

No. 10378.
FRANKLIN C. CORNELL
v.
LEHIGH VALLEY RAILROAD COMPANY AND DIRECTOR
GENERAL.

Submitted June 10, 1919. Decided February 12, 1920.

Rates on anthracite coal, in carloads, from Coxtan, Pa., to East Ithaca, N. Y., found to have been unduly prejudicial to the extent that they exceeded the rates contemporaneously in effect to Ithaca, N. Y. Reparation awarded.

E. H. Bostwick and *O. L. McCaskill* for complainant.

R. W. Barrett for Director General and Lehigh Valley Railroad Company.

REPORT OF THE COMMISSION.

DIVISION 3, COMMISSIONERS MEYER, HALL, AND EASTMAN.

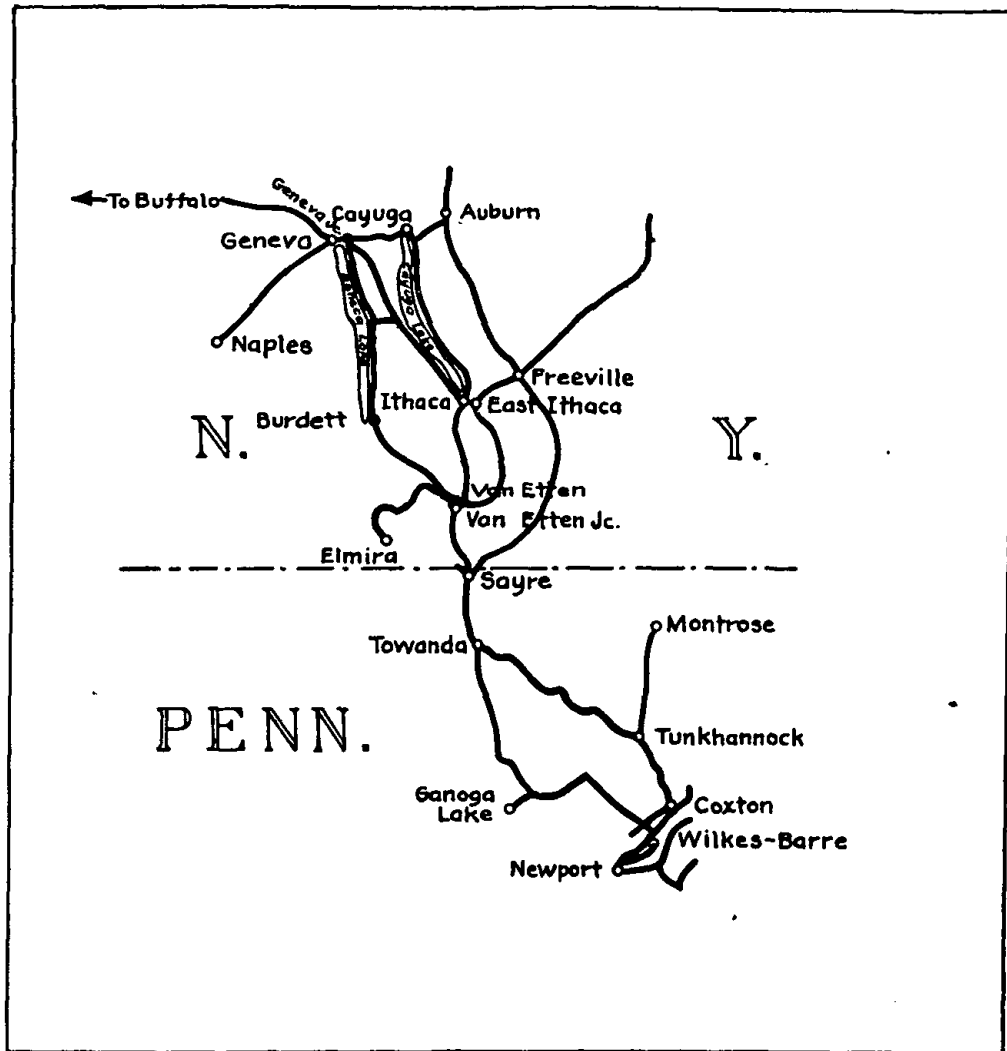
Complainant conducts a retail coal business in the city of Ithaca, N. Y., with a coal yard adjacent to the tracks of the Lehigh Valley Railroad at a station designated East Ithaca. His complaint filed December 27, 1918, as amended, alleges that the rates on anthracite coal, in carloads, from Coxtan, Pa., to East Ithaca were and are, as compared with the rates to Ithaca, unduly prejudicial to him and unreasonably preferential of his competitors located at Ithaca, in violation of section 3 of the act to regulate commerce and section 10 of the federal control act. Reparation is asked on shipments which moved in the period between January, 1917, and March, 1919, both inclusive.

