No. 12748.[1]

A. G. KIDSTON & COMPANY *v.* DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY ET AL.

Submitted February 21, 1922. Decided November 6, 1922.

Applicable car-demurrage charges collected at New York, N. Y., and Philadelphia, Pa., on carload shipments of steel plates, car trucks, and car-truck frames, for export, originating at various points, stored on the ground at the ports, found not unreasonable. Complaints dismissed.

E. A. Hodkinson, *Charles J. Biddle*, and *Charles Biddle* for complainants.

James E. Gowen, *W. J. Larrabee*, and *Henry Wolf Biklé* for defendants.

REPORT OF THE COMMISSION.

Cox, *Commissioner*:

These cases involve the same issue, were argued together, and will be disposed of in one report.

Exceptions were filed by defendants to the reports proposed by the examiners and oral argument was had. Our conclusions differ from those recommended by the examiners.

Complainants attack as unreasonable, unjustly discriminatory, unduly prejudicial, and otherwise unlawful storage charges on a demurrage basis exacted of them for the detention of various carloads of steel plates, car trucks, and car-truck frames received during the period from May 19 to September 30, 1920, at New York and Philadelphia for export; also the tariff rule providing for the assessment of storage charges equivalent to demurrage charges on property stored on the ground unless written request is made to have the property unloaded.

The complaints in Nos. 12748 and 13248 cover 36 carloads of steel plates, 21 via the Pennsylvania and 15 via the Delaware, Lackawanna & Western, from Buffalo, N. Y., Claymont, Del., and Harrisburg, Pa., which arrived at New York, for export, between June 1 and September 30, 1920. The plates were unloaded and stored on the ground by the defendants, some on the dates of arrival,

[1] This report also embraces No. 12863, Same *v.* Pennsylvania Railroad Company; No. 13248, Hawthorns & Company, Ltd., *v.* Delaware, Lackawanna & Western Railroad Company et al.; and No. 12808, J. G. Brill Company *v.* Philadelphia, Baltimore & Washington Railroad Company et al.

others within the free time, and the remainder on various dates after the free time had expired to release needed equipment or for the convenience of defendants. Demurrage charges at the rates of $2 for each of the first four days and $5 for each succeeding day were assessed until the cars were released in the sum of $6,223. Being unable to accept delivery, a representative of complainants advised representatives of defendants by telephone, on a date which is not recalled, that requests would be made to store the plates on the ground. In response, complainants' representative was informed that the plates were then so stored. Such instructions were not sent, because complainants deemed it unnecessary. Defendants have no record of this telephone conversation.

No. 12863 covers two carloads of steel plates shipped on March 1, 1920, via the Pennsylvania from Claymont to New York, for export. Being delayed in transit, they were diverted to and arrived at Philadelphia May 19, 1920, and were ordered to be delivered to a steamship May 26, 1920. A strike of longshoremen was declared on that date and continued until July 8, 1920. The steamship in which the plates were to be exported left Philadelphia June 3, 1920. The plates were unloaded and stored on the ground from June 11, 1920, until September 20, 1920, when orders to forward via another steamship were received. Demurrage of $458 on each car, assessed from the expiration of free time on May 29, 1920, to the date of release, was at the same rates as assessed upon the shipments at New York. At the rate for handling and ground storage the charges would have been $7.28 on one car and $25.42 on the other. No request to store the freight on the ground was made by complainants.

Complainant in No. 12808 shipped four carloads of car-truck frames and seven carloads of car trucks to its forwarding agent at Philadelphia, for export. They arrived at the port between May 22 and 24, 1920. Notice of arrival was promptly given the forwarding agent by defendants. Due to the longshoremen's strike the shipments were not promptly exported and to release needed equipment the cars were unloaded and their contents stored on the ground by defendants within the free-time period. The car trucks were ordered to vessel on July 22 and the car-truck frames on July 23, 1920. Charges were collected in the sum of $2,053, based upon the demurrage rates. As the storage period averaged about 45.5 days per car the shipments appear to have been undercharged. No written request for unloading was given by complainant or consignee.

The rules of the three defendants for the storage of shipments at seaboard points are identical. Under them various articles, in-

cluding those comprising complainants' shipments, whether held in cars or unloaded, are allowed 10 days' free time from the first 7 a. m. after the date on which notice of arrival is sent or given consignee, the carriers reserving "the right at their option to hold such freight in cars or to unload it." Shipments detained beyond the free time are charged car demurrage, except—

(a) If written request is made by shipper or consignee within the free time period to unload such freight on the ground, charges for the handling and storage will be assessed * * * * whether the shipment is held in cars or unloaded.

(b) If, after the expiration of the free time period, written request is made by the shipper or consignee to unload such freight, ground storage charges * * * will be assessed; the storage period to be computed from the third 7:00 a. m. after the date on which the property is ordered to be stored. Car demurrage charges to be assessed for each day of detention after expiration of free time to the third 7:00 a. m. after day on which property is ordered to be stored.

