No. 10363.
SOLVAY PROCESS COMPANY
v.
DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY AND DIRECTOR GENERAL OF RAILROADS.

Submitted June 21, 1919. Decided October 21, 1919.

Rates charged for shipments of limestone, in carloads, from Jamesville, N. Y., to Solvay, N. Y., found to have been and to be unreasonable. Reparation awarded.

Nathan L. Miller and *H. Duane Bruce* for complainant.

John L. Seager for Delaware, Lackawanna & Western Railroad Company.

William C. Redfield and *E. R. Magie* for Department of Commerce, intervener.

R. V. Fletcher for Director General of Railroads.

REPORT OF THE COMMISSION.

DIVISION 3, COMMISSIONERS HALL, DANIELS, AND EASTMAN.

DANIELS, *Commissioner:*

The complainant operates a large plant for the manufacture of soda ash and alkali products at the village of Solvay, which adjoins the city of Syracuse, N. Y., on the west. Limestone used in this manufacture is procured from complainant's quarry at Jamesville, N. Y., a point a few miles southeast of Syracuse, reached only by the line of the Delaware, Lackawanna & Western Railroad Company, hereinafter referred to as the defendant, and is transported by defendant in carloads to complainant's plant at Solvay, a distance of about 9 miles. For some seven years prior to May 6, 1918, the rate charged for this service was 15 cents per long ton. On that date, following the decision in *The Fifteen Per Cent Case*, 45 I. C. C., 303, the rate was increased to 17 cents per long ton; and on June 25, 1918, under General Order No. 28 of the Director General of Railroads, it was further increased by 1 cent per 100 pounds, or 22.4 cents per long ton. Under the rule for disposition of fractions, the rate thus became 40 cents per long ton. Complainant protested

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against this increase, and the rate was reduced to 1.5 cents per 100 pounds, or 30 cents per net ton, effective September 16, 1918, which is the present rate. By complaint filed December 17, 1918, these rates in excess of the former rate of 15 cents per long ton are attacked as unjust and unreasonable, in violation of the act to regulate commerce and of the federal control act. Reparation and just and reasonable rates for the future are requested.

The rates in issue, although applicable only to intrastate traffic, were initiated by the Director General of Railroads, and by section 10 of the federal control act the duty of determining the justness and reasonableness of rates so initiated is laid upon this Commission. The Director General filed formal answer denying any violation of law, but was not represented at the hearing. A report proposed by the examiner was served on the parties. Exceptions were filed and the case was orally argued before the Division.

About 1909, complainant contemplated the acquisition of a site for a limestone quarry near Syracuse, and considered, among others, that at Jamesville. Preliminary to the selection and purchase, it corresponded with the defendant relative to the necessary transportation service and the charges therefor. It was at first proposed that the rate from Jamesville to Solvay should be 20 cents per long ton, the complainant to perform all of the switching at both quarry and plant, the defendant to furnish temporarily 20 cars, and the complainant to furnish any additional cars required. Defendant was to pay complainant 0.6 cent per mile for the use of such additional cars. Later, however, it was agreed that the complainant should furnish all of the equipment, without mileage compensation, and in consideration of this modification the rate was made 15 cents per long ton instead of 20 cents. Another available site with a limestone deposit was situated on the rails of the New York Central. Defendant contends that the rate agreed on was made with a view to the competitive situation.

The quarry was opened and shipments commenced to move in 1911. In addition to the kiln stone used at the Solvay plant, which is in large sizes, the quarry produces, as a by-product, smaller stone known as "spawls," and ground limestone. The latter products do not move to Solvay, and the rates thereon are not in issue. The production of kiln stone is about 75 per cent of the total. The traffic has greatly increased in volume, especially during recent years, as shown by the following table:

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Year.	Carloads.	Net tons.	Freight charges.[1]
1911	1,825	95,461	....
1912	8,624	453,727	$60,266.57
1913	8,682	456,241	61,140.35
1914	8,097	433,367	57,782.38
1915	9,591	528,095	70,584.32
1916	13,156	760,218	101,087.17
1917	15,037	879,457	118,560.22
1918	12,814	745,101	170,449.63

[1] These figures are based upon payments during the year and do not exactly correspond with the tonnage of that year.