At the hearing defendants agreed to publish for the future the same rates on anthracite coal from Coxtan to East Ithaca as to Ithaca, but specifically denied that the rates attacked have been unlawful in the past. Complainant is satisfied with this basis for the future. The case, therefore, resolves itself into a claim for reparation. Rates are hereinafter stated in dollars and cents per gross ton.

Coxtan is the billing point for all northbound coal from the Lehigh, Schuylkill, and Wyoming regions of Pennsylvania, and is about 12 miles north of Wilkes-Barre, Pa., and 120 miles southeast

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of Ithaca. The city of Ithaca for the purposes of this case may be divided into two parts, viz, the valley and the hill, the former comprising the business part of the city, the older residential section, and the freight and passenger stations of the Lehigh Valley and the Delaware, Lackawanna & Western Railway. That part of the city designated as the hill includes the principal residential section and



Cornell University with its campus. Complainant's coal yard and the East Ithaca station are located on the hill in the vicinity of Cornell University. They are approximately 500 feet higher than, and 1.5 miles from, the station of the Lehigh Valley in Ithaca. All of complainant's competitors receive their coal in the valley.

The Lehigh Valley reaches Ithaca and East Ithaca by different lines of railroad as shown by the above map.

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All coal from Coxtton destined to Ithaca or East Ithaca moves over the main line and in the same trains as far as Van Etten Junction, N. Y., a point 20 miles from Ithaca and 25 miles from East Ithaca. The branch reaching East Ithaca is known as the Elmira, Cortland & Northern division, hereinafter referred to as the East Ithaca branch. The line to Ithaca also leaves the main line at Van Etten Junction and runs along Cayuga lake, rejoining the main line at Geneva Junction, N. Y. This is a part of the Seneca division, but for the purposes of this case will be referred to as the Ithaca branch. All of the Lehigh Valley's through passenger trains between Buffalo and New York operate over this branch. The line which is used for all through freight, and the one that may properly be termed the main line, extends from Van Etten Junction along Seneca lake to Geneva, N. Y. This line is double tracked and is a part of the Seneca division, but will be referred to herein as the main line.

Prior to April 1, 1916, the rates on coal from Coxtton to Ithaca and East Ithaca were the same, \$1.65 on prepared sizes and \$1.50 on smaller sizes. On that date and in conformity with our decision in *Rates for Transportation of Anthracite Coal*, 35 I. C. C., 220, hereinafter called the *Anthracite Case*, which prescribed, among other rates, maximum rates on coal from Lehigh producing fields in Pennsylvania to Ithaca, the rates to Ithaca were reduced to \$1.45 on prepared sizes and \$1.32 on pea and smaller sizes. No change was made in the rates to East Ithaca. While the latter point was not specifically mentioned in the *Anthracite Case*, we said that to related points the carriers would be required to establish rates in harmony with those prescribed. The table below shows the rates to Ithaca and East Ithaca prior to April 1, 1916, and the changes that have since been made:

Rates on anthracite coal.

From Coxtton, Pa.—	To Ithaca, N. Y.		To East Ithaca, N. Y.	
	Prepared sizes.	Pea and smaller sizes.	Prepared sizes.	Pea and smaller sizes.
Prior to April 1, 1916.....	\$1.65	\$1.50	\$1.65	\$1.50
From April 1, 1916, to April 1, 1918.....	1.45	1.32	1.65	1.50
From April 1, 1918, to April 4, 1918.....	1.45	1.32	1.80	1.65
From April 4, 1918, to June 25, 1918.....	1.60	1.47	1.80	1.65
From June 25, 1918, to July 19, 1919.....	1.90	1.80	2.10	2.00
From July 19, 1919, to present date.....	1.90	1.80	1.90	1.80

The rates to both Ithaca and East Ithaca were increased 15 cents per ton in April, 1918, as a result of our decision in *The Fifteen Per Cent Case*, 45 I. C. C., 303. They were again advanced June 25, 57 I. C. C.

1918, as a result of General Order No. 28 of the Director General of Railroads. During the period from April 1, 1916, to January 1, 1917, complainant was not interested in the rate situation, inasmuch as the Lehigh Valley Coal Sales Company absorbed the difference in rates and made complainant a delivered price which was the same as that made to his competitors.

In justification of the failure to maintain the rate parity between East Ithaca and Ithaca after the effective date of our order in the *Anthracite Case*, defendants rely principally on three propositions: First, that the operating conditions on the two branches are substantially dissimilar; second, that the location of complainant's coal yard on the hill is such that he enjoys a monopoly of the hilltop trade and that any difference in freight rates was more than offset by the natural advantage of his location; third, that during the period in question war conditions made it possible for coal dealers to sell at any price all coal they could secure. These points will be considered in order.

