No. 17065

COLUMBIA MILLS, INCORPORATED *v.* DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY

Submitted May 18, 1926. Decided October 8, 1926

Defendant's failure or refusal to compensate complainant, out of the line-haul rates, for the services performed by the latter in switching carload shipments between points within its industrial plant at Minetto, N. Y., and the point of interchange with defendant at that place, and in checking, weighing, loading, and unloading less-than-carload shipments delivered to or forwarded from the plant in trap or ferry cars, not found to violate any provision of the interstate commerce act. Complaint dismissed.

Frank A. Parker for complainant.
W. J. Larrabee for defendant.

REPORT OF THE COMMISSION

DIVISION 1, COMMISSIONERS LEWIS, MCMANAMY, AND WOODLOCK

LEWIS, *Commissioner:*

This case is submitted, without oral argument, upon complainant's exceptions to the report proposed by the examiner, who recommends dismissal of the complaint, and upon defendant's reply to the exceptions. We reach the conclusion so recommended.

Complainant is an industry located at Minetto, N. Y. By complaint filed May 12, 1925, it alleges that it has been subjected to unreasonable transportation charges by reason of defendant's failure or refusal to make it, complainant, proper allowances for services performed by it in moving carload shipments between points within its plant and the point of interchange with defendant, and in checking, weighing, loading, and unloading less-than-carload shipments delivered to or forwarded from the plant in trap or ferry cars. This is alleged to be in violation of section 1, and of the spirit of section 15 (13), of the interstate commerce act. The prayer is that we shall require defendant to establish reasonable allowances for these services, and shall award reparation on shipments handled by complainant within two years preceding the complaint.

The question of an allowance for the interchange switching will first be considered. The track layout at complainant's plant is shown on a blueprint diagram attached to the complaint. Cars are deliv-

ered or received by defendant at a "clearance point" on or adjacent to its right of way, and the entire switch movement between this point and the various loading and unloading points within the plant is performed by complainant's engine. This work has been so done since 1914. Complainant contends that under defendant's tariffs this service is included in the line-haul rates. It is not alleged that the rates to or from Minetto are unreasonable, and no question of preferential service to other shippers is involved. Apparently, the great majority of the shipments to and from Minetto have moved into and out of the plant.

The tracks within the plant inclosure, with the exception of the rails and metal fastenings, are not the property of the defendant. They were constructed, at different times, pursuant to written contracts entered into in 1910 and 1914 and later oral agreements between complainant or its predecessor and defendant. A contract entered into August 14, 1919, between the Director General of Railroads, complainant, and defendant, for the purpose of "defining the rights and liabilities of each of the parties hereto with respect to all of the said side-tracks" and terminable upon 60 days' notice by either party, contains the following provisions of interest here: Complainant is to provide all necessary rights of way outside of defendant's, and to secure all consents, licenses, or permits necessary to enable defendant to operate, repair, and maintain the sidetracks pursuant to the agreement. Complainant is to maintain and keep in good order and repair and in safe operating condition, at its own expense and to defendant's entire satisfaction, the sidetracks, exclusive of the rails and metal fastenings used in their construction. Defendant is to maintain, keep in repair, and renew and replace when necessary the rails and metal fastenings used in the construction, which are to remain its property. Complainant covenants not to direct, authorize, or permit the use of the sidetracks for the benefit of any other person, corporation, or party without defendant's written consent. Defendant is to "have the right to use the said side-track, or any extension thereof which may be hereafter constructed, for the purpose of serving other parties," and may handle and transport the freight of other parties on such tracks or extensions, provided that it is done in such manner and at such times as not to interfere unnecessarily or unreasonably with the handling of complainant's freight.

As we understand the blueprint before mentioned, the greater part of the interchange track also is within the plant inclosure. The plant tracks aggregate about 11,026 feet in length. The minimum switching distance between the interchange point and a plant unit is 2,450 feet, the maximum is in the neighborhood of 4,000 feet, and the weighted-average service is given as approximating a

distance of 2,550 feet. As distinguished from tracks owned or operated by an industrial or other common carrier by railroad, the tracks in question are purely plant facilities.

For some years prior to 1914 defendant performed the interchange switching service. Apparently because of defendant's train schedules, complainant found the service, performed principally by road-haul engines, inconvenient and unsatisfactory. Also, in 1914 material additions to the plant tracks were planned and made. Defendant advised complainant that the proposed new track layout would not be adapted to operation by defendant's power, because of excessive curvatures, but withdrew its objection to the proposed extension upon assurance that complainant would provide its own power to do the switching. Thereupon complainant purchased an engine and voluntarily undertook the work of switching to and from the interchange point. This it has continued to do, except that during short intervals, when its locomotive was disabled or derailed, defendant performed the necessary service to the extent of its ability to operate over the plant tracks. Some of these tracks contain 30° curves, whereas, it is testified, defendant's present types of motive power can not operate around curves in excess of 15°.

