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Record No. 6197

In the
Supreme Court of Appeals of Virginia
at Richmond

LYNCHBURG TRAFFIC BUREAU (CORP)

v.

NORFOLK & WESTERN RAILWAY COMPANY

FROM THE STATE CORPORATION COMMISSION

RULE 5:12 BRIEFS

§5. Number of Copies. Twenty-five copies of each brief shall be filed with the clerk of this Court and three copies shall be mailed or delivered by counsel to each other counsel as defined in Rule 1:13 on or before the day on which the brief is filed.

§6. Size and Type. Briefs shall be nine inches in length and six inches in width, so as to conform in dimensions to the printed record, and shall be printed in type not less in size, as to height and width, than the type in which the record is printed. The record number of the case and the names and addresses of counsel submitting the brief shall be printed on the front cover.

HOWARD G. TURNER, Clerk.

Court opens at 9:30 a. m.; Adjourns at 1:00 p. m.

IN THE

Supreme Court of Appeals of Virginia

AT RICHMOND.

RECORD NO. 6197

VIRGINIA:

In the Clerk's Office of the Supreme Court of Appeals at the Supreme Court of Appeals Building in the City of Richmond on Friday the 27th day of August, 1965.

LYNCHBURG TRAFFIC BUREAU (CORP.),
Appellant,

against

NORFOLK & WESTERN RAILWAY COMPANY,
Appellee.

From the State Corporation Commission

Upon the petition of Lynchburg Traffic Bureau (Corp.) an appeal of right is awarded it by one of the Justices of the Supreme Court of Appeals on August 27, 1965, from an order entered by the State Corporation Commission on the 1st day of April, 1965, in a certain proceeding then therein depending, entitled: Application of Lynchburg Traffic Bureau (Corp.) for a Declaratory Judgment; upon the petitioner, or some one for it, entering into bond with sufficient security before the clerk of the said State Corporation Commission in the penalty of three hundred dollars, with condition as the law directs.

RECORD

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page 1] Before the

COMMONWEALTH OF VIRGINIA

STATE CORPORATION COMMISSION

CASE NO. ————

LYNCHBURG TRAFFIC BUREAU (CORP.),
Petitioner

v.

NORFOLK & WESTERN RAILWAY COMPANY,
Respondent

MOTION FOR DECLARATORY JUDGMENT

Comes now petitioner and respectfully prays that this Honorable Commission declare the legal rate on "bulk ground limestone" moving in carloads from Buchanan, Virginia to Norfolk, Virginia via N & W Railway. Both points are located on the Norfolk & Western Railway.

I

The facts are that the N & W Railway maintain two sets of rates on ground limestone moving from Buchanan, Virginia to Norfolk, Virginia. One set of rates is 268 cents per ton prior to August 1, 1961 and 278 cents a ton thereafter published specifically from Buchanan, Virginia to Norfolk, Virginia, in N & W Railway Tariff 2, series (See Item 2460 page 66, V.C.C. 1317). The other rate is a mileage scale of rates applicable from Buchanan, Virginia to Providence, Virginia of 250 cents per ton prior to August 1, 1961 and 260 cents per ton thereafter published in Spaninger's
page 2] V.C.C. 417. These rates apply via N & W Railway to Norfolk and Norfolk Southern to Providence.

II

The rate from Buchanan, Virginia to Providence, Virginia of 250 cents per ton prior to August 1, 1961 and 260 cents per

ton thereafter is authorized by Item 50565 of Spaninger's V.C.C. 417. This Item makes the Moyock, North Carolina rate applicable from Buchanan to Providence, Virginia and the rate is published in Table 15-A, Spaninger's V.C.C. 417. The short line distance is 257.8 miles from Buchanan to Providence.

III

The specific rate on ground limestone is 268 cents prior to August 1, 1961 and 278 cents per ton after that date. The rate of 250 or 260 cents per ton from Buchanan, Virginia to Providence, Virginia applicable via N & W Railway to Norfolk thence Norfolk Southern is lower than the specific published rates are to Norfolk. Hence, the specific rates are unlawful and inapplicable under Section 56.97, Code of Virginia, 1950, as amended.

IV

This Commission, on November 17, 1961 by letter in response to question of petitioner of whether or not the N & W Railway had authority under Section 56.97, Code of Virginia, 1950, as amended, to charge more for a shorter haul than for a longer haul, as to rates under Table 15 and 15-A, stated as follows:

page 3] "However, there does not appear any (relief granted) against the scale as set forth in Table 15 and 15-A. I have checked this out with the N & W as well as the Southern Freight Tariff Bureau and they check out the same."

Therefore, can the N & W Railway charge at Norfolk a rate higher than the rate to Providence, Virginia is the question presented here.

V

That the N & W Railway does not have authority from this Commission under Section 56.97 to charge a higher rate from Buchanan to Norfolk than they charge through Norfolk from Buchanan to Providence and the specific rate to Norfolk is, therefore, in violation of Section 56.97, Code of Virginia, 1950, as amended.

This petition, your petitioner believes, can be handled and disposed of without formal hearing.

Wherefore, your petitioner respectfully requests this Honorable Commission to declare which is the legal rate and the rate to be applied on limestone moving from Buchanan to Norfolk, the rate of 268 cents or 278 cents per ton or the rate of 250 cents or 260 cents per ton depending upon date of movement.

LYNCHBURG TRAFFIC BUREAU
By: W. G. BURNETTE, Attorney

W. G. BURNETTE
1017 Church Street
Lynchburg, Virginia
August 25, 1964

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AT RICHMOND, SEPTEMBER 22, 1964
CASE NO. 17044

Application of
LYNCHBURG TRAFFIC BUREAU (CORP.)
For a Declaratory Judgment

On August 26, 1964, came the Lynchburg Traffic Bureau, a corporation, by W. G. Burnette, its attorney, and filed a petition for a declaratory judgment praying for an adjudication that the Commission determine the proper rate and charge on bulk ground limestone moving in carload lots from Buchanan, Virginia, to Norfolk, Virginia, via the Norfolk and Western Railway. It appearing that a controversy exists and the petitioner has no other adequate remedy, it is

ORDERED:

(1) That the matter be docketed and set for hearing before the State Corporation Commission in its court room in the Blanton Building in the City of Richmond at 10 o'clock, a. m., on October 28, 1964.

(2) That a copy of this order be sent to counsel for applicant.

A True Copy

Teste: WILLIAM C. YOUNG
Clerk of State Corporation Commission.

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AMENDMENT TO MOTION FOR DECLARATORY JUDGMENT

Comes now petitioner and respectfully prays leave be granted to amend the original Motion for Declaratory Judgment as hereinafter set forth.

I

That through inadvertence petitioner used the wrong tariff V.C.C. number in naming the tariff showing the rates from Buchanan to Providence, Virginia. In paragraph I on the last line of sheet 1, the tariff is described as Spaninger's V.C.C. 417. This number should be changed to Spaninger's V.C.C. 238.

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II

Petitioner, on sheet 2 paragraph II in the next to the last line in that paragraph the tariff is described as Spaninger's V.C.C. 417. The correct description is Spaninger's V.C.C. 238.

Petitioner moves that the corrections herein set forth be allowed and made in the original Motion for Declaratory Judgment.

