No. 1126.

WYMAN, PARTRIDGE & COMPANY; NORTH STAR SHOE COMPANY; MCDONALD BROTHERS COMPANY; POWERS MERCANTILE COMPANY; L. S. DONALDSON COMPANY; MINNEAPOLIS DRY GOODS COMPANY; JOHN W. THOMAS COMPANY; PLANT RUBBER COMPANY; FRANK S. GOLD COMPANY; THE GRIMSRUD SHOE COMPANY; ELIEL-JERMAN DRUG COMPANY; GEORGE R. NEWELL & COMPANY; HURTY-SIMMONS HARDWARE COMPANY; LINDSAY BROTHERS; W. B. & W. G. JORDAN; GREEN DELAITTRE COMPANY; THE PALACE CLOTHING HOUSE; THE JOHN LESLIE PAPER COMPANY; BRADSHAW BROTHERS; MINNEAPOLIS IRON STORE COMPANY; WINSTON-HARPER-FISHER COMPANY; SLOCUM BERGREN COMPANY; W. S. NOTT COMPANY; W. K. MORISON & COMPANY; BOUTELL BROTHERS; NEW ENGLAND FURNITURE AND CARPET COMPANY; TWIN CITY SHOE COMPANY; KENNEDY, ANDREWS DRUG COMPANY; THE WILLIAMS HARDWARE COMPANY; KELLOGG-MACKAY-CAMERON COMPANY; WARNER HARDWARE COMPANY; GALE-MONROE COMPANY; MCCLELLAN PAPER COMPANY; DAYTON DRY GOODS COMPANY, AND CHICAGO ASSOCIATION OF COMMERCE, INTERVENER,

v.

BOSTON & MAINE RAILROAD; NEW YORK, NEW HAVEN & HARTFORD RAILROAD COMPANY; NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY; PENNSYLVANIA RAILROAD COMPANY; GRAND TRUNK RAILWAY OF CANADA; ERIE RAILROAD COMPANY; DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY; LEHIGH VALLEY RAILROAD COMPANY; ERIE & WESTERN TRANSPORTATION COMPANY; CANADA ATLANTIC TRANSIT COMPANY; MUTUAL TRANSIT COMPANY; PORT HURON & DULUTH LINE OF STEAMERS; WESTERN TRANSIT COMPANY; GREAT NORTHERN RAILWAY COMPANY; NORTHERN PACIFIC RAILWAY COMPANY; WISCONSIN CENTRAL RAILWAY COMPANY; CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILWAY COMPANY; MINNEAPOLIS, ST.

PAUL & SAULT STE. MARIE RAILWAY COMPANY, AND CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY.

Submitted March 7. 1908. Decided March 16, 1908.

1. Unless a railway forming a part of a lake-and-rail route sees fit to hold itself responsible for losses arising from perils of the sea, it should tender to the public a transportation contract which leaves shippers free to arrange for their own marine insurance.
2. The defendants advanced their through rates from eastern points to Chicago and Minneapolis 3 cents per 100 pounds on first class and 1½ cents on Rule 25, etc., and these new rates included the cost of marine insurance. The bill of lading issued did not show definitely the rights of the shippers thereunder.

Held, That the advanced rates are unreasonable and should be reduced unless the carriers issue bills of lading making them responsible for loss by perils of the sea.

Fred B. Dodge for complainants.

H. C. Barlow for Chicago Association of Commerce, Intervener.

Clyde Brown, G. S. Patterson, W. S. Jenney, and *G. F. Brownell* for New York Central & Hudson River Railroad Company, Pennsylvania Railroad Company, Erie Railroad Company; Delaware, Lackawanna & Western Railroad Company; Erie & Western Transportation Company, Mutual Transit Company, and Western Transit Company.

REPORT OF THE COMMISSION.