Complainant cites the following provision carried in defendant's tariffs naming rates to and from Minetto:

> The rates named herein apply from and to the tracks, stations or other receiving and delivery points on railroads parties to this tariff, or to or from sidings connected with and operated by such railroads where the particular traffic is usually received or delivered, * * *.

It also contends that the plant tracks are in fact sidetracks used by or for the benefit of the public, and that it is defendant's duty to receive and deliver cars thereon. To support this contention it is shown that something like 20 per cent of the less-than-carload traffic handled to and from the plant tracks is for account of parties other than complainant. A few carload shipments also have been so handled.

The evidence discloses that nearly all of the less-than-carload shipments referred to were of goods owned by complainant's customers, shipped to its plant for processing, delivered accordingly, and reshipped to the owners after treatment. Such shipments, including occasional shipments for others, are received in cars loaded with shipments consigned to complainant, and outbound shipments of treated goods are consolidated with others in complainant's trap or ferry cars. The processed shipments are called of record "converter" goods or shipments. Freight bills on the inbound shipments were made out to complainant prior to August 1, 1925, and thereafter in the name of the owner, care of complainant. The

latter pays the freight on the incoming shipments, charges it back to the owners, and carries insurance on the goods in its own name.

The carload shipments referred to as having been handled for the public consisted of one car of junk, two of hay, and one of automobiles, outbound, and five cars of building materials, inbound. Most of the junk so shipped was old plant material, sold and loaded on the premises, supplemented by additional material brought there by the purchaser in order to make out a carload. For the shipment of hay the shipper requested that the cars be placed on the plant tracks, with which request defendant's station agent declined to comply until it had been supported by complainant's expressed consent. The circumstances surrounding the shipment of automobiles are not disclosed. The inbound carloads of building materials were consigned to a contractor engaged in construction work at the plant, in connection with which the materials were to be used, and were placed on the plant tracks for unloading at complainant's request.

Defendant points out that in terms the tariff provision above quoted applies only to " sidings connected with and operated by such railroads " and " where the particular traffic is usually received or delivered," etc. The plant tracks are, it contends, taken out of the purview of that provision by the facts that, upon complainant's initiative and by its voluntary action, they have not been " operated " by defendant since 1914, and that since that year the " particular traffic " has been " usually received or delivered " upon the interchange track.

While the weight of the evidence is that to a greater or less extent the plant tracks are unsuitable for operation of defendant's more modern locomotives thereover, it is unnecessary to review that question at length. The conclusion upon the first branch of the case rests upon other considerations. Primarily and principally in the interest of a more satisfactory interchange service, supplemented perhaps by projected track extensions over which defendant was unwilling to undertake operations, complainant voluntarily and upon its own initiative took over the switching service, and has since continued to perform it, in connection with its intraplant switching. In the complaint itself it is expressly admitted that the assumption of the interchange switching was wholly voluntary. Defendant was thereupon relieved of any duty it may have owed complainant in that behalf. At no time since has complainant demanded or asked that defendant resume the service, except in the emergencies before mentioned; nor, it appears, did it prior to February, 1925, ask defendant for an allowance to cover the interchange switching. It does not now seek a resumption of the service by defendant, and apparently

does not desire it. Its situation in that respect may well be, and probably is, like that of other industries in similar cases brought to our attention, which have found it conducive to a more effectual and economical coordination of intraplant and interchange switching to do the work themselves. At all events, complainant does not here seek alternative relief—that defendant either perform the interchange service or make an allowance to cover it. Complainant seeks compensation only. We have repeatedly applied the settled doctrine that a carrier has the right to complete a service included within its rates, and that when by action of a shipper it is deprived of opportunity to do so it can not be held to make compensation therefor. The service here in question has been voluntarily taken over by complainant.

Because made the subject of comment in the briefs, it may be added that at the hearing the defendant, while disclaiming any obligation in the premises, renewed a prior offer to switch cars over the two principal arteries of the plant tracks, upon condition that complainant will replace, at its own expense, the present 67-pound rails with 80-pound rails and the frogs at certain points with others having less angle. This offer is unacceptable to complainant, which contends that under the contract the obligation to make such track repairs and replacements is defendant's. Apart from the fact that the contract itself may be terminated upon 60 days' notice by either party, its terms do not clearly fix upon defendant an obligation to go beyond replacements in kind, and, in any case, defendant's obligation to operate over the tracks, if one there was originally, has been canceled by complainant's voluntary assumption of the service.

