No. 4792.
PLYMOUTH COAL COMPANY
v.
PENNSYLVANIA RAILROAD COMPANY ET AL.

No. 4792 (Sub-No. 1).
PLYMOUTH COAL COMPANY
v.
DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY.

Submitted June 17, 1916. Decided February 2, 1920.

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1. Rates applicable from April 9, 1910, to March 31, 1916, inclusive, on anthracite coal in carloads from Plymouth, Luzerne, and Kingston, in the Wyoming coal region of Pennsylvania, to South Amboy, N. J., f. o. b. vessel for transshipment, found not to have been unreasonable.
2. Rates applicable on the same commodity during the same period from the same points to New York lighterage station, N. J., f. o. b. vessels, found to have been unreasonable to the extent that they exceeded, per ton of 2,240 pounds, $1.45 on prepared sizes and $1.35 on smaller sizes. Reparation awarded.
3. The maintenance of the rates under attack, as compared with rates contemporaneously in effect from other anthracite-coal regions to tidewater, not shown to have resulted in undue prejudice or undue preference.

R. D. Jenks and *W. A. Glasgow, jr.*, for complainant.

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

George Stuart Patterson for Pennsylvania Railroad Company and Northern Central Railway Company.

REPORT OF THE COMMISSION ON FURTHER HEARING.

BY THE COMMISSION:

Prior to the final submission of these cases the complainant corporation, then engaged in mining and selling anthracite coal, conducted two mining operations, one at Plymouth, Pa., known as the Dodson colliery, and the other at Luzerne, Pa., known as the Black Diamond colliery. It also purchased coal from a colliery at Kingston, Pa., not owned or operated by it. The three towns are on the Bloomsburg branch of the Delaware, Lackawanna & Western Rail-

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road, hereinafter called the Lackawanna, in the Wyoming coal region[1] of Pennsylvania, and in close proximity. Luzerne is about 1 mile east of Kingston and Plymouth slightly more than 3 miles west of Kingston. Substantial quantities of anthracite coal mined from these three collieries were shipped by complainant to tidewater at South Amboy, N. J., f. o. b. vessels for transshipment, and to New York lighterage station, N. J., f. o. b. vessel, and were there sold. The lighterage station named is at Hoboken, and for brevity will be referred to as Hoboken.

In 1911, and before, complainant remonstrated with the defendant carriers about the rates applicable on this traffic, insisting that they were unreasonably high. It paid under protest the freight charges exacted on subsequent shipments, and by letter of January 25, 1912, without specifying particular rates or shipments, apprised us of its general dissatisfaction with the rate adjustment. Finally, on April 8, 1912, it filed the two complaints here before us alleging that the rates then applicable from Plymouth, Luzerne, and "other points" on the lines of the defendants, to South Amboy and Hoboken f. o. b. vessels for transshipment, were unreasonable, and sought reparation. It further alleged that the "existence" of those rates had been and then was subjecting complainant and other shippers in the Wyoming region to undue prejudice, and unduly preferring shippers in other anthracite-coal regions. In No. 4792 it attacked the joint rates to South Amboy over the Lackawanna, Pennsylvania, and Northern Central railroads, and in Sub-No. 1 the rates of the Lackawanna to Hoboken. Throughout this report the rates considered are those to tidewater, f. o. b. vessels for transshipment, and will be stated in amounts per ton of 2,240 pounds. The rates thus brought in issue, and the distances, are shown in the subjoined table:

From—	To—	Miles.	Rates under attack on—			
			Prepared sizes.	Pea.	Buck-wheat.	Smaller than pea.
Luzerne[1]	Hoboken	149.1	$1.58	$1.43	$1.28	
Kingston[1]	do	150.1	1.58	1.43	1.28	
Plymouth[1]	do	153.4	1.58	1.43	1.28	
Luzerne[2]	South Amboy	284	1.55	1.40		$1.25
Kingston[2]	do	283	1.55	1.40		1.25
Plymouth[2]	do	280	1.55	1.40		1.25

[1] Locally over the Lackawanna via the "cut-off," which was opened for operation in January, 1912. The distances over the old route to Hoboken from Luzerne, Kingston, and Plymouth were about 11 miles greater than those here shown.
[2] Jointly over the lines of the Lackawanna, Pennsylvania, and Northern Central via West Nanticoke, Pa.

