ALJ/WAT/ek/ltq

Decision 87 10 034 ORIGINAL OCT 16 1987

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

ORIGINAL

IDEAL PALLET SYSTEM, INC., a California Corporation, and MEL MERMELSTEIN, an individual, Complainants, vs. SOUTHERN PACIFIC TRANSPORTATION COMPANY, SOUTHERN PACIFIC LAND COMPANY, SOUTHERN PACIFIC INDUSTRIAL DEVELOPMENT COMPANY, Defendants.	Case 86-12-028 (Filed December 15, 1986)

Jeffrey N. Mausner, Attorney at Law, for complainants.
Leland E. Butler, Attorney at Law, for Southern Pacific Transportation Company; and Anthony P. Parrille, Attorney at Law, for Southern Pacific Land Company and for Southern Pacific Industrial Development Company; defendants.

O P I N I O N

Complainants Ideal Pallet System, Inc. (Ideal) and Mel Mermelstein (Mermelstein) allege discrimination by defendants Southern Pacific Transportation Company (SP), Southern Pacific Land Company (SPLCo.), and Southern Pacific Industrial Development Company (SPIDCo.) in their refusal to build a spur track for Ideal or to provide a bend in the team track so Ideal could then unload lumber from both sides of a railway car while providing Ideal's competitors and neighbors with such facilities.

Ideal further alleges that defendants have refused to allow Ideal to store lumber on the right-of-way property it leased from defendants while allowing Ideal's competitors and neighbors to store lumber on land similarly leased from defendants. Finally, Ideal charges that defendants have terminated Ideal's lease of defendants' right-of-way property and have informed Ideal that they will cut off Ideal's access to the team track for unloading of lumber while still granting access to the team track to Ideal's competitors and neighbors. Ideal contends that it has offered to purchase the previously leased property from defendants for the purpose of putting in a spur track, but that defendants have refused to sell the property to Ideal. Ideal maintains that defendants' actions are in violation of Public Utilities (PU) Code[1] Section 453 and that Ideal will be competitively harmed by defendants' actions.

Ideal seeks an order from the Commission requiring defendants to grant Ideal full access to unloading and loading facilities at the team track immediately behind and adjacent to Ideal's property and prohibiting defendants or any other entity from:

1. Padlocking Ideal's access gate to the track and to the area leased and used by Ideal.

2. Erecting a fence or storing any goods which would interfere with Ideal's access to the track.

3. Leasing or selling the right-of-way property between Ideal's property and defendants' track to any entity other than Ideal.

---

1 All code sections referred to in this decision are in the PU Code.

Ideal further requests an order requiring defendants to provide a bend in the secondary team track behind Ideal's property, or, in the alternative, to assist Ideal in providing a spur track to enable Ideal to unload railway cars from both sides.

Finally, Ideal requests that defendants refund all lease payments made over the past 14 years on the property in question and to pay all attorneys' fees and costs of this proceeding.

SP answered and admitted certain nonrelevant allegations of the complaint, but generally denied all allegations raised in connection with Section 453.

SPLCo. and SPIDCo. filed a motion to dismiss for lack of jurisdiction under Rule 56 of the Commission's Rules of Practice and Procedure.

Following notice, the matter came on regularly for hearing in Los Angeles on March 9, 1987 and again on April 9, 1987 before Administrative Law Judges William A. Turkish and G. Alison Colgan respectively. The matter was submitted subject to receipt of late-filed exhibits by May 15, 1987, which have been received. The matter is deemed submitted on May 15, 1987.

Ideal called three witnesses including its president, Mermelstein, to testify on its behalf. SP called Richard Carlson, its senior sales representative, to testify on its behalf. Twenty-four documents were received into evidence on behalf of Ideal and twenty-five documents were received into evidence on behalf of SP.

