HULBERT H. WARNER *v.* THE NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY, THE WEST SHORE RAILROAD COMPANY, THE NEW YORK, LAKE ERIE & WESTERN RAILROAD COMPANY, THE DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY, THE NEW YORK, ONTARIO & WESTERN RAILWAY COMPANY, THE PENNSYLVANIA RAILROAD COMPANY, THE BALTIMORE & OHIO RAILROAD COMPANY, THE PHILADELPHIA & READING RAILROAD COMPANY, THE LEHIGH VALLEY RAILROAD COMPANY, AND THE GRAND TRUNK RAILWAY COMPANY OF CANADA, AS MEMBERS OF THE "TRUNK LINE ASSOCIATION."

Complaint filed September 14, 1889. Answers filed October 4 to December 14, 1889. Heard and submitted February 19, 1890. Decided May 21, 1890.

In arranging the classification of articles of commerce, their market value and the shippers' representations to the public as to their character may properly be taken into account in ascertaining the analogy they bear to other articles, and determining the class to which they justly belong. This is especially applicable to articles in which there is no free competition among producers and shippers. And carriers are not required to estimate the intrinsic value of freight as distinguished from its commercial value for purposes of classification and rates.

The volume of traffic supplied by an article for transportation is also an element that may be considered in its classification, as a basis for rates that are reasonable both for carriers and shippers.

Patent medicines manufactured and shipped by the complainant are rated in the Official Classification as first class for less than car-loads and third class for car-loads. Ale, beer, and mineral water are rated as third class in less than car-loads and fifth class in car-loads. The market value of the medicines is three times or more higher than that of the other articles named and the quantity transported much

less. Upon complaint made that the patent medicines should be classified the same as ale, beer and mineral water:

Held, That in view of the much higher market value of the medicines and the smaller volume of traffic they supply a higher classification than for the other articles named, in which there is much greater competition among shippers, it is not unreasonable, and the classification at present in force is not shown to be unjust.

J. L. Lucky, for complainant.
Frank Loomis, for N. Y. C. & H. R. R. R. Co.
Ashbel Green, for West Shore R. R. Co.
J. A. Buchanan, for N. Y., L. E. & W. R. R. Co.
John B. Kerr, for N. Y., O. & W. Ry. Co.
James A. Logan, for Penna. R. R. Co.
J. K. Cowen, for B. & O. R. R. Co.
G. R. Kaercher, for P. & R. R. R. Co.
F. H. Janvier, for L. V. R. R. Co.
E. W. Meddaugh and *William A Day*, for Grd. Tr. Ry. Co. of Canada.

REPORT AND OPINION OF THE COMMISSION.

SCHOONMAKER, *Commissioner:*

The petition shows that the complainant is a manufacturer of proprietary or patent medicines at Rochester, N. Y., and that the respondent companies are members of the Trunk Line Association and transport freight under what is known as the Official Classification.

The complaint made is, in substance, that Official Classification No. 6, dated August 15, 1889, classifies "Medicines Patent, N. O. S. (not otherwise specified), in glass, packed in wood, O. R. (owner's risk of) fermenting, freezing, or breakage" first class in less than car-loads and second class in car-loads, and that transportation charges based on the classification discriminate against the petitioner's business in that they are higher than rates formerly charged on the same articles, and higher than the rates charged on ale, beer, and mineral waters, which are alleged to be similar to patent medicines in bulk, value and otherwise, and which are shipped in like quantities under the Official Classification as

third class in less than car-loads and fifth class in car-loads. That prior to August 15, 1889, medicines patent, in glass, &c., were given third-class rates by the Official Classification when shipped in car-loads, and prior to April 4, 1887, the railroads operating under the Middle and Western States Classification transported patent medicines at third-class rates in less than car-loads and at fifth-class rates in car-loads.

The answers of the different respondents are substantially the same. In substance they deny that the classification put into effect August 15, 1889, produced an unjust discrimination against the petitioner, or that it provides for higher rates than those charged on similar articles shipped in similar quantities. They further set forth that the railroad companies composing the Trunk Line Association, subsequent to the date of Official Classification No. 6, issued a supplement wherein patent medicines in car-loads are reduced from second class to third class, and that this change provides a rate which can not justly be complained of by petitioner or others in the same business. They admit that the traffic in question was classified prior to August 15, 1889, as alleged in the complaint, but say that as to the rates charged prior to April 4, 1887, by railroads in the Middle and Western States Association, they are not called upon to answer thereto, such rates having been various, and made according to the views then held by the several companies and associations making the same.

The material facts in the case are as follows:

The complainant has for several years been engaged in the manufacture and sale of patent medicines at the city of Rochester, N. Y. These medicines consist of different classes, and of several varieties under each class. The classes are designated "Warner's Safe Remedies," varying in price from $3.75 to $10 per case of a dozen bottles, depending on size of a bottle and character of remedy; "Warner's Log Cabin Remedies," varying in price from $3.75 to $7 per case of a dozen bottles; and "Benton's Hair Grower," vary-

ing in price from $7.50 to $20, according to the strength of the remedy.