[1] The Wyoming coal region is a part of what is known as the northern anthracite region, and extends from Pittston, Pa., on the east to Nanticoke on the west. Adjoining it on the east is the Lackawanna field, also in the northern anthracite region. On the south are the Lehigh and Schuylkill regions.

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The two complaints were heard together on one record in May, June, and October, 1913. At the outset complainant asked leave to defer presentation of evidence bearing upon its claims for reparation until the issues of unreasonableness should have been determined. This was granted and accordingly the cases were submitted in part on April 3, 1914. The general investigation, hereinafter called the *Anthracite Case*, instituted by us of our own motion on June 10, 1912, into the rates, practices, rules, and regulations governing the transportation of anthracite coal, was then still pending. It embraced, *inter alia*, the rates under attack in the two complaints now before us, and at the hearings thereon counsel for the Lackawanna urged continuance until decision of the *Anthracite Case*, saying that he would rely upon the showing there made, since our conclusions in that broader and more comprehensive inquiry would be determinative of the issues raised by the complaints.

Our conclusions in the *Anthracite Case*, decided July 30, 1915, are reported in *Rates for Transportation of Anthracite Coal*, 35 I. C. C., 220. We found that rates from the several coal regions to tidewater for transshipment had been generally 35 per cent of the prevailing market prices at the port. The underlying reasons for this adjustment, and its history, are set forth in our report in the *Anthracite Case*, and need not be repeated. In brief, market prices, rather than transportation conditions, were the controlling considerations. We found the rates then applicable on prepared, pea, and smaller sizes, including those in issue in these complaints, to be unreasonable and prescribed reasonable maximum rates for the future over the established routes. From Luzerne, Kingston, and Plymouth we prescribed $1.45 on prepared sizes and $1.35 on pea and smaller sizes to Hoboken over the Lackawanna, and $1.40 and $1.30, respectively, to South Amboy over the Lackawanna, Pennsylvania, and Northern Central, the latter a part of the Pennsylvania system. These conclusions determined in part the issues raised by the complaints before us and we so stated in our original report, *Plymouth Coal Co.* v. *P. R. R. Co.*, 37 I. C. C., 457, saying that complainant's claims for reparation remained undetermined and that in passing upon them consideration should be had of matters such as were put in evidence in the *Anthracite Case.*

Further hearing was had accordingly at which counsel for complainant, after introducing evidence as to specific shipments, the charges paid, and the amount of reparation claimed, invited attention to our report and order in the *Anthracite Case*, particularly to our findings in respect of—(*a*) circumstances surrounding the transportation; (*b*) earnings derived from the transportation of anthracite coal; (*c*) yield of revenue per ton-mile, car-mile, and train-mile;

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(*d*) history of the rates; (*e*) financial history of the anthracite coal-carrying roads, including the defendants here; and (*f*) the relation of those carriers to coal companies in which they held an interest. In this status the cases, after oral argument, were resubmitted.

We are thus led to the merits, and must first determine whether the rates under attack were unreasonable or otherwise unlawful during the period of two years prior to the filing of the complaints, and down to the effective date of our order in the *Anthracite Case*.

REASONABLENESS.

Complainant throughout the record has relied largely upon our findings in *Meeker & Co.* v. *Lehigh Valley R. R. Co.*, 21 I. C. C., 129, and *Marian Coal Co.* v. *D., L. & W. R. R. Co.*, 24 I. C. C., 140, hereinafter referred to as the *Meeker Case* and the *Marian Case.*

Stevens Colliery, the shipping point in the *Meeker Case*, is near Wilkes-Barre, Pa., in the northern anthracite region, about 6 miles north of Luzerne on the Lehigh Valley Railroad. Meeker & Company, the complainants, had shipped coal from Stevens Colliery to Perth Amboy, N. J., 165 miles, and from August, 1901, had been paying freight charges at rates of $1.55 on prepared sizes, $1.40 on pea size, and, with some exceptions, $1.20 on the size known as buckwheat. In that case, decided June 8, 1911, we found those rates to be unreasonable, prescribed $1.40, $1.30, and $1.15, respectively, as reasonable maxima for the future, and awarded reparation on shipments which moved within a period of years prior to June, 1911. Our findings were sustained by the Supreme Court of the United States. *Meeker & Co.* v. *Lehigh Valley R. R. Co.*, 236 U. S., 412.