Respectfully submitted,

LYNCHBURG TRAFFIC BUREAU
By: W. G. BURNETTE, Attorney

W. G. BURNETTE
1017 Church Street
Lynchburg, Virginia
October 16, 1964

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AT RICHMOND, OCTOBER 20, 1964

Application of CASE NO. 17044
LYNCHBURG TRAFFIC BUREAU (CORP.)
For a Declaratory Judgment

At the request of Counsel for the Norfolk and Western Railway Company and for good cause appearing;

IT IS ORDERED:

(1) That the hearing of this matter now docketed for October 28, 1964 be, and is hereby, continued until December 1, 1964 at 10 o'clock, a.m. in the courtroom of the State Corporation Commission in the Blanton Building in the City of Richmond.

(2) That copies of this order be sent to the Counsel for the applicant and to Carl B. Sterzing, Jr., Counsel for Norfolk and Western Railway Company.

A True Copy

Teste: WILLIAM C. YOUNG
Clerk of State Corporation Commission.

page 8] Lynchburg Traffic Bureau v. Norfolk and Western Railway Company VCC Case No. 17044

VIRGINIA

OFFICE OF STATE CORPORATION COMMISSION

NOV. 20, 1964
COMMERCE COUNSEL

NORFOLK AND WESTERN RAILWAY COMPANY
LAW DEPARTMENT
ROANOKE, VIRGINIA 24011

ROBERT B. CLAYTOR
Vice President—Law

MARTIN P. BURKS
General Counsel

JOHN S. SHANNON
JOHN R. TURBYFILL
General Attorneys

SIDNEY FALKENSTEIN
Assistant to General Counsel

CARL B. STERZING, JR.
RICHARD H. HAHN
Solicitors

November 19, 1964

W. G. BURNETTE, Esquire
1017 Church Street
Lynchburg, Virginia

Dear Mr. Burnette:

With reference to my letter of November 3, 1964, above subject, and in response to the interrogatories set forth in your letters of October 16 and November 18, this is to advise that we have made a thorough and complete review of this matter. Accordingly, I trust the following answers to your questions will satisfactorily explain why there has been no violation of the Virginia Code by the Norfolk and Western in the factual context of this case.

QUESTIONS:

(a) What is the rate on limestone from Buchanan, Virginia via the Norfolk and Western Railway to Norfolk thence Norfolk Southern to Providence, Virginia?

Answer: Prior to September 1, 1962, this rate was $2.50 per net ton *on ground or pulverized limestone* as described in Item 396 of the tariff hereafter cited, when such limestone is loaded in closed cars, *with minimum weight of 80,000 pounds, having actual value not exceeding $8.00 per net ton at point of origin and so certified on bill of lading.* This rate of $2.50 net ton is published in Table 15-A, page 33, Supplement 310 to Southern Freight Tariff Bureau, Freight Tariff 388-G, V.C.C. No. 238, for short line distance of 256 miles, constructed via C&O Railway to Lynchburg, Virginia, 49 miles, thence
page 9] via N&W Railway to Suffolk, Virginia, 168 miles, thence Seaboard Air Line Railroad to Norfolk, Virginia (Portsmouth), 18 miles, thence Norfolk Southern Railway to Moyock, North Carolina, 21 miles. This basis of rates is authorized by Item 50565-D, page 35 of Supplement 310 to the aforesaid tariff. Such rate reflects the original scale plus Virginia intrastate increases.

At the same time, a rate of $2.68 net ton was provided on stone covered by Item 400-D description and was applicable on ground limestone without restriction as to value and with no tariff requirement that any value be certified on the bill of lading at point of origin. The $2.68 net ton rate is published in Table 1, page 76, Supplement 237 to Tariff 388-G, as

amended on page 28 of Supplement 302 and pages 12 and 13 of Supplement 310. This rate also is for short line distance of 256 miles, as shown above. This rate reflects the scale prescribed by the Virginia State Corporation Commission in VCC Case No. 7009, September 17, 1940, when, for Virginia points in Southern Territory, generally south of the Norfolk and Western Railway, the Southern Territory lines were ordered to apply what was known as the T-295 scales in Southern Virginia. The $2.68 net ton rate therefore reflects that scale plus subsequent Virginia intrastate increases, and, as stated, this rate continues to apply when valuation is not covered or specified in the bill of lading in accordance with Item 400, Table 1, Scales 1 and 2, page 23, Supplement 310 to SFTB Freight Tariff 388-G.

The $2.50 and $2.68 net ton rates were increased, effective September 1, 1962, to $2.60 and $2.78 net ton, respectively, under Supplement S-12 of Tariff X-223-A, V.C.C. No. S-87 (VCC Case No. 15106).

(b) What is the rate from Buchanan to Norfolk?

Answer: The rate on stone, *viz.*, limestone, ground or marl, for acid soil treatment, carload minimum weight 60,000 pounds from Buchanan to Norfolk was $2.68 net ton prior to September 1, 1962. Effective September 1, 1962, this rate was increased to $2.78 net ton. These rates are published in Item 2475, page 67, of Norfolk and Western Railway Local Freight Tariff 2-J, VCC No. 1360, effective August 25, 1962 and as amended, the Norfolk and Western Railway distance from Buchanan to Norfolk being 267 miles. Later, in Item 2474 to the foregoing local tariff, the N&W also published a rate of $2.60 net ton, effective January 8, 1963, but this page 10] rate applies only on ground limestone having actual value not exceeding $8.00 net ton at point of origin and so certified on bill of lading. *it* is also restricted to closed cars and minimum weight of 80,000 pounds.

The basis for the rates published in the N&W local tariff cited above is the William Hodges Mann Scale which became effective as originally published by N&W on August 12, 1912 in Tariff No. 14932-C, with other Virginia lines being required to publish the same scale by order of the State Corporation Commission dated May 15, 1913 in Case No. 350. That is to say, except for the general increases subsequently authorized by the Virginia Commission, the scale published in Item 2475 of N&W Tariff 2-J represents the original William Hodges Mann Scale. It should be noted that this was the lowest scale

in effect on ground limestone for acid soil treatment in the State of Virginia. It was constructed on this low basis in line with the request of Governor William Hodges Mann of the State of Virginia in 1911 because of legislation requiring the State to purchase limestone quarries and, with the help of convict labor, grind limestone for the use of farmers. The William Hodges Mann Scale today remains the lowest scale applicable on ground limestone for acid soil treatment in Official Territory Virginia.

(c) Is the rate higher to Norfolk than the rate to Providence, Virginia via Norfolk?

Answer: As outlined above, the rate to Norfolk on ground limestone, for acid soil treatment, minimum weight 60,000 pounds, is $2.68 net ton which is no higher than the Item 400-D rate of $2.68 net ton to Providence, Virginia, where no value is required to be shown on bill of lading, for minimum weight of 80,000 pounds. The answer to your question, therefore, is *no,* taking into account the specific requirements in the tariff descriptions and thus deriving the rate which would have been applicable to Providence under the same circumstances.

(d) Can the Norfolk and Western Railway, since no relief was granted under § 56-97, Va. Code (1950), as amended, lawfully charge more at Norfolk than the rate to Providence, Virginia?

Answer: Of course, if such a question is to be answered in the same abstract manner in which it has been stated, the obvious answer is *no.* But, as we have seen, the Norfolk and Western has not departed from the long-and-
page 11] short-haul prohibition of this section which, in essence, states that no greater compensation may be assessed in the aggregate for the transportation of the same class or type of property over a shorter distance than for a longer distance along the same line, unless authorization to charge proportionally less for longer than for shorter hauls has first been obtained from the State Corporation Commission.

