NEW YORK HARBOR WATER FACILITIES APPLICATIONS

No. 6572[1]

APPLICATION OF NEW YORK CENTRAL RAILROAD COMPANY

Submitted June 23, 1925. Decided July 11, 1925

1. Upon application of railroad companies operating certain marine equipment in and about New York Harbor in the States of New Jersey and New York for permission under section 5 of the act, as amended by section 11 of the Panama Canal Act, to continue operation of such marine equipment; *Found*, That applicants, except the Central Railroad of New Jersey, have not brought the service within the terms of the act, and that the commission is without jurisdiction to enter the order sought. Applications denied.
2. Existing service by vessels of the Central Railroad of New Jersey upon the Sandy Hook water route between piers on lower Manhattan Island and Atlantic Highlands Pier, N. J., found to be operated in the interest of the public, that it is of advantage to the convenience and commerce of the people, and that an extension of time during which such service by water may continue will neither exclude, prevent, nor reduce competition on the route by water under consideration. Extension ordered.

C. L. Andrus for New York, Ontario & Western Railroad Company; *C. L. Addison* for Long Island Railroad Company; *Charles C. Paulding* for New York Central Railroad Company; *W. J. Larrabee* for Delaware, Lackawanna & Western Railroad Company; and *Henry Wolf Biklé* for Pennsylvania Railroad Company, applicants.

Julius Henry Cohen and *Billings Wilson* for Port of New York Authority.

C. S. Nelson and *W. H. Chandler* for Merchants' Association of New York.

REPORT OF THE COMMISSION

AITCHISON, *Chairman:*

The several applications before us, under section 5 of the act to regulate commerce as amended by section 11 of the Panama Canal

[1] This report also embraces No. 6646, Application of New York, Ontario & Western Railway Company under Provisions of Section 5 of Interstate Commerce Act, as amended by Section 11 of Act of Congress of August 24, 1911; No. 6664, Application of Long Island Railroad Company, Pursuant to Provisions of Same Section; No. 6665, Application of Delaware, Lackawanna & Western Railroad Company; No. 6708, Application of Central Railroad Company of New Jersey; and No. 7050, Application of Pennsylvania Railroad Company.

Act, were made at various times between February 11, 1914, and June 25, 1914, inclusive, by railroad companies engaged in interstate commerce and subject to the acts mentioned. Each of them owns and operates certain marine equipment in and about New York Harbor, in the States of New Jersey and New York. Of these applicants all except the Central Railroad Company of New Jersey and the Delaware, Lackawanna & Western Railroad Company aver that the operation of the marine equipment described in their applications is not in violation of section 5 of the act, as amended by section 11 of the Panama Canal Act of Congress of August 24, 1912, but in view of the penalties imposed thereby for violation of section 11, and for greater safety, they on advice of counsel present their applications. The two applicants excepted from the foregoing statement make no such averments. All the applicants aver that the existing service by water of their marine equipment as described in their applications is being operated in the interest of the public, and is of advantage to the convenience and commerce of the people; and that extension of time during which such service by water may continue to be operated beyond July 1, 1914, will neither exclude, prevent, nor reduce competition on the water route traversed by their vessels. The applicants seek an order from us, after the full hearing provided by section 11 of the Panama Canal Act, as to whether the continued operation of the marine equipment specified after July 1, 1914, would be in violation of that section, and for the entry of an appropriate order. The application in No. 6572 was originally presented by New York Central & Hudson River Railroad Company, which has since been succeeded in interest, title, and operation by New York Central Railroad Company. The application of the Pennsylvania Railroad Company in No. 7050 also covers similar siuations in harbors other than that of New York, but those features are not now before us.

At various dates in July, 1914, the applications were fully heard. The record was then closed as to each of the applications, so far as the service in New York Harbor was involved. Before any decision was made by us, the World War brought about conditions which made it seem undesirable to pass upon the applications, as all shipping matters were in a condition of uncertainty and change. The marine properties involved were all taken over by the President with the rail properties and systems of transportation of the applicants on December 26, 1917, and remained under Federal control until its close, February 28, 1920, when the rail and water properties of the applicants again came within their control. The applications were not pressed upon our attention; but upon our own motion

were assigned for further hearing on June 23, 1925, which has been had after full notice to the public as well as the applicants.