Taylor, Pa., the shipping point in the *Marian Case*, also in the northern anthracite region, is about 12 miles east of Luzerne on the Bloomsburg branch of the Lackawanna and slightly farther distant from Kingston and Plymouth. The complainant, Marian Coal Company, had shipped coal from Taylor to Hoboken, 147.8 miles, at rates which for 10 years had been $1.58 on prepared sizes, $1.43 on pea, and $1.28 on buckwheat. These rates, the same in amount as those from Plymouth, Luzerne, and Kingston to Hoboken, here under attack, were also found unreasonable in our report of June 8, 1912. We prescribed as reasonable maxima for the future $1.33 on prepared sizes, $1.24 on pea, and $1.09 on buckwheat, and awarded reparation on shipments delivered during the statutory period of two years prior to the filing of the complaint

In prescribing reasonable maximum rates in the *Marian Case* we took into consideration the revenue yield per ton-mile of the rates prescribed in the *Meeker Case*, and also the ascertained average distance of 155 miles to Hoboken from all anthracite collieries in the

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northern region on the Lackawanna, including Plymouth, Kingston, and Luzerne. This average distance was computed over the old route, and not via the new "cut-off" from Delaware Water Gap to Netcong, which was opened for operation in January, 1912, and reduced the average distance about 11 miles.

Prior to the effective date of our order in the *Marian Case* the rates to Hoboken there under attack, and also here in issue, had long been applicable from all collieries in the northern anthracite region on the line of the Lackawanna. In complying with our order in that case, which became effective November 1, 1912, the Lackawanna split the group at Taylor, establishing thence and from points east the lower rates to Hoboken prescribed by us, but from points west thereof the higher rates here under attack were continued in effect. These higher rates were established in 1903, shortly after the anthracite coal-carrying roads had generally acquiesced [1] in maintaining to tide-water flat rates based upon 35 per cent of the average market price of the coal at the ports. The grouping of all collieries on the line of the Lackawanna under common rates to Hoboken as it existed prior to the entry of our order in the *Marian Case*, was restored pursuant to our findings in the *Anthracite Case.*

With the foregoing history as a basis the complainant placed in evidence rate comparisons, the substance of which appears in the following table:

Comparison of rates under attack with those prescribed in the Meeker and Marian cases.			Rates on prepared sizes.	Yield.	
From—	To—			Per net ton-mile.	Per car-mile.[1]
		Miles.		*Mills.*	*Cents.*
Plymouth	Hoboken [2]	161	$1.58	8.75	38.3
Plymouth	South Amboy [3]	282	1.55	4.89	21.4
Stevens Colliery	Perth Amboy [3]	165	1.40	7.58	33.1
Taylor	Hoboken [4]	148	1.33	8.02	35.0

[1] Based upon average loading of 39 long tons.
[2] The distance used is the average from the three shipping points, Plymouth, Luzerne, and Kingston; and to Hoboken it is calculated over the old route, since the "cut-off" was not opened until January, 1912, and the issues here embrace traffic which moved before then. Over the "cut-off" the average distance to Hoboken is about 150 miles and the yield of revenue was 9.3 mills per net ton-mile and 40.8 cents per car-mile.
[3] Rate prescribed in the *Meeker Case.*
[4] Rate prescribed in the *Marian Case.*

Other comparisons were made with rates contemporaneously in effect for varying distances on anthracite coal, bituminous coal, and iron ore. These have had consideration and do not require detailed discussion.

The successive steps by which the Lackawanna placed empty cars at the coal breakers for loading, collected and assembled the loaded cars, classified, distributed, and unloaded them at the ports were

[1] Report in the *Anthracite Case*, pp. 227 to 234.

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comprehensively described of record, as were also the train movement from Plymouth to Hoboken, the grades encountered, and the power used. To some extent similar data concerning operations of the Lehigh Valley were placed in evidence, the object being to show on behalf of complainant that the transportation conditions over the two lines from the northern anthracite region to tidewater favored the Lackawanna. From general observation of the properties and operations, but without effort toward ascertaining costs in a definite and reliable way, a witness of long experience in practical operation gave it as his expert opinion that the Lackawanna had an advantage over the Lehigh Valley of approximately 15 per cent in the cost of transporting coal.

