JOHN C. HADDOCK, *Complainant*,
v.
THE DELAWARE, LACKAWANNA & WESTERN R. CO., *Defendant*.

(No. 265.)

Complainant is a miner and shipper of anthracite coal from a region in Pennsylvania from which defendant is a common carrier, and also a miner, purchaser and shipper of coal on its own account.

Complainant alleges that defendant gives to itself as a shipper of coal an undue and unreasonable preference and advantage in rates, as compared with those charged complainant; and further alleges specifically that the rates charged him by defendant on coal east to Hoboken, and west and north to Buffalo and other points, are unreasonable and unjust.

Respondent in reply relies on certain contracts between itself and complainant entered into prior to the enactment of the Act to Regulate Commerce, as controlling the charges for the transportation of coal by the former for the latter, and as precluding the jurisdiction of the Commission in the premises. The substance of one of these contracts is that the price for transporting complainant's coal to Hoboken shall be fifty per cent of the price for which respondent sells its own coal in Hoboken; the substance of other contracts is that complainant may ship his coal to points north and west upon the same terms and conditions as respondent for the time being transports coal for other parties, the terms to other parties being fixed in the published tariffs of respondent.

No claim is made that the validity of these contracts has been impaired or affected by the passage of the Act to Regulate Commerce, although the Commission distinctly propounded the inquiry whether such claim was made.

The case being thus at issue the complainant applied for subpœnas *duces tecum*, to compel certain third parties, as well as officers of respondent, to produce certain papers and contracts, alleged to be material as evidence upon the issue; and respondent moved to dismiss for want of jurisdiction.

The Commission carefully abstains from expressing any opinion as to the effect of the Act to Regulate Commerce in impairing the validity of the contracts referred to, but, assuming them to be still in force, as both parties admit them to be,—*Held:*

1. **That complainant is precluded, by the terms of the contract for shipping coal to Hoboken, from going into evidence** to show that the rate on his coal to Hoboken ought to be different from that fixed by the contract; and witnesses and evidence asked for to that end are immaterial.
2. The contracts providing that complainant may ship coal to points north and west, on the same terms and rates that respondent for the time being gives other persons, do not preclude complainant from showing that such rates are unjust, oppressive or unreasonable. Complainant is therefore entitled to a hearing upon that question.
3. The Commission cannot, for the purpose of discovering and preventing unjust discrimination by respondent, which is both a shipper and a carrier of its own products over its own line, compel it to keep separate accounts showing what it charges itself for transportation or what the cost of transportation to it is; and even were such a separate account required, it would form no safe guide in determining whether respondent did or did not use its power as a carrier oppressively.
4. **The application for subpœnas** *duces tecum* **is denied.** As applicable to contracts and papers of third persons, not before the Commission, it is denied on the ground of the injustice that might be done such persons; and generally (for the present at least) it is denied on the ground that the material facts can be proven by the testimony of witnesses, without the aid of documentary evidence; although respondent will be expected to produce, for purposes of examination, any books and papers of its own, material to the controversy.
5. **The respondent's motion to dismiss the complaint** *in toto* **is denied, as good ground of complaint is set forth in respect to northern and western shipments.**

Complaint filed June 21, 1890.—Answer filed July 14, 1890.—Application of complainant for subpœnas duces tecum, *filed October 15, 1890.—Hearings had on application for subpœnas* duces tecum *and on defendant's motion to dismiss the proceeding, October 21 and November 1, 1890.—Briefs and Printed Arguments filed November 1-8, 1890.—Decision filed November 30, 1890.*

PRACTICE.—Cross-motions for subpœnas *duces tecum* and for dismissal of complaint. See complaint, *ante*, p. 123.

Messrs. **Simon Sterne, Charles F. Beach, Jr., H. M. Hoyt** and **G. L. Halsey** for complainant.

Messrs. **M. E. Olmsted** and **John G. Johnson** for defendant.

REPORT AND OPINION OF THE COMMISSION.

Cooley, *Chairman:*

The petition of the complainant in this case shows:

First. That petitioner is and has been as hereinafter mentioned an owner of anthracite coal mines in Plymouth and Luzerne in the County of Luzerne, Pennsylvania, and an extensive miner and shipper of anthracite coal therefrom. That petitioner's mines are known as the Dodson and Black Diamond Mines, and have together a daily capacity of from 2,200 to 2,300 tons of coal.

Second. That defendant is a common carrier engaged in the transportation of passengers and freight by railroad between points in the State of Pennsylvania and points in the States of New York and New Jersey, and as such is subject to the Act to Regulate Commerce.

Third. That defendant is a corporation organized and existing under the laws of Pennsylvania, and is largely engaged as common carrier in transporting coal as interstate commerce from the Wyoming and Lackawanna coal regions in Pennsylvania eastward to tidewater at Hoboken, New Jersey, and westward to Buffalo, New York, and to intermediate points between said east and west termini, and to points beyond. That petitioner's mines aforesaid are located immediately upon the Lackawanna & Bloomsburg Railroad, which is a branch of defendant's railroad; that all or nearly all of petitioner's coal has been shipped as interstate commerce over the defendant's lines of railroad, and that petitioner has no other so convenient means of transport or carriage for his coal to market as the lines of railroad of defendant.

Fourth. That one of the principal markets for anthracite coal is in the City of New York, and that coal for points eastward from New York is delivered to vessels at some point in or about New York Harbor and thence shipped to its destination.

That there is nevertheless a valuable and growing market for anthracite coal to the westward of the anthracite coal regions of Pennsylvania. That the greater part of said westward traffic in anthracite coal over defendant's line of railroad is by way of the City of Buffalo, whence shipments are made by lake or transfer to other and connecting railroads.

Fifth. That in addition to petitioner there are other miners and shippers of anthracite coal, including the defendant herein, engaged in shipping anthracite coal as interstate traffic from said Wyoming and Lackawanna coal regions to various points in the States of New York and New Jersey and elsewhere over the lines of defendant's railroad.

Sixth. That defendant is itself one of the largest owners of anthracite coal mines in the United States, its mines being located on the line of its own railway and in the immediate neighborhood of petitioner's mines, and it is the largest single shipper of coal over its own lines to Hoboken, and either the sole or almost the sole shipper over its lines westward.