Complainant's investment at the quarry is upward of $1,000,000.

In preparation for the traffic defendant constructed sidings at Jamesville at an expense of about $7,000, and in 1915, better to accommodate its increasing traffic, constructed an additional main track between Jamesville and Syracuse at an expense of about $150,000. Defendant's witness testified that without complainant's traffic this additional track would not have been necessary.

The allegation of unreasonableness is supported largely by evidence bearing upon cost, and it is therefore necessary to consider the service with as much particularity as the record permits. The quarry and plant of the complainant are at opposite sides of the city of Syracuse, and the 9 miles of intervening track comprises a portion of the main line of the defendant's Syracuse and Utica division. The line runs directly through the city of Syracuse and passes defendant's Syracuse yards, which are near the center of the city. Under the present arrangement, a switching engine leaves the yards at about 4 a. m. and proceeds to Solvay, approximately 2.5 miles distant, where it picks up a string of empty cars, already assembled on complainant's track. It hauls these cars to the yards and delivers them to a road engine and crew for the haul of approximately 6 miles to the quarry. The train reaches the quarry between 7 and 7.30 a. m., where the cars are placed on a siding. The engine and crew remain at Jamesville until about 10 a. m., spending, when necessary, about two hours of the interval in switching for other shippers. The engine then picks up a string of loaded cars already assembled on the quarry siding and proceeds with them to Syracuse and Solvay. The train usually comprises 20 to 23 50-ton and 75-ton cars, loaded to capacity, and includes loads of spawls for Syracuse. The grade from the quarry to Syracuse descends about 57 feet per mile for a distance of approximately 5 miles. To the westward of the Syracuse yards, the grade ascends toward Solvay about 30 feet in a distance of 1 mile. It is estimated that one-half of the trains require the help of a "pusher" engine at this point. After placing the loads at the complainant's siding at Solvay, the engine immediately returns to

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the quarry with another train of empties, which it exchanges for loads, leaving the quarry the second time between 4 and 4.30 p. m. After delivering these loads at Solvay it returns to the yards light. While the traffic was heaviest this operation proceeded on Sunday as on other days, but at other times only one trip has been made on Sunday.

According to the defendant, the regularity and time of movements were insisted upon by the complainant, but the latter maintains that the convenience of the carrier was also considered, in that the movements were so timed as to interfere least with the passenger traffic. It is alleged by defendant that complainant's traffic is given right of way through Syracuse and that other traffic is sometimes delayed in consequence.

Owing to the contribution of equipment and the performance of terminal services wholly by the complainant, the shipment is unique in character, and the determination of a proper maximum charge for the carrier's service offers unusual difficulties. The former assistant general freight agent of the defendant, who had much to do with the negotiations establishing the rate of 15 cents per long ton, testified that in arriving at the rate defendant considered the probable volume of traffic, the manner of handling, the saving of terminal service at Jamesville and Solvay, the cost of construction of tracks, the matter of furnishing equipment, and, in as much detail as practicable, the total expense to the carrier. The allowance of 5 cents per ton in consideration of the furnishing of equipment by the shipper was based upon an assumed investment of $100,000 an equipment life of 10 years, and interest upon capital at 6 per cent. It appears, however, that the complainant's investment in the equipment used in this service has not at any time reached $70,000. This witness, who left defendant's service in October, 1917, testified that the results of the arrangement had fully met expectations and that the traffic had been regarded as very profitable to the carrier. He had not given the matter specific attention since 1916. No increase in the rate upon this traffic was made by the carrier when the 5 per cent increase on interstate traffic was authorized in the supplemental report in *The Five Per Cent Case*, 32 I. C. C., 325.

