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Decision No. 75612

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

ANCHOR HOCKING GLASS CORPORATION, a corporation, CONTINENTAL CAN CO., INC., a corporation, Complainants, vs. SOUTHERN PACIFIC COMPANY, a corporation, Defendant.	Case No. 8616 (Filed March 30, 1967; Amended May 14, 1968)
ANCHOR HOCKING GLASS CORPORATION, a corporation, BROCKWAY GLASS COMPANY, INC., a corporation, and GLASS CONTAINERS, INC., a corporation, Complainants, vs. SOUTHERN PACIFIC COMPANY, a corporation, Defendant.	Case No. 8802 (Filed May 8, 1968)

Stanley T. Grydyk, for Anchor Hocking Glass Corporation, Continental Can Co. (Brockway Glass Company, Inc.) and Glass Containers, Inc., complainants.
Albert T. Suter, for Southern Pacific Company, defendant.

O P I N I O N

The complainants in this proceeding are corporations engaged in the manufacture of glass products. During the period of October 31, 1961 through August 15, 1964 (Case No. 8616), and from July 27, 1964 through June 19, 1967 (Case No. 8802), Del Monte Properties Company shipped several hundred rail carloads of a product referred to as feldspar from Lake Majella, California, to

complainants' respective glass plants located at Oakland, Mulford and Hayward, California, via the rail facilities of the defendant (SPCo).

For such transportation the SPCo assessed and collected from complainants freight charges based upon a rate of 18½ cents per 100 pounds, minimum 100,000 pounds. Complainants contend that a rate of 11 cents per 100 pounds, minimum 100,000 pounds, for shipments of sand, in bulk, was applicable to said transportation,[1/] and that the assessed freight charges reflect overcharges to the extent that they are higher than those resulting under defendant's sand rate of 11 cents. It is further alleged that the assessed rate for feldspar of 18½ cents constitutes an unjust and unreasonable rate to the extent it exceeds the 11-cent rate for sand. Complainants request an order directing the SPCo to refund the asserted overcharges together with costs, attorney fees, damages and such other relief as may be provided by law.

The issues involved in Case No. 8616 and Case No. 8802 are identical and, except for the addition of Glass Containers, Inc., in Case No. 8802, the same complainants and defendant are involved. Accordingly, these matters were consolidated for hearing on a common record. Public hearings were held before Examiner Gagnon at San Francisco on June 19, October 23-24, and November 20, 1968. The matter was submitted subject to the filing of concurrent briefs, which were received February 20, 1969. The complaints now stand submitted for decision.

1/ Southern Pacific Company is a participating rail carrier in (1) Pacific Southcoast Freight Bureau, Agent, Tariff No. 300 which names the assessed rate of 18½ cents per 100 pounds on feldspar, in bulk, or in packages; and (2) said Agent's Tariff No. 278-A which names the sought sand rate of 11 cents per 100 pounds.

Statutory Provisions

Sections 451, 494 and 532 of the Public Utilities Code read, in part, as follows:

Section 451

"All charges demanded or received by any public utility, or by any two or more public utilities, for any product or commodity furnished or to be furnished or any service rendered or to be rendered shall be just and reasonable. Every unjust or unreasonable charge demanded or received for such product or commodity or service is unlawful."

Section 494

"No common carrier shall charge, demand, collect, or receive a different compensation for the transportation of persons or property, or for any service in connection therewith, than the applicable rates, fares, and charges specified in its schedules filed and in effect at the time, ..."

Section 532

"Except as in this article otherwise provided, no public utility shall charge, or receive a different compensation for any product or commodity furnished or to be furnished, or for any service rendered or to be rendered, than the rates, tolls, rentals, and charges applicable thereto as specified in its schedules on file and in effect at the time, ..."

Complainants' first cause of action relates to asserted violations of Sections 494 and 532. The complainants' second cause of action, alleging that the assessed rate is unjust and unreasonable, refers to an asserted violation of Section 451.

