No. 4401.

WILSON BROTHERS
v.
DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY.

Submitted February 13, 1912. Decided October 7, 1912.

Complainant leased from defendant a warehouse with platform extending to a terminal delivery track that serves complainant and other shippers and receivers. Defendant's tariff provided that track-storage charges should apply "upon carload freight for delivery from cars direct to drays." Complainant's freight is delivered upon a platform of the leased warehouse and not to drays; *Held*, That the assessment of track-storage charges against complainant under the circumstances was not in accordance with the published tariff, and was therefore illegal. Reparation awarded.

H. L. Davis for complainant.
Douglas Swift for defendant.

REPORT OF THE COMMISSION.

BY THE COMMISSION:

The complainant is a copartnership, trading under the firm name of Wilson Brothers, engaged in the produce business in South Brooklyn, N. Y. Its petition, filed September 8, 1911, alleges that track-storage charges were assessed against it without lawful tariff authority therefor, and that by reason thereof it was compelled to pay unjust and unreasonable charges. Reparation is asked.

There is a stipulation filed of record, duly signed by the parties to the proceeding, and the facts contained therein are substantially as follows:

Complainant conducts a produce business in a warehouse leased from the defendant, which warehouse adjoins defendant's tracks at its Twenty-fifth street terminal, Brooklyn, N. Y. A platform extends from said warehouse to the defendant's adjoining delivery track, which serves other shippers, as well as complainant, at their respective places of business, and connects with a general freight depot of the defendant and a public team track. The said terminal delivery track belongs wholly to the defendant, and is not included in nor affected by the lease of the warehouse. Cars consigned to complainant are unloaded upon said platform, and there is sufficient space alongside for two cars. The physical conditions at this

terminal are such that when complainant's cars have been placed the track space occupied thereby is accessible to no one other than complainant for loading or unloading, while at the other points beyond complainant's platform cars may be set for purposes of general loading and unloading. Each time that cars are moved to and from that portion of the track extending beyond complainant's platform it is necessary for the defendant to switch complainant's cars out of the way and to return them that the unloading may be completed. Track-storage charges were assessed and collected under the tariff hereinafter mentioned upon all cars, except those containing coal and coke, placed for unloading on any track at said terminal when detained beyond a specified period. The stipulation sets out that between November 1, 1909, and June 1, 1911, track-storage charges were assessed and collected from complainant in the sum of $398 upon interstate shipments of produce unloaded upon complainant's platform under a provision in said tariff reading as follows:

83. The following schedule of track-storage charges will apply in addition to the regular car-service or demurrage charges upon carload freight (except coal and coke) for delivery from cars direct to drays at the following stations:

Then follows a list of stations, including the one in question, and the amount of the charges to be assessed, depending upon the period of detention.

Complainant contends that the provision in the tariff applies only in those instances where delivery is made *direct to drays*, and that no track-storage charges should accrue where delivery is made upon the platform.

Defendant argues in its brief that the section of the track upon which complainant's cars were placed and held for unloading was in its nature a public-delivery track and not a private track of complainant; that the fact that complainant's use of said section of the track adjacent to their warehouse for unloading did not and could not deprive any other shipper or consignee of the use of it is not material. Defendant further states that the unloading of complainant's cars directly onto the warehouse platform instead of onto drays did not exempt them from track-storage charges under the tariff, in that the tariff does not say that the charge applies to carload freight which is or has been or shall be unloaded from car or dray, but that it provides for delivery from car to dray; that is, on carload freight which is of a character that may be or customarily is delivered from car to dray. It further urges that the lease of complainant's warehouse from defendant did not include the use of the track in question free of track-storage charges.

Since the filing of the petition in this case the defendant has amended its tariff by striking out the words "direct to drays," so that the tariff now reads " for delivery from cars at stations."

Upon consideration of all the facts and circumstances appearing of record, and upon examination of the tariff under which the charges complained of were assessed, we are of the opinion, and so find, that the delivery made to complainant was not made " direct to dray " and therefore does not come within the plain wording of the tariff, and that therefore the track-storage charges were illegally assessed.

We further find that in so far as complainant was compelled to pay the charges herein found to have been illegally assessed it was damaged thereby and is entitled to an award of reparation. Upon the filing of an agreed statement of the shipments upon which track-storage charges were paid, and agreement by defendant that it is correct, and a verification of said statement by the Commission, an order of reparation will be entered.