Seventh. That petitioner's Dodson mines at Plymouth are 165 miles from tide-water at New York and 285 miles from Buffalo, measured on the line of defendant's railroad.

That petitioner's Black Diamond mines at Luzerne are 163 miles from tide-water at New York and 283 miles from Buffalo, measured on the line of defendant's railroad.

That defendant has a published rate or tariff of charges which it charges private miners and shippers of coal, but that it gives to itself as a miner and shipper of coal what is in effect an undue and unreasonable preference and advantage in the matter of rates, in that the said defendant in disposing of the product of its own mines, or in selling the coal which it buys from other collieries, does so at a price which will not cover the cost of mining coal at its own collieries, or the price it pays other operators, adding thereto a reasonable charge for selling expenses and the rate of transportation it charges to other shippers and to petitioner.

That said published rate or tariff at the present time is $1.80 per ton of 2,240 pounds on all anthracite coal shipped to Hoboken and delivered there free on board vessels, and $2.50 per ton on all anthracite coal shipped to Buffalo, whether consigned to Buffalo or delivered there free on board vessels.

That the rate charged by competing railroads for carriage of anthracite coal to Buffalo from the same region for the same length of haul, and under similar circumstances and conditions, is 25 and 50 cents a ton less than is charged by defendant.

Eighth. That the charges made by defendant for the handling and transportation of petitioner's coal to Hoboken, New Jersey, and delivery there on board vessels are unreasonable and unjust.

That the charges made by defendant for the handling and transportation of petitioner's coal to Buffalo, whether consigned to Buffalo or intermediate points, or for delivery there to the other railroads or on board vessels, are unreasonable and unjust.

Ninth. That bituminous coal is like traffic with anthracite coal within the meaning of the Act to Regulate Commerce; that it comes chiefly in competition with the smaller sizes of anthracite coal, such as are commonly known as pea, buckwheat and culm, the production of which is not a matter of choice with miners, but such sizes result from the most careful manipulation of coal in mining and preparing for domestic use. That in the transportation of these smaller sizes of anthracite coal defendant discriminates in its own favor, and against complainant and other shippers, and that its charges for transportation made to other shippers than itself are excessive and unreasonable.

That with the use of ordinary care and diligence to prevent waste and small sizes, there will result of culm and of pea and buckwheat each a large percentage of the total output. That the percentage of these smaller sizes now produced is greater than formerly, for the reason that the carrying rates of anthracite coal being unjustly higher than for the carrying of bituminous coal for a like and contemporaneous service, the large sizes of anthracite formerly used in manufacturing have been largely driven out of the market, and only the smaller sizes are shipped. In making such smaller sizes, the percentage of culm, pea and buckwheat is greatly increased.

That were the prices charged for the transportation of culm, pea and buckwheat no higher than the prices charged for the transportation of bituminous coal, these products of the coal mines of your petitioner could and would find their way to market, but the price of transportation now charged by defendant is the same as for the larger size of anthracite, and that such price is not justified by the value of the article or the cost of transportation; that it is higher than the rate charged by other transportation companies for carriage of the same products, and is unreasonable and unjust. That in consequence of such unreasonable and unjust rate of transportation charged by the defendant, your petitioner cannot realize more than, or as much as, the cost of the transportation thereof as now charged, and these products therefore become waste.

That the rates charged to your petitioner for the transportation of his anthracite pea, buckwheat and culm to Hoboken and Buffalo and intermediate points are excessive and unreasonable.

Tenth. That by reason of the unjust advantages secured to itself by such discriminations and by the unjust and excessive rates charged to private miners, the property and power of defendant have now become so preponderating that three fourths of all the coal tonnage carried by defendant eastward is its own coal, and all or nearly all of its westward coal tonnage is its own coal, either mined or purchased by it, and that the same is true of all the railroads carrying coal from the Wyoming and Lackawanna coal regions.

That the rates charged by defendant and other roads to private shippers are for the most part uniform, and that by conspiracy and combination as to rates, and by a limitation of the quantities shipped, defendant and other railroad companies are able to and do control the market price of coal, and in effect unlawfully restrict the uses to which anthracite coal shall be put, and in many instances compel the miners to sell their coal at the mines to the railroad companies, at a price dictated by the latter, to the great damage of petitioner and other miners of anthracite coal.

Eleventh. That the anthracite coal carriers, by charging a very high rate for carriage, make the market price so high that its sale is cut off except for uses for which bituminous coal is not fitted. By reason of the high tariff on anthracite and the low tariff on bituminous coal, anthracite is largely displaced and driven out of the market for use in manufacturing and making steam. That the uses of anthracite coal are confined, by reason thereof, mainly to domestic use.

That one result of this restriction of market is that, when, as is usually the case at some time during the year, the demand becomes sluggish and the market price is lowered, and the rates of transportation being nevertheless maintained at a point which makes it impossible to ship coal at a profit, the mines are then shut down and the miners thrown out of employment until the stock in market is reduced and prices are again advanced and mining resumed. That the result is injurious and hurtful alike to the private owners and to the miners.

Twelfth. That the rates charged as aforesaid to petitioner constitute an unlawful and inequitable discrimination against him and all others similarly situated as shippers, against his and their business as interstate traffic, and against the region of country in which he and they operate and conduct the business aforesaid.

Thirteenth. That it is contrary to public policy and to the Constitution of the State of Pennsylvania that the same person should be a common carrier and a miner and shipper of coal. That such double relation to the coal traffic inevitably results in unjust and burdensome discriminations by the carrier against private miners and shippers of coal and dealers therein. That defendant, in violation of said Constitution and since its adoption in 1874, has acquired and owns and operates coal mines in the State of Pennsylvania and sells their products in competition with petitioner. That such offense against public policy and the

Constitution of Pennsylvania is equally contrary to the provisions of the Interstate Commerce Act. That defendant also, contrary to law and public policy, purchases from other miners large quantities of coal at the mines, not for its own use, but to be afterwards dealt in and sold as merchandise in competition with petitioner's coal. That the profits of carrying the coal are constantly and inevitably increased to a point which barely permits the private coal miner to ship his coal without loss; that he is often in effect compelled to sell his product to the railroad company at its own price at the colliery, or antagonize its power and encounter its arbitrary and excessive transportation charges, its grudging, irregular and capricious supply of facilities and its competition as a dealer able to dominate the market.

