No. 5265

L. WERTHEIM COAL & COKE COMPANY *v.* LEHIGH VALLEY RAILROAD COMPANY

Submitted May 18, 1925. Decided June 1, 1926

Upon further hearing reparation awarded on shipments of anthracite coal, in carloads, from points in the Lehigh and Wyoming regions of Pennsylvania to Jersey City, N. J., during the statutory period. Original report, 62 I. C. C. 211.

Pierre F. Cook for receivers of L. Wertheim Coal & Coke Company.

R. W. Barrett for defendant.

REPORT OF THE COMMISSION ON FURTHER HEARING

DIVISION 3, COMMISSIONERS HALL, CAMPBELL, AND COX

BY DIVISION 3:

In the original report herein, 62 I. C. C. 211, decided June 10, 1921, we found, among other things, that defendant's rates for the transportation of anthracite coal, in carloads, from points in the Lehigh and Wyoming regions of Pennsylvania to Jersey City, N. J., between the years 1906 and 1911, inclusive, were unreasonable to the extent that they exceeded $1.45 and $1.35 per long ton, respectively, on prepared and smaller sizes. We also found that during this period the complainant "made the shipments as described and paid and bore the charges thereon; that it was damaged thereby in the amount of the difference between the charges paid and those which would have accrued at the rates herein found reasonable, and that it is entitled to reparation, with interest, on shipments covered by the complaint and not barred by the statute of limitations." The exact amount of reparation could not be determined from the record then before us and complainant was instructed to furnish a statement in accordance with Rule V of our Rules of Practice.

The complainant corporation no longer exists. On October 2, 1914, approximately two years after the original proceeding was instituted, it was adjudged a bankrupt and Pierre F. Cook and Clarence M. Schwerin were appointed its receivers. The reparation claim herein considered was among the items covered by a chattel mortgage complainant had given to the Commercial Trust Company

of New Jersey as trustee under a deed of trust to secure an issue of bonds. In 1918 a suit to determine the right to the proceeds of the reparation claim, to which the receivers in bankruptcy and the above-named trust company were parties, was decided in favor of the latter. In June, 1919, the court discharged the receivers, the distribution of money in their hands having been completed. On October 17, 1921, the receivers were reinstated, with the consent of the trust company, with full power and authority to take into possession all of the property and assets covered by the mortgage hereinbefore referred to, including this claim for reparation.

The sole issue is whether the evidence of record is sufficient to warrant us in making an award of reparation against the defendant. The freight bills and other records of complainant have been destroyed. In preparing its Rule V statement the receivers were compelled to rely upon the records of the two coal companies from whom the greater portions of complainant's coal were purchased. These were the East Boston Coal Company, which shipped from Kingston, Pa., and the Mill Creek Coal Company, which shipped from various points in the Lehigh region. The receivers prepared statements based upon these records and purporting to show details of shipments made by these companies to complainant between 1906 and 1911, and on April 11, 1924, forwarded these statements to defendants for certification. On May 16, 1924, defendant returned the statements with the advice that it could not make such a certification, as its records covering the period referred to had been destroyed in accordance with our regulations governing the destruction of records. A petition filed by defendant on May 16, 1924, asking that the proceeding be reopened to afford it an opportunity to show "that any damage that may have been or may be awarded by the commission in the form of reparation has long since been fully paid to the complainant by defendant in the form of uncollected freight and demurrage charges" was denied.

A further hearing on the question of damage was had on December 19, 1924, at which the receivers introduced the statements hereinbefore mentioned, and their accuracy was attested by representatives of the coal companies in so far as they were based on their records. Any claims on shipments as to which the freight charges were paid on or before October 21, 1910, are barred by the statute of limitations in effect on October 21, 1912, when the original complaint was filed.

Defendant does not seriously urge that complainant did not actually receive shipments over its line during the reparation period. Its position is rather that (1) the evidence does not show that com-

plainant paid the freight charges; (2) that complainant owed it in unpaid freight and demurrage charges an amount much larger than the reparation claim; (3) that reparation can not legally be awarded to a corporation which no longer exists; (4) that complainant failed to comply with the provisions of Rule V requiring that statements showing the details of the shipments on which reparation is claimed be prepared immediately; and (5) that evidence upon which such a statement can be prepared is not in existence.

The last four defenses are clearly untenable. All of the unpaid freight charges and a considerable portion of the unpaid demurrage charges which defendant sought to collect covered traffic which moved subsequent to the reparation period. The assessment of demurrage charges against complainant under the constructive-placement rules was one of the grievances covered by the original complaint. It is beyond our jurisdiction to allow an offset of undercharges on subsequent shipments against the claim for reparation here under consideration and the record will not support a finding that demurrage legally accrued on any of the shipments included in such claim. It is well settled that reparation claims are assignable and the receivers are here acting as agents of the assignee, the trust company. The delay in submitting a reparation statement was largely due to the general investigation of the rates, practices, rules, and regulations governing the transportation of coal, reported in *Rates for Transportation of Anthracite Coal*, 35 I. C. C. 220, the court proceedings incident to the settlement of complainant's affairs, and the destruction of records pertaining to the shipments. Although our regulations permit of the destruction of a carrier's records after a certain number of years, they do not require it. Defendant's billing records covering shipments which moved during the year 1910 were destroyed on March 22, 1917, and those for the year 1911 on May 14, 1918. On these dates our original report had not been written, the hearings having been continued for various reasons, among them the pendency of *Rates for Transportation of Anthracite Coal*, *supra*. Defendant's ledger books covering these shipments were destroyed on May 14, 1918, at which time the parties had been for some months in active correspondence concerning the date to be set for a further hearing of the case. Defendant was fully aware of the fact that we had awarded reparation to complainant, and under such circumstances it can not plead destruction of its records as a defense.