With respect to complainants' first cause of action, Section 736 provides that all complaints for damages resulting from an alleged violation of Sections 494 or 532 shall be filed within three years from the time the cause of action accrues, and not after. If claim for the asserted damages has been presented in writing to the public utility concerned (as in the instant proceeding) within the three-year period, said period is extended to include six months

from the date notice in writing is given by the public utility to the claimant of the disallowance of the claim. The extended six-month period should be computed, as argued by defendant, from the date of the first disallowance after the last presentation or re-opening within the basic three-year period.[2/]

As to complainants' second cause of action, Section 735 provides that all complaints for damages, resulting from an asserted violation of Section 451 of the Code, shall be filed within two years from the time the cause of action accrues, and not after. Section 738 provides that the cause of action shall accrue upon the delivery or tender of delivery of the shipments upon which claim is made.

All claims for alleged overcharges in Case No. 8616 and Case No. 8802 which are barred under the three-year statute of limitation provisions of Section 736 of the Code, computed in the manner noted above, will not be considered herein. By Decision No. 74468, dated July 30, 1968, in Case No. 8616, defendant's motion to dismiss the second cause of action was granted. Said order of dismissal is predicated upon the fact that complainants' sought recovery of asserted unjust and unreasonable charges was barred under the provisions of Section 735. With respect to Case No. 8802, the Commission will not consider any allegation of unjust and unreasonable charges in connection with those shipments that have also been barred from consideration by Section 735.

2/ Graves & Sons Co. vs. Chicago, St.P.M.&O.Ry. 177 I.C.C. 732 (1931); W. A. Riddell Corp. vs. Chicago, M.St.P.&P.R.R., 269 I.C.C. 421 (1947).

The Commodity Transported

Fundamental to complainants' first and second causes of action is a determination of the correct description or classification of the commodity involved for transportation purposes.

Feldspathic sand products are used in the manufacture of glass primarily for their alumina content (Al_2O_3). The feldspathic dune sand deposits of the Del Monte Properties Company in the Monterey Peninsula area near Pacific Grove, California, are a major source of supply of feldspathic specialty sand products for local glass manufacturers. This specialty sand consists of about 53 percent quartz grains, 46 percent feldspar and 1 percent other minerals.

Feldspar is the name given to a group of aluminum silicate minerals that contain varying amounts of potassium, sodium, or calcium. The feldspars are important rock-forming minerals and constitute nearly 60 percent of many igneous rocks. In commercial usage the term "feldspar" includes feldspar-quartz mixtures containing as much as 25 percent quartz. Pure feldspar of any type is not found in commercial quantities.3/

Glass-grade feldspar must be very low in iron (Fe_2O_3) and few crude feldspars can meet the specifications for glass without beneficiation. While feldspar is used in the manufacture of glass chiefly for its alumina content, its alkali content also aids in fluxing and serves to replace other needed alkali. The alumina imports strength, toughness and durability to the glass or ceramics.

3/ Mineral Resources of California, Bulletin 191, California Division of Mines and Geology, 1966.
Mines and Mineral Resources of Monterey County, California, County Report 5, California Division of Mines and Geology, 1966.

The general use of feldspar in container glass and the increased use of such containers have made this a primary market for feldspar. 4/

The largest production of feldspar in California in recent years has come from specialty dune sand of the Pacific Grove area. Since 1952 the Del Monte Properties Company has produced a mixed potash and soda-lime feldspar concentrate which is separated from the feldspathic specialty dune sand by an attrition-froth flotation process. The three basic products produced by this process are described as (1) quartz-feldspar, commonly referred to as "Iron Float Sand" (I. F. Sand); (2) quartz; and (3) feldspar. The quartz and feldspar are separately dried and screened. The feldspar may then be stored or ground for marketing. The quartz product normally contains 98-99 percent silica oxide (SiO_2), 1 percent alumina (Al_2O_3), and .025 percent iron (Fe_2O_3). The feldspar product has been upgraded to about 17 percent alumina and the iron content has been reduced to about .10-.15 percent. The I. F. Sand is from the second circuit iron flotation phase of the process and the quartz and feldspar is produced by further processing the I. F. Sand through the quartz-feldspar third flotation circuit phase of the process.