That the holdings and ownership of coal lands and coal mines in the anthracite region by railroad companies, including defendant, have constantly increased, both in absolute quantity and in proportion to the whole, to such an extent that now nearly or quite three fourths of the anthracite coal mines and fields in the United States are owned directly or indirectly by the defendant and the other railroad companies running into that region. That such preponderance and power in the hands of a few corporations place private and noncorporate owners and miners at a great and dangerous disadvantage and leave them at the mercy of their powerful rivals, unless the Commission shall compel them to make such charges for transportation as are just and reasonable, and to abstain from all unjust discriminations.

Fourteenth. That petitioner is at a greater disadvantage in his dealings with the defendant than are other miners and shippers of coal over its lines, inasmuch as defendant is mortgagee of petitioner's mines; and further because of contracts regarding the transportation of his coal entered into by petitioner at or about the dates of the said mortgages to defendant, and which at the time he deemed it expedient and necessary for him to make, in view of the dominating power of the defendant over his business.

That defendant, under such transportation contracts, claims that petitioner is required to ship all his coal over defendant's railroad; that if such claim be well founded, it is of the greater importance to petitioner that the said defendant shall be strictly held to the requirement that its charges shall be reasonable and just, and that there shall be no unjust discrimination in any form against petitioner. That petitioner avers that there is nothing in said mortgages or contracts which gives to defendant the right to impose upon petitioner unjust or unreasonable charges for transportation, or to discriminate against him in any manner.

Petitioner prays that order be made commanding the defendant to cease and desist from said violations of the Act to Regulate Commerce, and for such other and further order as the Commission may deem necessary in the premises.

Respondent filed answer to this petition, admitting ownership of the mines known as the "Dodson" and "Black Diamond" mines by the complainant; admitting the ownership by itself of railroad lines as stated, and that it is engaged, as charged, in the transportation of anthracite coal purchased and mined by itself in pursuance of authority contained in its charter, and also of freight for other corporations and persons; that it transports coal for others, including complainant, as well as its own coal, from the Wyoming and Lackawanna coal regions in Pennsylvania eastward to tide-water at Hoboken, New Jersey, and westward to Buffalo, New York, and to intermediate points between such east and west termini and to points beyond. It admits the allegations in the 4th, 5th, 6th and 7th paragraphs of the petition, and denies those in the 8th, 11th and 12th paragraphs. It admits that it has a published rate or tariff of charges to shippers of coal of $1.80 per ton of 2,240 pounds of anthracite coal to Hoboken, delivered free on board vessels, and $2.50 per ton on like coal shipped to Buffalo, but denies that complainant was charged those rates for reasons hereinafter stated; admits that other carriers charge less on coal to Buffalo by 25 to 50 cents a ton, but says their rates are unreasonably low, and defendant is unwilling to accept the same; denies that bituminous coal is like traffic with anthracite within the meaning of the Act to Regulate Commerce; admits that certain small sizes of coal, known as culm, pea and buckwheat, result from the manipulation of anthracite coal in mining and preparing it for market, and that these small sizes are less valuable than the larger sizes; denies that any of its rates for transporting any sizes of anthracite coal are unreasonable or unjust; denies that bituminous and anthracite coal can properly be compared as to cost of transportation; admits that it carries more coal for itself than for others, but denies that the preponderance of its own traffic is by reason of unjust advantages secured to itself or of unjust or excessive rates charged to others; admits that the rates charged by it and other roads to private shippers are for the most part uniform; claims that having received its charter before the present Constitution of Pennsylvania was adopted it is not subject to the provisions therein which might otherwise affect its business.

The answer then proceeds to say that at the request of complainant, and for the purpose of enabling him to purchase said Dodson and Black Diamond mines, or an interest therein, or to discharge liens thereon, and to

enable him to operate said mines, the defendant has from time to time advanced him large sums of money and given him at his request contracts for the transportation of the products of his mines at favorable rates, and has at his request entered into agreements for the repayment of said advances in small installments, and proceeds to set forth contracts, agreements, bonds and mortgages, marked, respectively, Exhibits from 1 to 13, inclusive, to show the facts; all of which were entered into previous to the passage of the Act to Regulate Commerce. It avers that complainant, since the passage of that Act, has insisted upon the continuous validity of the agreements for transportation, and defendant has acquiesced; asserts that the terms upon which defendant must transport the coal of complainant are found in said contracts; that defendant has not deviated from the line of its obligations and duties under the same, but if it has, the remedy of complainant is in the courts; and it therefore prays that the complaint be dismissed.

To this answer were attached as exhibits copies of several agreements which are referred to therein. Exhibits Nos. 1 and 2 are an agreement for a loan and a bond for the money loaned, dated February 24, 1882. Exhibit No. 3 is the abstract of a mortgage deed for the loan. All these are between the defendant and John C. Haddock and Charles F. Steel, who are the borrowing parties. Exhibit No. 4 is a contract between the same parties for the transportation of the coal of Haddock & Steel from their colliery, located on the mortgaged lands and known as the "Black Diamond" colliery, to Hoboken in the State of New Jersey. The provisions of this contract important for the purposes of this proceeding are that Haddock and Steel shall deliver to the Railroad Company loaded in its cars at the said colliery for transportation to Hoboken all the coal which they have the right to mine and remove from said lands at the rate of 150,000 tons of 2,240 pounds of coal annually till the whole is removed and delivered, the same to be in as nearly equal daily deliveries as may be practicable, Sundays and the usual holidays excepted, the railway agreeing to furnish cars for the purpose. There are then the following agreements:

"And the said parties of the first part agree to pay the said party of the second part for the coal transported as aforesaid at the rate following, to wit: For the coal transported to Hoboken, as aforesaid, and then by the said party of the second part transferred from the cars into vessels provided by the said parties of the first part, the rate shall be fifty per cent of the average price per ton at which the said party of the second part shall have, during the month in which said coal is transported, sold and delivered their own coal, delivered on board of vessels at Hoboken aforesaid, in ascertaining which price no coal below the size known as 'pea' shall be taken into account, which payment shall be made on the 'eighth,' 'fifteenth,' 'twenty-second' and last day of every month at the office of the said party of the second part, in the City of New York, in funds par in said city. And for the purpose of ascertaining the amount to be paid on said days, it shall be assumed that the average price at which the said party of the second part sold and delivered their own coal on board of the vessel at Hoboken during the preceding month was the same as the price during the then present month, and payments shall be made upon that assumption, subject to adjustment when the price for the present month is ascertained.