As you will recall, this provision of the Virginia Code was taken practically *in haec verba* from Va. Const. § 160 and is essentially the same language as that which is employed in the long-and-short-haul clause of the fourth section of the Interstate Commerce Act of February 4, 1887, c. 104, Pt. I,

§ 4, 24 Stat. 380, 49 U.S.C. §4(1). For the sake of achieving an interpretation of the Virginia statute in regard to intrastate rates that harmonizes with the numerous applications of its equivalent in the Interstate Commerce Act to interstate rates, it is herein assumed that the Virginia State Corporation Commission would not see fit to depart from the well-settled meaning of this language which has been firmly established for many years by numerous Interstate Commerce Commission rulings.

The basic principle of these decisions is that, in determining whether there has been an unauthorized departure from the long-and-short-haul prohibition, only rates and charges of the same kind and character can be compared with one another. See *e.g., Egyptian Powder Co.* v. *Illinois Central RR.,* 126 I.C.C. 293, 301 (1927); *Belt Railroad & Stock Yards Co.* v. *Alton R.R.,* 225 I.C.C. 649, 659 (1938); *Whiterock Quarries* v. *Pittsburgh & L. E. R.R.,* 280 I.C.C. 143, 153 (1951). Applying that principle to the context of the present case, it is quite apparent that no long-and-short-haul violation exists, for, as already explained, the rate to Providence is only applicable on a different description and minimum weight than that governing the tariff description and minimum weight covering the rate to Norfolk. Thus, for the 92 carload shipments in question, which moved during the period October 12, 1960 through January 7, 1963, all of which were described as limestone for acid soil treatment, the correct rate was that which was in fact applied, *viz.,* $2.68 net ton prior to September 1, 1962 and $2.78 net ton thereafter. Moreover, even if SFTB Freight Tariff 388-G had application on such traffic moving within Official Territory Virginia, the rate you have urged could not be protected in the absence of specific compliance with the tariff requirement that valuation (not to exceed $8.00 per ton) be certified on the bill of lading. In other words, even supposing that, by any stretch of the imagination, a rate could be found in the SFTB 388-G tariff, it could only reflect the scales in Table 1 as provided in Item 400, inasmuch as no valuation was stated in the bills of lading covering these shipments.

page 12]

As you know, the Railway Company is compelled by law to be governed by the specific provisions of the tariff publications and, in order to secure the benefit of the rates as published in such tariffs, the shipper is likewise required to comply with all such provisions regarding commodity descriptions, declarations of value, minimum weight, etc. Thus, even if the shipments in question had moved to Providence rather than Norfolk, the same rates of $2.68 and $2.78 per net ton

(before and after September 1, 1962) would have been applicable under SFTB Tariff 388-G as were actually applied under N&W local tariff 2-J, for the stated reason that no certification was made on the bill of lading as to value not exceeding $8.00 per net ton. There accordingly could not have been a lower charge in the aggregate for the longer haul than for the shorter haul because the tariff requirement for securing the lower $2.50 and $2.60 net ton rates (before and after September 1, 1962) would not have been complied with on the facts of this case.

The foregoing situation was graphically described to you by Mr. Wesley O. Malbone, Transportation Rate Analyst, State Corporation Commission, in his letter to you dated May 1, 1964, copy of which we have been furnished. In that letter he noted that all the shipments involved here were transported in closed cars and described as bulk ground limestome or ground limestone in bags, for acid soil treatment, carload minimum weight 60,000 pounds, and were governed by N&W Freight Tariff 2 series, having moved in Official Territory Virginia. As further explained to you by Mr. Malbone, even if the rate published in the SFTB tariff had application between local origins and destinations on the Norfolk and Western, "the value shown in the Southern Freight Tariff scale would have to be shown on the bill of lading and so certified." Finally, Mr. Malbone explained to you in his May 1 letter that it certainly is not proper two years later to attempt to change the description of a commodity after a bill of lading has been issued, the freight delivered and charges collected on the legally applicable rate, for the purpose of attempting to secure a lower rate on such shipments or for any other purpose.

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Yet, in your reply to Mr. Malbone dated May 14, 1964 you made the novel contention that it was the carrier's responsibility to determine the correct commodity description under the Uniform Freight Classification. With all due respect, it does seem rather farfetched for a shipper to argue that a provision obviously designed to protect the carrier from a misdescription by the shipper which results in assessment of a lower than applicable freight charge could ever be used by a shipper against the carrier in order to confer a benefit on himself by reason of his own failure to comply with tariff requirements.

In your earlier correspondence with the Railway Company regarding this claim, some mention is made of the possibility that you also believe a tariff requirement of certifying actual

value on the bill of lading is invalid under Va. Code §56-119, which, similar to Section 20(11) of the Interstate Commerce Act, 49 U.S.C. §20(11), forbids contracts limiting a carrier's liability to a declared or released value, citing *Chesapeake & O. Ry.* v. *Osborne,* 154 Va. 477, 153 S.E. 865 (1930). As you may have since concluded, this argument is untenable because the declaration of value here involved was not in connection with any attempt to exempt or limit the carrier's liability.

There is a clear distinction between rates as to which a declaration of value is required as a released value, and those where the declaration required is the actual value of the shipment, the principle underlying the latter rates being that articles covered by different groups of valuation are to be treated as different commodities. In actual-value rates, there is no holding forth of an offer to transport goods of higher values at lower rates in consideration of a release of the carrier's liability, and the value declared is not given as a measure of the carrier's liability, but as a part of the necessary description of the goods. *Crown Overall Mfg. Co.* v. *Director General,* 100 I.C.C. 471, 475 (1925); *Carr* v. *Director General,* 118 I.C.C. 569, 571 (1926).

In summary, the lower rate to which you refer in alleging a long-and-short-haul violation is a rate on what, in effect, is a different commodity than that which was described in the bills of lading covering the shipments in question, page 14] taking into account the specific tariff descriptions and differing tariff requirements. Accordingly, there was, as suggested by Mr. Malbone in his letter to you, no necessity for obtaining relief from the operation of Code Section 56-97, for there was no departure in the first instance.

Since there is no dispute as to the facts and this controversy appears to involve simply a question of law, we agree that your petition can be handled and disposed of by the Commission without necessity for a formal hearing. I am therefore furnishing the State Corporation Commission of Virginia a copy of this reply and trust the above information will permit a more expeditious and informal disposition of this matter without necessity for the oral hearing now assigned at Richmond on December 1, 1964.

Yours very truly,

CARL B. STERZING, JR
Solicitor

kr/cbs

cc: State Corporation Commission
Commonwealth of Virginia
P. O. Box 1197
Richmond, Virginia

Mr. Wesley O. Malbone
Transportation Rate Analyst
State Corporation Commission
P. O. Box 1197
Richmond, Virginia

Mr. William C. Seibert
Commerce Counsel
State Corporation Commission
P. O. Box 1197
Richmond, Virginia

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AT RICHMOND, NOVEMBER 24, 1964
CASE NO. 17044

Application of
LYNCHBURG TRAFFIC BUREAU (CORP.)
For a Declaratory Judgment

At the request of Counsel for the Lynchburg Traffic Bureau and for good cause appearing;

IT IS ORDERED:

(1) That the hearing of this matter now docketed for December 1, 1964, be, and is hereby, continued until January 25, 1965, at 10 o'clock, a. m., in the courtroom of the State Corporation Commission in the Blanton Building in the City of Richmond.

(2) That copies of this order be sent to the Counsel for the applicant and to Carl B. Sterzing, Jr., Counsel for Norfolk and Western Railway Company.