The assailed feldspar rate was initially established in 1953, upon request of Del Monte Properties, in lieu of the otherwise applicable class rate. That shipper's request described the product for transportation purposes as a feldspar. Such action was taken even though the product had the appearance of sand for which lower commodity rates were provided from and to the points in question.

4/ Nonmetallic Minerals, by Raymond B. Ladoo and W. M. Myers, 2nd Ed., (1951), McGraw-Hill Book Co., Inc.

The product was also described as a feldspar by Del Monte Properties Company on its sales invoices. A geologist testifying on behalf of complainants, on cross-examination, agreed that for commercial usage the product could properly be described as a feldspar, although from a technical scientific standpoint he expressed the opinion that the commodity is a sand.

The Del Monte Properties Company production of the product it describes as feldspar is generally ground and sold to the porcelain and ceramic industry. However, a few years ago it was unable to sell all of its feldspar product and a large stockpile of the unground product was accummulated. This production imbalance, as between the directly related quartz-feldspar (I. F. Sand) product and the commodity described as feldspar, was alleviated by offering the surplus unground feldspar product to the glass manufacturers for a price somewhat competitive with I. F. Sand, the product normally purchased by complainants. It is the subsequent movement of this surplus unground feldspar product, via the SPCo, to complainants' respective glass plants which gave rise to these complaints.

The Lawful Tariff Rate

It is well settled that how a commodity is described, advertised and sold in the commercial trade or market also identifies the commodity for transportation purposes. In Charles Nelson vs. Arcata & Mad River R.R. et. al., 34 C.R.C. 526 (1930), we held that "... where in the transportation field terms have been used in their accepted commercial sense for a long period of time, neither shippers nor carriers can revert to a technical interpretation to compute the freight charges (citing cases)." Similar conclusions were also reached In re Rates, Rules & Regulations of All Common Carriers and

All Highway Carriers, 46 C.R.C. 21 (1945); and in Clover Valley Lumber Co. vs. Western P.R.R., 46 C.R.C. 368 (1946). This same principle of tariff interpretation has also been held by the Interstate Commerce Commission.

In Markstein, dba Dixie Chemical Products vs. Missouri P.R.R., 243 I.C.C. 345 (1941) that Commission said at page 348: 5/

> "It is not the use to which a commodity is put that is controlling in the determination of the applicable rate, but rather the nature of the article shipped. American Cotton Waste & Linter Exc. vs. B. & O.R.Co., 169 I.C.C. 710. The true test is the character of the shipment, and in numerous proceedings we have accepted the manufacturer's description of a commodity for sales purposes as determinative of its identity for transportation purposes. Northern Pump Co. vs. Chicago, M.St.P. & P.R. Co., 190 I.C.C. 421." (Emphasis added.)

It has been clearly demonstrated that the quartz-feldspar (I. F. Sand) and the product described as feldspar by Del Monte Properties Company are considered as two distinct products for both commercial usage and transportation purposes and so recognized by complainants. For transportation purposes the SPCo classifies the former product as a sand for which specific commodity rates are provided, and sought herein to be made applicable to the latter product. That product, however, is classified by the SPCo as a feldspar for which the assailed commodity rate is named from and to the points involved.