"And the right of the said party of the second part, to be paid for said transportation and handling, shall be held to have accrued as soon as the coal arrives at Hoboken, or such point convenient thereto as may be provided for the standing of loaded cars, even though the coal, for any reason, had not been transferred into vessels.

"The said parties of the first part may send such portion of the said coal as they shall desire to such points and places north and west upon the same terms and conditions as the said party of the second part for the time then being transports coal for other parties over the railroad of the said party of the second part.

"And in case the said parties of the first part shall at any time fail to pay the said party of the second part as hereinbefore provided, for the transportation or handling of any part or portion of said coal, the said party of the second part shall, in addition to all other legal remedies for securing and collecting the same, have the right to take, and, in such way and manner as the said party of the second part may deem proper, sell and dispose of any and all of the coal of the said parties of the first part, which may be in the cars of the said party of the second part, at the aforesaid colliery or collieries, or at any other place, or in transit, or in stock, and to apply the proceeds in payment of the amount due the said party of the second part, for transportation of said coal, or due and unpaid for the transportation of any other coal, returning the excess, if any, to the said parties of the first part.

"And in case of the failure of the said parties of the first part to furnish for transportation the coal as aforesaid, or to pay for the transportation thereof, as the same may become due and payable, the said party of the second part may take possession of the mines and improvements of the said parties of the first part, in the way and manner as hereinafter provided.

"The number of tons transported shall be ascertained by the weights of said coal, as weighed in the cars of the said party of the second part, at the colliery aforesaid, by a person to be approved by the general coal agent of the said party of the second part, and paid by the said parties of the first part, upon a suitable scale to be provided by the said parties of the first part, and in weighing the same the usual allowance to compensate for snow and ice that may be on the coal or cars, as is customary to be made by the said party of the second part in weighing its coal, and for dust and

themselves definitely and conclusively their rights in respect to the transportation of complainant's coal, so that if the complainant was in any respect wronged in regard to such transportation the wrong was one for which he had ample redress in the courts.

The application of the complainant and this motion to dismiss were taken up and argued by counsel at the same time. Upon the argument neither party raised any question of the original validity of the contracts for the transportation of the coal mentioned. Nor was it claimed that any subsequent legislation, state or national, had in any manner had the effect to nullify or change the legal obligations of the parties under them. The question was put distinctly by the Commission to the counsel of both parties, whether it was claimed that the contracts in any respect had been changed or modified in their legal operation or put an end to by the Act to Regulate Commerce, and the reply was understood to be positive that such a claim would not be advanced. The parties differed in their construction of the contracts, and in their understanding of their rights respectively under them, the complainant insisting among other things that they were to be construed in harmony with the provisions of the Constitution of Pennsylvania herein after referred to, but the argument all proceeded upon the assumption that when a correct understanding of the contracts was reached the obligations of the parties must be determined thereby so far as they were found to govern the case. The fact that respondent is a large owner of coal lands upon which it is engaged extensively in the mining of coal and transporting the same to market over its own lines, and that it also purchases and deals in coal not mined by itself, and that this is done by authority of state law, was taken on the argument as undisputed, and is assumed to be so in what will now be said; and inasmuch as the parties raised no question of the validity of the contracts for transportation, or of their having been affected by subsequent legislation, the Commission will make none. It will, of course, be understood that it expressly avoids any intimation of opinion on that subject for the very sufficient reason that the case as presented does not, in the view of the Commission, call for any such opinion.

On the argument counsel for complainant presented a statement of facts expected to be proved on the hearing, prefacing it with his view of the effect of the contracts upon the matters in controversy, namely:

"The contracts pleaded by the defendant cover but two points on the subject of rates; (first) they provide that the whole product of complainant's mines shall be transported to market by defendant, and they provide a maximum rate to Hoboken; (second) they concede on behalf of the railroad, as to west-bound traffic, the common-law obligation of a carrier not to discriminate against the shipper, which is now, both in Pennsylvania and under the Act to Regulate Commerce, a statutory obligation."

The offer of proof covered all the facts set forth in the complaint, and went further into detail as to the policy and practices of the respondent whereby it succeeded in absorbing to itself and absolutely owning and controlling five sixths of the total amount of anthracite coal transported over its lines. The excessive rates of the respondent it was asserted precluded complainant from having more than a limited market for his small sizes of coal, though respondent transports and markets its own small sizes to complainant's loss and damage. It was proposed to be shown that the discriminations of defendant as a common carrier in favor of itself as a miner, and against all other shippers of coal, tends to create a monopoly in its favor in the anthracite coal business along its lines; that such discrimination is destructive of the rights of property of complainant; also that there is a growing market for the smaller sizes of anthracite coal from which complainant is wholly shut out by the practices and policy of the defendant; also that there is a growing market for what are known as the commercial sizes of anthracite coal throughout the west from which the practices and policy of respondent shut out the complainant; also that the aggregate prices at which respondent sells its coal at specified northern and western points is less than the cost to complainant of mining his coal plus the open rate which is charged him for transportation to those points, and hence a most destructive competition is established against the complainant. This brief statement will be sufficient for the purpose of an understanding of what follows.

Upon this statement counsel for the complainant present certain points which they have argued with great force and earnestness, and each of which demands some attention at our hands.

First, it is said that so far as the complaint charges discrimination in rates upon shipments of small sizes, that is, upon buckwheat and culm, the matter is entirely outside of the contracts put in by respondent, for the reason that those sizes as marketable sizes of coal are products which, commercially speaking, have originated since the contracts were entered into—the contracts themselves being silent upon the rates for those sizes—and for the further reason that for the existence of those sizes at present in any considerable quantity, the recent policy and practices of the respondent are chargeable.

The matters of fact here asserted the complainant proposes to establish, but for the pur-

wastage in transportation, provided for in existing transportation agreements made by the said party of the second part, shall be made.

"And the said parties of the first part further agree to furnish, and have placed at such points as the said party of the second part may direct at Hoboken, aforesaid, vessels for the reception of at least eighty per cent of the said coal, so that the said party of the second part can transfer the same directly from the cars into vessels within twenty-four hours from the time of the arrival of the cars containing said coal at Hoboken, or at such place convenient thereto as the said party of the second part may have or provide for the standing of loaded cars.