Shipments * * * on which written request to unload is made by the shipper or consignee within the free time * * * will be subject to handling and ground storage charges as follows: (a) A charge of 55 cents per ton, net or gross as rated, will be made for the first thirty days or fraction thereof, computed from the first 7:00 a. m. after the date on which notice of arrival is sent or given to consignee. (b) A charge of 5 cents per ton, net or gross as rated, will be made for each succeeding 30 days or fraction thereof.

The charge under (b) was increased August 26, 1920, to 7 cents.

At the hearing counsel for complainants expressly stated that he considered the rule unlawful only as applied to the particular facts in these cases which may be distinguished from others which may arise.

Complainants take the position that, under the option reserved to defendants in the tariff to hold freight in cars or to unload it, they chose to unload it without notifying complainants of their having done so. Cars were not being detained nor tracks occupied. Complainants' property was lying on the ground exactly as if they had made written request to have it so stored. In other words, complainants contend that car-demurrage charges in the circumstances here considered were unlawful since they are assessable only for the detention of cars and the occupation of tracks; that they were unreasonable because the service actually rendered was that for which handling and ground-storage charges were assessable; and that written request was a vain act, since the property was on the ground, a fact of which defendants had record.

For some time prior to February 28, 1920, when the present rules were established, defendants' tariffs provided for the assessment of ground-storage charges on shipments such as those here considered, whether unloaded at the request of the shipper or for the

convenience of the carrier, the charges to be applied from the first 7 a. m. after date of arrival. The charges under this rule were 50 cents per ton for the first 15 days, and thereafter 5 cents per ton for each succeeding month or fraction thereof. Shippers objected to this arrangement because they were thereby subjected to ground-storage charges during what would be free time if the freight were left in the cars. For example, if a carload shipment weighing 46 tons were unloaded upon arrival, ground-storage charges of $23 accrued immediately; whereas if the shipment had been allowed to remain in the car, 17 days, including 10 days free time, would elapse before an equal amount of demurrage charges would accrue. In answer to protests the present rules were formulated by a committee composed of representatives of both carriers and shippers.

The lower basis of handling and ground-storage charges was established with a view to relieving shippers of the necessity of providing storage within their plants by permitting them to store export freight at the seaboard while awaiting shipment, and also for the purpose of securing for the carriers a more uniform movement of traffic, thereby relieving congestion at the seaboard and simplifying the accumulation of cargoes. If shipments are unloaded on the ground to release needed equipment at the convenience of the carrier, without written request of the shipper, and the lower basis of ground-storage charges is applied, the carrier incurs the risk of unloading cars for which disposition orders might be received in a day or two. This is conceded by counsel for complainants. Defendants also urge that if the application of the ground-storage charges is not made dependent upon the shippers' written request to unload, discrimination might result, because it would be impossible to police the situation to prevent the preferential unloading of cars. They contend that these charges are extremely low, that they are a concession to the shipper in his own interest, and that it is not unreasonable to make their application conditional upon the certainty of a written request.

The duty of unloading carload freight or of furnishing orders for other disposition thereof after notice of arrival rests primarily upon the consignee. That duty was not discharged by the consignees herein. The demurrage charges as such are not attacked and, as previously observed, complainants do not contend that the rule assailed is unreasonable, except as applied to the particular facts in this case. The particular facts are that complainants had failed to comply with a specific requirement of the rule, and that defendants had themselves unloaded the freight. The lower basis of charges was open to complainants whenever they cared to avail themselves of it through the simple expedient of sending the required notice.

Charges for ground storage on a car-demurrage basis have been sustained by us in various cases. *Dodge Bros.* v. *Director General*, 62 I. C. C., 689. The underlying principle in these cases is that such charges are imposed, not primarily to produce revenue, but to accomplish a specific purpose, such as the prompt removal of the freight from the carriers' premises. If the purpose is reasonable and the charges are no higher than necessary to accomplish it, the charges are reasonable.

Reference is made in the briefs and on argument to *Naylor & Co.* v. *D., L. & W. R. R. Co.*, 52 I. C. C., 397. We there found the collection of ground storage on a demurrage basis subsequent to the unloading and release of the equipment by the carrier unreasonable. The shipments covered by that case were stored by defendant on its premises at Hoboken, N. J., in January and February, 1917. At that time the governing tariffs provided for the application of low ground-storage charges on freight unloaded at the request of the shipper or consignee, and for the application of storage charges on a car-demurrage basis when unloaded by the carrier for the purpose of releasing equipment. No request for the unloading of these cars had been made. Between the period in which these shipments were stored and the time of the hearing the rules of the defendant carrier had been amended so as to make applicable ground-storage charges on shipments unloaded for the convenience of the carrier. These amended rules, with minor changes, were those to which objection was later made by shippers, and which were changed to the present form for the reasons previously set forth herein. The record in the *Naylor case* was extremely brief, and little attempt was made to defend the applicable rules.

Upon the records in the cases now before us we find that the charges collected for the detention of complainants' shipments were not and that the rules assailed were not and are not unreasonable, unjustly discriminatory, unduly prejudicial, or otherwise unlawful. The complaints will be dismissed.

CHAIRMAN MCCHORD and COMMISSIONERS MEYER, AITCHISON, and POTTER dissent.