Defendants state that the Ithaca branch is highly developed and capable of efficient operation, and that the track and bridges were constructed and are maintained for the heaviest locomotives. On the other hand they assert that the East Ithaca branch was constructed for light branch-line traffic and light locomotives, and could not be brought up to a high state of efficiency except at large expense. The tractive power of the largest locomotive that can be operated on the Ithaca branch is four times as great, they say, as that of the largest locomotive that can be operated over the East Ithaca branch.

It is admitted by defendants that larger territory and population are served by the East Ithaca branch than by the Ithaca branch. No figures have been introduced to show the relative density of tonnage. From the record it may fairly be inferred that the Ithaca branch has been developed and maintained at a high state of efficiency for the purpose of enabling the Lehigh Valley to operate its through passenger trains over this route, thereby giving Ithaca and Cornell University the advantage of through service. The controlling grade for tonnage-rating purposes on the one branch is substantially the same as on the other. The maximum on the Ithaca branch is about 16 feet to the mile, and on the East Ithaca branch about 15 feet. The elevations of Van Etten, East Ithaca, and Ithaca are, respectively, 1,010 feet, 872 feet, and 390 feet. Defendants also state that the cost of operation per 1,000 tons hauled 1 mile on the East Ithaca branch is 400 per cent of the similar cost on the Seneca division. It is not shown how this conclusion was reached and the comparison is of little value, since the Seneca division includes the main line over

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which through freight trains are operated. No allocation is made showing the cost of handling traffic over the Ithaca branch as compared with the East Ithaca branch.

Complainant and Cornell University are the only receivers of coal at East Ithaca. Coal and general merchandise constitute the principal tonnage received there. Class rates on the Lehigh Valley from New York and Wilkes-Barre, representative points of origin, and commodity rates on lumber, clay, iron, and steel articles from New York, on cement from the Lehigh district, and on brick from Perth Amboy, N. J., were and are the same to East Ithaca as to Ithaca. The record discloses only a few instances in which the rates to East Ithaca are higher than to Ithaca. In view of the fact that defendants have maintained a rate parity between Ithaca and East Ithaca on substantially all traffic from the east except coal, it would seem that they have not seriously considered that the cost of operation on the one line justified a higher basis of rates than on the other.

The second contention is that the advantage of complainant's location has offset any disadvantage he may have experienced in rates. Where the transportation conditions are substantially similar we have never held that a carrier has the right to discriminate against one point in favor of another because a shipper located at the former has a natural advantage over his competitor located at the latter. Defendants, however, urge that complainant was not in actual competition with other coal dealers in Ithaca for the reason that the railroad delivered his coal on the hilltop, whereas his competitors could only reach that part of the city by hauling their coal up a steep grade. The record clearly establishes the fact that there is active competition between the complainant and the other coal dealers in Ithaca both for the trade in the valley and for the trade on the hill. Complainant aptly expressed the situation when he stated that coal dealers, like the milkmen, were all over the city.

Exhibits were introduced showing the location of complainant's customers on the hill and in the valley. Similar exhibits show that complainant's competitors have a substantial part of the hilltop trade. Coal is hauled by teams or trucks and the same price is made by dealers wherever the customer is located. For sidewalk delivery to any part of the city a dealer pays for hired teams or trucks at the rate of 50 cents per ton and for any further carriage or stowage by manual labor there is an additional payment of 25 cents per ton. These payments appear to be uniform with all dealers and the amounts thereof are included in the cost to the consumer whether the services are performed by hired teams or trucks or by the dealer's own facilities. Complainant asserts that because of ice and snow in the winter season it is more difficult and ex-

pensive for him to haul coal down the hill than it is for his competitors to haul it up. He admits, however, that in summer time his location is of some advantage, but explains that the summer trade is small as compared with the winter business. The record is clear that complainant has keen competition for the hilltop trade and that his location has given him no monopoly in that part of the city.

We come now to the point that war conditions enabled complainant to dispose of all the coal that he could secure and at any price, and that he has not, therefore, been damaged by the difference in rates. It is conceded that during the period in question there was a serious coal shortage. In November, 1917, the Fuel Administrator established at Ithaca maximum prices for the distribution of anthracite coal. The price originally fixed considered various elements of cost and included the freight rates and a profit of 25 cents per ton. Complainant called the attention of the local fuel administrator to the difference in rates after the price of coal had been fixed for Ithaca. He was then offered the privilege of adding 20 cents per ton to the sale price fixed for Ithaca in order to offset the difference in rates. Complainant insists that he was unable to take advantage of this offer as it would have meant a loss of good will with a consequent serious loss of business when normal conditions again obtained. The regulations of the Fuel Administrator were withdrawn in February, 1919. During the periods after that date and prior to November, 1917, when the Fuel Administrator was not in control, the evidence shows that complainant absorbed the difference in rates in making a price to his customers, in order that he might be in a position to offer coal on the same basis as his competitors. From the record as a whole it is clear that during the entire period in question complainant absorbed the difference in freight rates in making a price to his customers.