"And the said party of the second part further agrees to provide stocking grounds at or near Hoboken, aforesaid, for the storing of, and to unload and store so much of, said coal, not exceeding twenty per cent thereof, as is not transferred directly from cars into vessels, and when vessels to receive the coal thus stocked are furnished, shall load the same into vessels. Should the said parties of the first part fail to furnish vessels so as to enable the said party of the second part to transfer at least eighty per cent of said coal directly from the cars into vessels within twenty-four hours, as aforesaid, the said party of the second part may at their option discontinue furnishing cars for the reception of coal at the said colliery until vessels are furnished as aforesaid,—it being understood and agreed that the said party of the second part shall not be bound to furnish stocking room for more than six thousand tons at any one time.

"The average net price the said party of the second part shall sell their coal on board vessels at Hoboken shall be determined by a written statement made by the treasurer of the said party of the second part.

"And the said party of the second part further agrees that if at any time a general reduction in the rate hereinbefore provided for transportation of coal to Hoboken is made to other shippers of coal, the said parties of the first part shall be entitled to the benefit of the same, while such reduced rate is in force. And the said party of the second part shall have the right to the use of so much land at or convenient to the said colliery as they may require for a car repair shop, with the right to remove the same at their pleasure, prior to or upon the termination of this agreement.

"If by reason of strikes among the employés of either party (even though such strikes should be caused by a reduction of wages), or by reason of injury to the works, buildings or fixtures of either party, or delays, or obstructions to the mining or transportation of said coal, either party should be temporarily disabled from furnishing or transporting said coal as hereinbefore agreed, neither party shall, for such temporary non-fulfillment of this agreement, be liable to pay damages, if reasonable exertion is made to remove such disabilities.

"And it is further agreed, by and between the parties hereto, that the said parties of the first part shall have the right, upon giving three months' written notice to the general coal agent of the said party of the second part of their intention so to do, to increase the annual deliveries as aforesaid to three hundred thousand tons per year. And after having given such notice, they shall thereafter be bound to deliver for transportation as aforesaid, to the said party of the second part, such additional quantity annually during the term of this agreement."

This agreement bears the same date with the other papers above mentioned. Exhibit No. 5 is a similar agreement made between the Plymouth Coal Company, by John C. Haddock, Chairman, and the respondent Company, for the transportation of coal from the Dodson mine to Hoboken, aforesaid, and to Syracuse in the State of New York, on substantially the same terms, the rate for transportation from Syracuse to "be such as the said Railroad Company may from time to time fix, not exceeding the rates charged other parties similarly situated, whose coal is destined to the same market." This bears date February 25, 1879. Exhibit No. 6 has no importance in this controversy. Exhibit No. 7 is another agreement of complainant with respondent for the transportation of coal from the Dodson colliery. Exhibits Nos. 8 to 13 inclusive all have reference to the same general subject of loans from respondent to complainant, and of the transportation by respondent of complainant's coal from the collieries mentioned. The transportation agreement first mentioned sufficiently shows the terms of all the agreements for transportation put in evidence, and the subsequent agreements are therefore not further mentioned or given.

The case being thus at issue complainant on affidavits filed showing cause therefor made application for subpœnas *duces tecum* addressed to Samuel Sloan, President; E. R. Holden, Second Vice-President; William R. Storrs, General Coal Agent, Frederick H. Gibbens, Treasurer, of the respondent Company, and various other persons named, requiring the production of books, accounts, papers, etc., and, among other things, calling for contracts, agreements and documents in possession of the person named, or under his control, "relating in any wise to the matters hereinbefore specified, or to any other matter whatsoever in issue in this proceeding as the same is disclosed by the pleadings herein." What was required of each person is specifically mentioned, but it is not deemed necessary to state in detail here.

When this application for subpœnas *duces tecum* was called up, motion was at the same time made on behalf of the respondent to dismiss the whole proceeding upon the ground that it presented only judicial questions, and did not, therefore, come within the jurisdiction of this Commission. The basis of the motion in general terms may be said to be this, that the parties had by their contracts fixed for

poses of this case we are bound to say that we cannot regard them of legal importance. We have carefully examined the contracts attached to the answer, and are all of opinion that they cover, and were evidently intended to cover, all shipments of coal by the complainant. Whether he had in view at that time these small sizes of coal as a marketable commodity which he might ship to Hoboken or other distant points, or whether they were then produced as marketable commodities by anyone, we cannot think are questions that can affect the construction of the contracts themselves. Their terms are as broad as they could well be made. They are to cover "all the coal" which the contracting parties of the first part were to mine and remove from their lands, and are not limited to coal of any particular sizes or to coal which was then marketable. If complainant relies upon these contracts we see no escape from the conclusion that he has by their terms precluded himself from raising the point which is now presented. The contracts, though they clearly imply both the existence of coal of smaller sizes than pea coal and that they are marketable commodities at Hoboken, make no distinction between them and coal of the common sizes, except as it excludes them from being taken into consideration when the price of transportation to Hoboken is to be determined. But that price is a price for the transportation "of all the coal" which complainant is to ship to that point, and he undertakes to pay it. He cannot make an exception to the contract now because of subsequent facts rendering it important, nor because the facts are such that he would unquestionably have insisted upon it at the time had he foreseen what was to occur. Nor can the policy or the misconduct of the respondent change the construction of the contracts. They may perhaps be such as to give to the complainant a right of action at law, but such an action would be founded on something outside the contracts, and would not at all relieve the complainant from the obligations he had assumed in entering into them.

This being our view of the contracts, and it appearing to us very clear that the complainant has thereby bound himself as to what the prices for the transportation of the coal to Hoboken shall be, and how determined, and that the reasons that governed the parties in fixing the terms of their contracts are not open to inquiry in this proceeding, which has not for its object the avoidance of the contracts, it follows as a necessary consequence that the complainant is not entitled to go into evidence called for by his motion, by which he proposed to establish the fact that for the transportation of these smaller sizes of coal to Hoboken the price ought to be something different than that fixed by the terms of the contract. All the evidence called for for that purpose, and all the witnesses proposed to be examined to that end, are made by the contract itself entirely immaterial. Nor is the suggestion that the respondent may not have rendered true statements, or full statements, or indeed any statements at all, for the purposes of fixing the prices of transportation to Hoboken according to the terms of the contracts, of any moment here whatever. If the fact is so there may be a remedy in the courts, but there is none here. If the rate of transportation were not fixed by contract we might have jurisdiction to determine what it ought to be, but when the contracts before us made by the parties themselves have undertaken to determine how the rates shall be fixed that matter is taken entirely out of our hands. We say this assuming all the while that the contracts are valid, just as the parties assume them to be, and expressing no opinion for ourselves on that point.