A True Copy

Teste: WILLIAM C. YOUNG
Clerk of State Corporation Commission.

page 16] LYNCHBURG TRAFFIC BUREAU
A Non-Profit Organization
1017 Church Street - P. O. Box 859
LYNCHBURG, VIRGINIA
Telephone VIctor 5-2881

W. G. BURNETTE
Secretary-Manager

January 14, 1965 B

Mr. Carl B. Sterzing, Jr.
Solicitor
N & W Railway Company
Roanoke, Virginia

RE: Case No. 17044
Lynchburg Traffic Bureau v.
N & W Railway

Dear Mr. Sterzing:

I have just now had time to look at your letter of November 19, 1964 concerning the above case.

You state the rates on limestone carload from Buchanan, Virginia to Providence, Virginia were 250 cents per ton prior to September 1, 1962 and 260 cents per ton thereafter. There is no dispute between us as to the rates of 250 and 260 cents being applicable on limestone with value not exceeding $8.00 per ton from Buchanan to Providence and that the said rates apply via N & W Railway Norfolk and Norfolk Southern Railway and that the said rates were established without authority to depart from the provisions of Section 56.97 of the Code of Virginia. These rates are published in Spaninger's V.C.C. 238.

page 17] We are also in accord that the rates are 268 cents and 278 cents per ton from Buchanan to Norfolk on limestone with a value of not exceeding $8.00 per ton or on limestone with a greater value than $8.00 per ton. These rates are published in a tariff of the N & W Railway.

The claim papers contain a statement from the consignee showing that the value of the limestone does not exceed $8.00 per ton. Hence, the value of the limestone, even though that value is not declared on the bill of lading, meets the tariff requirement, so as to entitle a shipment moving from Buchanan to Providence or Norfolk to a rate of 250 cents and 260 cents per ton. The only defense offered against protecting the

250 cents and 260 cents rate at Norfolk is that the bill of lading does not contain a notation that the value does not exceed $8.00 per ton. The failure to certify on the bill of lading the actual value of the limestone is due to an error of the shipper. The shipper and not the consignee is to certify on the bill of lading the value of the limestone. Consequently, the consignee is not at fault for the failure of the shipper to certify the value nor will the N & W be hurt by now allowing an amendment to the bill of lading so as to certify the value.

page 18] The commodity actually transported had an actual value of less than $8.00 per ton and under that value was entitled to the rates of 250 cents and 260 cents. In other words, one question is should the consignee or the shipper be permitted to correct the bills of lading to show that the actual value of the limestone was less than $8.00 per ton when in fact the actual value did not exceed $8.00 per ton. The carriers have authority and the shipper is obligated to correct all bills of lading so as to make the description of the article on shipping papers conform to the tariff provisions. In fact, that right exists as the bill of lading provides the following:

"Received subject to the classification and tariffs in effect on the date of the issue of this bill of lading." (See V.C.C. OC-A5, page 182)

The tariff in effect provides that the value is to declared on the bill of lading and the terms of the contract of carriage (the bill of lading) provides that such description can be corrected at any time to make the description in the bill of lading conform to the description in the tariffs. Therefore, the contract of carriage authorizes the correction as does Rule 2 of V.C.C. OC-A5, so there is no reason for not applying the rates of 250 cents and 260 cents on these shipments.

The facts are: (a) that the rates published from Buchanan to Norfolk are 268 cents and 278 cents on limestone for acid soil treatment regardless of the value of the limestone; (b)

page 19] that the limestone here considered had an actual value of not exceeding $8.00 per ton, but the value was not declared on the bill of lading; (c) that the rates published are 250 cents and 260 cents on limestone for acid soil treatment or for other kinds of usage with a value not exceeding $8.00 per ton moving from Buchanan, Virginia to Providence, Virginia; (d) that Norfolk is an intermediate point to Providence; and (e) that no relief was granted to permit departure from the provisions of Section 56.97 of the Virginia Code.

It is clear from these facts that the limestone moving from Buchanan to Norfolk was of the same class as the class of limestone on which the published rates are 250 cents and 260 cents from Buchanan to Providence through Norfolk. The assessment of rates of 268 cents and 278 cents on these shipments completed the violation of Section 56.97 Code of Virginia, 1950 as amended as those rates exceeded the rates through Norfolk to Providence of 250 cents and 260 cents per ton.

The law requires (Section 56.102) that a carrier collect no more or no less than the applicable rate regardless of how the shipment is described on the bill of lading and if described on the bill of lading different from the description in the tariff, then the bill of lading is to be corrected so the proper rate will be applied.

page 20] Reference has been made to certain letters written by Mr. Malbone concerning this subject. Mr. Malbone, on November 17, 1961 wrote the Lynchburg Traffic Bureau in response to the question of whether or not relief was granted the N & W Railway to depart from the provisions of Section 56.97 made answer, in part, as follows:

"There have been several departures granted by this Commission on the stone rate from 56.97 of the Virginia Code. However, there does not appear any against the scales as set forth in Table 15 and 15-A" (Table 15-A contains the rates to Providence) and "I have checked this out with the N & W as well as the Southern Freight Tariff Bureau and they check out the same."

The letter of May 1, 1964 from Mr. Malbone to which the N & W Railway has referred contains only opinions of Mr. Malbone. The fact remains that no relief was granted the N & W Railway to depart from the provisions of Section 5697 of the Code or to charge more at Norfolk than to charge through Norfolk to Providence, Virginia.

Mr. Malbone states in his letter of May 1, 1964 that the rates in Tables 15 and 15-A have no application between these points (meaning, I think, Buchanan to Norfolk) but the fact remains that the said rates have application from Buchanan via N & W Railway through Norfolk to Providence (See Supplement 310 Spaninger's V.C.C. 238, Table 15-A. Spaninger's V.C.C. 238 shows that the rates do apply from Buchanan to Norfolk and under Section 56.97 of the Code, the N & W Railway cannot lawfully charge

page 21] a higher rate at Norfolk than at Providence.

Mr. Malbone also states in his letter of May 1, 1964 that:

"You cannot change the description of a commodity after the bill of lading has been issued and freight charges paid in an attempt to secure a lower rate."

The bill of lading itself shows that a correction in the bill of lading can be made as the shipment is accepted subject to the provisions of the tariffs and the provisions of the tariffs require the value to be declared as to the rates of 250 cents and 260 cents per ton.

The above conclusion of Mr. Malbone is contrary to Section 56.102 Code of Virginia and the contract of carriage. The Commission, under that Section, is also granted authority to authorize changes in the bills of lading so as to make the bills of lading conform to the provisions of the tariffs and to make the bill of lading description conform to the commodity actually shipped. The Commission can change any provision of a tariff it finds improper. Moreover, without that Section an error in describing the commodity shipped can always be corrected. If that be not true, then a carrier can charge more or less than the applicable rate simply by misdescription. Section 56.105 and 56.106 Code of Virginia make it unlawful to commit any act to obtain a rate less than the regular rate and Section 56.102 requires the proper rate to be used. Consequently, the bill of lading description can always be changed.

page 22] The commodity is described in the bill of lading or rather is shown on the freight bill as "Bulk *gound* limestone for AST." See Freight No. 65829 of 10-18-61 covering N & W Car 48707 attached to the claim papers you have. I am attaching a copy thereof hereto for the Commission. The bill of lading of one shipper provides a place to declare the value when the rate is dependent upon a declared or released value. A copy of the bill of lading is attached for the Commission. You have the originals in your possession as well as the original of all freight bills.

The actual value of the limestone was less than $8.00 per ton and that is the extent of the liability of the carrier in case of loss of the limestone. Therefore, the parties are in agreement as to the rates but the N & W Railway is seeking to avoid applying the Providence rates at Norfolk on the technical ground that the bill of lading did not contain a notation that the value did not exceed $8.00 per ton. The law and the contract of carriage allows the bill of lading to be

changed to conform with the tariff and the Commission has authority to order the change made and to order the protection of the rates of 250 cents and 260 cents.