Except in minor details, and except as to one feature of the water service of the Central Railroad Company of New Jersey which requires separate treatment, the services afforded by the applicants which they seek authority to continue despite the prohibitions of section 11 of the Panama Canal Act, are similar in types. Each of the applicants is a heavy carrier of passengers and of property and reaches with its rails the shores of New York Harbor. For reasons which are well understood, and which have often been brought out in our reports, railroads bringing passengers to the shores of New York Harbor find it necessary to maintain and operate (1) passenger ferry boats crossing to, from, and between the densely populated islands and mainland of the New York port district. Rail carriers of freight find it necessary to maintain and operate (2) car floats for the transport between, to, and from the islands and mainland of freight in carloads, for transfer to other common carriers, to industrial railways, to ocean docks, and to private sidings; and also (3) lighters, and barges, whereby freight brought to or to be carried from the shore by them is transported within the harbor lighterage limits otherwise than in loaded cars. In addition, the rail carriers must also maintain and operate (4) other accessorial marine equipment, necessary either for the purpose mentioned in items 1 to 3 above, or for the more convenient operation of their railroad lines. The services are more fully described in *The New York Harbor Case*, 47 I. C. C. 643.

Generally speaking, the equipment described is used only for the purposes indicated. Occasionally, in times of slack rail traffic, barges or lighters are chartered to private parties or used for purposes not connected with the operation of the railroad, but this is not usual, and such use is subordinated to the primary utilization of the marine equipment as an adjunct of the rail systems of the applicants. There are private barges and lighters to be had in New York Harbor, and doubtless repair equipment, although the record is silent as to the latter feature. No privately owned barge or lighter operates on any defined route by water, nor do the barges, lighters, and floats of the applicants seem to have defined routes by water. There are no privately operated passenger ferries which compete, or which may compete, with the passenger ferries of the applicants plying between the rail terminals and established water depots on opposing shores of the harbor. Competition between the passenger ferries of applicants and the privately owned passenger ferries in New York Harbor is not of substantial volume or of marked intensity.

Since the filing of the applications certain changes were made in the legislation which we are now called upon to administer as a result of the codification made by the transportation act, 1920. The paragraph of section 5 of the act to regulate commerce, which was added thereto by section 11 of the Panama Canal Act, has become paragraph (9) of section 5 of the interstate commerce act. The two succeeding paragraphs of section 11 of the Panama Canal Act have become paragraphs (10) and (11) of section 5 of the interstate commerce act. These provisions of the Panama Canal Act, so imported into and made a part of the interstate commerce act, are those which prohibit, under penalty, the railroad ownership or operation of competing water carriers, confer upon us jurisdiction to determine questions of fact as to competition upon the application of any railroad company, and to make an order permitting the continuance in operation of any vessel or vessels already in operation, or the installation of new service; and also authorize us to extend the time within which such service by water may continue to be operated beyond July 1, 1914,

> If the Interstate Commerce Commission shall be of the opinion that any such existing specified service by water other than through the Panama Canal is being operated in the interest of the public and is of advantage to the convenience and commerce of the people, and that such extension will neither exclude, prevent, nor reduce competition on the route by water under consideration.

These are the provisions under which the instant applications are presented and have been heard.

The provisions of the Panama Canal Act so incorporated into the interstate commerce act are, of course, to be treated as a part of that act, and subject to the general definitions and limitations therein contained. The transportation act, 1920, simultaneously amended paragraph (3) of section 1 of the act so that thereafter all car floats and lighters used by or operated in connection with any railroad, should be included in the term "railroad" as used in the act. Ferries have been so included in the term railroad from the enactment of the original act to regulate commerce in 1887. Vessels are now likewise to be taken as included in the term "transportation" as used in the act, equally with locomotives, cars, and other vehicles, and all instrumentalities and facilities of shipment or carriage.

It seems obvious from the record that the facilities embraced in the applications under the classes enumerated above as 1 to 4 are embraced in the term railroad, as used in the act, and therefore are not "any common carrier by water operated through the Panama Canal or elsewhere with which said railroad * * * does or may compete for traffic." We have held that before our jurisdiction may

be invoked, some probable and potential competition with some vessel carrying freight or passengers upon the water route must appear. No such competition appears here with respect to the services enumerated as items 1 to 4 above. Any competition on the water route seems vague and improbable, even if possible. The applicants compete between themselves, but their competition is in respect to rail service, as to which the water transportation is an incident, an incident recognized by the act as embraced in the term "transportation" as applied to carriers by railroad, and by instrumentalities in precise terms embraced in the term "railroad." The transfer and lightering services are equivalent to necessary extensions of the rail lines of the applicants, *Steamer Lines on Long Island Sound*, 50 I. C. C. 634, 647, and the same can be said as to the ferries and car-float service, *Nashville, Chattanooga & St. Louis Ry. Boats and Barges*, 49 I. C. C. 737. As the applicants have not brought the service within the terms of the act, our jurisdiction to issue the order sought is lacking, and the applications must be denied.

