

MS

ORIGINAL

Decision No. 77797

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

MARKOVITS & FOX,
a corporation,

Complainant,

vs.

SOUTHERN PACIFIC COMPANY,
a railroad corporation,

Defendant.

Case No. 8987
(Filed October 23, 1969)

Marvin Handler and Jeffrey M. Howard of
Handler, Baker & Greene, for complainant.
A. T. Suter and Richard S. Kopf, for
defendant.

O P I N I O N

This proceeding concerns a complaint filed by Markovits & Fox (M&F) against Southern Pacific Company (SP).^{1/} A similar complaint was filed with the Interstate Commerce Commission. A joint hearing was held before Public Utilities Commission Examiner Frank J. O'Leary and Interstate Commerce Commission Examiner Robert M. Glennon at San Francisco on March 16, 17, 18, 19 and 20, 1970. The matter was submitted subject to the filing of concurrent briefs on June 4, 1970.

M&F conducts operations as a buyer, processor and seller of ferrous and non-ferrous scrap metals at a location which is in the northern portion and within the corporate limits of San Jose and is approximately 1.25 miles north of SP's switching limits in San Jose. Said switching limits were established in 1908; since

^{1/} Now known as Southern Pacific Transportation Company.

that time only minor modifications have been made. M&F moved to said location in 1963 because of requirements for a larger facility. Prior to that time it was located southerly of its present location and was within SP's established switching limits in San Jose.

M&F competes with other dealers of ferrous and non-ferrous scrap metals who are located in the San Francisco Bay Area. M&F's principal competitor in the City of San Jose is Levin Metals Corporation (Levin). Levin is located within SP's established San Jose switching limits.

On several occasions, M&F has requested SP to extend its San Jose switching limits to include its facility; such requests have not been granted. M&F alleges that being located beyond SP's switching limits, it is being discriminated against because of inadequate car supply and the payment of rates higher than those paid by Levin for similar transportation. M&F also alleges further discrimination because SP has established and maintained rates from points in the San Joaquin Valley, such as Modesto and Ceres, to San Francisco and Oakland, which are lower than the rates applicable to M&F's facility, even though the distance by rail is shorter to M&F than to San Francisco and/or Oakland.

With respect to the allegation of inadequate car supply, M&F presented evidence that gondolas furnished by SP for transportation of scrap to Fontana were not large enough, in 109 instances from August through December 1969, to accommodate the minimum weight of 140,000 lbs. applicable to the \$.285 cwt rate from San Jose to Fontana.

In order to meet the minimum weight, M&F was required to pay the \$.285 cwt rate on 848,690 lbs. not actually shipped. Evidence was also presented by M&F that the Western Pacific Railroad

Company (WP) has available, for the transportation of scrap metal, gondola cars with a cubic capacity approximately 25 percent greater than gondolas available from SP. Said WP cars are capable of transporting the required minimum weight of 140,000 lbs. The WP cars normally are not available to Southern California points. However, if they were available and M&F were to route shipments over WP via San Jose, M&F would, in addition to paying the line haul rate from San Jose to Fontana via WP, have to pay the local SP rate from Wayne Station to San Jose (7-1/4 cents cwt at the time of hearing) by reason of being located outside of SP's established switching limits. It would therefore cost M&F 7-1/4 cents per hundred pounds more to ship from San Jose to Fontana via WP cars than it would Levin, since Levin is located within SP's established switching limits. Said additional transportation cost to M&F would be eliminated if M&F were included within SP's San Jose switching limits. Additional evidence concerning inadequate car supply was presented by M&F in connection with transportation in interstate and foreign commerce, which will not be discussed herein.

Evidence was also presented by M&F which shows that on shipments of scrap metal originating at its location destined to US Pipe at Decoto it must pay the local SP rate from Wayne Station to San Jose plus the local WP rate from San Jose to Decoto. The assessment of charges for similar shipments moving from Levin to US Pipe at Decoto are based on only the local WP rate from San Jose to Decoto. Because of the additional charges paid by M&F for transportation it is placed at a competitive disadvantage in sales to US Pipe in Decoto. If M&F were within SP's established switching limits it would not have to pay the local SP rate from Wayne Station to San Jose.

One of the sources for ferrous scrap metals is the San Joaquin Valley. M&F contends it is unable to compete with other scrap dealers located in San Francisco and Oakland because the present rate structure favors buyers located in San Francisco and Oakland on shipments moving from Modesto and Ceres. The rates per hundred pounds are as follows:

<u>From</u>	<u>To</u>	
	Oakland & San Francisco	San Jose
Ceres	27-1/2 cents	39 cents
Modesto	23-1/2 cents	39 cents

The rates to Oakland and San Francisco are subject to a minimum weight of 30,000 pounds, whereas the rates to San Jose are subject to a minimum weight of 40,000 pounds. The distances from Ceres and Modesto in miles are as follows:

<u>From</u>	<u>To</u>		
	San Francisco	Oakland	San Jose
Ceres	107.4	100.4	94.2
Modesto	103.1	96.1	89.9

SP presented evidence that M&F knew, prior to the time of moving, of the disadvantages of a location outside of the established switching limits. Evidence was also presented which shows when the San Jose switching limits were established in 1908 and in 1936 when they were changed slightly, the entire industrial area of San Jose was located within the switching limits. The greatest concentration of industry is still located within said switching limits. The industrial development outside the switching limits is spread out in an illogical and patchwork fashion. There is not much industry around M&F's new facility.

