No. 12876.

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

Submitted November 7, 1923. Decided January 14, 1924.

Upon further argument original findings and order, 77 I. C. C., 60, affirmed.

Ashby Williams for complainant.

W. J. Larrabee and *Thomas M. Woodward* for defendants.

REPORT OF THE COMMISSION ON FURTHER ARGUMENT.

LEWIS, *Commissioner:*

In our original report, 77 I. C. C., 60, we found that the failure of defendants to furnish lighterage from Jersey City, N. J., across New York Harbor to Long Island City, N. Y., on certain carload shipments of ironwork for freight cars originating at Berwick, Pa., during the period from November 30, 1918, to March 12, 1919, destined ultimately to Brazil, was not shown to have resulted in the collection of charges which were unreasonable or otherwise unlawful, and dismissed the complaint. Upon petition of complainant the proceeding was reopened for further argument, which has been had.

The facts are as follows: Complainant operates a railroad in Brazil, South America, and purchases material therefor in the United States. On or about November 1, 1918, it entered into a contract with the American Car & Foundry Export Company for the manufacture of a number of sets of ironwork for freight cars to be shipped from Berwick to New York City, N. Y., for export to Brazil. The first shipment was made about November 26, 1918, and the last about March 12, 1919. Prior to and during the period of movement there was great congestion in and around New York Harbor. Shipments had been arriving more rapidly than they could be handled and the congestion extended far back into the interior. The United States Railroad Administration was acting in close cooperation with the War Department and other governmental agencies in an effort to clear the accumulation of freight and keep the traffic moving, particularly that destined to the American and allied forces overseas. During this period it was a physical impossibility for the

carriers to lighter all traffic offered and resort was had to embargoes under which freight, both export and domestic, was accepted only upon authorization of the so-called general operating committee or freight-traffic committee acting for the United States Railroad Administration. Permits for transportation of export freight to the ports were issued under rules which required that the application be made by the steamship company and that the applicant guarantee to accept the freight within five days after its arrival at the rail terminal. For a period of about a month prior to February 14, 1918, shipments of domestic freight for delivery by lighter were accepted under certain restrictions, but from that date until May 5, 1919, permits therefor were issued only on condition that the shippers perform the lighterage service at their own expense.

In this case the applications for permits were made by complainant and not by any steamship company, as required for export traffic, partly because there had been no prior reservation of vessel space and partly because, as complainant explains, it was necessary for it to assemble the separate packages in New York prior to transshipment. When complainant's agent applied for the permits he was informed that under the embargo laid by the director general the only condition upon which they could be issued was that the movement by lighter beyond the rail terminals be performed at complainant's expense.

The record contains certain correspondence and documents which are enlightening as to the conditions under which the permits were issued and the shipments made. On November 13, 1918, an application for a shipping permit was made to the domestic division of the freight-traffic committee reading in part as follows:

Railroad shipping permit is hereby requested covering movement of following freight, consigned to the Compagnie Auxiliare de Chemins de Fer Au Bresil 25 Broad Street, New York

Quantity	35 carloads
Terminal road	Pennsylvania Railroad
Station delivery desired	Greenville Pier, for consignee's lighters.

Accompanying the above application was the following letter, omitting immaterial portions:

We enclose herewith application for G. O. C. permit covering 35 carloads of box car material which is now ready at the American Car & Foundry Export Company, Berwick, Pa.

Inasmuch as we have made arrangements for the storage of this material at Ravenwood which is located underneath the Queensboro Bridge, and we have the facilities for lighterage delivery, we would greatly appreciate it if you will kindly issue the necessary railroad permit.

In accordance with the above, a permit was issued for movement to Greenville Piers, N. J., which provided for consignee's lighterage at its expense.

On November 27, 1918, a similar application was made for movement of further shipments over the Pennsylvania Railroad, accompanied by a letter guaranteeing to take immediate delivery of the material in complainant's own lighters upon its arrival at New York. The permit issued carried the same provision as to lighterage as the previous permit. These two permits cover all shipments moved over the Pennsylvania Railroad.

In the case of the Delaware, Lackawanna & Western, the applications were somewhat differently worded. On December 14, 1918, complainant applied to the foreign division of the freight-traffic committee for a permit to ship 35 carloads for Delaware, Lackawanna & Western delivery. The delivery specified was "For export free lighterage." Under date of December 18, complainant wrote to the freight-traffic committee as follows:

> We enclose herewith an application in triplicate covering 35 carloads of box or stock car material which is now ready at Berwick, Pa.
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> We would greatly appreciate it if you will kindly issue G. O. C. permits covering same. We have made every endeavor to file this application through a steamship company, but there is a great delay in filing through one of the steamship companies.
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> Inasmuch as we guarantee to take immediate delivery of this material upon its arrival in New York, will you kindly issue the necessary authority.

On the same date another letter was written to the committee, reading in part:

> Please note that in the event of our being unable to give railroad company lighterage instructions to the steamship pier with steamship permit attached upon arrival of material at New York, we hereby guarantee to take immediate delivery of said material in our own lighters at our own expense as soon as the goods arrive in New York.