This view makes it unnecessary to discuss the evidence presented by the applicants and by the Port of New York Authority tending to show that the service is in the interest of the public and is of advantage to the convenience and commerce of the people; and also as to whether an extension of the service after the date limited in the Panama Canal Act will exclude, prevent, or reduce competition by water on the route under consideration.

A different situation exists with respect to the service of the Central Railroad of New Jersey between Manhattan Island and Atlantic Highlands, N. J., which has not been heretofore considered.

The Central Railroad Company of New Jersey, by means of rail lines which extend from Jersey City, N. J., through Elizabethport and Matawan, reaches various points located along the Atlantic Ocean, south of Sandy Hook, to Point Pleasant, N. J. From points in the city of New York it is necessary to make use of the ferry to reach Jersey City, as a part of the rail journey to the group of beach resorts mentioned. The rail movement is necessarily circuitous, and roughly follows the outline of the capital letter C.

The railroad also operates two passenger steamers, the *Monmouth* and *Sandy Hook*, over what is known as the Sandy Hook route, from piers on lower Manhattan Island through New York Bay, the Narrows, the Lower Bay, and Sandy Hook Bay, to Atlantic Highlands Pier, N. J., just west of Sandy Hook. Here a connection is made with the rail line from Matawan to Point Pleasant, N. J. The Sandy Hook water route is used as an alternative route for the ferry-rail line. Tickets issued by the railroad between New York City and Atlantic beach points may be used interchange-

ably over the rail route through Jersey City and the ferry to Manhattan Island, or by rail to Atlantic Highlands and thence by way of the Sandy Hook route, or vice versa. This situation brings the Sandy Hook route within the provisions of section 5 of the act. *Lake Line Applications under Panama Canal Act*, 33 I. C. C. 699, 703.

The Sandy Hook route of the Central Railroad of New Jersey finds a competitor in a privately owned excursion boat, called the *Mandalay*, which carries passengers between New York and Atlantic Highlands, and lands them at a pier adjacent to that of the Central Railroad. Passengers by the *Mandalay* do not commonly use the rail service of the Central Railroad; they are principally excursionists, or else passengers destined to inland points, who use automobile or bus service from the Atlantic Highlands pier. The rate of fare on the *Mandalay* is much cheaper than on the Central Railroad Company of New Jersey.

The competition of the *Mandalay* has originated since the filing of the application by the Central Railroad Company of New Jersey in No. 6708.

The record indicates that the combination of the Sandy Hook water route and the rail lines from Atlantic Highlands pier to the New Jersey beaches is generally more popular than the ferry-and-rail route to the same points.

The mayor of Atlantic Highlands, and president of its board of trade, as representing the municipality, testified that the effect of the withdrawal of the service over the Sandy Hook route would be to depopulate the community in the summer. Officials and citizens of the other New Jersey beach points testified as to the advantage to the convenience and commerce of the people of the continued operation of the Sandy Hook route, in the interest of the public. The applicant contends that discontinuance by it of the Sandy Hook route would seriously impair its revenues on its New Jersey rail branches.

This testimony is uncontroverted of record. No complaints have ever been lodged with us which indicated any possible detriment to the public interest or the convenience and commerce of the people by reason of the continued operation of the Sandy Hook route. It is evident that the operation of the route has neither reduced nor prevented competition, for, as indicated, competition has come about during the pendency of the instant application. From the record we find and conclude that the vessels carrying freight or passengers upon the Sandy Hook route by water, owned and operated by the applicant Central Railroad Company of New Jersey, are being

operated in the interest of the public, and that the service they afford is of advantage to the convenience and commerce of the people, and that an extension of the time during which such service by water may continue will neither exclude, prevent, nor reduce competition on the route by water under consideration. It is understood that rates, schedules, and practices of the applicant have been filed with us in the same manner and to the same extent as those of the railroad generally. If not, they should be filed with us within the time provided in the accompanying order.

So far as the exceptions relate to service in New York Harbor, other than the Sandy Hook route embraced in No. 6708, an order of dismissal will be entered. An appropriate order will be entered in No. 6708, extending the time during which such service by water may continue to be operated, subject to the further order of the commission.

The application of the Pennsylvania Railroad Company as to its service elsewhere than in New York Harbor will be continued for further proceedings.