We have consistently held that when the sought interpretation of a tariff is contrary to the plain intent of the tariff, relief

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5/ Like conclusions were also reached in the following proceedings: White & Miller vs. Pacific Electric Ry., 235 I.C.C. 35 (1939); Tool Steel Gear & Pinion Co. vs. Pittsburgh & Lake Erie R.R., 287 I.C.C. 260 (1952); Patterson Foundry & Machine Co. vs. Chicago, B. & Q.R.R., 262 I.C.C. 339 (1945); Hyman-Michaels Co. vs. Chicago, R.I. & P.R.R., 308 I.C.C. 339 (1959); and Cooperative G.L.F. Mills, Inc. vs. Central R.R. of New Jersey, 268 I.C.C. 407 (1947).

should be denied. California Chemical Company vs. Southern Pacific Company, et al., 64 Cal. P.U.C. 590-594 (1965). The application of the assailed feldspar rate of 18½ cents for the transportation involved by the SPCo was in accordance with the provisions of its lawful published and filed tariff, in effect at the time of movement, and in consonance with the statutory mandates of Sections 494 and 532 of the Code. Therefore, complainants' first cause of action in Case No. 8616 and Case No. 8802, respectively, should be dismissed. Such action will dispose of all outstanding issues in Case No. 8616.

The Legal Rate

Complainants' second cause of action alleges that the feldspar rate of 18½ cents is unjust and unreasonable to the extent that it exceeds the sand rate of 11 cents.

The reasonableness of rates consists of a zone of reasonableness between maximum reasonable rates and minimum reasonable rates within which a carrier may exercise its managerial discretion. For example, in The River Lines, Inc., 65 Cal. P.U.C. 345 (1966) we stated at pages 355-56:

> "Section 451 requires all common carrier rates to be just and reasonable. Except as provided in Section 452, common carriers may and should in the exercise of managerial discretion establish rates that lie within an elastic 'zone of reasonableness.' This expression 'imports a rate which is confined in its maximum to a figure not so excessive as to be greater than the particular traffic will bear, and in its minimum not so low that it will be destructive of the business of the common carrier, or that it will not return to the carrier at least the actual cost of transportation.' (SPCo vs. Railroad Commission, 13 Cal. 2d 89,96.) Abutting the two boundaries of the 'zone of reasonableness' we have then a 'maximum' and a 'minimum' reasonable rate."

In Reduced Rates on Bulk Cement, 50 Cal. P.U.C. 622 (1951), the Commission defined the maximum and minimum limits of the so-called zone of reasonableness as follows:

> "... The upper limits of that zone are represented by the level at which the rates would be above the value of the service, or be excessive. The lower limits are fixed, generally, by the point at which the rates would fail to contribute revenue above the out-of-pocket cost of performing the service, would cast an undue burden on other traffic, or would be harmful to the public interest. Rates at the upper limits of the zone may be termed maximum reasonable rates; those at the lower limits of the zone may be termed minimum reasonable rates."

Complainants make no allegation that the feldspar rate is discriminatory; their sole contention is, in effect, that the feldspar rate exceeds a maximum reasonable rate. The thrust of their contention is that a just and reasonable rate for the shipments involved should be no higher than the 11-cent rate for sand because (1) both sand and feldspar have similar physical and transportation characteristics; and (2) the value of Del Monte Properties Company's I. F. Sand ($7.00 per ton) and feldspar ($7.50 per ton) is relatively the same. Complainants note that while the value of feldspar is only 7 percent higher than the like value for I. F. Sand, the assailed feldspar rate of 18½ cents is 70 percent higher than the sand rate of 11 cents. This disparity as between the comparable values of sand and feldspar on the one hand and the substantial differential in rates maintained for said commodities on the other hand, complainants submit, clearly indicates the unreasonableness of the feldspar rate.

It is generally agreed that the physical and transportation characteristics of I. F. Sand and feldspar are practically the same. However, it is also generally agreed by the parties that "... there are many factors which must be considered in the determination of just and reasonable rates. No one factor is controlling or is necessarily dominant." Petition of Grower-Shipper Vegetable Association of Central California, 58 Cal. P.U.C. 332 (1961). The complainants

here note that there are many considerations influencing the making of reasonable freight rates including density, weight of the commodity, cost of service, loading, distance and value. Atchison, T&S.F.Ry.Co., 43 C.R.C. 25 (1940). Rate comparisons of similar commodities in the same territory or under the same circumstances and conditions also provide a basis for examining the reasonableness of a particular rate. Richfield Oil Co. vs. Sunset R. Co., 24 C.R.C. 729 (1924).

