No. 16393

BIRKETT MILLS ET AL. *v.* DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY ET AL.

Submitted February 16, 1927. Decided March 4, 1927

Transit charge of 1.25 cents maintained at New York points in connection with so-called f. o. b. rates on grain and grain products from Erie, Pa., and Buffalo and Oswego, N. Y., to eastern destinations found not unreasonable but unjustly discriminatory and unduly prejudicial. Defendants' failure to permit transit in connection with so-called at-and-east rates on grain from those ports to the same destinations found not unreasonable, unjustly discriminatory, or unduly prejudicial. Unjust discrimination and undue prejudice ordered removed. Reparation denied.

August G. Gutheim, *W. H. Kimball*, and *W. G. Johnston* for complainants.

F. E. Pond for New York State Millers' Association; *V. M. Parshall* and *J. W. Enright* for Central States Millers' Association; and *L. G. Macomber* for Toledo Produce Exchange, interveners.

E. H. Burgess, *W. J. Larrabee*, and *Parker McCollester* for defendants.

REPORT OF THE COMMISSION

DIVISION 4, COMMISSIONERS MEYER, EASTMAN, AND WOODLOCK

MEYER, *Commissioner:*

Exceptions were filed by complainants to the report proposed by the examiner, to which defendants replied, and oral argument has been had. Our conclusions differ in some respects from those recommended by the examiner.

Complainants are millers, grain dealers, and elevator companies located at points in the State of New York. By complaint filed October 6, 1924, as amended, they allege that the transit charge of 1.25 cents maintained at such points in connection with the so-called f. o. b. rates on grain and grain products from Erie, Pa., and Buffalo and Oswego, N. Y., to eastern destinations, and defendants' failure to permit transit in connection with the so-called at-and-east rates on grain from those ports to the same destinations, was and is unreasonable, unjustly discriminatory, unduly prejudicial to (*a*) complainants, (*b*) the cities of Erie, Buffalo, and Oswego, and (*c*) traffic in ex-lake grain from Erie, Buffalo, and Oswego, and unduly

preferential of (*a*) millers, dealers, and elevator companies located at points in central and western territories, (*b*) the cities in which the latter millers, dealers, and elevator companies are located, and (*c*) of traffic in grain from central and western territories moving all rail or ex-lake via central territory ports. We are asked to require defendants to establish reasonable and nonprejudicial transit arrangements and charges for the future and to award reparation. Rates and charges are stated in cents per 100 pounds, unless otherwise indicated.

The New York State Millers' Association, Central States Millers' Association, and Toledo Produce Exchange intervened, but no evidence was adduced on their behalf. The municipalities of Erie, Buffalo, and Oswego were not represented as such.

Most of the grain used by complainants originates in western territory. That from the Northwest moves chiefly over the lakes and that from the Southwest and Central West, purchased at Kansas City, moves largely all rail. About two-thirds of their western grain moved over the lakes in 1924 and about four-fifths in 1925. During the six months ended December 31, 1924, complainant millers received about 211,000,000 pounds of grain of all kinds, of which about 13,000,000 originated in trunk-line territory and 198,000,000 in central and western territories. Of the latter, about 135,000,000 moved over the lakes to Buffalo and about 63,000,000 moved all rail. Complainants compete with millers and dealers in central and western territories in the purchase of grain in those territories and in the sale of the products at eastern destinations.

The so-called f. o. b. rates are the local rates from the lake ports and do not include elevation or other services incident to the transfer of the lading from the lake vessels to the cars. They apply on both grain and grain products. The so-called at-and-east rates are proportional rates from the lake ports. They apply only on grain which is moved to the lake ports by water and include a charge of 1 cent a bushel for elevation and transfer of the lading to the cars. Under the f. o. b. rates milling in transit is permitted at points in trunk-line territory, including those at which complainants are located, at a charge of 1.25 cents. Transit is not permitted under the at-and-east rates, as such rates do not apply on grain products and the transit rules provide that on grain milled in transit the rate on grain products shall apply from the point of origin of the grain to the destination of the products. Under the all-rail rates on grain products from central and western territories, transit is accorded at mills in central territory and at complainants' mills at a charge of 0.5 cent. Transit is also accorded at mills in central territory and at complainants'

mills under the ex-lake rates on grain products from central territory ports at a charge of 0.5 cent. Generally at all points in western territory no transit charge is assessed. The all-rail rates on grain products from central and western territories and the ex-lake rates on grain products from central territory ports are 0.5 cent higher than the corresponding rates on grain.

We will first consider defendants' failure to permit transit under the at-and-east rates on grain. In *Mixed Car Dealers Asso.* v. *D., L. & W. R. R. Co.*, 33 I. C. C. 133, such failure was also alleged to be unreasonable and discriminatory. Reference was made to the special character of these rates and it was found not unreasonable to refuse to permit transit thereunder. This issue was not stressed in the present proceeding. The record herein affords no ground for a conclusion different from that in the case cited.