The first ground relied upon requires a more detailed discussion. In paragraph 11 of the complaint it is alleged that complainant purchased coal f. o. b. mines and paid the freight thereon upon delivery at Jersey City. Defendant answered that it had "not

sufficient knowledge to admit or deny the truth of the allegations of par. 11." In paragraph 13 of the complaint it is alleged that the complainant's coal yard was leased from defendant and that one of the covenants of the lease required that it ship its coal over defendant's lines so long as it secured the same rates as other shippers for like service. Defendant admitted the truth of this allegation and furnished a copy of the lease. In paragraph 19 of the complaint it is alleged that coal had been shipped to complainant from points in the Lehigh and Wyoming districts of Pennsylvania since 1907, and the rates charged on the various sizes were set out. Defendant admitted the truth of these allegations.

The testimony shows that complainant was a retail coal dealer; that it purchased coal from mines on the Lehigh Valley in Pennsylvania; that under its lease from defendant it agreed to transport coal over the defendant's lines; that it purchased its coal f. o. b. mines; and that the rates charged by defendant were $1.60 per long ton on prepared sizes, including broken coal, egg coal, stove coal, and nut coal; $1.45 per long ton on pea coal and buckwheat coal; and $1.15 per long ton on rice coal. Witnesses for two of the coal companies which sold coal to complainant appeared at the further hearing. One of them testified that the records of the East Boston Coal Company showed the following carloads consigned to complainant during the reparation period: Broken coal, 71 carloads, aggregating 2,279.20 long tons; egg coal, 146 carloads, aggregating 4,576.99 long tons; stove coal, 120 carloads, aggregating 4,074.29 long tons; nut coal, 42 carloads, aggregating 1,235.88 long tons; and pea coal, 24 carloads, aggregating 752.15 long tons. These figures were taken from the manifest books of the coal company, which books show the name of the consignee, the destination, the route, the car number and initial, weight, and kind of coal.

Another witness testified that the records of the Mill Creek Coal Company show that on various dates throughout the reparation period complainant was billed for coal from the following points: Lyman and Middle Lehigh, Pa., broken coal, 9 carloads, aggregating 394.92 long tons; Vulcan and Lyman, Pa., egg coal, 26 carloads, aggregating 1,023.38 long tons; Lyman, stove coal, 6 carloads, aggregating 267.45 long tons; Vulcan, Buck Mountain, Middle Lehigh, and Lyman, pea coal, 103 carloads, aggregating 4,347.02 long tons. This information was taken from the coal company's so-called bill book which showed that bills were sent to complainant on the dates mentioned for certain carloads of coal containing a stated number of tons. The car numbers and initials were not shown.

Neither of these witnesses could testify from personal knowledge as to the dates of delivery of the various shipments or that complainant paid the freight charges. They both testified that the coal was sold f. o. b. mines and that the coal companies did not pay the freight charges. The record does not indicate that defendant failed to collect freight charges from the complainant during the reparation period. The receivers allowed three days from the date the coal was billed for its movement to Jersey City. This was based upon statements by various shippers as to the average time required for the movement. The receivers have also fixed the date of payment of charges in each instance one month after the date of delivery or tender of delivery. This action is not borne out by the allegations of the complaint to the effect that defendant discriminated against complainant by refusing to extend credit on any shipment for a greater period than one week, while extending longer periods of credit to its competitors.

Defendants point out that the record does not show that the shipments were, in fact, delivered to complainant at Jersey City and were not diverted to some other point. It has not introduced any evidence which would establish a reasonable probability that any of the shipments were diverted or that any other than the legally published rates were charged. The fact that complainant was a retail coal dealer tends to show the contrary.

The receivers and complainant have proved a complete chain of circumstances which, considered together, point to the ultimate fact that complainant not only received the shipments upon which reparation is claimed but that it paid and bore the charges thereon. We can not assume, as defendant would have us, that the complaint of 1912 was filed as a mere gesture. Defendant has admitted that portion of the complaint which alleges the fact of shipments and the rates charged and has introduced no evidence tending to show that the freight charges were not paid by the complainant. There is proof that they were not paid by the producers of the coal. Defendant has never sought in any action at law to collect unpaid freight charges covering shipments which moved during the reparation period. Defendant virtually asks us to believe that it has been remiss in its duty to collect freight charges during the reparation period although it vigorously pressed claims for payment of demurrage charges during the same period. It is significant that defendant's petition for reopening filed in May, 1924, was not based upon the ground that complainant had not received shipments or paid freight charges but upon the ground that any damage thereby incurred was more than offset by outstanding undercharges on other

shipments. In an issue, provable by a preponderance of the evidence, as between two parties, one of whom alleges an affirmative which it establishes by the best obtainable evidence, and the other of whom introduces no evidence but rests its case solely upon the alleged insufficiency of its adversary's showing, the doubt, if there be a doubt, must be resolved in favor of the former.

We affirm our former findings and further find that Pierre F. Cook and Clarence M. Schwerin, receivers of the L. Wertheim Coal & Coke Company, are entitled to reparation in the sum of $2,587.74, with interest.

An appropriate order will be entered.