The shipments by the complainant are made in quantities of usually not less than one ton, and from that to car-loads, to all parts of the United States and over all roads, including those named in the petition.

On the respondents' lines the Official Classification is used. In the first four editions of the Official Classification, issued respectively April 1, 1887, July 15, 1887, February 1, 1888, and August 15, 1888, these medicines were embraced in the first class, and no classification was given for car-loads. By supplement issued October 16, 1888, to the fourth edition, less than car-loads were put in first class and car-loads in third class. In the fifth edition, issued February 18, 1889, patent medicines N. O. S. were placed in first class, with no classification for car-loads; and patent medicines N. O. S., in glass, packed in wood, C. R. (carrier's risk), were double first class, and no lower class for car-loads; and patent medicines N. O. S., in glass, packed in wood, O. R. fermenting, freezing or breakage, valuation on basis of 25 cents per quart and to be so stated on shipping receipts by shippers, third class, no lower classification for car-loads. In the sixth edition, issued August 15, 1889, medicines N. O. S. were placed in first class; medicines N. O. S., in glass, packed, C. R., double first class; medicines, patent, N. O. S., in glass, packed in wood O. R. fermenting, freezing or breakage, less than car-loads first class, car-loads second class. By supplement to the sixth edition, issued October 10, 1889, the last-named specification in less than car-loads was placed in first class, and in car-loads in third class. No valuation clause is contained in the Official Classification No. 6 or the supplement thereto. In the seventh edition, issued April 15, 1890, since the hearing, the change made by the supplement is incorporated in the classification. In other respects there is no change.

The classification of the articles with which the patent medicines in question are compared by the complainant appears as follows in the different editions of the Official Classification: In the first edition ale, beer, porter, or mineral

waters, bottles, well packed in barrels or boxes, O. R. less than car-loads third class, car-loads fifth class. In the second edition ale, beer, or porter, in open carriers, C. R., first class; ale, beer, or porter, in open carriers, O. R., less than car-loads third class; ale, beer, porter, or mineral waters, bottles, well packed in barrels or boxes, O. R., less than car-loads third class, car-loads fifth class. In the third, fourth, fifth and sixth editions ale, beer or porter and mineral waters, bottles, well packed in barrels or boxes, O. R., less than car-loads third class, car-loads fifth class.

The patent medicines in question are in bottles, packed in boxes which average a cubic foot in size and weigh thirty-five pounds. Freight agents regard them as desirable freight to handle. Packages of medicine are somewhat similar to packages of ale, beer and mineral water.

No change has been made in the less than car-load rates since the Act to regulate commerce went into effect, but during that time car-loads were advanced from third to second class, at an increase in rates of from twenty to thirty per cent.

The first class rate from petitioner's place of business to Chicago is 53 cents per hundred pounds, the second class rate is 46 cents, and the third class rate is 35 cents. The advance made August 15, 1889, increased the rate from 35 to 46 cents per hundred pounds. The St. Louis rates advanced from 41 cents to 53 cents per hundred pounds. The first class rate to East St. Louis is 61 cents; and third class rate 41 cents. The rate on ale, beer, porter and mineral waters, in less than car-loads, to Chicago is 35 cents per hundred pounds, and to St. Louis 41 cents; in car-loads, to Chicago 21 cents, and to East St. Louis 25 cents.

The liquid medicines are mostly extracts of herbs, diluted with water, and containing from ten to twenty-five per cent. of alcohol. The shipments made by the complainants have averaged about the same each year. About sixty car-loads were shipped in car-load lots in 1889. The quantity of ale, beer and mineral water shipped in car-loads is much greater than shipments of complainant's medicines. In the instances of shipments of ale, beer and mineral water, the bottles and

cases in which they are shipped come back to the shippers, and the railroads get some return freight thereon, but at a low rate. In the case of complainant's shipments the bottles never come back.

The complainant sells more Safe Cure than any other of his remedies—nearly as much as all the others combined. The average value of the goods per case, with the discounts off, is $9. A case contains a dozen bottles. From six to seven hundred boxes make a car-load, and at the third class rate the minimum car-load is twenty thousand pounds. A car-load, of six hundred boxes at $9 per box, amounts to $5,400. According to a price-list of an importer of ales at New York a car-load of ale or beer, at $3 per case, one dozen bottles to the case and six hundred cases to the car-load, would amount to $1,800. The retail price of the Safe Cure is $1.25 per bottle. The retail price of mineral waters is from 25 to 30 cents per bottle for quart bottles, and in some instances 50 cents per bottle. The complainant's bottles contain a little over a pint.

A case for beer or ale is somewhat larger than a case for the complainant's remedies. The weight of a case of Safe Cure in bottles is thirty-six pounds including the box, and the weight of a case of beer is about forty-five pounds. On the basis of value a car-load of beer, compared with a car-load of Safe Cure, pays about four times as much freight.