We will next consider the reasonableness of the 1.25-cent transit charge. Complainants rely mainly on the existence of the 0.5-cent charge on all-rail traffic. They contend that the services incident to transit cost less on ex-lake than on all-rail traffic although the transit charges on the former is two and one-half times that on the latter. They also show that defendants provide transit services of various kinds on other commodities in trunk-line territory, the charges for which are the same regardless of whether the commodities originate within or west of trunk-line territory. Defendants introduced evidence showing that the actual cost of the transit services is in excess of the 1.25 cents charged and that said charge is less than the transit charge on other commodities in trunk-line territory, although the cost of the transit service on grain is greater than on any other commodity. In the *Mixed Car Dealers Asso. case*, decided February 8, 1915, we found that this 1.25-cent charge was not unreasonable. The 0.5-cent charge on all-rail traffic was also then applicable. Rates and charges generally have been substantially increased since that time.

With respect to unjust discrimination, complainants also rely on the differing transit charges on ex-lake and all-rail traffic. They contend that, as the transit charges are separately established charges for distinct services, they must stand or fall as such. They refer to *Central R. R. Co.* v. *United States*, 257 U. S. 247, in which it was held that a transit charge is a local charge for which the carrier establishing it is alone responsible. We believe that complainants' position is sound and that, as the differing transit charges are for the same transit services at the same points by the same carriers, unjust discrimination under section 2 of the act exists.

There remains the issue of undue prejudice. We will first consider complainants' position with respect to ex-lake traffic from

central territory ports. As heretofore stated, the transit charge on such traffic is 0.5 cent. The following shows the rates and charges to New York, Philadelphia, and Baltimore on grain products milled in transit in trunk-line territory from ex-lake Buffalo grain as compared with grain products milled in transit in central territory from grain ex-lake central territory ports:

	To New York	To Philadelphia	To Baltimore
From Buffalo:	*Cents*	*Cents*	*Cents*
Rate	21.5	21	21
Transit charge	1.25	1.25	1.25
Total	22.75	22.25	22.25
From Cleveland:			
Rate	23	21	21
Transit charge	0.5	0.5	0.5
Total	23.5	21.5	21.5
From Toledo:			
Rate	25	23	22
Transit charge	0.5	0.5	0.5
Total	25.5	23.5	22.5

It will be noted that the total charges from Buffalo are less than from Toledo in each instance and are lower to New York and higher to Philadelphia and Baltimore than from Cleveland. The distances are not shown but apparently will average considerably greater from Cleveland and Toledo than from Buffalo. The lake charges are the same to central-territory ports as to Buffalo.

We will next consider complainants' position with respect to all-rail traffic. Defendants' sole justification for the different transit charges at complainants' mills on all-rail and ex-lake traffic is a difference in competitive conditions. They say that the 0.5-cent charge on all-rail traffic has been in effect in central territory for many years and was established in trunk-line territory to enable millers there to compete with the central-territory millers at the same through charges, and that there is no necessity from a competitive standpoint to make a similar reduction in the transit charge on the ex-lake traffic. While defendants may, for competitive reasons, establish a lower transit charge on particular traffic than they otherwise would, they may not lawfully do so if they thereby unduly prejudice other traffic. Here, for substantially similar services, different transit charges are assessed dependent wholly on whether the traffic comes to trunk-line territory all rail or over the lakes. If over the lakes, the charge is 1.25 cents, if all rail, it is 0.5 cent. The services within trunk-line territory, including the transit services, are substantially the same in either case. On other commodities

accorded transit within trunk-line territory by defendants, different charges are not assessed dependent upon whether the rail movement begins within or west of trunk-line territory. The all-rail and rail-lake-rail routes are in competition for the traffic. This being so, it is clear that the differing transit charges at the same milling points are unduly prejudicial to the ex-lake traffic and unduly preferential of the all-rail traffic.

Considerable evidence has been introduced comparing the through charges on grain from western markets moving all rail and grain moved by rail-lake-rail route to complainants' mills, there milled, and the products shipped east. We do not attach great weight to such comparisons here. The lake rates are contract rates and are not subject to our jurisdiction. They vary considerably from season to season and during seasons. Manifestly we can not fix freight rates or transit charges so as to preserve a fixed relationship between the through charges by all-rail and rail-lake-rail routes.

In *Buffalo Grain Cases*, 46 I. C. C. 570, we found that the 1.25-cent transit charge at points in trunk-line territory on ex-lake grain from Buffalo was unduly prejudicial to Buffalo and unduly preferential of Chicago, Ill., and certain ports in central territory.

We find that defendants' failure to accord transit under the at-and-east rates on grain from Erie, Buffalo, and Oswego was not and is not unreasonable, unjustly discriminatory, or unduly prejudicial.

We further find that the transit charge of 1.25 cents maintained in connection with the f. o. b. rates on grain and grain products from Erie, Buffalo, and Oswego was not and is not unreasonable, but that it was, is, and for the future will be unjustly discriminatory, unduly prejudicial to complainants and to ex-lake grain traffic from Erie, Buffalo, and Oswego, and unduly preferential of millers, dealers, and elevator companies handling ex-lake grain from central territory ports and of all-rail grain traffic from points in central and western territories. The undue prejudice should be removed by establishing at complainants' mills the same transit charge on ex-lake grain from Erie, Buffalo, and Oswego as contemporaneously applies at said mills on all-rail grain from central and western territories and the same transit charge which contemporaneously applies at milling points in central territory on ex-lake grain from ports in central territory. This will also remove the unjust discrimination found.

Damage resulting from the unjust discrimination and undue prejudice has not been shown.

An appropriate order will be entered.