Nondisputed Facts of the Case

The subject matter of this complaint involves the leasing of SP's right-of-way property lying between its industrial siding track and the eastern boundary line of complainants' place of business in Huntington Beach, California. Ideal is a corporation which manufactures wooden pallets from lumber which, from approximately 1972 until recently, was delivered to Ideal by rail car on SP's siding track located behind Ideal's property. The portion of SP's right of way between Ideal and the track was leased

by Ideal. James Lumber Company (James) occupies an area to the east of SP's track, directly across the track from Ideal's property, and leases a portion of SP's right of way to the north of and on the same side of the track where Ideal is located. James uses a track-crossover north of Ideal's leased property to get back and forth across the track between its lumber yard and its leased area. Ideal's south boundary borders property owned by Randall Lumber Co. (Randall) which extends eastward to within 10 feet of SP's track. A spur extends into Randall's property from SP's track. SP's industrial siding track runs northward, past Ideal's, James', and Randall's properties, and terminates at Warner Avenue, approximately two blocks away.

In 1972, Ideal and SP entered into a one-year written industrial lease (Exhibit 2). Under the terms of the lease, Ideal leased a portion of SP's right of way, which measured approximately 100 feet in length and approximately 90 feet in depth between Ideal's eastern property line and SP's industrial siding track (referred to by complainants as SP's secondary track). The lease also provided Ideal the use of 60 feet of track for spotting and unloading one rail car and gave each party the right to terminate the lease on 30 days' notice. The lease rate was $60 per month. Ideal thereafter paved the leased area to satisfy the requirements of a city ordinance (Exhibit 13). On July 28, 1986, SP gave Ideal a 30 days' notice of termination of the lease.

Ideal's Presentation

The relevant testimony of Mermelstein and the documents received into evidence on behalf of complainants indicate the following:

1. The property leased from SP was to be used strictly for unloading purposes. Although Ideal leased the property, other people [not identified] used SP's right of way, including complainants' leased area. Upon informing SP of this, SP replied that the track was a team track and could be used by anyone.

2. Throughout the years, complainants attempted to get SP to install a spur into Ideal's property or to have SP put a bend in the track to enable two-sided unloading of rail cars by Ideal. Unloading from only one side of the track as presently configured was extremely difficult. Nothing came of these requests.

3. Ideal offered to buy the leased property from SP, but SP refused to sell. Randall informed Ideal that it too had previously tried to buy the right-of-way property leased by Ideal, but was also turned down by SP.

4. Randall informed complainants that it owned the spur track coming into its property. Both Randall and James have spur tracks leading into their properties from the industrial siding track.

5. Ideal still wants to buy the property so that it can put in a spur track. It does not want to put in a spur track on leased property because after going to the expense of putting it in, SP could then tell Ideal to "go fly a kite".

6. Ideal is not permitted by its lease to store lumber on its leased area although James stores lumber on its leased area (to the north of Ideal's leased area).

7. In February 1984, SP informed Ideal by letter that, effective March 19, 1984, the rent for Ideal's leased area was to be increased from $60 per month to $540 per month. The rent increase was never put into effect.

8. At the time the rent was to be increased, SP's track was a public team track and Ideal could have unloaded lumber there even if it had not leased the property.

9. In a meeting in 1985 with James' owner and a SP representative, Mermelstein was informed that James intended to lease, improve, and use SP's right of way from a

point approximately 200 feet north of the northern boundary of Ideal's leased area, and extending northward to Warner Avenue, for unloading of rail cars. Mermelstein was also informed that the approximately 200 feet of right of way between Ideal's leased area and James' leased area and approximately 170 feet of right of way between Ideal's leased property and Randall's property was going to be leased to Randall for unloading and storage of lumber.

10. Mermelstein was asked whether he would give Randall permission to cross Ideal's area and he stated he had no objection, providing that Randall would repair any damage done to Ideal's paved area and would permit Ideal complete and unfettered access to its leased area as well as permission to cross Randall's area.

11. On March 11, 1986, in a letter to Randall, a copy of which was sent to Ideal, SP indicated that Mermelstein had given his permission for Randall to cross Ideal's leased area to reach the area to be leased to Randall north of Ideal's leased area. SP informed Randall that the area north of Ideal's area could not be used for storage.

12. On June 21, 1986, Mermelstein sent a mailgram to SP, informing SP that he was denying consent for Randall to cross Ideal's leased area.