Petitioner requests the Commission to decide the issue without a formal hearing. If the N & W Railway replies to this letter, then petitioner wishes the opportunity to
page 23] make reply to the further statements of the N & W Railway.

The Commission should find the rates on limestone from Buchanan to Norfolk to be 250 cents and 260 cents per ton and petitioner so prays.

Respectfully submitted,

LYNCHBURG TRAFFIC BUREAU
W. G. BURNETTE

WGB:se

CC: State Corporation Commission
Commonwealth of Virginia
Richmond, Virginia

Mr. W. C. Seibert
Commerce Counsel
State Corporation Commission
Richmond, Virginia

Mr. W. O. Malbone
Transportation Rate Analyst
State Corporation Commission
Richmond, Virginia

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AT RICHMOND, JANUARY 27, 1965

Application of CASE NO. 17044

LYNCHBURG TRAFFIC BUREAU (CORP.)
For a Declaratory Judgment

At the request of Counsel in this case and for good cause appearing;

IT IS ORDERED:

(1) That this matter which came on for hearing on January

25, 1965 be, and is hereby, continued until March 30, 1965, at 10 o'clock, a.m., in the courtroom of the State Corporation Commission in the Blanton Building in the City of Richmond.

(2) That copies of this order be sent to the Counsel for the applicant and to Carl B. Sterzing, Jr., Counsel for Norfolk and Western Railway Company.

A True Copy

Teste: WILLIAM C. YOUNG
Clerk of State Corporation Commission.

page 29] Lynchburg Traffic Bureau v. Norfolk and Western Railway Company—VCC Case No. 17044——

VIRGINIA

OFFICE OF STATE CORPORATION COMMISSION

FEB. 23, 1965

COMMERCE COUNSEL

NORFOLK AND WESTERN RAILWAY COMPANY
LAW DEPARTMENT
ROANOKE, VIRGINIA 24011

ROBERT B. CLAYTOR
Vice President—Law

MARTIN P. BURKS
General Counsel

JOHN S. SHANNON
JOHN R. TURBYFILL
General Attorneys

SIDNEY FALKENSTEIN
Assistant to General Counsel

CARL B. STERZING, JR
RICHARD H. HAHN
Solictors

February 19, 1965

W. G. BURNETTE, Esquire
1017 Church Street
Lynchburg, Virginia

Dear Mr. Burnette:

Reference is made to my previous letter of November 19,

1964, your reply of January 14, 1965 and other correspondence in connection with the above matter. Your letter of January 22, 1965 to Mr. W. C. Seibert, Commerce Counsel of the Corporation Commission, indicates a desire that we reply to your latest letter on the merits.

Accordingly, we are undertaking to make one more reply herein although, we respectfully submit, our letter to you of November 19, 1964 quite thoroughly discusses all the matters touched upon in your letter of January 14. With every due respect, however, I believe you either have not or do not desire to consider seriously our very exhaustive explanatory letter of November 19, 1964. Yet, while I fully realize that it will be very difficult, if not impossible, to change or alter your mental conviction with regard to the alleged violation of the long and short haul provisions of Virginia Code Section 56-97, I hope the following additional comments, though necessarily somewhat redundant, will serve to persuade you that your client's claim is completely without foundation.

First of all, Mr. Burnette, we are faced with only one basic question: What rate was applicable to the shipments of limestone covered by the involved bills of lading from Buchanan to Norfolk via Norfolk and Western Railway? My letter of November 19, 1964, under Questions (a) and (b) page 30] sets forth in detail the tariff provisions applicable to various movements of limestone between the points in controversy. Briefly restated, one set of rates (250 and 260 cents per net ton) applied on limestone, etc. having actual value of less than $8.00 per net ton and *so certified on the bill of lading*. The other set of rates (268 and 278 cents per net ton) applied on ground limestone for acid soil treatment, with no requirement of certification as to value.

In connection with the foregoing, it will be recalled that the shipments in question carried no certification as to value and were described as "ground limestone for acid soil treatment." Under such circumstances, it seems incontrovertible that the higher rates of 268 and 278 cents were the only legally applicable rates on these shipments. This conclusion follows inexorably from the oft-expressed rule that where a general description and a specific description are both published in commodity rate tariffs, that description must govern which more specifically covers the commodity shipped. Thus, in *Louisville Water Co.* v. *Illinois Central R.R.*, 14 F. Supp. 301, 304 (W.D. Ky. 1936), it was held, quoting a previous decision by the Supreme Court that:

"Where a commodity shipped is included in more than one

tariff designation, that which is more specific will be held applicable."

Also, see *United States* v. *Gulf Refining Co.,* 268 U.S. 542, 546 (1925); *Gideon-Anderson L. Co.* v. *St. Louis S. W. Ry.,* 88 F. 2d 232, 235 (8th Cir. 1937). The Interstate Commerce Commission has held similarly in numerous cases. Typical is its finding that:

"As between two different descriptions of a commodity the specific takes precedence over the general description. *Tobias Bag Co.* v. *Pan-Atlantic S. S. Corp.,* 293 I.C.C. 393, 396 (1954).

Focusing now on the present problem, it will be noted again that the commodity shipped was "ground limestone for acid soil treatment." The rate of 268 cents (278 cents) that was actually applied carried this specific description (see Item 2460, N&W Railway Tariff 2-I, V.C.C. 1317). By contrast, the rate you seek carried the more general description "Limestone, Ground (having actual value not exceeding
page 31] $8.00 per net ton at point of origin and so certified on bill of lading)." The cases cited above are therefore squarely in point here.

In your January 14 letter, you reiterate your contention that the lower rate applies because the value of the commodity shipped was in fact less than $8.00 per net ton, regardless of the lack of certification to that effect on the bill of lading as called for in the tariff item describing the lower rated commodity (Item 396-series, SFTB Tariff 388-G, V.C.C. 238). Yet, you must realize this is not a case of first impression. It is not as if we were painting on empty canvas, with the law still undeclared.

On the contrary, the ICC has considered cases in which the issue was practically identical to that presented here, holding invariably for the defendant carriers upon a finding that the assessed rates were legally applicable because at the time of actual movement the shipper failed to include the required certification in the bill of lading. See *e.g., West End Iron & Metal Corp.* v. *Duluth, S. S. & A. Ry.,* 279 I.C.C. 614 (1950). Your attention is particularly directed to the decision in *Lapides Metals Corp.* v. *Boston & M. R.R.,* 278 I.C.C. 214 (1950), where it was stated at p. 215:

"At the time the shipment moved . . . [a lower] rate also was applicable on pieces of aluminum . . . having no recognized commercial use or value except for recovery of the alum-

inum or aluminum alloy content thereof; provided . . . (a) the shipment was described on the bill of lading as scrap aluminum or aluminum alloy . . . [and] (b) the shipper certified on the bill of lading that the material had been bought as aluminum scrap. . . . These provisions were not complied with at the time the shipments moved, although a certificate purporting to meet the requirements of the provisions was presented by complainant to the defendants some time thereafter. As the shipper did not comply with the terms of the tariff, including the required certification on the bill of lading, the rate charged was applicable."

Also see *Calkins* v. *Michigan Central R.R.,* 129 I.C.C. 475, 476 (1927).

It is noteworthy that in each of the cases cited above the complaining shippers submitted to the involved page 32] carriers *subsequent to the dates of movement* certificates purporting to show that the nature of the articles shipped was actually such as to constitute lower rated commodities contained in tariffs subject to a certification or similar requirement. Yet the Commission held this belated profer of compliance with the tariff requirement was not enough; in order to make the certification effective to secure the lower rates it had to be on the bills of lading themselves at time of movement.