In further support of the asserted unreasonableness of the feldspar rate, complainants introduced in evidence a value and rate comparison of alleged comparable shipments of bulk cement and dolomite. While the value of the cement and dolomite is shown to be higher than the like values for either I. F. Sand or feldspar, the former products enjoy rates comparable or lower than the 11-cent sand rate for relatively the same lengths of haul. Complainants contend, therefore, that there is no justification for the rate differential as between sand and feldspar. Pac. Rice Growers Assoc. vs. A.T. & S.F.Ry., 19 C.R.C. 248; and San Francisco N. & C.Ry., 13 C.R.C. 95 (1917).

The rail witness for defendant testified that the feldspar rate was first established in 1953 as 13 cents per 100 pounds. It has remained at the same level, except for authorized ex-parte increases (Ex Parte 123 increase raised the 13-cent rate to 18½ cents), and a significant volume of traffic has assertedly moved thereunder, including the volume incentive rate of 17½ cents which became effective on September 14, 1966. In establishing the 13-cent rate on feldspar consideration was given to many rate-making factors, including rate comparison with other commodities for like lengths of haul. The 13-cent feldspar rate was finally related to rates on

fluxing lime. The rail witness noted the similar transportation characteristics surrounding like movements of feldspar and fluxing lime. For example, he stated that both products are upgraded from their basic raw material of sand and limerock which, in turn, take lower rates than the upgraded products. He explained that both feldspar and fluxing lime encounter similar competitive factors, which assertedly is not the case as between sand and feldspar.

Defendant argues that the 11-cent sand rate is not a proper yardstick to measure rates on feldspar because the sand rate is depressed, due to a long history of barge or water competition. The SPCo did not demonstrate by what specific amount the sand rate is deemed to be depressed; nor, in the light of such assertions, were the reasons given for the subsequent publication of lower volume incentive rates on sand from and to the points involved. One may draw the conclusion, however, that such action was due to competitive factors. We agree with the rail witness that the historical movement of feldspar has demonstrated a greater ability to contribute more to the total transportation burden than like movements of sand.

Defendant submits that complainants' rate comparison on dolomite and cement are of no probative value because such rate comparison did not show the extent of movements of the compared commodities; nor did complainants' witness furnish any background data as to the circumstances under which the compared rates were established, or that said rates were deemed to be reasonable. Moreover, on cross-examination, it was developed that dolomite is a basic material that may be processed into a commodity called roasted dolomite and that rates on this processed commodity are comparable to the rates on feldspar which is processed from feldspathic sand.

The complainants' witness also agreed that cement is highly competitive from both a market and transportation standpoint.

In Southern Pipe and Casing Co. vs. Pacific Electric Ry., 49 C.R.C. 567 (1950), we stated:

> "It is well-settled with respect to rate comparisons generally that when they are submitted in complaint proceedings it is incumbent upon the party offering the comparisons to show that they are a fair measure of the reasonableness of the rates in issue ..." (citing cases).

Defendant also argues that complainants' contention that glass manufacturers have found it more economical to discontinue purchasing feldspar because of the high freight rates is not supported by the record. The defendant directs attention to the testimony of the general manager for the Sand Division of Del Monte Properties Company. The general manager explained that, when the shipments involved were transported, a stockpile imbalance of feldspar had been created because, at that time, the ceramic industry was unable to utilize the available supply. In an effort to dispose of the surplus feldspar, its sale to the glass companies was encouraged by pricing the feldspar so as to be competitive with other merchandise. Once the surplus feldspar was eliminated, the normal flow of the feldspar output returned to the ceramic industry. The general manager further stated that Del Monte Properties Company is now selling Iron Float Sand (I. F. Sand) to the glass manufacturers. This latter product is transported at the applicable sand rate. The witness stated that in order to have the same alumina content in complainants' glass manufacturing operations, as is present in the feldspar product, it is necessary for the glass companies to purchase approximately two carloads of I. F. Sand, in lieu of one car of feldspar. Finally, the witness noted that if the glass industry wanted to

continue using the feldspar product, the price ($7.50 per ton) would have to be increased in order to cover the cost of producing the additional feldspar with a waste by-product.