A permit was then issued, which carried the notation, "If no steamer available on arrival consignee will accept delivery by own lighter."

On January 13, 1919, application was made for permission to ship 35 carloads more with delivery specified as for export lighterage free. Accompanying this application was a letter reading in part:

> Please note we hereby guarantee to take immediate delivery of the above shipment consisting of 35 carloads in our own lighters as soon as same arrive in New York.

The permit issued in this case gave as destination New York lighterage. Two other permits were later issued upon application, both specifying destination delivery as New York lighterage station

for export, one of which bore the notation that if no steamer was available at time of arrival, consignee would take delivery by its own lighters.

The bills of lading issued for transportation over the Pennsylvania Railroad specified as destination "Greenville Pier for consignee's lighterage, New York City" and bore reference to the g. o. c. permits under which they were issued. Greenville Piers is a rail terminal of the Pennsylvania Railroad on the New Jersey side of New York Harbor. In the case of the Delaware, Lackawanna & Western, the bills of lading, with one exception, gave as the destination New York City, the destination on the exception being New York lighterage station. On all but two or three the words "lighterage free" appear. Each bill also bore the g. o. c. permit number under which it was issued.

The complainant contends that its agreements to take possession of the shipments at the rail terminals in New Jersey and lighter them at its own expense were made under compulsion and therefore void. There was no compulsion. Complainant had the option of shipping to tidewater, where it could perform the remaining part of the service incidental to placement of the material in storage or on vessels or of sharing the disabilities of other shippers who in a time of radical measures to meet a national emergency that grew out of, and was incidental to, the war, were denied access to New York Harbor and other congested water fronts. It choose the former. To have done otherwise would have occasioned a loss far in excess of the cost of the lighterage.

There is no question raised in this case as to the right of the director general to issue the embargo. As stated, he was working in close accord with the War Department and other agencies of the Government in meeting a national emergency. The point is urged, however, that inasmuch as the carriers accepted the shipments at point of origin for export, they were under obligation to transport them to New York City and deliver them by lighter without additional cost at any free-lighterage delivery point. If the shipments had been accepted unconditionally and under circumstances usually and normally prevailing, such would have been the case. But they were not so accepted. They were accepted pursuant to the provisions of an embargo. The embargo published by the director general was a lawful act and justified by the circumstances then existing. With reference to the power of the director general, the court said in *Dahn* v. *McAdoo*, 256 Fed., 549:

> The Director General is therefore authorized by this act of Congress and proclamation of the President to promulgate general and special orders for the control and management of the railroads, which have the force and effect of law and are of paramount authority.

Rules were necessary effectually to carry out the embargo. The director general, realizing that under a complete embargo great hardship would follow, adopted the permit system, the effect of which was to modify the strict enforcement of the embargo and permit shipments to move under certain conditions when special circumstances warranted it. This was also a proper and lawful act, within his power, and was of great benefit to complainant in that it permitted it to receive its shipments at tidewater, where they could be delivered to vessels for export or held for such purposes as might be desired. All of the rules adopted by the director general with reference to the embargo, including the provisions in the permits, having the force and effect of law, must be considered in connection with the notations on the bills of lading in determining what the conditions were under which the shipments were accepted, transported, and delivered.

The acceptance, as stated, was on condition that the consignees take possession of the material at the rail terminals in New Jersey. This was in accordance with the modified embargo. An embargo is a temporary measure which leaves the rate structure unimpaired. It may take the form of a complete suspension of all transportation service, or, as modified in this case, a suspension of a part only of the service. In either event the rate structure remains unchanged and unaffected, but if the embargo is partial, charges may not be assessed in excess of the tariff rates for that part of the service which has been actually performed. Here the rates to the New York lighterage stations in New Jersey were the same as those applying to complainant's warehouse or to vessels. There were no rules published in the tariff by which lower rates were authorized on these shipments if complainant performed its own lighterage. The tariff rates for the transportation actually performed by the carrier were charged, and no showing has been made that they were unreasonable or in violation of any of the provisions of the act.

We have had before us in other proceedings issues much the same in principle as those here under consideration. In *National League of Commission Merchants* v. *P. R. R. Co.*, 83 I. C. C., 723, complaint was made that the failure of defendants therein to make delivery at billed destinations in New York of interstate carload shipments of fruits and vegetables, thereby requiring the complainants to transport the shipments by dray from points short of destination, resulted in damages in the amount of the drayage charges in violation of sections 1, 2, 3, 6, and 15 of the interstate commerce act. The shipments had been accepted for transportation under joint

rates to the borough of Manhattan, but, by reason of strikes, lighterage service was temporarily suspended, and none reached the billed destination. In order to obtain their shipments, complainants unloaded the cars at whatever points they might be and drayed the contents to destination at their own expense. The following excerpts are taken from our decision in that case:

