MJO

ORIGINAL

Decision No. 74005

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

CITY OF SAN CARLOS, a Municipal corporation, Complainant, vs. SOUTHERN PACIFIC COMPANY, a corporation, Defendant.	Case No. 8697 (Filed October 10, 1967)
Investigation on the Commission's own motion into the Rates, Charges, Rules, Operations, Practices, Contracts, Leases, Service and Facilities of all the vehicular parking areas adjacent to railroad stations between San Francisco and San Jose, California, owned or controlled by SOUTHERN PACIFIC COMPANY.	Case No. 8700 (Filed October 10, 1967)

ORDER DENYING MOTION ON AFFIDAVIT OF PREJUDICE

It appearing that Southern Pacific Company on November 22, 1967 filed a motion in the above-numbered proceedings based upon an affidavit of prejudice (Section 170.6 C.C.P.) seeking the disqualification of Commissioner William Bennett, and

It appearing that the Commission has determined that Section 170.6 C.C.P. has no applicability to its proceedings, therefore

IT IS ORDERED that the Affidavit of Prejudice filed herein on November 22, 1967 is of no force and effect and the motion based thereon is denied.

C. 8697, C. 8700 Mjo

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

Dated at San Francisco, California, this 16th day of APRIL, 1968.

Peter E. Mitchell
President

Wilson

William Symons, Jr.

Thad P. Morrissey
Commissioners

C. 8697

WILLIAM M. BENNETT, COMMISSIONER, DISSENTING OPINION

This case had its genesis in proceedings before this Commission concerned with establishing a reasonable fee applicable to Peninsula parking lots owned and operated by the Southern Pacific Company. On November 6, 1967, counsel for Southern Pacific in public hearing before this Commission in Case 8697 was candid in stating on the record that the Southern Pacific Company would not comply with a restraining order previously issued by this Commission on October 10, 1967, and signed by Commissioners Mitchell, Gatov and Symons. Southern Pacific took the position at that time and even during the proceedings herein that the restraining order of the Commission was invalid. Even repeated refusals by the Supreme Court of the State of California to nullify such order was disregarded by the Southern Pacific.

The refusal of the Southern Pacific Company was so notorious that undoubtedly this explains the failure of that company to present any testimony whatsoever by way of a defense to the proceedings initiated or by way of mitigation for its contemptuous action. Southern Pacific conducted itself with an air of certainty almost as though it had suddenly become immune to the jurisdiction and process of this Commission.

But for the candor of Southern Pacific counsel in freely admitting to violation of the Commission's orders, this matter would not have come to the Commission. It is most curious, perplexing and beyond explanation that neither the staff of this Commission, the Director of Transportation nor the Chief Counsel brought to our attention the disregard by Southern Pacific of a Commission order. Only the frankness of Southern Pacific counsel in the public proceedings apprised us that a lawful order of the Commission was being disobeyed. This is hardly in keeping with the concept of a vigorous, independent staff acting in the public interest. And it is so unlike staff action of recent years when it did exhibit initiative, independence and simply performed statutory duty. We

can well ask why staff personnel knowing of Southern Pacific's disregard for a Commission order chose to remain silent. I think it correct to state that but for the information supplied by Southern Pacific counsel as to the railroad's disregard for a lawful order that there never would have been knowledge of contempt let alone proceedings to impose punishment for contempt.

That the Southern Pacific Company considers itself beyond the reach of this Commission and the Supreme Court of this state is plain. It makes its own determination as to that which is binding upon it and obeys or disobeys accordingly.

The interests of its commuters, the authority of this Commission, the public service obligations of this corporation, all are seemingly of little or no concern to the management of Southern Pacific Company. This corporation should realize as should all other California public utilities that if regulation is to be ignored, if a permissive regulatory climate is to inhibit the vigor of this Commission, then the public will not be served or protected by this Commission, and the raison d'etre for its being will be gone. And when the public realization becomes widespread and if the historical process repeats itself then the only answer toward control of a public service corporation as here lies in public ownership. And shortsighted management enraptured with profit and indifferent to public need can only hasten that day.

The convenient story of the President of Southern Pacific that he believed counsel's advice that the restraining order was not valid discloses a woeful inadequacy upon the part of Southern Pacific counsel and Southern Pacific management. Obviously this was the testimony that had to be given. Merely giving it does not make it credible. Southern Pacific was here testing the Commission and almost got away with it. The difficulty was however that the contempt was so open and flagrant that it could not be disregarded. The distressing thing here is the spectacle of management totally callous toward public responsibilities and indifferent to the obligations of law.

Some comments are in order. The order of my brethren ruling upon my qualifications is irrelevant, unnecessary and beyond their power. As a Commissioner I take my authority from the constitution--not from my colleagues. Further, I had thought that the California Supreme Court had clearly determined this matter when they denied the efforts of the Southern Pacific Company to disqualify me from the case.