From the general manager's testimony it can readily be seen that it was to complainants' economic advantage to acquire the temporary surplus supply of feldspar. Complainants' substantial purchase of the surplus feldspar at a sales price slightly higher than that for I. F. Sand, plus the absorbing of substantially greater freight charges than would otherwise be necessary had the complainants continued their customary practice of ordering I. F. Sand, tends to confirm that the economic savings, referred to in the shipper's testimony, was actually experienced by complainants. They were, however, apparently unable to retain this economic savings once the stockpile of surplus feldspar was exhausted and the imbalance as between the inter-related production of I. F. Sand (quartz-feldspar), silica sand, and feldspar had been eliminated. The solution to this latter industrial problem rests, in the first instance, with complainants and Del Monte Properties Company (the shipper), and not with the defendant rail carrier.

Defendant submits that complainants have failed to sustain their burden of proof with respect to their allegation of unreasonableness; and that, on the contrary, defendant has affirmatively shown the assailed rates to be just and reasonable. From all the facts of record, we are persuaded that the assailed rate, in effect at the time of movement, did not exceed a maximum reasonable rate, was within the so-called "zone of reasonableness," and was not unjust and unreasonable. A finding for defendant is in order.

Findings and Conclusion

1. During the period specified in the complaints, defendant transported numerous shipments tendered for transportation by Del Monte Properties Company for movement from Lake Majella, California, consigned and delivered to complainants at Oakland, Hayward, and Mulford, California.

2. The shipments consisted of a material which is processed by Del Monte Properties Company from sand deposits at or near Monterey Bay, California. The processing consists of three separate stages, involving various washing and flotation methods, for the purpose of extracting the feldspar fraction from the sands. The final product resulting from the third processing is predominantly feldspar. This material is the subject of the shipments referred to herein.

3. The purchasers and receivers of the shipments, the complainants herein, have at all times referred to and described the material in their purchase orders and in correspondence with the shipper and seller as feldspar.

4. The shipper, Del Monte Properties Company, has at all times referred to and described the shipments in bills of lading and invoices prepared and issued by it as feldspar.

5. Various publications, including bulletins issued by the California Division of Mines and Geology, refer to and describe the commodity processed and produced by Del Monte Properties Company as feldspar.

6. The commodity shipped is known and described in commercial practices as feldspar and, in accordance with fundamental transportation principles, the assessment and collection of freight charges on the involved shipments on the basis of the rate applicable to feldspar is just and proper."

7. Defendant's lawful tariff rate, in effect at the time of movement involved herein, was 18½ cents per 100 pounds on the commodity feldspar as set forth in Item 3320 series of Pacific Southcoast Freight Bureau Tariff 300.

8. Complainants have failed to sustain their burden of proof that the charges assessed and collected are unjust and unreasonable.

9. The charges assessed and collected did not exceed a maximum reasonable rate; were within a zone of reasonableness; and are, therefore, just and reasonable.

In consideration of the above findings, we conclude that the assailed rate has not been shown to be in violation of Sections 451, 494 and 532 of the Public Utilities Code. The complaints will be dismissed.

O R D E R

IT IS ORDERED that the complaints in Case No. 8616 and Case No. 8802, respectively, be and they are hereby dismissed.

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

Dated at San Francisco, California, this 29th day of APRIL, 1969.

William Symons, Jr., President

Commissioners