13. On June 23, 1986, a SP representative called and indicated that SP would invoke the 30-day clause of the lease and deny Ideal use of the leased area unless Ideal permitted its gate to the leased area to be padlocked by Randall who would open said lock for Ideal for the unloading of cars. Randall also offered to unload Ideal's inbound rail cars for Ideal, as a courtesy.

14. On July 28, 1986, SP informed Mermelstein by letter that, because of Mermelstein's refusal to allow Randall access across Ideal's leased area, and because SP's

attempts to negotiate with Mermelstein were unsuccessful, SP was giving Ideal 30 days' notice of termination of the lease. In a letter to Mermelstein dated July 2, 1986, SP stated that the proposed leases with James and Randall would considerably increase SP's rail revenue and rental income at this location.

15. In recent years, Ideal has decreased the amount of lumber received by rail primarily because of lack of proper unloading facilities, the time and trouble spent in unloading rail cars from one side only, and poor service by SP in the spotting of cars and lost cars. Ideal now receives its lumber by truck. If SP would give good service, Ideal would bring in more lumber by rail.

16. When Ideal moved to its present property, its relocation agent sought to have a rail spur installed from the industrial siding track onto the leased area so that Ideal could unload cars from both sides. Ideal did not want the spur going into its property because it would have taken up a considerable part of the property. Negotiations between Ideal's agent and SP regarding the spur broke off because Ideal did not feel the cost was worth putting in a spur when SP could terminate the lease on 30 days' notice.

17. Ideal never requested permission, in writing, to be able to store lumber upon its leased property but made several oral requests to SP.

18. In 1976, Ideal took rail delivery of approximately 25 carloads; in 1977, approximately 60 carloads; in 1978, approximately 50 carloads; in 1979, approximately 75 carloads; in 1980 and 1981, approximately 90 carloads; in 1985, the number of carloads decreased to 14-15 cars; and in 1986, approximately 17 carloads.

19. Ideal's production of manufacturing pallets has decreased in recent years.

SP's Presentation

The relevant testimony of R. Carlson and documents submitted on behalf of SP indicate the following:

1. In 1979, Ideal requested installation of a spur line from SP's industrial siding track into Ideal's property. SP drew up plans, calculated the cost factors, and submitted same to Mermelstein for his approval. Because of the costs, Mermelstein never approved SP's plans for the spur and the proposal died. Mermelstein thereafter sought to have SP put a bend in SP's industrial siding track without cost to Ideal. SP investigated this possibility and found it to be unfeasible.

2. During the past five years, in all the meetings with Mermelstein, the subject of storage of lumber on Ideal's leased property was never raised by Mermelstein. Neither was there any request by Mermelstein to lease any additional SP right-of-way property.

3. The carloads of lumber received by Ideal and the resulting revenues received by SP in 1978 were: 35 carloads and $32,081 revenue; in 1979, 65 carloads and $57,941 revenue; in 1980, 56 carloads and $64,340 revenue; in 1981, 40 carloads and $65,884 revenue; in 1982, 17 carloads and $27,059; in 1983, 16 carloads and $30,327; in 1984 and 1985, 11 carloads each and $26,440 and $24,381 revenues, respectively; in 1986, 14 carloads and $33,880 revenue.

4. By comparison, James had no less than 451 carloads annually, beginning in 1977, increasing each year to 1,782 carloads by 1986. Since 1981, annual revenues to SP from deliveries to James were always greater than $1 million, increasing each year through 1986, when revenues to SP reached $4,130,840. Randall's carload deliveries began in 1981 with 119 cars for

the partial year, producing revenues of $225,989 for SP. The number of carloads increased each year through 1986 when it totaled 611 cars, producing revenues of $1,415,726 to SP.

5. The basis upon which a spur and switch is paid for from funds provided by SP, rather than being advanced by an industry customer subject to a payback arrangement, is based upon General Order 15, which requires a ratio of 20 to 1 based upon revenues per car. If the revenues received are less than 20 times the cost of installing the switch and spur track, the industry customer must pay the cost, subject to a 5-year payback on the basis of $20 refund per car on cars which exceed revenues to SP of $300 per car.