Complainant made an attempt, by questioning defendant's employees and by calling for information from defendant's records, to establish the cost of the service involved. Upon this information, gleaned from witnesses, from statements filed after the hearing, from the defendant's annual reports to the Commission, and from other sources, complainant bases an argument that the former rate of 15 cents per long ton was high in comparison with the costs attributable to the particular traffic. The period selected was the calendar year

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1918. The methods employed and the results may be summarized as follows:

Wages of train crew.—In response to complainant's request, defendant filed a statement showing the actual payments of wages to the road-engine crew employed in the service for the months of January, May, and October of each of the years 1912 to 1918, inclusive. The amount stated for those months of the year 1918 is $3,446.98, from which complainant estimates the total for the year at $13,787.92. Inasmuch as the crew was employed about two hours of each day in other switching, nine-elevenths of $13,787.92, or $11,281.02, is assigned to the stone traffic; and as, during 1918, only about 84 per cent of the stone traffic was moved to Solvay, complainant concludes that 84 per cent of $11,281.02, or $9,476.05 is chargeable to its traffic.

Engine costs.—Complainant requested of defendant a statement of the cost of fuel, oil, water, and other supplies furnished the engine used in the service for the years 1912 to 1918, inclusive. In response to this request, defendant filed a statement of the average of such costs per engine-mile for all its engines, both passenger and freight, for the years 1912 to 1917, inclusive. These items for the year 1917, which are higher than for any other year, aggregate 25.75 cents. Complainant computes the mileage of the engine as 36 miles per day, or 13,140 miles for the year, from which it deduces a total cost of $3,383.47 for the year, 84 per cent of which, or $2,842.11, is attributed to complainant's traffic.

Wages of gatemen and flagmen.—According to defendant's statement, the amount of wages of gatemen and flagmen employed on the line between Jamesville and Solvay for the months of January, May and October, 1918, was $8,862.27, from which complainant estimates that the total payments for the year amounted to $35,449.08. Complainant assumes that about three-fourths of this amount, or $26,586.81, is chargeable to freight traffic, the basis of this assumption being that about three-fourths of defendant's total transportation revenue is derived from freight traffic. Complainant assigns 11.3 per cent of this $26,586.81, or $3,004.31, as the amount chargeable to the particular traffic here involved. The ratio of 11.3 per cent is thus explained: In response to a request from the complainant for a "statement of the number of cars handled on the Delaware, Lackawanna & Western through the Syracuse yard in the months of January, May, and October in each of the years 1912 to 1918, inclusive," defendant filed only a statement of the "number of cars arriving Syracuse yard, Year of 1918." The number thus shown is 112,782, from which complainant concludes that its traffic for the same year, 12,814 loaded cars, constituted 11.3 per cent of the total.

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Maintenance of way.—Defendant's witness testified that the cost of maintenance of the main tracks here involved, for the year 1918, was $1,434.10 per mile, which, applied to the total of 13.62 miles of such tracks, amounts to $19,534.44. Applying to this amount successively the ratios of 75 per cent to segregate freight expense and 11.3 per cent to segregate the expense attributable to complainant's traffic, yields a final figure of $1,655.37 as the allowance for maintenance of main tracks. According to the same witness, the cost of maintenance of complainant's sidings was $593.73 per mile, or $866.84 for the total length of 1.46 miles. The total of maintenance of way costs chargeable to complainant's traffic as thus computed is $2,522.21.

Maintenance of engine.—Defendant expressed inability to state the costs falling under this head, and complainant estimates the amount at $2,000, taking into consideration the cost of the engine, $17,019.36, and the proportion of its service in hauling complainant's traffic.

Other expenses.—In the absence of information requested of defendant, complainant assigns, under this heading, an amount of $2,000 to cover superintendence, station expense, etc.

Taxes.—The average amount of taxes per mile of road paid by defendant for the year 1918 is stated at $3,744.49. Complainant multiplies this amount by 15, which is the number of miles of defendant's track used in this traffic, and applies to the product the ratios of 75 per cent and 11.3 per cent, already explained, arriving at $4,760.17 as the amount of taxes assignable to its traffic.