The Lackawanna introduced an exhibit, prepared for use in the *Anthracite Case*, showing the terminal operations at all collieries on its line, the road-haul movement, and the terminal services at the ports. Its operating witness disclaimed any intent to show that the terminal operations at Plymouth and Luzerne were more difficult than at other collieries. Except for the additional hauls, averaging less than 15 miles, coal from these latter points and from Kingston is transported to tidewater over the same rails and under the same transportation conditions as from Taylor. On the whole the evidence as to physical operation is not materially in conflict, and discloses no condition which justified leaving collieries west of Taylor in a group by themselves at a rate level higher than that contemporaneously applicable from the collieries at and east of Taylor on the same line.

Little evidence was offered with reference to the joint route of the Lackawanna, Pennsylvania, and Northern Central to South Amboy, and the rates applicable over that route. Allowing for the greater quantum of service in units of miles complainant took the position that since this longer route was free from heavy grades, and thus more simple of operation, the transportation costs presumably were not greater than those incurred by the Lackawanna and Lehigh Valley; and sought to sustain this position by showing that from April 1, 1902, to May 7, 1907, the Pennsylvania had voluntarily maintained, without the concurrence of the Lackawanna, rates of $1.40 on prepared sizes, $1.25 on pea, and $1.10 on smaller sizes, out of which it absorbed the Lackawanna switching charge of 15 cents from Plymouth, Luzerne, and Kingston to the junction at West Nanticoke. This adjustment, as explained by the Pennsylvania, could not continue under the amendments of 1906 to the act to regulate commerce and, consequently, on May 8, 1907, it was replaced by the joint rates of $1.55, $1.40, and $1.25, respectively, here under attack. These rates were 3 cents lower than

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those contemporaneously applicable over the Lackawanna to Hoboken, and were so made to equalize in part the freights by water from the ports, which were approximately 5 cents higher from South Amboy than from Hoboken. By our order in the *Anthracite Case* we required establishment over this route, among others, of the rates therein prescribed, viz, $1.40 on prepared sizes and $1.30 on smaller sizes. But before that order became effective on March 31, 1916, the Pennsylvania sought and on March 9, 1916, obtained from us a modification which enabled it to withdraw, as it desired, from further participation because of its long haul and low earnings.

The allegations that undue prejudice and undue preference had resulted from exaction of the rates assailed are not supported by any evidence and will not be further considered.

Upon the entire record we find that the rates assailed on anthracite coal in carloads from Plymouth, Luzerne, and Kingston to New York lighterage station f. o. b. vessels, for the period from April 9, 1910, to March 31, 1916, inclusive, were unreasonable to the extent that they exceeded, per ton of 2,240 pounds, $1.45 on prepared sizes and $1.35 on smaller sizes, which we find would have been reasonable. We further find that the joint rates assailed on the same commodity from the same points to South Amboy, f. o. b. vessels for transshipment, during the same period, were not unreasonable or otherwise unlawful.

REPARATION.

The rates prescribed as reasonable maxima for the future in the *Anthracite Case* constitute the basis of the reparation claims. Included therein are all shipments which moved after January 26, 1910, which is two years prior to the date on which the complainant by letter, in a very general way, and without specifying rates or shipments or indicating any intention of claiming reparation, first expressed to us its dissatisfaction with the rate adjustment. We are of opinion that this letter was not such a complaint as would toll the statute of limitations. We are further of opinion and find that no damage was suffered by complainant through the exaction of charges at the joint rates here in issue from Plymouth, Luzerne, and Kingston to South Amboy, which, as we have found, were not unreasonable.

We proceed to consider the merits of the claims in 4792 (Sub-No. 1) on shipments made to Hoboken over the Lackawanna prior to April 1, 1916, on which the freight charges were paid subsequent to April 8,[1] 1910.

[1] The first day of the two-year period antedating the filing of the complaints is excluded. *Navassa Guano Co. v. C., M. & St. P. Ry. Co.,* 39 I. C. C., 171.

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The original complaint was filed April 8, 1912. No complaint has since been filed claiming reparation on shipments which moved after that date. Section 16 of the act to regulate commerce, as amended, provides:

All complaints for the recovery of damages shall be filed with the Commission within two years from the time the cause of action accrues, and not after, * * *.

In *Lamb-Fish Lumber Co.* v. *Transcontinental Freight Bureau*, 53 I. C. C., 221, we had occasion to consider this provision, the construction placed upon it by the court in *Phillips* v. *Grand Trunk Ry.*, 236 U. S., 662, 667, to the effect that—

under such a statute the lapse of time not only bars the remedy but destroys the liability * * *

and the holding in *Louisville Cement Co.* v. *Int. Com. Comm.*, 246 U. S., 638, that the cause of action accrues when the unlawful charges are collected. Upon the facts there before us we found that the original complaint, filed before the shipments moved, and thus before any cause of action accrued thereon, did not stay the running of the statute of limitations, and that in the absence of any showing that the supplemental complaints before us were filed within two years from the time the causes of action accrued they must be dismissed as barred by the statute.

