No. 12876.

COMPAGNIE AUXILIARE DE CHEMINS DE FER AU BRESIL *v.* DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY, DIRECTOR GENERAL, AS AGENT, ET AL.

Submitted June 16, 1922. Decided December 30, 1922.

Defendants' failure to furnish lighterage from Jersey City, N. J., through New York Harbor to Long Island City, N. Y., on shipments of box-car and stock-car ironwork from Berwick, Pa., for export, not shown to have resulted in the collection of charges which were unreasonable or otherwise unlawful. Complaint dismissed.

Edward B. Patterson and *Ashby Williams* for complainant.
W. J. Larrabee and *Thomas M. Woodward* for defendants.

REPORT OF THE COMMISSION.

DIVISION 1, COMMISSIONERS MCCHORD, AITCHISON, AND LEWIS.

LEWIS, *Commissioner:*

Exceptions were filed by the complainant to the report proposed by the examiner and the case was argued orally before us.

Complainant, a foreign corporation with an office in New York, N. Y., alleges that, due to defendants' failure to furnish free lighterage from Jersey City, N. J., through New York Harbor to Long Island City, N. Y., on 500 sets of ironwork for freight cars, shipped during the period from November 30, 1918, to March 12, 1919, inclusive, from Berwick, Pa., to New York, for export, it was compelled to perform such service at its own expense, resulting in the payment of charges which were illegal, unreasonable, unjustly discriminatory, and unduly prejudicial. We are asked to award reparation.

The shipments consisted of 134 carloads of ironwork for freight cars for use on complainant's railroad in Brazil, 52 carloads of which moved from Berwick over the line of the Pennsylvania Railroad and 82 over the line of the Delaware, Lackawanna & Western Railroad, hereinafter called the Lackawanna, to the New Jersey shore opposite New York City. Complainant lightered them at its own expense to a warehouse in Long Island City, where they were stored for periods ranging over several months before being exported.

The bills of lading covering the shipments which moved over the Lackawanna bore, after the word destination, the notation "New York City, N. Y." and were marked "lighterage free." Those covering the shipments which moved over the Pennsylvania showed "Greenville Pier, for complainant's lighterage, New York City, N. Y." The words "for export" were also shown on all the bills of lading. The Pennsylvania Company's Greenville pier and the New York lighterage station of the Lackawanna are both located on the New Jersey side of New York Harbor.

Defendants' tariffs contained a rule which provided for free lighterage from their rail terminals on the New Jersey shore to Long Island City. The rates applying from Berwick to Long Island City were the same as those applying to Jersey City.

At the time of movement the following embargo was in effect on traffic moving via the Lackawanna:

Export Freight.

All freight for export via all Atlantic ports except when offer is made and acceptance has been authorized by the General Operating Committee in accordance with Circular No. 965 * * *. This railroad will not accept any freight covered by through export bills of lading for the port of New York.

Domestic Freight.

Effective with close of business April 18, 1918, by order of the Domestic Division, Freight Traffic Committee, North Atlantic Ports, 141 Broadway, New York, embargo is placed on all carload domestic freight for delivery at New York, Brooklyn, Long Island City, Blissville, Jersey City, Hoboken, Weehawken, Staten Island, and all New York Harbor Lighterage, except the following articles when for other than lighterage delivery *

EXCEPTIONS BY SHIPPING PERMITS: Domestic freight for New York City District when covered by 'F. T. C.' permits issued by the Domestic Division, Freight Traffic Committee, North Atlantic Ports. Waybilling agents must endorse on card and revenue billing reference to authority 'F. T. C. No. —', otherwise cars will be rejected at junctions.

Substantially the same embargo was in effect on the lines of the Pennsylvania during the same period, as well as on all other lines reaching the port of New York. There can be no doubt as to the right of carriers to place embargoes in proper cases, and the right of the director general to place an embargo in this case is not questioned.

In order to obtain a permit to make an export shipment under the above embargo it was necessary that the application for it be made by the steamship company, and the permit would be issued only upon the guaranty of the applicant that the freight would be accepted within five days after its arrival at the rail terminal. In this case the application was made by complainant's traffic manager, who intended to take delivery as the shipments came in and store

them until sufficient quantities of the component parts had arrived to make enough complete cars to warrant exportation to Brazil. The shipments were therefore treated by the carriers, in so far as the embargo was concerned, as though they were domestic shipments.

Domestic shipments requiring lighterage were permitted by the committee from January 15, 1918, to February 14, 1918, on application made by consignees and filed with the station in New York Harbor where delivery was desired, but commencing with the latter date and continuing to May 5, 1919, no permits were issued for domestic shipments requiring lighterage except on the condition that the consignees would lighter the freight at their own expense, because of the congested condition of the port and the lack of adequate facilities to handle the accumulation of traffic.

Complainant's traffic manager testified that when he applied for the permits he was told that they would only be issued on condition that the lighterage services be performed at complainant's own expense, and he explained his acceptance of them by saying that he had no other recourse than to accept them without the free-lighterage privilege. He admitted, with respect to both the Pennsylvania and the Lackawanna shipments, that he agreed to take delivery on the New Jersey shore. Complainant contends, however, that regardless of these facts, defendants, upon accepting the goods at Berwick, were bound by law to lighter them free in New York Harbor, as provided by existing tariffs.

An examination of complainant's exhibits shows that all but two of the permits under which the shipments were made contained provisions requiring the consignee to perform the lighterage services. One of the two remaining permits is silent with respect to lighterage, but complainant's letter on the strength of which this permit was issued, contains a guaranty that the complainant would take delivery in its own lighters. The other permit says nothing about lighterage services, as the application on which the permit was issued does not ask for it.

Complainant argues that its noncompliance with the conditions laid down by the general operating committee governing traffic for export operated to the interests of the carriers in that the shipments upon arrival were removed from the railroad premises and from the lighters more promptly than would have been the case if the rules had been strictly observed. It cites *Anderson & Co.* v. *Director General*, 61 I. C. C., 64, as authority for its contention that the failure to observe the committee's requirements should not bar it from the relief here sought. In that case the carriers had in effect certain tariff rules on shipments for export through Pacific coast ports which provided that on traffic through San Francisco the

export rates would apply only on freight originally consigned through, with rail, port, and ocean charges fully prepaid from point of origin to a specific destination beyond the port of exit, such destination to be shown in the bill of lading issued at the time of shipment and for which through export bill of lading had been issued prior to the arrival of the freight at the port. The terms of these rules were not fully complied with, and as a result the carriers charged domestic rates, which were substantially higher than the export rates. It appeared at the hearing that the necessary permits had been obtained by the shippers, reservations for vessel space had been made, and that after reaching the ports ocean bills of lading were executed in accordance with the reservations previously made and the articles were exported without unusual delay. Under the particular circumstances of that case we found that the application of the tariff rules to those shipments, which had not contributed to congestion at the port any more than they would have done if they had been handled in strict conformity with the rules, resulted in charges that were unreasonable in comparison with those contemporaneously applicable to other export shipments handled in substantially the same manner but in connection with which the formalities prescribed by the rules had been complied with.

In *Baltimore Chamber of Commerce* v. *B. & O. R. R. Co.*, 45 I. C. C., 40, we indicated our approval of the permit system, provided the permits were necessary and properly policed. It appears in the instant case that permits were proper.

We find that defendants' failure to furnish lighterage from Jersey City through New York Harbor to Long Island City on the shipments involved is not shown to have resulted in the collection of charges which were unreasonable or otherwise unlawful. The complaint will be dismissed.