The usual shipments of mineral waters are in casks. Most of the shipments of ale and beer are in barrels. Shipments of ale and beer are made at owner's risk of everything except actual loss, as in case of collisions, and the same rule applies to complainant's product. Losses scarcely ever occur in the case of complainant's shipments. The total amount of complainant's annual shipments is something over 200,000 boxes. The market value, in round numbers, less discounts to the trade, is $1,500,000. The market value of the remedies is made by advertising. The actual value is less than twenty-five per cent. of the market value.

Some ales and beers are put on the market as tonics.

The complaint in this case was filed when car-loads were embraced in the second class. There was apparently just

ground of complaint for that classification. The change in the classification made soon after the complaint was filed, reducing car-loads to third class, was a proper correction, and removed to a great extent the substantial ground of complaint. It was, in fact, conceded by complainant on the hearing, that there was at least doubt whether the complaint would have been filed if this reduced classification had previously existed.

One ground of complaint on the part of the complainant is the frequent changes made in the classification of complainant's medicines. There is justice in this complaint. These changes seem to have been made with annoying frequency and to have been mostly inconsistent and arbitrary. No explanation was offered by the carriers for these repeated changes.

The carriers concede by their own action that the complainant is fairly entitled to a car-load classification, and, moved possibly by the complaint filed, car-loads were eventually placed in the third class. No reason whatever has been assigned why this was not done from the first. From the carriers' point of view it is now admitted to be just, and if just now it was just at the time of the first official classification.

The complainant, however, is not fully satisfied with the present classification. He insists that the classification of his remedies shall be the same as that of ale, beer, and mineral waters; and this contention is based on two general grounds. One is that the mode of packing, the convenience in handling, and the risks in transportation are substantially the same. The other is that the intrinsic value of the remedies is no greater than the intrinsic value of the other articles with which he claims they should be classified. It is said in behalf of the complainant that, while the market value of the remedies is about four times greater than that of mineral water and the other articles, about three-fourths of the market value is the result of skill in advertising the remedies. Whatever the fact may be in the case of these medicines, it can hardly be expected of carriers that they should disregard the market value of the articles they carry, and what their manufacturers give the public to understand concern-

ing them, and enter upon the difficult and expensive task of an analysis of freight to ascertain its intrinsic value as distinguished from its market value.

If a rule of this kind were possible and should be generally applied, it would result in most injurious consequences to some of the most important articles of commerce of large actual value, but, on account of their abundance, of low market value, such as grain and other food products, coal and lumber.

The value of an article to a manufacturer is the price it commands, and it seems only reasonable that carriers should take into account the market value, a thing generally known and easily ascertained, as one of the considerations in arranging their classifications and fixing the rates that a commodity should bear. It is not seen how the relations that any specific commodity should bear to other commodities for classification purposes can be arrived at in any other practicable way. The wide difference in the market value of ale, beer, and mineral water on the one hand, and the remedies of the complainant on the other hand, is, so far as can be seen under the evidence in this case, a reasonable ground for a difference in the classification of these respective articles.

The difference in market value is doubtless due largely to the free and active competition among producers and shippers of the other articles. In the case of patent medicines the right to manufacture and sell is exclusive, and the commodity is not affected by competition to force down its market price. The principle of the value of the service to the shipper in such cases allows a higher rating than where unrestricted production and strong competition in substantially like traffic influence commercial values and require rates under which business can be done.

Another ground for a difference exists in the very much greater quantities of ale, beer and mineral waters transported than of the medicines of the complainant and similar articles. Both the market value of the commodities and the volume of business they furnish to carriers are proper elements to be considered in the classification. The volume of traffic implies only the extent to which a particular article

has become a subject of transportation, and does not imply that a large shipper of the same or like traffic can have any advantage over a shipper of smaller quantities. Like traffic of large shippers and of small shippers must have the same classification for car-loads and the same for less than car-loads.

The point made by the complainant that a lower classification and rate were given to the medicines in question in some of the numerous classifications in existence prior to the general Official Classification, is in no way controlling. The class rates in the Middle and Western States Classification, prior to April 4, 1887, were in fact higher than they are under the Official Classification, and there was a general lack both of consistency and uniformity in the classifications and rates that prevailed prior to the 4th of April, 1887. This point and most of the others that are raised in this case received consideration by the Commission in the case of Myers *v.* Pennsylvania Co. *et al.*, 2 I. C. C. Rep. 573, and the discussion and conclusions in that case substantially cover the questions in this case.

As the classification is now arranged and has existed since October 10, 1889, the complainant's remedies are in the first class in less than car-loads and in the third class for car-loads. It is clear that they should be classed no higher than these classifications. No question is raised as to the relative classification of car-loads and less than car-loads. It is also plain that there is no just reason why carriers should be compelled to put them upon an equality with ale, beer, and mineral waters, and it is not apparent that justice requires a compulsory change to a lower classification either for car-loads or less than car-loads. If transportation reasons, or other reasons, hereafter arise for more favorable classifications, they can be presented and acted upon, or perhaps may be found satisfactory to carriers themselves.

On the facts now before the Commission the complaint as against car-loads in the third class and less than car-loads in the first class is not sustained, but it is ruled that the classification of car-loads in the second class, at the time the complaint was filed, was unjust.