> Complainants state that they were in effect compelled by defendants to take delivery in this irregular manner. In the sense that delivery had to be taken in this manner or else not at all, complainants were compelled to act, but an inference that the carriers wilfully sought to relieve themselves of their duty to complete delivery is entirely unwarranted. Both carriers and consignees in cooperating as they did during this emergency were mutually benefited; the carriers in having their equipment released, the consignees in getting control of their traffic so as to realize some profit or stop loss thereon. * * *
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> Another theory advanced by complainants appears to be that defendants' withholding of a part of the service that complainants were entitled to receive under the published tariffs subjected complainants to the payment of unreasonable aggregate transportation charges, and that they were thus damaged. That defendants did not complete the transportation service that they undertook to perform when the traffic was delivered to them at origin under a through bill of lading calling for delivery in New York is true, but it is equally true that defendants' failure to complete this service has not been shown to have been because of any unreasonable conduct or practices on their part. On the contrary, it appears that defendants made every reasonable effort to complete delivery, and that their inability to do so was due to circumstances beyond their control. This latter fact being true and defendants not having collected any unreasonable charges for the services actually rendered, although they were less than would ordinarily be accorded, there are no grounds upon which to base a finding of violation of section 1.
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> We find that no violation of the interstate commerce act has been established in these cases. The complaints will be dismissed.

The complaint in *Waste Merchants Asso.* v. *Director General*, 57 I. C. C., 686, was brought to obtain reimbursement for services performed by the shippers which were included in the tariff rates for transportation. In that case the carriers held themselves out by their tariffs to perform without additional cost the service of loading into cars at piers carload shipments of waste paper and certain other commodities originating at New York and Brooklyn, N. Y. Due to the congestion at the New York piers and terminals, shippers of all commodities were subjected to long delays. Embargoes were laid to facilitate the removal of accumulated traffic. Finally as a means of expediting the movement of paper stock an agreement was reached between the shippers and the carriers whereby the former undertook to do their own loading into cars. This arrangement was beneficial to both parties, to the carriers by releasing labor at a time of labor shortage and to the shippers by relieving them of the

greater expense incident to the delays to their trucks standing in line at pier entrances. The complainant alleged that the failure of the carriers to render the service of loading as provided in their tariffs, thus compelling complainant's members to furnish such service, was unlawful and resulted in unreasonable and prejudicial rates. We dismissed the complaint, pointing out that the benefit received by complainant's members far outweighed the cost to which they were subjected and holding that under the circumstances there was no obligation on the part of the carriers to make an allowance to complainant's members for the loading services. See also *American Mfg. Co.* v. *Director General*, 77 I. C. C., 52.

The complainant here is asking for reparation in the amount of the charges which it paid for the service of lighterage. The act provides that in case a carrier violates a provision of the act it shall be liable to the person injured thereby for the full amount of the damages sustained in consequence of such violation. Even if a violation of the act could here be charged against the director general, the burden would still be upon complainant to prove that it had been damaged. The facts sufficiently show that instead of suffering any real damage, complainant was put in a far better position than it would have been if no transportation had been accorded. It was within the power of the director general to withhold all transportation under the circumstances presented.

We have considered all the points raised by the parties on further argument and find that defendants' failure to furnish lighterage service is not shown to have resulted in the collection of charges which were unreasonable or otherwise unlawful. Our original findings and order are affirmed.

Cox, *Commissioner*, dissenting:

The decision in this case involves a very important principle. The question to be considered was whether the contractual relation entered into, as shown by the bills of lading issued and the practice of operation under embargoes as modified by the general operating committee, was legal. The complainants' contention in this case was that it not only was illegal, but that the method of using modified embargoes was discriminatory and prejudicial, as it placed within the power and discretion of the general operating committee the modification of established rates and practices.

It hardly needs the citation of authorities to point out the fact that rates and regulations can not be changed except in the manner prescribed by law, and where bills of lading have been issued which are in conformity with existing published rates and regulations those bills of lading measure the duties and responsibilities of the ship-

per and the carrier alike and can not be modified by any collateral agreement.

If a general embargo can be temporarily lifted and the acceptance of shipments authorized upon the condition that the shipper assume a part of the carrier's burden under the lawfully published tariffs, there would be practically no prohibition against accepting shipments upon the condition that an increased or lowered rate be paid, which would open the door wide for all sorts of discriminations that are expressly prohibited under paragraph 1 of section 3 and paragraph 7 of section 6.

In *Powell-Myers Lumber Co.* v. *St. L., I. M. & S. Ry. Co.*, 45 I. C. C., 594, 595, we said:

> An embargo on traffic is an emergency measure adopted where it is physically impossible for carriers to transport freight, or where there is an unusual accumulation of traffic. Under such circumstances there is temporarily and to a limited extent a failure by a carrier to fulfill its obligations as a common carrier. Such failure is unlawful unless it has sufficient justification, and, with respect to interstate traffic, also violates that provision of the act to regulate commerce which requires that carriers subject thereto shall "furnish * * * transportation upon reasonable request therefor." That some embargoes may be justifiable is obvious, but carriers may not, under the guise of an embargo, attempt to accomplish results which the law requires shall be effected only by means of published tariffs.