EASTMAN, Commissioner:

The foregoing is, with some modifications, the statement of the pertinent facts by the examiner who heard the testimony and which was served upon the parties in the form of a proposed report, containing his recommendations that the rates exacted for the transportation of anthracite coal, in carloads, from Coxtton to East Ithaca, during the period covered by the complaint should be held unduly prejudicial to the extent that they exceeded those contemporaneously in effect to Ithaca, that complainant should be found to have been damaged, and that reparation should be awarded. Exceptions were filed by defendants.

Defendants contend that the operating conditions over the East Ithaca branch as compared with those over the Ithaca branch justi-

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fied the difference in rates. While the evidence shows that the line from Van Etten to Ithaca is better ballasted, has heavier rails, and in general is better constructed than the line from Van Etten to East Ithaca, it also shows that a greater population is served by and a heavier volume of coal moves over the East Ithaca branch than over the Ithaca branch and that the former branch has the advantage in the matter of grades. It was testified on behalf of complainant and not disputed by defendants that in negotiating the controlling grade on the Ithaca branch it is necessary either to split the train or to use an additional engine. The evidence as to the comparative costs of transportation is somewhat conflicting and not conclusive. In considering this matter it is to be observed that up to Van Etten the hauls are identical and that the hauls beyond that point are only about 19 per cent of the through hauls.

Defendants contend that no weight should be accorded the fact that they maintained Ithaca and East Ithaca upon the same basis with respect to class and commodity rates from various points, averring that these were merely "paper rates." It is in evidence, however, that cement, brick, structural iron, general merchandise, and other commodities were received to some extent at East Ithaca. In any event, we think the record sufficient to sustain the conclusion of the examiner without reference to the fact that defendants maintained East Ithaca and Ithaca on the same basis in the case of other rates.

Defendants argue that complainant had no competition at Ithaca during the reparation period and therefore suffered no damage because, first, during that period any dealer could sell at any price every pound of coal he could get and, second, the location of complainant's place of business at Ithaca gave him a natural advantage over other coal dealers in respect of the trade on the hill, and irrespective of the demand for coal during the war, diminished the possibility of competition for the sale of coal in a large portion of the city adjacent to his coal trestle. The record is clear that complainant could and did sell all of his available coal. The claim for reparation is not based upon any loss of business, but rather upon the alleged fact that because of the difference in the freight rate complainant was forced to shrink his profits by the amount thereof. Complainant's positive testimony is that during the reparation period he did not charge any higher price than his competitors, and that he could not have charged a higher price without serious loss of prestige and future business, and there is no evidence to the contrary. While there was no competition for present business, there was competition for future trade. This future business and good will of his customers was a thing of value to complainant and must

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be recognized as a justification for meeting the prices of his competitors.

There is no merit in defendants' contention that the natural advantage of complainant's location offset any disadvantage in the freight rate. If there is any substantial natural advantage to complainant in his location on the hilltop that is his and can not be taken away from him. Furthermore, the evidence shows that it did not give complainant a monopoly of the hilltop trade or enable him to increase his prices above those of his competitors.

Upon consideration of the whole record we adopt the foregoing statement of the examiner, as modified, and make it a part of this report. We are of opinion and find that the rates on anthracite coal, in carloads, from Coxton, Pa., to East Ithaca, N. Y., during the period in which the shipments covered by complainant's claim for reparation moved, were unduly prejudicial to complainant to the undue preference of his competitors at Ithaca, to the extent that they exceeded the rates contemporaneously in effect on anthracite coal, in carloads, from Coxton to Ithaca, N. Y.; that complainant made shipments as described and paid and bore the charges thereon at the rates herein found unduly prejudicial; that he has been damaged to the extent that the rates exacted thereon exceeded the rates contemporaneously in effect to Ithaca; and that he is entitled to reparation, with interest. The exact amount of reparation can not be determined upon this record. Complainant should prepare a statement showing the details of the shipments in accordance with rule V of the Rules of Practice, which statement should be submitted to the defendants for verification. Upon receipt of a statement so prepared and verified we will consider the entry of an order awarding reparation.

HALL, *Commissioner*, dissenting in part:

In my opinion rate disparity is not shown to have been the proximate cause of any injury suffered by complainant. He has failed to establish the fact of his injury and the amount of resulting damage with the degree of particularity and certainty which would be required in a court to support a verdict for damages. This I understand to be requisite in cases of this nature.

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