SP maintains that operating conditions are substantially dissimilar in serving M&F as opposed to serving Levin. When outbound

shipments are made by M&F via WP it is necessary that SP pick up cars at M&F's plant, move them to SP's marshalling yard, and then move the cars to the interchange track with WP. In the past the same procedure was utilized for shipments moving from Levin. Evidence was presented that said procedure with respect to Levin is uneconomical and impractical because the interchange track is located only about 1/4 mile from Levin. Instructions have been issued whereby switch crews serving Levin will in the future move outbound cars to be routed via WP directly to the interchange track. Movement of cars from M&F direct to the interchange track is not practical.

With respect to M&F's allegation concerning shipments moving from the San Joaquin Valley points, SP presented evidence (Exhibit 33) which shows the estimated variable cost of a car loaded at 16.6 tons from Modesto to Oakland to be \$131.25 and from Modesto to Wayne Station to be \$136.95. Although the exhibit does not show a comparable figure from Modesto to San Francisco, said cost would be approximately the same as the cost to Oakland. The revenue derived from a car loaded to 16.6 tons from Modesto to Oakland is \$78.02 ($33,200 \times 235$ cwt) or \$53.23 less than the variable cost. The revenue derived from a car loaded to 16.6 tons from Modesto to San Jose and Wayne Station is \$156.00 ($33,200$ as $40,000 \times 39$ cwt) or \$19.05 greater than the variable cost.

Based upon the evidence adduced the Commission finds that:

1. M&F conducts operations as a buyer, processor and seller of scrap metals.
2. M&F's place of business is located within the city limits of San Jose, but outside SP's established San Jose switching limits.
3. M&F's main competitor in San Jose is Levin.
4. Levin's place of business is located within the city limits of San Jose and within SP's established switching limits.
5. SP's San Jose switch limits were established in 1908 and only minor modifications have been made since that time.

6. M&F also competes with scrap dealers located in San Francisco and Oakland.

7. In 109 instances during the period August through December 1969 the gondola cars delivered to M&F could not be loaded to the required minimum weight of 140,000 lbs. on shipments of scrap moving to Fontana.

8. WP has available gondola cars, with a cubic capacity approximately 25 percent greater than those available from SP which can be loaded to 140,000 lbs.

9. Because of its location outside SP's switching limits when shipping to Fontana or Decoto via WP, M&F must pay the rate from Wayne Station to San Jose, presently 7-1/4 cents per hundred pounds, in addition to the WP line haul rate.

10. The 7-1/4 cent rate set forth in finding 9 is not applicable on shipments originating at Levin because of its location within SP's San Jose switching limits.

11. Although the variable cost of a car loaded to 16.6 tons is lower from Modesto to Oakland than from Modesto to San Jose or Wayne, the revenue received for such a shipment to Oakland is \$53.23 less than the variable cost, whereas the revenue for a similar shipment to San Jose is \$19.05 greater than the variable cost.

12. The location of M&F outside of SP's switching limits causes undue discrimination against M&F.

13. The rates and minimum weights which SP maintains on ferrous scrap from San Joaquin Valley points to M&F are unduly discriminatory to M&F and are unduly preferential to M&F's competitors at Oakland and San Francisco.

14. SP has not furnished M&F with gondola cars of sufficiently adequate capacity to enable M&F to meet the minimum weight of 140,000 lbs. maintained in connection with shipments to Fontana.

Based upon the above findings the Commission concludes that:

1. The discrimination set forth in findings 12 and 13 is in violation of Section 453 of the Public Utilities Code.
2. SP should remove the discrimination set forth in findings 12 and 13 by:
 - a. Revision of its San Jose switching limits to include the location of Markovits and Fox; and
 - b. Equalize the rates from Ceres and Modesto to San Francisco and/or Oakland, on the one hand, and the rates from Ceres and Modesto to San Jose, on the other hand.
3. SP's failure to provide M&F with a supply of gondola cars of sufficiently adequate capacity to enable M&F to meet the minimum weight of 140,000 lbs. maintained by SP set forth in finding 14 is in violation of Section 451 of the Public Utilities Code.
4. SP should cease and desist from failing to furnish an adequate supply of gondola cars to M&F.

O R D E R

IT IS ORDERED that:

1. Within thirty days after the effective date of this order defendant shall redefine its San Jose switching limits so as to include the location of complainant.
2. Within thirty days after the effective date of this order defendant shall remove the discrimination set forth in finding 13.
3. Within thirty days after the effective date of this order defendant shall supply cars of capacity adequate to meet the minimum weight requirement as set forth in finding 14 or in the alternative shall amend the minimum weight of 140,000 pounds in applicable tariff items to read 140,000 pounds except if car is loaded to full visible or weight carrying capacity, actual weight will apply.

The Secretary of the Commission is directed to cause personal service of this order to be made upon complainant and defendant. The effective date of this order shall be twenty days after the completion of such service on defendant.

Dated at San Francisco, California, this 6th day of OCTOBER, 1970.

Chairman

Augusta
William J. ...
Therese ...
Vernon L. Sturgeon
Commissioners

I dissent
J. ...