The circumstances here are dissimilar. At the first hearing, on May 1, 1913, counsel agreed that the evidence bearing upon the claim for reparation should be deferred pending determination of the issue of reasonableness. At the further hearing on April 28–29, 1916, complainant submitted detailed statements, which had been checked by the Lackawanna, of shipments made between January 26, 1910, and April 1, 1916, and the amount of reparation claimed. No objection was then made or has since been made by defendant to the inclusion of shipments which moved subsequent to the date of filing the complaint.

The complaint alleged that the rates were unreasonable both in the past and for the future, and indicated clearly that shipments were continuing under these rates. It was understood by defendant and by us that complainant was claiming reparation not only for the period in the past but also on subsequent shipments up to the time of the establishment of reasonable rates, if we should find that the rates attacked were unreasonable. We are of the opinion and find that the complaint filed and the hearings and proceedings had were such as to fully apprise defendant of complainant's claims for reparation, both in respect to shipments which had moved during the statutory period prior to such filing, and in respect to shipments which continued thereafter to move at the rates therein assailed

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down to April 1, 1916, the effective date of our order prescribing maximum reasonable rates for the future. We therefore include in our consideration the claims based on such subsequent shipments.

Certain defenses thereto were interposed by the Lackawanna. Its counsel had repeatedly urged of record that our conclusions in the *Anthracite Case* would, in the main, be determinative of the issues here raised and should have consideration, but, after that case was decided, insisted on brief and in oral argument that no such consideration should be given, since none of the evidence in that case was properly before us upon the record here. The complainant and the defendants, including the Lackawanna, had participated in the *Anthracite Case*, and were there represented by the same counsel as here. We think that as such consideration was specifically requested upon the record and all parties in interest were afforded opportunity for full hearing the objection should be overruled. *Phillips* v. *Grand Trunk Ry.*, *supra.*

All shipments included in the claims were consigned to the American Exchange National Bank of New York and it paid the freight charges. The president of the complainant coal company and the assistant cashier of the consignee bank testified that in paying these charges the bank acted as fiscal agent of complainant and charged to complainant in open account the amounts so paid. This testimony was not rebutted. The Lackawanna insisted that the written contract of agency must be produced, as being the best evidence of who paid and bore the charges, and that since it was not forthcoming, apparently because lost or mislaid, complainant had failed to establish its right to an award of damages, even if such award were otherwise justified. We think that the uncontroverted testimony of competent witnesses in behalf of both principal and agent was sufficient to establish the fact that payment was made by the agent for its principal, and that the proof is not impaired by failure to place in evidence the written contract which created that relation.

It appears that complainant in an assignment made by it March 6, 1915, of choses in action, *inter alia*, to the children of its former president, then deceased, included its rights and interest in the claims here before us. Neither the assignees nor any successor of theirs in interest intervened in the proceedings or asserted therein any rights against complainant. The Lackawanna insists that this assignment precludes recovery by complainant. If we find that complainant has been the party injured by a violation of the act to regulate commerce it is to complainant that our award of reparation should be made under that act, and we may not deny it reparation because of an assignment *pendente lite* under which no adverse rights are asserted, even if we have jurisdiction under that act to pass upon such conflicts.

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The main defense lies in the contention that complainant has failed to prove actual damage resulting from its payment of freight charges at the rates found unreasonable. A like defense was considered by the Supreme Court of the United States in *Southern Pac. Co.* v. *Darnell-Taenzer Co.*, 245 U. S., 531, where the court said that plaintiffs, having been assessed charges at rates subsequently found unreasonable, suffered losses—

* * * when they paid. Their claim accrued at once in the theory of the law and it does not inquire into later events.

This followed a statement of the matter in issue, the court saying:

The only question before us is that at which we have hinted; whether the fact that the plaintiffs were able to pass on the damage that they sustained in the first instance by paying the unreasonable charge, and to collect that amount from the purchasers, prevents their recovering the overpayment from the carriers.