This appears to be exactly what the Corporation Commission's Transportation Rate Analyst, Mr. Wesley O. Malbone, was saying in his letter to you dated May 1, 1964, when he advised that one cannot change the description of a commodity after the bill of lading has been issued and the freight charges paid in an attempt to secure a lower rate. Not only is this logical as a matter of abstract reasoning, but it is also eminently correct under the authorities, as we have seen above. Thus, the validity of Mr. Malbone's opinion is fully borne out, though, based on his experience and knowledge, it would have merited weighty consideration in any event.

Notwithstanding, you have rejected the foregoing proposition, albeit without citation to opposing authority, if there is any. Nevertheless, we submit that it renders false the underlying assumption that forms the basis for your client's whole case.

Proceeding further, you have stated at various times in our exchange of correspondence, and apparently still maintain, that the bill of lading provisions and the classification (V.C.C. OC A-5, page 182) permit the subsequent alteration of the bills of lading description so as to make applicable the low-

er rates. In arriving at such a conclusion, it is clear that you have placed a very strained and unnatural interpretation on the bill of lading and classification provisions.

It is, of course, axiomatic that the description in the bill of lading provision quoted in your letter of January 22 reads more fully as follows:

"Received, subject to the classification and tariffs in effect at the date of the issue of this Bill of Lading, *the property described below* . . . ." (Emphasis added.)

On this point, it is incontrovertible that the description shown on the bills of lading covering the considered shipments conformed properly with the tariff description published in connection with the rates actually assessed. In fact, since you make reference to Va. Code Sections 56-102, 105 and 106, it might be pointed out that if the Norfolk and Western were now to accept an altered or amended bill of lading at this stage, such action would very probably constitute a direct violation of these statutes, for such a departure from the tariff referred to would be for the very purpose of protecting less than the regular rates in effect at the time of shipment. This is precisely the type of practice at which Sections 56-105 and 106 are aimed, and would place your clients as well as ourselves in jeopardy of the penalties therein imposed.

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Furthermore, even if a misdescription within the meaning of those statutes were by any stretch of the imagination involved here, they do not by their terms become operative unless the misdescription is "knowingly and willfully" made. And there is no question in this case of any collusion between shipper and carrier in using the description contained in the tariff publishing the rates you seek to have applied. As far as Code Section 56-102 is concerned, this prohibition simply makes it unlawful to charge other than the published tariff rate; and, as explained, the charges here were made at the rate published in the tariff containing the same description as that used in the bills of lading. So there can be no question of violating any of these sections *unless* we comply with your request. In other words, your theory of recovery has paradoxically placed you in the position of attempting to use these Code provisions for the purpose of justifying a proposal that would appear to actually result in their contravention, a curious situation indeed.

Nothing is changed by your statement that the consignee cannot be bound by the failure of the shipper to certify on the

billing that the value of the limestone did not exceed $8.00 per net ton. Not only would it serve no useful purpose to belabor the point further with citations of the overwhelming authority to the contrary, but it has already been repeatedly pointed out that the tariff required such certification as a condition precedent to applicability of the lower rate. No wishful theorizing about the law can alter the fact that this condition simply was not met. Regardless of who paid and ultimately bore the freight charges, the railroad could not and cannot disregard the requirements of its tariffs, nor depart from the legally applicable rates. See again Va. Code (1950) §56-102.

In this connection, it is settled that the freight charges for a movement must be assessed in accordance with the page 34] manner in which the goods were tendered, even though it may develop that lower charges might have properly been applicable had the shipper elected to tender the goods for transportation in a different manner. See, in this respect, *Dallas Cotton Exchange* v. *Atchison T. & S. F. Ry.*, 163 I.C.C. 57 (1930); *Goodman Mfg. Co.* v. *Chicago, B. & O. R.R.*, 21 I.C.C. 583 (1911); *Northern Milling Co.* v. *Chicago & N.W. Ry.*, 237 I.C.C. 235 (1940); *Sinclair Refg. Co.* v. *Ft. Worth & R. G. Ry.*, 169 I.C.C. 421 (1930); *Lindsley Bros. Co.* v. *Great Northern Ry.*, 113 I.C.C. 166 (1926); *Passow & Sons* v. *Chicago, M. & St. P. Ry.*, 37 I.C.C. 711 (1916); *Sam H. Kyle* v. *Missouri, K. T. Ry.*, 42 I.C.C. 335 (1916); *Columbian Iron Works* v. *Southern Ry.*, 45 I.C.C. 173 (1917); *Nevada Dept. of Hwys.* v. *Baltimore & O. R.R.*, 132 I.C.C. 727 (1927). Finally turning to Va. Code Section 56-97 itself, this provision requires that no transportation company shall "receive any greater compensation in the aggregate for the transportation of passengers of the same class or property along the same line in the same direction for a shorter than for a longer distance . . . ." This obviously contemplates the actual receipt of compensation for actual movements of the same commodity to the intermediate point. The rates applicable from Buchanan to Norfolk, which were assessed on the shipments in this case, applied on "Ground Limestone for Acid Soil Treatment." Lower rates to Providence applied on "Ground Limestone (having actual value not exceeding $8.00 per net ton at point of origin and so certified on bill of lading)." Contrary to your contentions, therefore, we submit that if tariff descriptions are to have any meaning at all, the commodity actually billed and shipped was different for rate-making purposes than the ground limestone on which the lower rates applied to Providence.

It is true that, effective January 8, 1963, in Item 2474, N&W

Tariff 2-J, VCC 1360, the Norfolk and Western published the same rate on limestone to Norfolk as had previously been maintained to Providence. But this rate likewise called for the same description and actual value certification on the bill of lading, while the higher rates continued to apply to both Norfolk and Providence when such provisions had not been met. Consequently, even though a shipper who complied with the applicable tariff provisions might have complained of an unauthorized long and short haul departure prior to January 8, 1963, the manner in which the subject shipments were tendered and billed by your clients prevents the existence of such a violation in the context of this case. That is to say, they could not on these facts have claimed the benefit of the lower rates even if the shipments had been billed to Providence rather than Norfolk.

The facts and the law in this controversy may be summarized briefly as follows:

page 35] 1. The bills of lading carried a description which conformed to the tariff description in connection with the assessed rates (Item 2460, N&W Tariff 2-I, VCC 1317). No certification as to actual value was required under this tariff and none was noted on the bills of lading, as would have been required in connection with the sought rates of 250 cents (260 cents) in SFTB Tariff 388-G, VCC 238. To have applied any rates other than those actually assessed would, under such circumstances, have constituted a violation of Code Section 56-102.

2. Modification of the bill of lading description for the purpose of securing a lower freight rate would contravene Sections 56-105 and 56-106, and could render liable not only the Railway Company but your clients as well.

3. The shipments as billed to Norfolk contained articles which were different for rate-making purposes than those described in connection with the lower rate to Providence, so there was no possibility of violating Code Section 56-97. As to whether a shipment billed in accordance with the description carrying the lower rate and containing the actual value certification might have constituted a technical departure from the long and short haul prohibition, your clients have no standing to raise that question because they did not use that description or make that certification. Moreover, the whole question has been rendered moot by subsequent publication of the lower rate to Norfolk in N&W Tariff 2-J, VCC 1360. The latter also, however, requires a proper description and certification on the billing, though it does remove any question as to application of

higher rates on the same commodities at Norfolk.