Second, it is said that so far as the contracts pleaded by the defendant assume to fix the rates upon shipments of coal north and west, they were at the time the said contracts were made merely declarative of a general rule of law which was then part of the statutory law of the State of Pennsylvania, and has since become part of the statutory law of the United States, and the contracts can therefore in no wise affect the present controversy so far as those rates are concerned. In support of this position sections 3, 5 and 7 of article 18 of the Constitution of Pennsylvania of 1874, and also the Act of the Legislature of that State of June 4th, 1883, forbidding unjust discriminations, are quoted; also the case of the *Wabash, St. Louis & Pacific Railway Company* v. *Illinois*, 118 U. S. 557, 30 L. ed. 244, asserting the paramount authority of the United States government in matters of interstate commerce; also the cases of *The Skinninggrove Iron Company* v. *The Northeastern Railway Company*, 5 Ry. & Can. Traf. Cas. 244, decided by the English Commissioners; and of *The Poughkeepsie Iron Company* v. *The New York Central & Hudson River Railroad Company et al.*, 3 Inters. Com. Rep. 248, recently decided by this Commission, from which the conclusion is deduced that when the carrier is also a producer, and especially on its own behalf, it is illegal for it to discriminate in its own favor as against other shippers.

It is further said, *thirdly*, that so far as the contracts pleaded by the respondent can in any respect be regarded as affecting this controversy they are to be read herein only as a tariff or a maximum rate sheet—the wrongs complained of being wrongs sustained by the complainant within and independently of such maximum rates, and being entirely aside from the contracts themselves. The case of the *Aberdeen Commercial Co.* v. *The Great North of Scotland Railway Company*, 3 Ry. & Can. Traf. Cas. 205, is supposed to cover this contention.

It is further, *fourthly*, said that the defendant

can no more set up these contracts as a defense, when it is itself, as a common carrier, charged with wrong-doing, than the complainant could plead the contracts for the purpose of enforcing as against the respondent a discrimination in his favor, and to this *Hurlburt* v. *Lake Shore & Michigan Southern Railroad Company*, 2 Inters. Com. Rep. 81, and *Bullard* v. *Northern Pacific Railroad Company*, a recent Montana case, are cited.

It is further said, *fifthly*, that the respondent, as a common carrier of goods for hire, can no more discriminate against the complainant in favor of itself as a producer and shipper of coal, than in favor of any other shipper. Discrimination by a carrier in its own favor is the worst form of discrimination, and is clearly within the mischiefs intended to be prevented by the Interstate Commerce Law. The case of *Baxendale* v. *Great Western Railway Company*, 1 Nev. & McN. 202, is cited; also *Garton* v. *Bristol & Exeter Railway Company*, 1 Nev. & McN. 218; *Reynolds* v. *Western New York & Pennsylvania Railroad Company*, 1 Inters. Com. Rep. 685; *Riddle, Dean & Co.* v. *Pittsburg & Lake Erie Railroad Company*, 1 Inters. Com. Rep 688; *Riddle, Dean & Co.* v. *New York, Lake Erie & Western Railroad Company*, 1 Inters. Com. Rep. 787; *Heck & Petree* v. *East Tennessee, Virginia & Georgia Railroad Company*, 1 Inters. Com. Rep. 775, and others.

It is further contended, *sixthly*, that the defendant, being a common carrier for hire, and enjoying franchises from the public by reason thereof, cannot lawfully, under the peculiar circumstances and conditions under which the anthracite coal business is carried on, do business, in its capacity as a miner and shipper of coal, at a loss, or in such a way that an apparent loss in mining can result in an actual profit to the respondent only by the prostitution of its franchises as a common carrier. The case of *Rice* v. *Western New York & Pennsylvania Railroad Company*, 3 Inters. Com. Rep. 162, recently decided by the Commission, is cited as bearing upon this contention.

All these points, from the second to the sixth inclusive, it is seen elaborate and present in different forms the one main contention as regards shipments to the west and north under these contracts, that the respondent as a common carrier of interstate traffic, being also a producer and purchaser and shipper on its own account, is by law precluded from unjust discrimination in its own favor; that any such unjust discrimination subjects it to the discipline of the Act to Regulate Commerce, and brings it within the regulating power of this Commission. It is to this general contention that we shall now direct what we have to say.

We shall assume, in whatever will be said upon this case, that the underlying principle of complainant's contention is sound and just. The respondent is a common carrier, charged with duties to all who may present themselves for carriage or offer their property for that purpose, and one of the highest of these duties is that it shall not discriminate as between those thus offering. This we assume to be the obligation of the common law, and of the constitutional and statutory law of Pennsylvania as well. Whether by the contracts brought into the case there was discrimination as between the complainant and other persons, of which such other persons might find fault, is a question not before us and not in any way involved in this proceeding. We proceed, as already said, upon the assumption that the contracts were valid when made.

But we are confronted here with a situation that is peculiar, and elsewhere than in the coal regions of the country would be regarded as extraordinary. Respondent is not only a carrier for all other persons who may offer, and charged with duties of impartiality as such, but it is also itself a shipper over its own lines. It may be said to offer to itself property for transportation, and this not merely casually and for some temporary or special purpose, but regularly and as a very large part of its business. Indeed, it is probably true that respondent became a carrier because of having immense quantities of property to be carried, and that its line was constructed mainly for its own purposes as owner and shipper, the business of common carrier being added to that of producer and dealer in coal with a view to an additional profit or to lessen the cost of conducting the primary business. The situation is what creates the difficulty in dealing with the case. It presents the question of impartiality in such a manner that it may not be possible to deal with it as it would in general be dealt with if it were to arise as a question affecting rights as between third parties who were shippers only. It might be easy to apply the rule against unjust discrimination in that case, while it might be difficult to call it a rule against unjust discrimination *in this case*. The right of the complaining party might be precisely the same in each case, and yet the situation might make the method of enforcement quite different, and might even require that a different term should be applied to the wrong from which the complainant suffered. No matter what the situation is, the respondent must not use its power and the means at its disposal as a carrier to avoid performing the full measure of its duty. It must not use them oppressively. It must, as far as possible, deal as between all shippers, including itself as a shipper, in such a way that all shall have proportional benefit whenever demanding its service.