Defendant urges that in the *Anthracite Case* we authorized increases in the coal rates from Plymouth, Luzerne, and Kingston to many destinations, including the rates on sizes smaller than pea from these points to Hoboken, and that during the period covered by the reparation claims complainant shipped to tidewater about 35,567 tons of coal in sizes smaller than pea, at rates ranging from 7 to 22 cents less than those which we there found to be reasonable maxima and permitted the carriers to establish. Conceding that the doctrine of set-off is not a good defense, since the regulating statute does not entitle carriers to recover from shippers where charges have been collected at rates less than those subsequently determined to be reasonable, the defendant nevertheless urges that the facts shown do not justify a departure from the reasoning followed in denying reparation in many cases where general rate adjustments, including both increases and decreases, have been required.[1] In *Sloss-Sheffield Steel & Iron Co.* v. *L. & N. R. R. Co.*, 51 I. C. C., 635, we have recently discussed considerations which have moved us in awarding and denying reparation and need not repeat them here.

It being our judgment, formed upon the facts of record in the cases here before us, and fortified by the results of our investigation of the whole subject in the *Anthracite Case*, that the rates paid by complainant and assailed by it as unreasonable, were unreasonable in the instances, to the extent, and during the period covered by our finding in the preceding portion of this report, we now further find, under the doctrine laid down in the *Darnell-Taenzer Case*, *supra*, (*a*) that within the period April 9, 1910, to March 31, 1916, inclusive, the Plymouth Coal Company, here complainant, paid, through the American Ex-

[1] *Anadarko Cotton Oil Co.* v. *A. T. & S. F. Ry. Co.*, 20 I. C. C., 43; *Warnock Co.* v. *C. & N. W. Ry. Co.*, 21 I. C. C., 546.

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change National Bank of New York, its fiscal agent, to the Delaware, Lackawanna & Western Railroad, here defendant, freight charges aggregating $345,820.87 on certain carload shipments of anthracite coal which had been transported by the defendant from Plymouth, Luzerne, and Kingston, Pa., to New York lighterage station, N. J., f. o. b. vessels; (*b*) that in the aggregate these shipments consisted of 187,389.93 long tons of prepared sizes and 34,800.36 long tons of pea size, and the freight charges paid thereon were assessed at rates of $1.58 and $1.43 per long ton, respectively, which are herein found to have been unreasonable; (*c*) that freight charges aggregating $318,695.88 would have accrued and become payable on these shipments if the rates herein found reasonable, $1.45 and $1.35, respectively, had been applicable; (*d*) that by reason of having been required to pay the aforesaid charges at unreasonable rates the complainant, at the time of payment, suffered damages to the extent of the difference between the charges paid and the charges it would have been required to pay at the rates herein found reasonable; and (*e*) that the complainant is entitled to recover from the Delaware, Lackawanna & Western Railroad the damages thus sustained, amounting in principal to $27,124.99, with interest. Appropriate orders will be entered requiring payment by the defendant to the complainant in conformity with these findings in No. 4792 (Sub-No. 1), and dismissing the complaint in No. 4792.

HALL, *Commissioner*, concurring:

With all that is said and decided in the foregoing report I am in accord, but something remains to be said if the considerations which lead me to join in awarding reparation are to be adequately expressed.

The act to regulate commerce lays upon the carrier the duty of publishing and establishing just and reasonable rates. The rates so established may not be departed from by shipper or carrier. Later on, in passing upon those rates, we may deem it fitting to prescribe a lesser rate as reasonable maximum for the future, but our power to do so is conditioned on our being of opinion that the existing rate is unreasonable. If both rates are within the "flexible limits of judgment" which the Supreme Court recognizes when exercised by us, and which presumably exist when exercised by a carrier in initiating a rate, it seems harsh to hold, in effect, that because the carrier was unable to forecast the precise rate within those limits which would later meet our approval it must repay the difference to the shipper who has paid it. But if the carrier charged with the statutory duty of initiating just and reasonable rates goes clear outside the limits of judgment and publishes rates which are unconscionable for the service rendered, and which plainly could not be ap-

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proved by the regulating tribunal, however constituted, it seems but just that when the carrier's default is later remedied by that body through determination of what in its judgment would have been a maximum reasonable rate, the rate so determined should replace for all purposes that which was extorted from the public, and that all who paid the unconscionable rate, and not merely those who have complained about it, should have their loss made good by an award of reparation.