4. In light of the foregoing, it can only be concluded that the rates assessed on the shipments in question were the legally applicable rates in effect at the time of movement, and we have previously pointed out that the same rate would have been applicable to Providence if the same billing had been used for a shipment to that destination instead (the Item 400-D rate of $2.68 per net ton is published in Table 1, p. 76, Supplement 237, SFTB Tariff 388-G, VCC No. 238, as amended on p. 28 of Supplement 302 and pp. 12 and 13 of Supplement 310—see p. 2 of my letter dated November 19, 1964.) Hence no possibility for a long and short haul departure exists, for here the same rate would have been charged to the more distant as to the intermediate point.

Very truly yours,

CARL B. STERZING, JR.
Solicitor

kr/cbs
cc: State Corporation Commission
Commonwealth of Virginia
P. O. Box 1197
Richmond, Virginia

page 36]

MR. WESLEY O. MALBONE
Transportation Rate Analyst
State Corportaion Commission
P. O. Box 1197
Richmond, Virginia

MR. WILLIAM C. SEIBERT
Commerce Counsel
State Corporation Commission
P. O. Box 1197
Richmond, Virginia

page 36A] March 23, 1965 W

State Corporation Commission
Commonwealth of Virginia
P. O. Box 1197
Richmond, Virginia

RE: V.C.C. Case No. 17044
Lynchburg Traffic Bureau v.
Norfolk & Western Railway

Dear Sirs:

This proceeding is for declaratory judgment as to the legal and lawful rate on limestone with a value not exceeding $8.00 per ton moving from Buchanan, Virginia to Norfolk, Virginia via N & W Railway.

In considering this proceeding, the motion for declaratory judgment as amended should be considered along with the letters from the N & W Railway dated November 19, 1964, January 19, 1965, and February 19, 1965 and the letter of the Lynchburg Traffic Bureau dated January 14, 1965 and this letter.

There are two sets of rates on limestone from Buchanan, Virginia to Norfolk, Virginia applicable via the N & W Railway. One set, a point to point rate published in N & W local tariff V.C.C. 1317 of 268 cents or 278 cents with the increase added. This rate does not require the declaration of value.

The other set of rates is the rate from Buchanan to Providence, Virginia of 250 cents and 260 cents with the increase added applicable via N & W Railway and published in Spaninger's V.C.C. 238. This rate is applicable at Norfolk via N & W Railway on limestone with a value not exceeding $8.00 a ton under the provisions of Section 56.97, Code of Virginia 1950 as amended. The evidence submitted to the N & W Railway shows that the value of the considered limestone was less than $8.00 per ton and the said limestone qualified for the rate of 250 cents or 260 cents per ton with the increase added.

page 36B] The failure to declare the value of the limestone is not fatal as the law requires the N & W Railway to apply the published rate on the commodity actually shipped. In other words, the law imposes a rather severe penalty upon a shipper and carrier who commits false billing. The N & W Railway is here seeking to apply false billing on these shipments of limestone by not wanting to correct the bill of lading description to conform to the commodity actually shipped and this refusal results in an effort to apply an unlawful rate. The acceptance by the Commission, under Section 56.102 of the Code of the tariff publishing the rate of 250 cents and 260 cents per ton with the increase added from Buchanan to Providence, required the N & W Railway not to charge a different rate at any point than the rate the Commission permitted the N & W Railway to publish in Spaninger's

V.C.C. 238. The published rate to Providence was less than the rate is to Norfolk, so that rate cannot be exceeded at Norfolk under Section 56.97 of the Code.

The bill of lading must be corrected to show the value of the limestone as required by the tariff and that correction is not only property but it is required by law in order to avoid being guilty of false billing. To collect charges different from those published is a crime.

There are two rates involved in this proceeding. One rate is unlawful as it violates Section 56.97 Code of Virginia, 1950 as amended. The unlawful rate is the rate of 268 cents or 278 cents per ton with the increase added published in the local tariff of the N & W Railway, V.C.C. 1317. The lawful rate is 250 cents and 260 cents per ton with the increase added published by agent Spaninger in V.C.C. 238 to Norfolk, thence Norfolk-Southern to Providence, Virginia. No relief was obtained from the Commission to depart from the provisions of Section 56.97 of the Code by establishing a lower rate to Providence via N & W Railway than apply via N & W Railway to Norfolk. The lower published rate to Providence is the only lawful rate from Buchanan, Virginia to Norfolk, Virginia under Section 56.97 of the Code.

The statements of the N & W Railway are both confusing and misleading as I see the proposition. The issues are: (a) what was the value of the limestone here considered. The record shows the value to be less than $8.00 per ton; (b) what is the legal or lawful rate from Buchanan to Norfolk on limestone with a value not exceeding $8.00 per ton. The record shows the rate on limestone with a value of less than $8.00 per ton is 250 cents or 260 cents per ton with the increase added from Buchanan to Providence, Virginia applicable via N & W Railway through Norfolk to Provi-
page 36C] dence, which rate is duly and legally published rate to Norfolk; and (c) did the N & W Railway obtain authority to depart from the provisions of Section 56.97 of the Code to charge more at Norfolk, an intermediate point to Providence, than the N & W Railway charges on the same shipment or shipments moving from Buchanan to Providence, Virginia via Norfolk. The record shows that no relief was obtained from the Commission to depart from the provisions of Section 56.97, Code of Virginia 1950 as amended. Therefore, the lawful and legal rate is the rate of 250 cents or 260 cents per ton with the increase added and a departure from those rates is not permitted under Section 56.102.

This letter is the final letter to be written under my understanding of the proceeding. Therefore, the Commission is

respectfully requested to consider all the written statements of the parties hereto and to render its report thereon. No formal hearing is necessary and the hearing scheduled for March 30, 1965 should be cancelled.

It is respectfully submitted that the Commission find the legal and lawful rate on limestone here considered to be 250 cents or 260 cents per ton with the increase added and issue an order carrying into effect that finding.

Respectfully submitted,
LYNCHBURG TRAFFIC BUREAU
By: _____

W. G. Burnette, Attorney
Mr. Wesley O. Malbone
Transportation Rate Analyst
State Corporation Commission
P. O. Box 1197
Richmond, Virginia

WGB:se
cc: Mr. Carl B. Sterzing
Solicitor
Law Department
N & W Railway
Roanoke, Virginia

Mr. William C. Seibert
Commerce Counsel
State Corporation Commission
P. O. Box 1197
Richmond, Virginia

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AT RICHMOND, APRIL 1, 1965
CASE NO. 17044

Application of
LYNCHBURG TRAFFIC BUREAU (CORP.)
For a Declaratory Judgment

By its petition the Lynchburg Traffic Bureau, a corporation, filed a petition on August 26, 1964, for a declaratory judgment praying that the Commission determine the proper rate and charge on bulk ground limestone moving in carload

lots from Buchanan, Virginia, to Norfolk, Virginia, via the Norfolk and Western Railway. The matter was assigned for hearing before the Commission and after several postponements came on for hearing on March 31, 1965.

Counsel for the petitioner and counsel for the Norfolk and Western Railway Company have filed statements in the case and have agreed that the matter be decided on the written pleadings and statements without appearance of the counsel in the case.

The matter now coming before the Commission for consideration, the Commission has considered the pleadings and the statements and finds that the rate charged on the shipments in question was proper, and

IT IS ORDERED, That the proceeding be dismissed and the papers passed to the file of ended causes.

IT IS FURTHER ORDERED, That copies of this order be sent to Counsel for the applicant and Counsel for the Norfolk and Western Railway Company.