PROUTY, *Commissioner:*

Three routes exist for the transportation of merchandise from the east to the west—the all-rail, the ocean-and-rail, and the rail-and-lake. By the first, as its name implies, the transportation is entirely by rail; by the second freight is carried from some Atlantic seaport like New York or Boston to some more southerly port like Norfolk, from which it is taken by rail to destination; by the third traffic moves from the eastern point to some port upon the Great Lakes like Buffalo, is thence transported by water to a western lake port like Chicago or Duluth, and from thence again by rail to destination if that be an interior point. There is a fourth route termed the "canal-and-lake" route, being through the Erie Canal to Buffalo and thence via the Great Lakes and rail, but this route may be omitted from the discussion.

When the second and third of the above routes are used a certain amount of water transportation is involved. In accordance with the terms of the Harter Act, so called, water-carriers may exempt them-

selves from responsibility on account of perils of the sea, except in so far as the loss results from their own negligence, and to secure protection against these perils of the sea for which the carrier is not responsible marine insurance is usually taken out. The cost of this insurance has been and is included in the rate which applies via the ocean-and-rail route, but the almost universal rule is for the shipper to himself provide this insurance, and such had always been the practice upon the rail-and-lake route up to the season of 1907.

At the opening of navigation in 1907 rail-and-lake rates were advanced and the cost of insurance was included in the rate. These advances were: To Minneapolis 3 cents on first and second class, 1½ cents on Rule 25, 1 cent on the third, fourth, and fifth classes and Rule 26, and one-half cent on the sixth class. Rates to Chicago were at first advanced but 2 cents upon the first two classes, but in July another cent was added, thus making the advance to Chicago the same as to Minneapolis except on Rule 25, which was advanced 2 cents to Chicago. During the season a reduction of 1 cent was made in the sixth class, thus producing a final reduction of one-half cent in that class. The lawfulness of these advances and of the advanced rates as they exist was attacked by the complaint as originally filed.

The original complainants were merchants located and doing business in the city of Minneapolis who had occasion to ship from various points in the east via this route. After the filing of the complaint the Merchants' Association of Chicago, representing certain shippers in that city, filed an intervening petition which put in issue not only the reasonableness of the advanced rates, but also claimed that these advances by being applied to Chicago and Minneapolis while no corresponding advances were made at St. Louis, worked a discrimination against the former cities. This claim will be first considered.

St. Louis, Chicago, and Minneapolis all compete in jobbing goods throughout Missouri River territory and territory west extending as far as the Pacific coast. In order that these localities may be upon a substantial parity in this business, it is necessary that the rates upon which they bring their supplies from eastern points of production should bear a certain relation to one another, and such relation has been for a long time in the past established and maintained. Of the three routes above mentioned the standard is the all-rail, the rates of the other two being somewhat less and made with reference to the all-rail rates. It appears that the ocean-and-rail rates have differed by a fixed arbitrary or differential from the all-rail rates, but this does not seem to have been true of the rail-and-lake rates. Taking New York as the point of origin in the East and the first-class rate as illustrative of all the classes, the rail rate to Chicago has been 75 cents, to St. Louis 87 cents, while the ocean-and-rail is, in each case, 10 cents lower than the all-rail, being 65 cents to Chicago

and 77 cents to St. Louis. The rail-and-lake rate since 1901 has been 59 cents to Chicago and 77 cents to St. Louis; that is, while the rail-and-lake rate has been 6 cents lower than the ocean-and-rail at Chicago, it has been the same at St. Louis. The advance in 1907 made that rate 62 cents to Chicago, but left it 77 cents to St. Louis.

If the cost of bringing merchandise from eastern points to Chicago were materially increased, while remaining the same at St. Louis, this would be strong ground for claiming that Chicago was subjected to unfair treatment. It does not seem probable that the effect of the present change can be at all serious. The relation in the all-rail and the ocean-and-rail rates still remains the same, and the advance in the rail-and-lake rates is comparatively slight. Those rates were not advanced to St. Louis because they were already equal to the ocean-and-rail rates, and since the ocean-and-rail is a somewhat more desirable route than the rail-and-lake, it is evident that no business would move under a higher rate. In other words, Chicago would not have been benefited by an advance in the rail-and-lake rate to St. Louis, the only effect being to divert the small amount of business which now moves over that route to the other available routes. We do not feel, therefore, that if this advance is justifiable upon other grounds it should be condemned as unlawful simply because the addition was made at Chicago without a corresponding increase at St. Louis.