6. If SP executes the proposed lease with Randall and includes Ideal's leased area, several public team tracks would be available in the area which Ideal could use for unloading lumber. The Smeltzer team track is approximately two miles away.

7. When negotiations first commenced with Randall for leasing of the property north of and south of Ideal's leased property, a proposal was made which would permit Ideal access to the area leased by it, but subject to a locked gate which would be controlled by Randall. Randall would open the gate at any time for Ideal to unload cars and Randall even offered to unload Ideal's lumber for Ideal. Mermelstein refused to accept this proposal.

8. The track used by Ideal ceased to be a public team track in March 1987 when SP leased most of the right of way along the former team track to James. Subsequent to Mermelstein's refusal to have Ideal's gate locked, SP decided to lease to Randall the entire area running north from Randall's property to the southern boundary of the area leased by James.

9. Nobody on the staff of SPLCo. or SPIDCo. had any responsibility with respect to SP railroad operations. SPLCo. merely provided information on property boundaries and rental information. Neither organization has any responsibilities in connection with operating properties of SP in issue in this matter.

Motion of SPLCo. and SPIDCo. for Dismissal

SPLCo. and SPIDCo. move for dismissal on the basis that they are not public utilities and thus not subject to the jurisdiction of the Public Utilities Commission (PUC).

SPLCo. and SPIDCo. argue that unless an enterprise is a public utility, as defined, the Commission is without power to regulate and control it. Section 216(a) of the PU Code defines public utility as including:

> "...every common carrier, toll bridge corporation, pipeline corporation, gas corporation, electrical corporation, telephone corporation, telegraph corporation, water corporation, sewer system corporation, wharfinger, and heat corporation, where the service is performed for, or the commodity is delivered to, the public or any portion thereof."

Subsection (b) provides further:

> "Whenever any [of the above] perform a service for, or delivers a commodity to, the public or any portion thereof for which any compensation or payment whatsoever is received, [such entity] is a public utility subject to the jurisdiction, control, and regulation of the commission and the provisions of this part."

An enterprise is not a public utility under this section unless it falls within one of the enumerated classes of public utilities set forth herein. Television Transmission, Inc. v Pub. Util. Comm. (1956) 47 Cal 2d 82; Pajaro Valley Cold Storage Co. (1958) 56 CPUC 707.

SPLCo. and SPIDCo. argue that they do not fall within any of the enumerated classes of public utilities and that while SP is a common carrier subject to PUC jurisdiction, SPLCo. and SPIDCo. are not (Section 211).[2] They contend that neither are in the business of public transportation nor are they agents of a carrier for transportation purposes.

According to the declaration of the Director of Administration for Santa Fe Pacific Realty Corporation, who is also an assistant secretary of both defendant companies, SPLCo. and SPIDCo., manage real estate assets, both raw and developed land, by developing such land to generate income, holding it in inventory for future development, or disposing of it by sale. SPLCo. and SPIDCo. just own property and buildings. They have no employees. The assets of both are managed by employees of Santa Fe Pacific Realty Co. and SP has no input into the management of such assets and exercises no control over or involvement with the assets of SPLCo. and SPIDCo. SP has its own real estate management group which deals with SP's operating property.

Complainants argue that SPLCo. and SPIDCo. are agents of SP and hold themselves out as all being one company as evidenced from letters, bearing their letterheads, making reference to the property leased by SP to Ideal. Complainants rely on In re Southern Pacific Peninsula Parking Lot Complaints (1967) 67 CPUC

---

2 §211 as relevant, defines a "common carrier" as:
"...every person and corporation providing transportation for compensation to or for the public or any portion thereof, except as otherwise provided in this part.

"'Common carrier' includes:
"(a) Every railroad corporation; street railroad corporation; express corporation; freight forwarder; dispatch, sleeping car, dining car, drawing room car, freight, freightline, refrigerator, oil, stock, fruit, car-loaning, car-renting, car-loading, and every other car corporation or person operating for compensation within this state."