A True Copy
Teste: WILLIAM C. YOUNG
Clerk of State Corporation Commission

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* * * * *

CASE NO. 17044
July 7, 1965

Application of
LYNCHBURG TRAFFIC BUREAU (CORP.)
For a Declaratory Judgment
Opinion, DILLON, *Chairman*:

On August 26, 1964, W. G. Burnette, Counsel for the Lynchburg Traffic Bureau, filed a petition before the State Corporation Commission seeking a declaratory judgment to determine the proper rate on ground limestone, in carloads, from Buchanan, Virginia, to Norfolk, Virginia. The matter was originally set for hearing on October 28, 1964. After several postponements, it came on for hearing on March 31, 1965. Upon agreement of counsel for the petitioner and for the Norfolk and Western Railway Company, it was decided on the pleadings and written statements filed with the Commission without appearance of counsel in the case.

After a review of the pleadings and written statements, the Commission issued its order of April 1, 1965, finding that the rate charged on the shipments involved was proper and dismissed the proceedings.

The matter involves a determination of the proper rate on ground limestone in carloads moving from Buch-
page 39] anan, Virginia, to Norfolk, Virginia. The published rate by the Norfolk and Western Railway for this movement was $2.68 per net ton prior to September 1, 1962, and $2.78 per net ton on and after September 1, 1962. The petitioner contends that a rate of $2.50 per net ton should have been applied on the shipments prior to September 1, 1962, and $2.60 per net ton on and after that date, as these last two rates were published on ground limestone in carloads from Buchanan, Virginia, to Providence, Virginia, in another tariff to which tariff the Norfolk and Western Railway is a party.

The petitioner contends that the lower rate applied, because the distance from Buchanan to Norfolk is less than the distance from Buchanan to Providence and under § 56-97 of the Code of Virginia, a rate to an intermediate point may not exceed a rate to a further distance point without authority of the State Corporation Commission. § 56-97 of the Code reads as follows:

"§ 56-97. *Long and short haul.*—No transportation company doing business in this State shall take, charge or receive any greater compensation in the aggregate for the transportation of passengers of the same class or property along the same line in the same direction for a shorter than for a longer distance, the shorter being included within the longer distance. But this section shall not be construed as authorizing any such company to charge and receive as great
page 40] compensation for a shorter as for a longer distance; but, upon application to the State Corporation Commission any such company may, in special cases, after investigation by the Commission be authorized to charge less for longer than for shorter distances for the transportation of passengers or property, and the Commission may, from time to time, subject to the provisions of the Constitution, prescribe the extent to which such designated company may be relieved from the operation of this section."

The specific references to tariffs involved are not being enumerated because the rates themselves are not questioned, but only the application of the rates.

The rate from Buchanan to Norfolk is published by the Norfolk and Western Railway in its tariff. The rate from Buchanan to Providence, Virginia, to which Norfolk is an intermediate point, is shown in a tariff published by an agent publishing tariffs for a number of railroads. The rate from Norfolk to Buchanan has no restrictions or limitations. The rate from Norfolk to Providence applies only on ground or pulverized limestone loaded in closed cars with a minimum weight of 80,000 pounds having actual value not exceeding $8.00 per net ton at point of origin and so certified on the bill of lading.

There is no evidence that the shipments involved consisted of ground or pulverized limestone having actual
page 41] value not exceeding $8.00 per net ton at point of origin and so certified on bill of lading. In fact, the evidence shows that the bill of lading did not disclose that the shipment was ground or pulverized limestone having an actual value not exceeding $8.00 per net ton at point of origin. The contention of the petitioner is that the Norfolk and Western Railway should have applied the further distance rate to the shipments which were not valued at time of shipment because relief had not been obtained from the State Corporation Commission to apply a higher rate at an intermediate point, regardless of the fact that the essential determination of value did not appear on the bill of lading. The petitioner contends that the value was actually less than $8.00 per net ton.

The matter first was brought to the attention of the Commission in September, 1961 and the Tariff Analyst of the Commission took the position that in order to secure the lower rate claimed under § 56-97 of the Code, the commodity should meet the description of the lower rate and it would have to be valued at the time of movement and such value indicated on the bill of lading at that time. It was again handled in September, 1964 informally, and again the claim of the petitioner for the lower rate was denied. The question, therefore, is whether or not the shipper of the ground lime-
page 42] stone in carloads, which was not valued at time of movement, is entitled to the lower rate because it is contended that it was an error in failing to sign a bill of lading that the value actually did not exceed the value which determines the lower rate.

If the shipments had been valued at $8.00 per net ton at point of origin, and so certified on the bill of lading, and if the shipments were ground limestone in closed cars with the minimum weight of 80,000 pounds, then the lower rate in effect from Norfolk to Providence would have applied on ship-

ments from Buchanan to Norfolk, because relief from the provisions of § 56-97 had not been obtained from the State Corporation Commission.

The sole question is whether or not the Commission should, after shipments have been moved, determine that a rate based on the value of the goods shipped should be applied because the goods may have been of less value but not so stated on the bill of lading. To reach such a conclusion would disrupt and disturb rates which are based on value of the commodities shipped. There would be no need to certify on the bill of lading that the value of the shipment was such to secure the lower rate. To authorize this rate now would discriminate

page 43] against all shippers who may have shipped to many points the same commodity without certifying the value on the bill of lading and contrary to the requirements of § 56-97 of the Code, which does not permit any undue or unreasonable preference or advantage to shippers and unjust discrimination against any shippers. §§ 56-105 and § 56-102 of the Code of Virginia for any railroad company to order to secure less than regular rates. It is unlawful under § 56-102 of the Code of Virginia for any railroad company to receive a lesser charge than specified in the tariffs.

As stated, had the shipments in question moved under the requirements of the lesser rate, they would have been subject to the provisions of § 56-97 of the Code and the lesser rate applied. This is not the case. The shipments moved under an entirely different set of circumstances and without any determination of the value stated on the bill of lading at the time of movement.

The Commission cannot now require the defendant to apply a rate on a commodity which, at the time of movement, did not meet the requirement that the value and description which determine the rate appear on the bill of lading. Accordingly, the matter was dismissed.

CATTERALL and HOOKER, *Commissioners,* concur.

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STATE CORPORATION COMMISSION
COMMONWEALTH OF VIRGINIA

CERTIFICATE

It is certified to the Supreme Court of Appeals of Virginia that the foregoing transcript of the record in this proceeding,

there being no exhibits, contains all of the facts upon which the action appealed from was based, together with all of the evidence introduced before or considered by this Commission.

Witness the signature of Jesse W. Dillon, Chairman of the State Corporation Commission, under its seal and attested by its Clerk this 12th day of July, 1965, at Richmond, Virginia.

JESSE W. DILLON
Chairman
Attest: WILLIAM C. YOUNG
Clerk

CERTIFICATE

I, William C. Young, Clerk of the State Corporation Commission, certify that within sixty days after the final order in this case Lynchburg Traffic Bureau (Corp.), by its attorney, Wilbert G. Burnette, 1017 Church Street, Lynchburg, Virginia, filed with me a notice of appeal therein which had been delivered to Carl B. Sterzing, Jr., Norfolk and Western Railway Company, Roanoke, Virginia, opposing counsel, to Counsel for the State Corporation Commission and to the Attorney General of Virginia, pursuant to the provisions of Section 13 of Rule 5:1 of the Rules of Supreme Court of Appeals of Virginia.

Subscribed at Richmond, Virginia, July 12, 1965.

WILLIAM C. YOUNG
Clerk

* * * * *

A Copy—Teste:

H. G. TURNER, Clerk.

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