I can see no element of extortion in a rate established by a carrier in the fair exercise of its best judgment as to what will be just and reasonable, even though that judgment does not exactly coincide with the judgment later formed by the regulatory body, and in such cases no reparation should be awarded unless it be upon proof of actual damage to complainant traceable to that error in judgment as proximate cause.

But when nothing that can fairly be called judgment has been exercised by the carrier, and the rate established by it and exacted from the public is unconscionable, such that the regulating tribunal can properly say, "The carrier must have known that this rate was unjust and unreasonable, or should have known if it did not in fact," then extortion has been practiced and the carrier should be made to restore every dollar exacted by it in excess of the maximum rate which we later fix.

In our thirtieth annual report to the Congress, December 1, 1916, we said, at page 76:

In connection with the question of reparation on account of an unreasonable rate charged it should be borne in mind that the standard of reasonableness under our act is not a definite fixed standard. That is to say, whether a certain rate is reasonable or not often can not be known by the carrier until the Commission has passed upon it. Now, in seeking reparation on account of an unreasonable rate, complainants frequently invoke the common law in support of their claims, but we have been referred to no common-law case where the standard exceeded by the carrier was not a fixed definite standard which the carrier knew and was bound to observe. The act contemplates that we shall find rates reasonable or unreasonable according to whether, in our opinion, the rate bears a proper relation to the service rendered. But this is preeminently a question upon which opinions of the Commission and of the carriers may differ, and the act contemplates an original exercise of the carriers' judgment.

In our earlier annual reports, notably that for the year 1897, we repeatedly dwelt upon the fact that the reparation awarded rarely, if ever, reaches the one who has suffered loss and with whom the loss abides, and in our latest report, that of December 1, 1919, we said, at pages 20–21:

The fact suggested by the court in the *Darnell-Taenzer Case*, that in the end the public probably pays the damages in most cases of compensated torts and

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that the ultimate consumer who may have been actually damaged by the unreasonable charge can not recover, appears to be an insufficient reason upon principle why the shipper, who eventually has not been damaged, should be allowed to recover. The exaction of an unreasonable charge by a carrier is a public wrong; but there is a clear distinction between a public wrong and private damages. *International Coal Case.* If the law provided that no recovery shall be allowed for any violation of the act unless the party claiming reparation can show that he suffered pecuniary loss or damage, it would probably result that in some cases the damages could not be proven and the unreasonable charge would be retained by the carrier. If it be felt that it would be against public policy to permit carriers to retain charges found to be unreasonable, it would seem preferable that the carrier be required to pay the unreasonable charge into the public treasury than to continue the policy which permits a private individual who has not really suffered damage to recover.

* * * * * * *

The law might well affirmatively recognize that private damages do not necessarily follow a violation of the act; and provide that sections 8, 9 and 16 of the act shall be construed to mean that no person is entitled to reparation except to the extent that he shows that he has suffered damage. The close analogy between a relatively unreasonable or unjust rate and an unjustly discriminatory or unduly prejudicial rate, and the difficulty of determining just when a rate becomes unreasonable or that it is unreasonable *per se*, suggest that the law should provide that if a rate is found to be unreasonable the rule of damages laid down in the *International Coal Case* should control.

Irrespective of such statutory pronouncement as we have thus suggested there is authority for the view that under the existing act the fact of injury to complainant and the amount of resulting damage must be proved in all cases in which reparation is awarded for violation of the act. Reference has been made to the *Meeker Case* and to the decision of the Supreme Court in which that litigation culminated. Our order covered two claims made by Meeker & Company, one based on alleged unjust discrimination and one based on alleged unreasonableness. Judgment on that order was obtained in the trial court, and reviewed in the circuit court of appeals. *L. V. R. R. Co.* v. *Meeker*, 211 Fed., 785. In its decision, after quoting three propositions from the supplemental brief of defendant in error, as follows:

(1) The measure of damage was clearly the difference between the unreasonable rate paid and the reasonable rate. (2) That all that the shipper had to establish, consequently, was the amount of the charges which he had paid, and what the reasonable charge would have been. (3) Having established these facts, the shipper was entitled, *as a matter of law*, to recover the difference between the two rates—that is, the overcharge.

the court said:

These propositions constitute the gravamen of defendant in error's whole argument.

and then proceeded with a discussion which included the following:

A situation where the rates paid were the rates fixed by the act, as the only legal rates that could be demanded or paid, even though those rates are de-

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clared afterwards by the Commission, in the performance of its administrative function, to be unreasonable, differs essentially from a situation where an *illegal* rate is, in the first instance, coerced or *extorted* by the carrier. The tariff rate paid by the shipper was the legal rate, any departure from which is made by the statute a misdemeanor and punishable by fine. There is consequently no "overcharge" to be recovered as such, as in the cases cited at common law, and no coercion except that of the law. It is obvious that, even though the statute were silent as to the measure of damage applicable to the first situation, that measure could not justly be the same as in the second.