291 and In re Key System Transit Lines (1953) 52 CPUC 589, as controlling. We disagree.

In re Southern Pacific Peninsula Parking Lot Complaints, supra, dealt with a number of complaints against SP by various municipalities. In Case 8087, as relevant herein, the City of Mountain View filed a complaint against SP and Card-Key Systems, Inc. (Card-Key), alleging discrimination and placing an unconscionable burden on train riders by the imposition of parking fees at SP's railroad station parking lot in that city. SP owned the land adjacent to its railroad station in Mountain View which, prior to 1959, had been used by SP's customers as a parking area for their vehicles, without charge. In 1959, SP entered into a lease for the parking area with Card-Key who thereafter operated the parking area and compelled SP's customers to pay parking fees. SP operated and maintained parking areas adjacent to its stations in other municipalities where it did not compel its customers to pay fees to park.

SP contended that its property used for commuter parking adjacent to its stations was nonutility property which it could develop to its highest and best use. SP also contended that it had not dedicated its parking lot property to public utility use but merely allowed parking on its property when the property was idle and not being used for any other purpose. Card-Key contended that it was not a public utility and was therefore not subject to the jurisdiction of the PUC.

The PUC held that it has jurisdiction over parking facilities at railroad stations which are used to a significant degree by customers of the railroad and further held that SP had held out to the public that SP's patrons, including commuter patrons, could use land owned by SP adjacent to its stations for parking even though it had not formally or specifically dedicated such property. The Commission determined that the proper test to determine whether facilities or service have been dedicated to a

public use is whether there has been a holding out of the facility or service to the public and that dedication may be found by implication. Yucaipa Water Company No. 1 v P.U.C. (1960) 54 Cal 2d 823, 827; Coml Communications v PUC (1958) 50 Cal 2d 512, 523; California Water and Telephone Co. v PUC (1959) 51 Cal 2d 478, 494; S. Edwards Associates v Railroad Comm. (1925) 196 Cal 62, 70. Jurisdiction was based on the following conclusions of law: customer parking facilities adjacent to a railroad station are "incidental to the safety, comfort, or convenience of the person being transported" (Section 208); are part of a "station", "depot", "grounds", or "terminal facilities" (Section 229); are "facilities" or "service" (Sections 730, 761, 762); can be reasonably necessary to accommodate passengers (Section 763).

The Commission did not hold that such facilities or service must be provided at all railroad stations nor to what degree they must be provided, but that since SP had provided parking adjacent to its railroad station, such parking area being considered directly related to the activities of SP, a public utility, it too was subject to PUC jurisdiction. Thus, since the parking lot adjacent to the railroad station was held to be subject to Commission jurisdiction, Card-Key, as operator of the lot, was also held subject to Commission jurisdiction as the agent of SP.

In this proceeding, although there have been communications with Ideal by SPLCo. and SPIDCo. over the years, there has been no contact between Ideal and those entities since 1980 with respect to SPIDCo., and since 1985 with respect to SPLCo. According to the sworn declaration of an officer of those companies, they no longer exercise any duties in connection with the operating properties of SP and SP is solely responsible for its operating property. The evidence confirms this and it is clear that since 1985, only SP employees have represented SP's interest in the property leased by Ideal. The action against which Ideal has brought this complaint was taken by SP alone and neither SPLCo.

nor SPIDCo. were involved other than as a communications link between Ideal and SP prior to 1985. Neither SPLCo. nor SPIDCo. had any authority to bind SP with respect to a rearrangement of the rail facilities, to provide rail service, or to establish any tariffs for rail service. There is no evidence that either company acted in any position of authority with respect to the changing out of tracks, installing a spur, canceling Ideal's lease, or otherwise preventing Ideal from using SP track adjacent to its property. For these reasons, we hold that neither SPLCo. nor SPIDCo. are public utilities subject to our jurisdiction and the complaint against them should be dismissed.

