use said spur track without paying for the construction thereof and in accordance with the provisions of the terms and conditions of defendant's Supplement No. 1 to General Order No. 15 standard form of agreement would accord to complainants a preference, advantage and concession not available to other corporations or persons under comparable circumstances.

33. Complainants have refused to pay for construction of said spur track and accept service thereover in accordance with the Supplement No. 1 to General Order No. 15 agreement which contains the terms and conditions which defendant regularly and uniformly extends to all corporations and persons under comparable circumstances.

34. After complainants failed and refused to execute the written Supplement No. 1 to General Order No. 15 agreement pertaining to said spur track which was submitted to them for signature and after they failed and refused to pay for the construction of said spur track pursuant to said agreement, defendant disconnected the switch to and removed said spur track from service.

35. Complainants are copartners.

36. Defendant does not file reports, and the Commission has never required defendant to file reports concerning removal of industrial spur tracks.

The Commission concludes as follows:

1. The Commission has jurisdiction over the construction and removal from service of the industrial spur track which is the subject matter of this proceeding even though the cars which have been shipped and which are to be shipped are wholly in interstate commerce, because the federal government has not occupied the field of regulation of industrial spur tracks. (49 U.S.C.A. Sec. 1(22); City of Yonkers vs. U. S., 322 U. S. 685, 88 L. ed. 400; Western R. Co. vs. Georgia Pub. Serv. Comm., 267 U. S. 493, 69 L.ed. 753; New Orleans Terminal Company vs. Spencer, 255 F. Supp. 1.)

2. Said spur track was constructed by defendant pursuant to an express contract and agreement with complainants, i.e., the defendant's Supplement No. 1 to General Order No. 15 agreement, Exhibit No. 4 herein.

3. Even if there had been no express contract between defendant and complainants, the evidence establishes an implied contract pursuant to said Supplement No. 1 to General Order No. 15.

4. The actions of complainants create an estoppel preventing them from denying the existence of a contract based on said Supplement No. 1 to General Order No. 15.

5. Defendant is not permitted or required by any provision of law or by any order or rule of this Commission to provide industrial spur track service on any terms or conditions other than those that are regularly and uniformly extended to all corporations and persons under comparable circumstances.

6. Defendant was not required to comply with the provisions of the Commission's General Order No. 36B because the removal of said track by defendant was pursuant to the provisions of a special contract "wherein time limits or other conditions affecting the permanency of such facilities are specified".

7. The Commission's General Order No. 36B has not been violated by the actions of defendant respecting said spur track.

8. The actions of defendant pertaining to said spur track have been in compliance with requirements of state and federal law and have not violated any provision of law or any order or rule of the Commission.

9. The defendant's motion to dismiss the complaint herein should be granted and the complaint should be dismissed.

## O R D E R

IT IS ORDERED that:

1. The defendant's request for an examiner's proposed report is denied.

2. The defendant's motion to dismiss the complaint herein is granted.

3. The complaint is hereby dismissed.

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

Dated at San Francisco, California, this 14th day of FEBRUARY, 1968.

President

Commissioners