No. 4135.

EDISON PORTLAND CEMENT COMPANY

v.

DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY ET AL.

Submitted July 24, 1911. Decided February 5, 1912.

Following rule 68, tariff circular 18-A, cited and approved in *De Camp Bros. & Yule Iron, Coal & Coke Co.* v. *V. & S. W. Ry. Co.*, 22 I. C. C. Rep., 274; *Held*, That the principal defendant is responsible to complainant in the amount of damages caused by having unlawfully published a tariff showing that it could make delivery on the track of a carrier from whom it had not obtained concurrences, and which carrier refused to participate in the tariff.

F. C. Morris for the complainant.

Douglas Swift and *A. S. Learoyd* for Delaware, Lackawanna & Western Railroad Company.

William C. Coleman for Baltimore & Ohio Railroad Company.

REPORT OF THE COMMISSION.

BY THE COMMISSION:

The complainant is a corporation engaged in manufacturing cement at New Village, N. J. Its petition, filed June 1, 1911, alleges that the published tariff of the Baltimore & Ohio Railroad Company, which is the principal defendant, represented that that carrier could and would make a certain terminal delivery on the tracks of the Erie Railroad at Akron, Ohio; that, relying upon the said tariff, it shipped, in February and March, 1909, from New Village to Akron, via defendants' lines, two carloads of cement, consigned to the Akron Paving and Plaster Company, to which firm, according to the tariff, switching delivery could be made at a charge of $2.50 per car, which the defendants would absorb; that upon arrival of the cars at Akron they were placed upon a delivery track of the Baltimore & Ohio Railroad, from which the consignee was compelled to haul the shipments at a cost of $12.60, in addition to the published

rate. The claim was first presented to the Commission November 4, 1910. Reparation is asked in the amount incurred for drayage.

On February 25, 1909, and on March 11, 1909, the complainant shipped from New Village, N. J., two carloads of cement, each weighing 57,000 pounds. Both cars were consigned to the consignee alleged in the petition, and each was routed "Lack. line, B. & O. & Erie R. R.," and in each bill of lading was inserted a rate of $2.20 per ton.

At the time the shipments moved there was no joint rate from New Village to Akron in connection with the Erie Railroad. A joint through rate of $2.20 per ton was published by the Lackawanna and the Baltimore & Ohio railroads, and the latter had on file with the Commission a delivery circular showing the deliveries that it could make at various points on its line. This circular showed the consignee as being located on the Erie tracks at Akron and represented that delivery could be made by switching, for which a charge of $2.50 would be made by the Erie, and another tariff provided that this charge would be absorbed. The Erie Railroad had not at the time concurred in the delivery tariff of the Baltimore & Ohio and upon arrival of cars refused to accept the same or make the delivery which the tariff of the Baltimore & Ohio represented could be made. The consignee is located upon the Erie tracks, and the tracks of the Baltimore & Ohio, from which it was obliged to take delivery, are distant about one and one-half miles from its plant. It unloaded and drayed the cement to its plant and rendered bills therefor against complainant, which amounted on one car to $5.85, on the other $6.75, for which amounts it was given credit by the complainant.

The effect of the action of the Baltimore & Ohio was to make the Erie Railroad a party to its delivery tariff. This the record clearly shows, and this defendant admits that it had no authority to do so. The publication of the Baltimore & Ohio Railroad Company was in direct contravention of the Commission's rules made under the authority of section 6 of the act, to the effect that lawful concurrence must be secured from every carrier shown as participating in a tariff, and that a joint tariff must show the form and number of concurrence of each participating carrier. We do not doubt that complainant was misled by this publication. In accordance with rule 68 of tariff circular 18–A, cited and followed in *De Camp Bros. & Yule Iron, Coal & Coke Co.* v. *V. & S. W. Ry. Co.*, 22 I. C. C. Rep., 274, we hold that the Baltimore & Ohio is responsible for any damage resulting to complainant from its unwarranted action in showing the Erie Railroad as a delivering carrier.

Upon the record we find that the shipments were made as stated above; that by reason of the inability of the Baltimore & Ohio Railroad Company to make the delivery promised in its tariff the complainant has been damaged in the sum of $12.60, which it was compelled to pay for drayage from the tracks of the Baltimore & Ohio Railroad to the plant or warehouse of the consignee; and that it is entitled to an award of damages in the said sum, with interest from April 12, 1909, which the Baltimore & Ohio Railroad Company will be required to pay without contribution from the other carriers. An order will be entered accordingly.