In marking this distinction the court followed that made by the Supreme Court in *Penna. R. R. Co.* v. *International Coal Co.*, 230 U. S., 184, at page 202:

But the English courts make a clear distinction between overcharge and damages, and the same is true under the commerce act. For if the plaintiff here had been required to pay more than the tariff rate it could have recovered the excess, not as damages but as an overcharge, and while one count of the complaint asserted a claim of this nature the proof did not justify a verdict thereon, for the plaintiff admitted that it had only paid the lawful rates named in the tariff. *Of course, no part of such payment of lawful rates can be treated as an overcharge or as an extortion.* (Italics ours.)

Proceeding, the circuit court of appeals observed with reference to section 8 of the act:

The learned counsel for the defendant in error seems to argue that this statute creates a *general* liability, independent of any relativity, limitation, or qualification as soon as a violation of the act is shown. That this is not so is apparent. It is not a *general* liability that is imposed by the act, but a particular liability to the person injured "for the full amount of damages sustained in consequence of any violation of the provisions of the act." The liability thus defined is the only civil liability anywhere imposed, and no other or different civil liability can attach itself to *any* violation of the act. The liability thus imposed being the same for all violations of the law, without exception, that liability as defined by the statute is to the "person or persons injured for the full amount of damages sustained in consequence of *any* such violation of the provisions of this act." We can not avoid the plain and exigent meaning of this language. It is impossible, in view of it, to attribute to Congress an intention to apply it to only a portion of the offenses against the act.

The circuit court of appeals concluded that the plaintiff below had made out no case for a recovery of damages and reversed the judgment of the trial court. The Supreme Court, in turn, reversed the decision of the circuit court of appeals in so far as it denied a prima facie effect to our finding that complainant had been damaged, saying:

In view of the recital that the findings were based upon the evidence adduced, it must be presumed, there being no showing to the contrary, that they were justified by it.

In the course of its opinion the Supreme Court further said:

We think * * * that what it (the act) requires is * * * a finding which, as applied to the present case, would disclose (1) the relation of the

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parties as shipper and carrier in interstate commerce; (2) the character and amount of the traffic out of which the claims arose; (3) the rates paid by the shipper for the service rendered and whether they were according to the established tariff; (4) whether and in what way unjust discrimination was practiced against the shipper from November 1, 1900, to August 1, 1901; (5) whether, if there was unjust discrimination, the shipper was injured thereby, and, if so, the amount of his damages; (6) whether the rate collected from the shipper from August 1, 1901, to July 17, 1907, was excessive and unreasonable, and, if so, what would have been a reasonable rate for the service, and (7) whether, if the rate was excessive and unreasonable, the shipper was injured thereby, and, if so, the amount of his damages.

It would seem obvious from the requirement of such a finding as (7), and its analogy to (5), that the Supreme Court here recognized that a shipper is not necessarily injured by the payment of a rate later found by us to have been unreasonable.

In the case now before us complainant paid the same rates as those which for years had been collected from shippers of anthracite coal from the northern region to tidewater at the same points. Those rates were based on a percentage relation to the average selling price of the coal at the ports, 35 per cent then, and 40 per cent before. The rate therefore did not merely enter into the selling price. It grew out of the selling price. It was necessarily taken into account in every sale and ordinarily borne by the purchaser as between him and the vendor. Moreover, the rate so established on the smaller sizes was less than what we found reasonable in the *Anthracite Case* and in our former report in the case now before us; and the anthracite rates generally were assembled in group adjustments in which differences in distance were treated as relatively unimportant, with the result that when reviewed in the *Anthracite Case* we found some too high and some too low. The act provides no means by which the carrier can be recouped in instances where its rates are found to have been too low.

From the record now before us I am not convinced that the complainant has in fact suffered injury or damage, as those terms are known to the law, but under the doctrine laid down by the Supreme Court in the *Darnell-Taenzer Case*, *supra*, I feel constrained to share in this award of reparation.

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