Ideal versus SP - Jurisdictional Issues

Ideal alleges discrimination by SP, in violation of Section 453.[3] The underlying basis for this charge of discrimination lies in SP's termination of the lease between the parties that previously permitted Ideal access to SP's right of way situated between SP's track and Ideal's property. Access to this right of way had permitted Ideal to unload lumber from railcars and

---

3 §453, in relevant part, states:
"(a) No public utility shall, as to rates, charges, facilities, or in any other respect, make or grant any preference or advantage to any corporation or person or subject any corporation or person to any prejudice or disadvantage.
"(b) No public utility shall prejudice, disadvantage, or require different rates or deposit amounts from a person because of race, religious creed, color, national origin, ancestry, physical handicap, medical condition, occupation, sex, marital status or change in marital status. A person who exhausted all administrative remedies with the commission may institute a suit for injunctive relief and reasonable attorney's fees in cases of an alleged violation of this subdivision. If successful in litigation, the prevailing party shall be awarded attorney's fees.
"(c) No public utility shall establish or maintain any unreasonable difference as to rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service. . . ."

move the lumber directly into its facility for storage until the lumber was used for the construction of wooden pallets. Ideal contends that SP's termination of its lease while allowing Ideal's neighbors and competitors to retain their similar right-of-way leases and that SP's leasing additional right-of-way property to those neighbors constitute acts of discrimination. Ideal further alleges that cutting off its access to SP's track after Ideal had leased the right-of-way property for approximately 15 years, providing unloading facilities to Ideal's neighbors which was not provided to Ideal, refusing to allow Ideal to store lumber on its leased right-of-way property while allowing Ideal's neighbors to store lumber on their leased right-of-way properties, and refusing to provide a spur track or bend in the secondary industrial track constitute additional acts of discrimination. We find little or no merit to these allegations.

Article I of Chapter 3, of which Section 453 is a part, deals primarily with public utility rates. Section 453 prohibits discrimination in the setting of rates and charges and in furnishing service and facilities to the utility's customers or subscribers. A public utility's obligation in providing its service to the public is to charge the same rates and charges to all customers within the same class of service so that no customer receives any unfair advantage over other customers within the class. Likewise, public utility services or facilities must be offered in a nondiscriminatory manner and the utility cannot refuse to serve customers within its service area.

The alleged acts of discrimination set forth by Ideal do not relate to the setting of rates and charges nor to the furnishing of services and facilities to SP's customers, and, as such, do not fall within the contemplation of Section 453.

SP, a public utility common carrier, owes a duty, under Section 453, to its passengers and freight shippers. The railroad's passengers and freight shippers are its "customers" and

the rates, charges, service, and facilities it must adhere to are those covered by published tariffs. The purpose of requiring the railroad to publish its tariffs is to assure uniform rates, charges, etc., to all members of a class of customers alike. With respect to shippers, SP owes the obligation of providing rail cars for carrying the commodity to be shipped, transporting such commodity to a destination, and charging the shipper only the authorized tariff rate for such shipment. There is no obligation by the railroad,for instance, to install a connection between the railroad track and the shipper's private track or spur line from its track to the door of the shipper unless the shipper requests such spur and meets the requirement of Section 560. Needless to say, not every shipper has the convenience of a spur track terminating at its door. Physical distance from the railroad track, the cost of such spur or private track, and the volume of products shipped by railroad are considerations given thought by shippers. Where the volume of freight to be shipped is great and the convenience of having a track outside the shipper's door is desired, a shipper will locate its place of business along the railroad's industrial track and direct a spur to be installed. Other shippers must deliver their freight to the railroad for shipment. So it is with receivers of freight as well. If a receiver of freight receives large volumes of freight by railcar and wishes to have the convenience of delivery to its door, it may locate its business adjacent to the railroad's right of way and have a connection installed between the railroad track and its private rail track or install a rail spur into its property.