This leaves the question upon the original complaint, under which the first objection seems to be that these advances, if they cover the cost of insurance and are made for that purpose, place that cost upon shippers of high-grade commodities instead of distributing it equally over different classes of freight. These advances are 3 cents upon the first and second classes, only 1 cent upon the third, fourth, and fifth, and a reduction of one-half cent upon the sixth class. Hence, if insurance were effected by the 100 pounds it is evident these increases would rest most heavily upon the higher classes. In point of fact, insurance is based upon value, the cost increasing with the amount insured. Since commodities shipped under the higher classes are usually much more valuable per 100 pounds than those shipped under the lower classes, it does not necessarily follow that an addition of 1 cent upon class 4 may not be equivalent in cost of insurance to an advance of 3 cents upon class 1. The rate applicable to class 6 was reduced, and this class therefore bears no part of the cost of insurance, while obtaining certain benefits therefrom. But with respect to the other classes this claim of the complainants could only be sustained by an examination in detail of the value of the different articles actually moving under this tariff.

Wyman, Partridge & Company, whose firm name heads the list of complainants, shipped during the season of 1907 goods of the value of

$3,000,000 by this route, and the value of the shipments of Marshall Field & Company, of Chicago, represented by the intervening association, was $12,000,000 for the same period. Many small shipments move, however, by this route, and while the large shipper finds no difficulty in securing his own insurance the small shipper would prefer to have that matter attended to by the railway without action upon his part. If the shipper obtained through this insurance taken out by the carrier proper protection without material increase of expense to him, we think the present arrangement would be better than the old practice under which each shipper procured his own insurance.

The representative of Wyman, Partridge & Company testified that the advance in transportation charges exceeded by about 15 to 20 per cent the cost of insurance. He also stated that he would not seriously object to the advance in rates provided the protection obtained under the insurance effected by the carrier could be relied upon. His company felt that it could not be and actually expended some $2,500 in obtaining marine insurance during the season of 1907, notwithstanding that such insurance was also provided by the transportation company. The serious question, therefore, is whether this rate, embracing the cost of insurance, is one proper to be tendered the public.

When the shipper himself effects his own marine insurance he receives a policy which states the terms and conditions upon which that insurance is placed. If a loss is not paid he has a contract upon which he can bring suit and he may select such insurance company that this suit can be brought in the state of his residence.

There is the greatest uncertainty just what protection the shipper secures under the arrangement which is attacked by this proceeding. The rate is a joint through rate applicable over both the rail and the water line. Undoubtedly, these carriers might, if they saw fit, issue bills of lading which would make them responsible for loss by peril of the sea. Under such a contract for transportation the carrier would stand responsible for loss upon the water, would thereby acquire an insurable interest in the goods as against such loss, and might take out marine insurance for its own benefit. In case of loss it would be liable to the shipper and would look for indemnity to the insurance company.

But such is not the contract which these defendants make with their shippers. As already said, they may exempt themselves from those perils of the sea which are not due to their own negligence, and without exception they do this by the terms of the bills of lading which are issued. They are not, therefore, liable as common carriers for loss upon the water not due to the negligence of the water

carrier. What they undertake to do is to procure insurance which shall indemnify not the carrier but the shipper against such loss.

The testimony does not show clearly what contract of insurance is executed. It seems to be a general policy upon the cargo for the benefit of whosoever may be interested. The name of no shipper is specified, the value of no invoice is known, the value of the entire cargo is not known and can not be known. The shipper has no information as to the company in which the insurance has been placed, nor as to the nature of the policy which has been taken out, nor as to the conditions which he must perform in order to perfect his claim in the event of loss. If loss occurs he knows not whom to sue nor where to sue, and the company may be one upon whom no service can be obtained without going into some foreign jurisdiction at great expense.