General expenses.—Defendant was requested by complainant to state its average general expenses per mile of road, but filed instead an apparent total for the system amounting to $295,914 for the months of January, May, and October, 1918, from which complainant estimates defendant's general expenses for the year at $1,183,656. Complainant then referred to Moody's Manual to ascertain defendant's total trackage, and by using the figures there given, 2,652 miles, reached an average expense per mile of $446, or $6,690 for the 15 miles involved. Again using the ratios of 75 per cent and 11.3 per cent, complainant arrives at $566.97 as the amount of general expenses chargeable to its traffic.

The items of cost thus arrived at aggregate $27,171.82 from which complainant concludes that the total cost to the carrier of handling the traffic here in question during the year 1918 could not possibly have exceeded $30,000, against which is shown an actual gross revenue of $170,449.63. The revenue at 15 cents per long ton would have amounted to $100,760.

Complainant also compares this revenue with the total investment, allowing $17,019.36 as cost of engine, $7,000 as investment in sidings,

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and $270,000 as estimated investment in 9 miles of track, which is used for other traffic as well as complainant's and reaches the conclusion that a rate of 15 cents per long ton, after allowing 12 per cent for interest and depreciation, would have covered the total cost of service and yielded a profit of $35,000. It is also pointed out that the ton-mile earnings of this traffic, about 1.49 cents at the 15-cent rate and 2.98 cents at the 30-cent rate, are far in excess of the average for all of defendant's freight traffic, which, for the year 1918, was 9.02 mills.

The numerous assumptions resorted to by the complainant are not in all cases warranted, nor are the deductions always reasonable. For example, if the number of cars reported by defendant as having arrived at its Syracuse yards during the year 1918, 112,782, includes empty cars as well as loaded cars, it is obvious that complainant's deduction that its traffic constitutes 11.3 per cent of the total is incorrect. The average length of haul is greater than on the traffic in question. Nor is it at all apparent that complainant's cars should take the average basis. This ratio affects several of the principal items of cost. Engine-miles incident to the trips from yard to plant and return are omitted, as is also the expense of the service of the yard engine and "pusher" engine. The allowance of $2,000 for maintenance of the road engine used is considerably below the average cost of engine repairs alone, without consideration of depreciation. The method of arriving at the amount of general expense is of questionable accuracy and unauthorized by the record, but the character of movement and traffic indicates that the cost other than that directly connected with the movement of the trains is relatively low. Further criticism of complainant's methods might be made but it does not follow that its conclusions should be regarded as wholly without significance. Taking the figures of cost, so far as produced, together with other evidence of record, it seems probable that the traffic here involved, under the rate charged prior to May 6, 1918, was at least as profitable to the carrier as was its other carload freight traffic in general. During the year 1918 the average loading of complainant's cars was approximately 58 net tons, which at the rate of 30 cents per ton would have yielded a revenue of $17.40 per car.

Defendant made no affirmative showing of cost of service, but on brief expressed the hope that the Commission would not "give effect to any ill-considered or fragmentary cost figures or to figures based on inadequate study and on general average statistics." It seems appropriate to remark that a complainant's inquiry as to the cost of the service he receives, especially where rates are increased ostensibly to meet those costs, is entitled to serious consideration.

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Defendant further contends that the rate of 20 cents originally offered by the carrier was influenced by the fact that complainant was then considering a quarry site on the New York Central, and that the reduction of 5 cents per ton in consideration of the furnishing of equipment by the complainant was excessive. In support of the latter contention the following computation was submitted:

Total investment in cars never exceeded		$66,350.47
(Ex. 6 and statement filed since hearing by witness Manning.)		
Interest at 6 per cent for 10 years		39,810.26
Investment and interest		106,160.73
Tons carried, 7 years	4,351,667	
Tons carried, 3 years (estimated)	2,384,776	
Total net tons	6,736,443	
Equivalent to 6,014,681 long tons, which, at 5 cents per ton, would amount to		300,734.05
Surplus after paying total purchase price of cars with 6 per cent interest available for maintenance, etc		194,573.32

However, an allowance of 6 per cent for return upon investment and for maintenance other than depreciation is presumably insufficient. Moreover, the consideration for the 5-cent reduction is not here fully accounted for. As already stated, the originally proposed rate of 20 cents contemplated the payment of mileage on complainant's cars. The true consideration was thus stated by defendant's vice president in a letter to complainant's president, dated November 29, 1909:

> In going over this matter again on the basis of your providing all the equipment from the start, it seems to us that a reduction of 4 cents per gross ton in the rate, that is, from 20 cents to 16 cents, would be, all things considered, an equitable adjustment.
>
> We feel, however, that we would rather be relieved of the burden of paying per diem, keeping the records, etc., and are prepared to name rate of 15 cents per gross ton on this traffic without the payment of mileage and with the understanding that you furnish all equipment necessary to handle the traffic.