The evidence in this matter clearly shows that Ideal and SP entered into a written one-year lease in 1972 which enabled Ideal to have direct access from its property to SP's track via a 90-x-100-foot parcel of SP's right of way for unloading lumber from railcars. Also included in the lease was the right to receive service on 60 feet of rail track that allowed the spotting of one

railcar for unloading purposes. At the time of entering into the lease, Ideal had the option to receive its lumber at SP's closest "public team track" at Warner Avenue, approximately one-fourth of a mile to the north, at no cost. Such "public team track" was used by the public to unload their consigned railcars. Instead, because of the convenience, Ideal chose to lease a portion of SP's right of way behind Ideal's property for its unloading. The lease rental was $60 per month. Paving of the leased portion of the right of way by Ideal was a requirement imposed by the City of Huntington Beach.

After the lease expired one year later, use of the right of way reverted to a month-to-month basis under the same terms and conditions of the original lease. Paragraph 3 of the lease specifies that the [leased] "premises shall be used by lessee solely and exclusively for loading and unloading of rail cars." Paragraph 8 grants each party the right to terminate the lease upon 30 days' written notice to the other party. SP gave Ideal such 30 days' notice of termination on July 28, 1987. As SP acted in accordance with the terms of the lease, there is no issue for the Commission to resolve.

With respect to the allegation of discrimination by providing unloading facilities to Ideal's neighbors which were not afforded to Ideal, the record indicates that both Jones, which occupied property to the east of and on the other side of SP's track directly opposite Ideal, and Randall, which occupied property directly south of and on the same side of the track as Ideal, had spur tracks running into their properties from SP's track. This enabled both neighbors to spot railcars on their properties, permiting them to unload lumber from both sides of a railcar, while Ideal, because of the configuration of SP's industrial tracks, could unload railcars only from one side. The difficulty of unloading from one side of a railcar plus the time involved in doing so was apparently of considerable concern to Ideal.

Ideal sought to have SP install a spur track from SP's track onto Ideal's leased right-of-way parcel to alleviate the difficulty it was experiencing in its one-sided unloading operation. The record reflects that SP drew up such plans, along with costs involved, and submitted same to Ideal. Ideal thereafter dropped further action on the spur because it would have had to bear the cost of installing such spur and Ideal's president felt it made no sense for him to spend money to install a spur when the lease gave SP the right to terminate the lease upon 30 days' notice. Thereafter, Ideal sought to have SP reconfigure its industrial track by putting a bend in the track which would then permit Ideal sufficient room to bring a forklift around to the opposite side of a railcar and unload from both sides. SP considered and rejected such request because the plan was considered unfeasible. Since the evidence is clear that Ideal had the opportunity to have a spur track installed but declined to do so because of cost, it hardly amounts to discrimination by SP or as constituting preferential treatment to Ideal's neighbors.

Some time in 1985 or 1986, James negotiated a lease with SP for use of a 600-foot portion of SP's right of way beginning from approximately 150 feet north of the north boundary of Ideal's leased portion and extending northward, almost to Warner Avenue. The terms of that lease permitted James to store lumber on the leased parcel. Ideal contends that this constituted preferential treatment to James. However, there is no evidence that Ideal ever requested the right to store lumber on its leased property either at the time the lease was negotiated or at any time thereafter. We find no discrimination or preferential treatment under these circumstances.

In 1986, Randall determined that it needed additional areas for unloading and entered into negotiations with SP to lease an unused 95-x-200-foot portion of SP's right of way lying between

Ideal's leased area and James' leased area as well as a 95-x-170-foot parcel situated between Ideal's leased portion and the Randall property. However, in order to use the parcel lying between Jones' and Ideal's leased rights of way, Randall would have had to cross Ideal's leased parcel. After meetings between SP, Ideal, and Randall in which the matter was discussed and thought to have resulted in an agreement, Ideal notified SP by telegram that it would not consent to Randall crossing Ideal's leased area. When Ideal persisted in its refusal, SP invoked the 30-day termination clause by letter dated July 28, 1987 to Ideal.