Concerning the parking lot decision the majority embarks upon a most curious discussion concerning the tax liability of California railroads. The record is quite clear that Southern Pacific has a tax expense associated with each parking lot which is the subject of today's order. Heretofore the Commission has always recognized that a public utility whether it be a railroad corporation or other is entitled in the rate fixing process to compensation for taxes paid. And further in the parking lot decision in this Commission dated June 20, 1967, Decision No. 72615 the majority which is now reversing itself found specifically that SP is entitled to recoup taxes, assessments, improvements and maintenance of parking lots. Not only is the Commission disregarding its recently enunciated parking lot order but it is disregarding all of the regulatory concepts which heretofore have been considered well established, as part of the rate fixing process of this Commission. We are prompted to wonder why. Today's order insofar as it relates to the parking lots merely sets aside the decision of an impartial examiner who heard the fresh testimony and who judged the credibility of witnesses and the majority arbitrarily rewrites the decision. In seeking to reach some unformulated goal or objective the majority of necessity does violence to basic regulatory principles and law. Does the majority actually hold by this decision that there is question as to whether taxes are an operating expense in a rate proceeding? So far as the staff position is concerned there is no evidence whatsoever from the staff rebutting in any wise the hard fact that Southern Pacific has a tax liability upon each parking lot.

Turning to the contempt proceeding the Commission has mixed two cases terribly. There is nothing whatsoever even by employment of the single word "refund"--about refunds in the contempt case. The opinion in the contempt case which is judicial in nature is supposed to be based upon the order to show cause, the allegations of contempt associated therewith and only the evidence pertaining to these matters adduced at public hearing. There is nothing in the contempt proceedings about refunds and therefore it is improper for the Commission to be mixing parking charges, refunds, and a punitive fine in one composite order. The staff has advised us that the contempt order is erroneous in presenting for the first time and in the ultimate majority decision discussion of refunds.

There is, however, a sly benefit to the Southern Pacific by the intrusion of the irrelevancy of refunds. Southern Pacific well knows that refunds are not part of a contempt order. And all today's majority order does is to defer and to place in doubt a specific fine of $22,000. Southern Pacific is required to set up some type of plan detailing the manner in which it shall refund parking charges. And the logical question arises at this point whether or not Southern Pacific is to base a refund plan upon Examiner Daly's original decision which provides for a 35 cent daily parking charge or whether the refund plan is to be based upon the majority's tentative daily charge of 25 cents. Standing plain in all of this is the fact that the 25 cent daily charge of the majority is not final in that the majority parking lot decision sets the matter down for further testimony to decide the tax issue and upon resolution of that issue conceivably the parking lot charge will, unless we abandon all past regulatory precedent, revert to the 35 cent charge which includes taxes as proposed by the examiner herein originally.

There is nothing in the majority order which covers the period of refunds by way of termination and all today's majority orders do is to defer any real decision either on parking lot charges or by way of imposing a $22,000 fine now for perhaps the most flagrant contempt ever visited upon this body. Further, the confusion contained in today's contempt order whether deliberate and calculated by way of deliberate error to constitute reversal error on an appeal or whether coming from lack of expertise in the regulatory field has the same end result. And that end result is that nothing is being done to Southern Pacific. The Commission has given the Southern Pacific a beautiful error as the basis for rehearing--indeed the majority being placed upon notice of the deliberate error were quick to point out that Southern Pacific could ask for a rehearing.

One wonders whether or not the contempt order as it has been doctored and diluted by the extraneous element of refunds and as it has been rewritten has in fact given the Southern Pacific due process. My brethren do not seem to realize that contempt is a judicial proceeding and because of the penalties involved rights are to be scrupulously observed. The handling of today's orders is unique. Apparently now parties before us are to be treated to the copycat decision. And the Commission at least to its credit advertises the pure results of an impartial examiner and then illustrates its absolute power by arbitrarily assigning a decision to an examiner who never heard a line of testimony and to a commissioner who did not set on even one day's hearing. Southern Pacific is to be congratulated. A friendly Commission can achieve its ends either by an outright bold favor or if they be too much for public consumption then it can write a decision and place in it very carefully and deliberately a finding and a procedure here concerning refunds which constitutes in my opinion the basis of a successful appeal. Better then a friend of the court utilities now are served by friends at the court.

The decisions proposed by Examiner Daly were the ones which should be signed. In short, Southern Pacific should be ordered to pay and at once a $22,000 fine. Their contempt was notorious, flagrant, self-serving and illustrative of a consistent public be damned attitude. As to the parking lot charges if the Commission does not know that since 1912 we have allowed taxes as an operating expense, they are free to wend their way through that concept and to arrive inevitably at the result contained in the examiner's original report. Southern Pacific today by the gentle treatment accorded them now has a license to be indifferent, arrogant and, if necessary, contemptuous.

/s/ WILLIAM M. BENNETT

WILLIAM M. BENNETT
Commissioner

Dated: San Francisco, California
April 16, 1968