We do not feel that shippers should be forced to rely upon this sort of an undertaking for protection. Without doubt these carriers might, if they saw fit, as already suggested, contract to indemnify the shipper against loss due to perils of the sea. In such event the carrier itself would become the insurer and the shipper would require no additional insurance. It would be entirely immaterial to the shipper whether the carrier did or did not protect itself by insurance against possible loss. This kind of a rate these carriers might have established and they might with propriety have made a somewhat higher charge than was imposed under the old tariff where the shipper himself was obliged to incur the expense of this marine insurance.

If the carrier elects, as it undoubtedly may, to exempt itself from liability for perils of the sea, then we think the shipper should be left free to place his own insurance as he sees fit. Such insurance under that kind of a transportation contract is no part of the transportation service. The right of the carrier to effect this insurance for the benefit of the shipper without authority is doubtful; and assuming the right to exist, the justice of forcing upon the public, at its expense and against its protest, an arrangement of this kind is still more doubtful. In our opinion, unless the railway sees fit to assume these perils of the sea it should tender to the public a transportation contract which leaves shippers free to arrange for their own marine insurance.

It has already been noted that Wyman, Partridge & Company took out insurance for which they paid some $2,500 during the season of 1907, acting in this respect precisely as though no insurance had been effected by the railway. It further appeared that in one or two cases large shippers held the written guaranty of the line which they patronized that loss upon the water should be made good by the carrier. It is needless to observe that serious discrimination

might result where one shipper held this sort of a guaranty while the general public had no similar assurance.

The defendants sought on the trial to justify these advances by increased cost of operation, and introduced testimony tending to show that the expense of handling this westbound traffic was greater during the year 1907 than it was during the year 1906. From this they argued that even if the shipper feels obliged to effect his own insurance in the future as in the past he should still pay the higher charge.

When this rate was advanced many of the defendants stated that the advance had been made for the purpose of covering the cost of insurance. Several of the answers take the same ground. While we must give due weight to this claim of the defendants and the evidence which sustains it, the whole record suggests that it was an afterthought required by the necessities of the defense rather than by the necessities of the carriers.

It fairly appears that the carriers can effect this insurance in the manner they do much cheaper than it has been purchased in the past by shippers acting individually, and also that the insurance thus obtained would afford adequate protection to the carrier against loss from perils of the sea and perhaps, to some extent, against its liability as a common carrier. The present arrangement is therefore to the advantage of the carrier. In the past this insurance has cost the shipper something, and he can well afford to pay a somewhat higher rate if he obtains the same protection from the carrier which he has previously enjoyed from the insurance company. The advances in rate amount to something more than the saving in insurance, but, under all the circumstances, we do not think that it would be unreasonable to impose this additional burden; in other words, we should feel satisfied to leave these present rates in effect provided the carrier did in fact extend to the shipper that protection against those perils of the sea which was formerly secured by his insurance, and which he is supposed to pay for in these advanced rates.

We do not think that the present arrangement upon the part of the carriers gives him any protection upon which he is bound to rely. Therefore it adds nothing to the value of the service to him and affords no justification for the advance. Since the justification for the rate fails, the rate itself, under present conditions, must be condemned. Existing rail-and-lake rates, in cents per 100 pounds, for the following classes are from New York:

To—	Class 1.	Class 2.	Rule 25.	Class 3.	Rule 26.	Class 4.	Class 5.	Class 6.
Chicago	62	54	45	41	33	30	25	21
Minneapolis	83	72	60½	54	43	38	32	26

In our opinion these rates are excessive and ought not to exceed for the future, in cents per 100 pounds, the following:

To—	Class 1.	Class 2.	Rule 25.	Class 3.	Rule 26.	Class 4.	Class 5.	Class 6.
Chicago	59	51	43	40	32	29	25	21½
Minneapolis	80	69	59	53	42	37	32	26½

No order will be made until May 1, 1908. An order will then be issued putting in the reduced rates above named, unless the defendants have previously tendered a contract of shipment under which the shipper receives the same protection which he has formerly had under his policy of marine insurance, and make the necessary changes in their tariffs, if any are required.

13 I. C. C. Rep.