But how is it to be determined whether the respondent discriminates as between itself as

shipper and some third party shipping coal over its line? This is not the case of two artificial bodies, the one a coal company and the other a railroad company, both composed of the same persons and in absolutely the same interest, but it is the case of one artificial body carrying on two kinds of business. Complainant insists that in order to determine whether the respondent discriminates in its own favor in the matter of transportation it is necessary that an account should be kept as between itself as carrier and itself as a shipper of coal. This will enable other shippers and the public authorities to ascertain what the cost of transportation is, and thereby the proper charge for transportation against the respondent may be determined, which charge must not be exceeded for the carriage of coal for others. The respondent insists, on the other hand, that any such account would be mere book-keeping; that the results would be of no interest and no importance to the complainant; that it would not measure the charge to be made to him, for that is measured by the contract itself, which provides that he is to be charged what others are charged on the shipments to the north and west. But this the complainant insists would leave the respondent at liberty to discriminate at will as against him and others, and in fact to shut him entirely out of northern and western markets by the delivery at such markets of its own coal for sale at prices below its charge for carriage.

It was not understood to be claimed by complainant or admitted by respondent at the argument that any account was now made by respondent of the cost of transportation of its own coal. Our understanding is that no such account is kept. The keeping of it, so far as respondent is concerned, if no interest of third parties were involved, would have no importance, except as it might enable it to determine at what price it could afford to offer its coal for sale in markets at a distance from the colliery; and the management might well suppose that for this purpose it was needless to its interests. We can very well understand that they might not care to be at the trouble and expense of such an accounting.

Can we oblige them to keep such an accounting if they have none now? What authority can we exercise for that purpose? It is not suggested that it would fall within our province to do so, except as it may be necessary to prevent unjust discrimination. But would it have any value to that end? The cost of the transportation of any one article of commerce over the line of a public railway can never be arrived at with anything like accuracy. If the carrier did but one kind of business, it might at the end of the year very easily average the cost as between the shipments by quantity; but this respondent carries persons, and it carries an infinite variety of articles of property,—sometimes thousands of these articles by a single train, sometimes only one article by the same train, this last being generally true when coal is transported. It is not possible to apportion either the interest, if any, upon its indebtedness, or the cost of maintenance of road and equipment, or the general cost of management, as between various branches of its business as carrier, so as to reach the proper proportion to be charged to each, with even an approach to accuracy. Such carriers endeavor to apportion the cost of passenger and freight service, but it is necessarily done very largely by estimates, and in some particulars by arbitrary allotments of items of expense, which may make an apportionment sufficient for its own purposes and to give the public some general idea of what the cost is of the two branches of the service. But that is all. Should the attempt be made to make a similar apportionment as between the various kinds of freight carried, the elements of uncertainty that would necessarily be dealt with would increase and multiply at every step. If the carrier desired to make the cost of any particular traffic appear large or appear small, it would not be difficult to swell it or to lessen it by such figures as would appear perhaps equally plausible in each case, but which, nevertheless, would not be such in either case as ought to determine the rights of third persons.

We shall be compelled to say, therefore, that if this carrier were required to keep such an account as the complainant insists it ought to keep, it would necessarily be one that could not be relied upon as absolutely or even approximately accurate, because accuracy is not predicable of it. We must say further, that, if the account could be once made out under the direction of this Commission upon a basis that would be satisfactory to both parties to this controversy, it would still be necessary in order to keep it so that the Commission should assume and exercise continuous supervision thereafter of the making up of the subsequent accounts, determine the items that should go into them, see to the apportionment of cost as between all the various kinds of traffic,—in short, to assume general supervision of the respondent's books so far as they showed its financial transactions, since nothing short of this could render it impracticable for the respondent to so manage its accounts and apportionments as to accomplish deception and effect the very purpose which the making of the account is intended to preclude.

This Commission cannot order any such account to be kept. First, it has not the power. Second, if it had, it would be impracticable when its own duties in other directions are considered. Third, it would be useless if done. It could form no safe guide in deter-

mining whether the respondent did or did not use its power as a carrier oppressively.

But, on the other hand, when the respondent says that the contract fixes what should be paid by complainant for shipments to the north and west, we think the statement is inaccurate. Complainant is at liberty to ship his coal to such points and places north and west as he shall desire, upon the same terms and conditions as respondent for the time being transports coal for other parties. That is his right. Now, respondent says that it has certain definite rates fixed and published for the transportation of coal north and west, and, in substance, that it has a right to charge those rates for the transportation of complainant's coal. Complainant says that those rates are prohibitive: that it is impossible that he should do business under them; and the intimation is that they are made prohibitive purposely, that the respondent may transport its own coal to the markets north and west and sell it below the published rates of transportation; and these rates are further asserted to be unjust and unreasonable.

It is in our opinion no answer for the respondent to say that the rates as published are such as are charged to third persons. Any third person has a right to complain of these rates as unjust, oppressive and unreasonable, and if such a complaint were to be brought to the attention of this Commission, it must be inquired into, and if the rates were found to be as charged, it must order that they be reduced. The complainant would have the benefit of that reduction, just as much as the complaining party would; but complainant has the same right to arraign the rates as being unreasonable that any other person has, and he would have this right if there were no other shipper to the north and west over respondent's road. The complainant makes that complaint here, and he is entitled, as we think, to a hearing upon it.

The question, then, as between the complainant and the respondent in this case should rather be called a question of reasonable rates than a question of unjust discrimination, for the reason that, as already shown, there is, from the very nature of the case and because of the situation—the respondent being both carrier and shipper—a situation that we must now assume we can in no wise change or alter, an absolute impossibility of applying any definite rule whereby unjust discrimination can be determined. Complainant is entitled to reasonable rates on all shipments, where he has not agreed upon a rule for determining the amount, as he has on those to Hoboken; and what are reasonable rates is to be determined in view of all the circumstances of the case. The rule of evidence for this purpose ought to be an exceedingly liberal one, and all those circumstances which the carrier may properly take into account, in order to determine at what it could afford to carry this species of traffic, or what it would be politic to charge, ought to be considered.