Section 15(13) of the act, cited in the complaint, contemplates an allowance only to the "owner of property transported" and for a service rendered or instrumentality furnished in aid of the transportation within a carrier's duty. Such an allowance is optional with the carrier, and we are empowered to fix merely the maximum that may be paid. *Rutherford-Brede Co.* v. *Director General*, 61 I. C. C. 515, 517; *Cambria Steel Co.* v. *Director General*, 64 I. C. C. 737, 741; and others to the same effect. The cases in which we may and may not make awards to the owners of property transported are distinguished in *Borden's Farm Products Co.* v. *N. Y., N. H. & H. R. R. Co.*, 92 I. C. C. 270, 272–3; affirmed, 102 I. C. C. 497.

The tariff provision above quoted is general in character. The "sidings" upon which it provides for receipt and delivery of traffic would not, in the usual acceptation of the term, include tracks within the limits of an industrial plant and constructed for the latter's particular purposes; certainly, not those the service to and from which has been taken over by the industry by its own preference

and voluntary intercession. Nor does the record support the allegation or contention that the tracks in question were ever recognized or utilized by defendant as parts of its public terminals. The terminable contract hereinbefore outlined merely reserved to defendant the right to make such use, provided it did not interfere with complainant's. Not only is such use as has been made by or for others than complainant not traceable to any desire or design of defendant's, but the latter has its own terminals at Minetto, apparently adequate to meet all demands made upon them up to this time.

There remains the question of compensation to complainant for services in connection with the trap-car shipments. Those shipments have been described in the foregoing portion of this report as consisting principally of complainant's own, plus the converter shipments, plus occasional other shipments for outside interests.

Defendant is under no duty or obligation to " farm out " the work of and incident to receipt or delivery of less-than-carload freight handled in the usual way, and such traffic as is accorded the service of a trap or ferry car, received or delivered upon private sidings remote from the carrier's own terminal facilities, is for obvious reasons loaded or unloaded by the consignors or consignees. This is recognized in the definition in *Trap or Ferry Car Service Charges*, 34 I. C. C. 516, 519–20:

> The term trap or ferry, strictly speaking, is applied to a car placed at an industry or commercial house having a private siding and there loaded by a shipper with less-than-carload shipments, and hauled by a carrier to its local freight or transfer station for handling and forwarding of contents; and also it applies to a car loaded with less-than-carload shipments which is hauled to and placed upon the private track of an industry or commercial house by the carrier from a local freight or transfer station.

So far as a consignor's or consignee's own traffic is concerned the respective services of the carrier and the shipper—at least, those of the latter—are in the general practice taken into account in the applicable line-haul rates. In the case next above cited the question was, not whether allowances should be made by the carriers to shippers, but whether the carriers might impose upon the shippers additional charges for the special service of the trap or ferry car, which proposed charges were found not justified for reasons stated.

The status of the so-called converter shipments is essentially similar to that of complainant's own, as before pointed out. Individual shipments for other consignees having no such relationship have also been handled, but it is explained for defendant that they arrive at Minetto in cars destined to the plant and unaccompanied by revenue billing, and that by the time the latter is received the cars have been switched by complainant to its unloading points. This service and the ensuing services attendant upon delivery to the con-

signees have been performed upon complainant's volition, without request by defendant and, it is testified, without its intention or desire. Defendant expresses a preference to handle such shipments through its own terminals. In any event, as before observed, it is defendant's privilege to perform these services itself, and we can not competently prescribe the compensation it is to pay to a voluntary agent for performing them.

Complainant cites, as analogous, the Jay Street Terminal, at Brooklyn, N. Y., where allowances are made by carriers, including the defendant, to Arbuckle Brothers, owners and operators of the terminal, for services in connection with the receipt and delivery of freight. That terminal, however, as is made clear in the opinion of the court in *United States* v. *Balt. & Ohio R. R. Co.*, 231 U. S. 274, is not an industrial plant, equipped with tracks arranged and used primarily for industrial purposes, but is a public station for the receipt and delivery of freight, by contract with the railroads concerned, all of whose rails end on the New Jersey shore of the harbor. The terminal concern also performs between its Brooklyn pier and the rail lines the lighterage service included in the rates published by those lines. The allowances made by the railroads to the terminal owners, covering the handling of their own traffic as well as that of other shippers, were not prescribed by this commission, and our decision and order out of which the above case arose turned wholly upon an alleged unlawful discrimination against a rival commercial concern also shipping through New York Harbor. The situations there and here are not parallel, and, in any event, there is in this case no question of undue prejudice or preference or of unjust discrimination as between shippers or receivers of freight at Minetto or as between complainant's plant and the Brooklyn terminal.

We find that defendant's failure or refusal to compensate complainant, out of the line-haul rates, for the services performed by the latter in switching carload shipments between points within its plant and the point of interchange with defendant, and in checking, weighing, loading, and unloading less-than-carload shipments delivered to or forwarded from the plant in trap or ferry cars, is not shown to violate any provision of the act.

The complaint will accordingly be dismissed.