Both parties submitted comparisons of the rates in issue with those charged for the transportation of stone at points more or less remote from Syracuse, but, apart from the movement from Oxford Furnace, N. J., to New Village, N. J., there is no such showing of similarity in circumstances as entitles the comparisons to controlling weight.

Defendant offers no defense of the 40-cent rate, which was in effect from June 25 to September 16, 1918. The reason for the change to 30 cents, effective on the latter date, is not shown of record, but counsel for the defendant assumes that the rate was reduced in recognition of the contributions of service by the complainant. In

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defense of the present 30-cent rate, defendant cites the act of August 29, 1916, the President's proclamation of December 26, 1917, the federal control act, and the recital of General Order No. 28.

These recitals tend, however, to justify the rate increases under that order as a whole and not necessarily the increase in every rate. The order provided in general for an increase of 25 per cent in freight rates, but the rates on certain commodities, including that here involved were increased by specific amounts regardless of distance or volume of the rate increased. The increase of 1 cent per 100 pounds on complainant's traffic amounted to about 135 per cent of the former rate. Had the rate been $1 per ton instead of 17 cents, it is apparent that the increase would have been but 22.4 per cent. The present rate of 30 cents per net ton represents an increase of approximately 100 per cent.

It appears that complainant's traffic manager, under date of June 6, 1918, addressed the director of traffic of the Railroad Administration protesting against the proposed increase of 1 cent per 100 pounds on his traffic and asking that it be limited to 25 per cent instead. When General Order No. 28 was promulgated, an immediate increase of revenue was doubtless deemed imperative. It is not, however, to be presumed that there was any intent permanently to abandon the standards by which the rights of individual shippers had been determined during a period of peace. It is rather to be presumed that the constituted authorities had in contemplation ultimate readjustment in cases where the universality of their methods might be shown to work undue hardship upon particular shippers. It is unnecessary to consider here the justification for the general increases in rates; the question concerns the specific increase applied to what is an almost unique movement of this particular traffic.

The Secretary of Commerce was represented at the hearing and has filed a brief supporting generally the contentions of the complainant, but urging in addition the power and primary duty of the Railroad Administration to foster and protect commerce, with only secondary regard to the adequacy of rates as sources of revenue. He differentiates in this regard between federal and private control, pointing to the fact that the Railroad Administration is given the support of public funds derived from general taxation. He urges also the importance of relieving complainant's traffic from any unnecessary burden, in view of the utility of its products and their wide distribution. However, in considering its powers and duties under the federal control act in reviewing rates initiated by the Director General, the Commission has concluded that the words "just and reasonable," as used in that act, have substantially the same meaning as in the act to

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regulate commerce, from which they are drawn. *Willamette Valley Lumbermen's Asso.* v. *S. P. Co.*, 51 I. C. C., 250, 258.

Upon all the facts of record, we find that the rates charged by defendants for the transportation of complainant's shipments of limestone in carloads, from Jamesville to Solvay, moving after June 25, 1918, were, and that the present rates, are, and for the future will be, unjust and unreasonable to the extent that they exceeded or may exceed 25 cents per long ton. An order to this effect will be entered. We further find that since June 25, 1918, complainant has made numerous shipments from Jamesville to Solvay, as described, and has paid and borne the charges thereon; that it has been damaged to the extent of the difference between the charges paid and those that would have accrued at the rate herein found just and reasonable; and that it is entitled to reparation, with interest. The amount of reparation due should be determined in the manner provided in rule V of the Rules of Practice, and when so determined the entry of an order for reparation will be considered.

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