It would be out of place for us, in these preliminary proceedings, to undertake to point out in detail what facts might be shown when that question is gone into. In fact, counsel need no intimation from us for that purpose. They understand very well what they are entitled to show upon a question of this kind. But it may not be improper to say now that, among the facts to be taken into account, may very well be the market value of the coal at the colliery, and the market value, or at least what the coal is sold for, at the points to which the complainant desires to ship—Syracuse, Buffalo, or any other. And what respondent sells for at those points is clearly admissible, we think, when the question of value is under consideration, and also as having some bearing upon the question of reasonable rates. The transportation cost will be assumed to be the same whether the coal carried be respondent's own coal or complainant's coal. It is probable, at least, that respondent does not sell its coal in distant markets without realizing some profit both upon the mining and the transportation. If, in its capacity as dealer, it establishes a price in some market, the question may at least be discussed whether it does not thereby furnish a basis by which a reasonable rate for other dealers may be arrived at; whether it does not fix a maximum of the charge it can make to others. However that may be, the extent of its own profits upon coal marketed, compared with the rate it charges other dealers for transportation, or whether it makes any profit at all, may well be inquired into by any tribunal authorized to pass upon the reasonableness of rates.

By its motion for subpœnas *duces tecum* complainant is understood to desire to obtain, as instruments of evidence, among other things, certain contracts for the sale of coal made between respondent and third parties. If such contracts were put in evidence they might show, perhaps, what respondent is receiving for its coal at some of the points of delivery. But that is a fact that it is entirely competent to prove by any person in respondent's service who knows the facts, and also by any third party, purchaser or otherwise, who may know the facts. But we do not think complainant is entitled to call for the contracts themselves for this purpose. Third persons have rights in such contracts. They would have a right to object to the contracts being produced if they themselves were present before us at the hearing, but they can certainly lose no rights by reason of being strangers to the proceedings and not present. There may, for aught we know, be

matters in their contracts with which neither this complainant nor any other individual of the public has any concern whatever or any business to inquire into. We do not know that such is the case, but we do know that for the purpose of ascertaining the selling price of coal it is not necessary that the production of the contracts be required, and also, as has been said, that parties interested in them, and who are not here to consent to their being produced, might rightfully object if they were here.

This seems to us to be all that it is necessary should be said at this time in regard to the motions that have been made. Without passing specifically upon the application for subpœnas *duces tecum*, we think it advisable that no such subpœnas should now be issued. Some that have been asked for could not be issued for the reason above assigned. So far, also, as they seek to obtain an accounting in respect to eastern shipments, the subpœnas should not be granted for the reason that no such accounting could be had here. It must be had, if at all, in the courts. In respect to the reasonableness of rates upon shipments to the north and west, we think it advisable that the testimony be taken in the ordinary way, and when the time comes for taking it the respondent will be expected to produce for the purposes of examination any books or papers of its own that may seem to be relevant and that may properly be called for, but it should not be required to make exhibit of any dealings with third persons, unless their bearing upon the controversy is manifest. If a long examination of books and papers is probable, it might be well, perhaps, if the parties should agree upon the taking of the testimony before a commissioner. It might prove a saving of time and labor to them as well as to the Commission.

The motion for the dismissal of the complaint must be denied, as the complainant, we think, sets forth sufficiently a good ground of complaint in respect to northern and western shipments. The decision as made will very much narrow the scope of the investigation, since it will necessarily exclude whatever belongs under the contracts to the judicial tribunals.

E. KURTZ JOHNSON and W. A. Wimsatt

v.

THE RICHMOND, FREDERICKSBURG & POTOMAC R. Co., The Washington Southern R. Co. and The Baltimore & Potomac R. Co.

(No. 274.)

THE PETITION of the above-named complainants, filed Nov. 5, 1890, shows that the said respondents make an unjust and unreasonable charge against them for the transportation of railroad ties between Guiney's Station in the State of Virginia, and Washington, in the District of Columbia, of nine cents per hundred pounds, the tariff on analogous articles being but six cents per hundred pounds.

S. F. WOODSON and Aaron Haas, a Committee from ATLANTA CHAMBER OF COMMERCE,

v.

THE CINCINNATI, NEW ORLEANS & TEXAS PACIFIC R. Co., the Georgia Pacific R. Co., the Western & Atlantic R. Co., the Alabama Great Southern R. Co. and the New Orleans & Northwestern R. Co.

(No. 275.)

THE PETITION of above-named complainants, filed Nov. 11, 1890, shows that respondent railroads give undue advantage and preference to the merchants of Chattanooga, Tenn., Montgomery and Birmingham, Ala., as compared with Atlanta, Ga., all above cities competing for business in the same territory, in violation of sections 2 and 3 of the Act to Regulate Commerce.

The rates charged by said railroads on sugar from New Orleans to points named are as follows:

To Atlanta, distance 495 miles, rate 39c., being 1.575c. per ton per mile.

To Chattanooga, distance 491 miles, rate 19c., being .774c. per ton per mile.

The rates charged by said railroads on grain from Ohio River points, Cincinnati as basis, to points named are as follows:

To Birmingham, distance 478 miles, rate 20c., being .837c. per ton per mile.

To Montgomery, distance 574 miles, rate 20c., being .696c. per ton per mile.

To Atlanta, distance 473 miles, rate 27c., being 1.141c. per ton per mile.

Atlanta is paying the highest rate, as well as the highest rate per ton per mile—in some instances more than twice the milage rate charged other competing cities.

E. C. FRANKE & Co.

v.

THE LOUISVILLE & NASHVILLE R. Co. and the East Tennessee, Virginia & Georgia R. Co.

(No. 276.)

ABSTRACT of complaint, filed Nov. 24, 1890.

Complainants are commission merchants, under the firm name and style of E. C. Franke & Company, and doing business at Louisville in the State of Kentucky. Defendants are common carriers, etc. Business of complainants is the buying, selling and shipping, among other things, of leaf tobacco at Louisville, said shipments being made in part to the Cities of Greeneville and Bristol, Tenn. Defendants have established and maintained a rate of sixty-seven and one half cents per hundred pounds upon leaf tobacco in hogsheads from Louisville aforesaid, to Greeneville in the State of Ten-