SP's lease with Randall would have permitted lumber storage on the 95-x-170-foot parcel lying between Ideal's parcel and Randall's lumber yard property, but would not have permitted storage on a 95-x-200-foot parcel lying just north of Ideal's parcel. SP's permission to James to store lumber on its leased parcel was a negotiated agreement as was apparently SP's permission for Randall to store lumber on one of its leased parcels but not on the other. Although Ideal's witness testified that he orally requested permission to store lumber on its leased parcel, there was no corroborative evidence of such request, and certainly the fact that the negotiated lease prohibited such storage would seem to indicate that no request was made for such storage of lumber at the time the lease was executed. SP's witness testified that Ideal never requested permission or brought up the subject of lumber storage in any of their meetings or by letter to SP. The evidence indicates that if Ideal had made a request to store lumber on its leased parcel, it is likely that such request would have been granted since Ideal's leased parcel is similarly situated as is Randall's leased parcel, which had been approved for lumber storage. We do no find any discrimination against Ideal by SP from these facts.

Finally, although Ideal's month-to-month tenancy with SP has been terminated in accordance with the terms of the original lease, Ideal may avail itself of SP's nearest "public team track" for unloading of lumber which is approximately two miles away. While it will no longer have the convenience of "back door" unloading that it enjoyed under the lease, Ideal will be no worse off than other members of the rail freight receiving public who are not situated along a rail line and who have to go to the nearest public team track to receive their freight shipments.

We conclude, from all the evidence, that SP did not violate Section 453 and that the complaint should be denied.

Federal versus State Jurisdiction

Although a question regarding state versus federal jurisdiction was raised by the ALJ during the hearing, it was not raised as an issue by either party in their pleadings. The only issue properly before the Commission is the issue of discrimination under Section 453 alleged by complainant over which we do have jurisdiction and we need not, therefore, consider any federal versus state jurisdictional issues.

Findings of Fact

1. The use of a 95-x-100-foot parcel of SP's right of way by Ideal was subject to the terms of a one-year written lease, negotiated and entered into by SP and Ideal.

2. After the one-year lease expired, Ideal continued to use the 95-x-100-foot right-of-way parcel on a month-to-month basis under the terms of the original lease.

3. The terms of the lease granted each party the right to terminate the lease on 30 days' written notice.

4. The terms of the lease prohibited Ideal from storing lumber on the 95-x-100-foot leased parcel.

5. Ideal never requested that it be permitted to store lumber on its leased parcel.

6. SP discontinued its Warner Avenue public team track when it leased a major portion of that right of way to James Lumber Company.

7. Ideal may continue to receive rail shipments of lumber, if it so desires, at the public team track, along with other members of the railcar freight receiving public, located two miles away.

8. SP has no legal obligation to permit industrial receivers of railcar freight whose properties lie along a rail line to come onto SP's right of way for loading or unloading purposes without SP's permission.

9. Public team tracks or freight stations designated by SP are available to receivers of railcar freight for unloading or receiving freight.

10. SP drew up plans and cost figures for installation of a switch and spur for Ideal.

11. SP did not refuse to install a rail spur for Ideal.

12. Ideal refused to have SP install a switch and spur because of cost.

13. SP terminated Ideal's month-to-month occupancy of SP's right of way in accordance with the terms of the original lease.

14. SP did not unlawfully discriminate against Ideal.

15. SPLCo. and SPIDCo. are not public utilities.

Conclusions of Law

1. Since this Commission does not have jurisdiction over SPLCo. and SPIDCo., the complaint, as to these defendants, should be dismissed.

2. Ideal has not met its burden of proof as to unlawful discrimination by SP and its complaint should be denied.

O R D E R

IT IS ORDERED that:

1. Case (C.) 86-12-028 with respect to Southern Pacific Land Co. and Southern Pacific Industrial Development Co. is dismissed.

2. The complaint of Ideal Pallet System, Inc. and Mel Mermelstein in C.86-12-028 is denied.

This order becomes effective 30 days from today.

Dated OCT 16 1987, at San Francisco, California.

STANLEY W. HULETT
President
DONALD VIAL
FREDERICK R. DUDA
G. MITCHELL WILK
Commissioners

Commissioner John B. Ohanian, being necessarily absent, did not participate.

I CERTIFY THAT THIS DECISION WAS APPROVED BY THE ABOVE COMMISSIONERS TODAY.

Victor Weisser, Executive Director

po