

No. 23347¹

BRUNSWICK-BALKE-COLLENDER COMPANY ET AL. v.
DELAWARE, LACKAWANNA & WESTERN RAILROAD
COMPANY ET AL.

Submitted May 23, 1931. Decided December 18, 1931.

Rates on slate slabs, rough quarried, sawed four sides or less, or sand rubbed, in carloads, from Pen Argyl, Pa., Fair Haven, Vt., Granville, N. Y., and Portland and Monson Junction, Me., and other points in the same respective rate groups, to destinations in central territory found applicable and not unreasonable or otherwise unlawful. Complaints dismissed.

L. P. Siddons and *Charles O. Swartz* for complainants in Nos. 23347 and 23347 (Sub-No. 2); *Albert E. Enoch* for complainants in No. 23347 (Sub-No. 1).

Charles O. Swartz for intervener.

W. J. Larrabee, Henry J. Hart, H. T. Newcomb, and *H. D. Boynton* for defendants.

REPORT OF THE COMMISSION

DIVISION 3, COMMISSIONERS McMANAMY, LEE, AND TATE

BY DIVISION 3:

Exceptions were filed by complainants to the report proposed by the examiner, and defendants replied. The case was orally argued.

Complainants are corporations, a company, and copartners quarrying slate, or dealing in that material and its products.² By complaints filed March 15, April 11, and June 23, 1930, in the title case and Sub-Nos. 1 and 2, respectively, as amended, it is alleged that the rates on slate slabs, rough quarried, sawed four sides or less, or chiseled, dressed, hammered, or sand rubbed, and on slate slabs, lettered, polished, or traced, in carloads, from certain points in Maine, Vermont, New York, and Pennsylvania to destinations in Canadian and central freight association territories, and points south and west of the latter territory, were and are inapplicable, unreasonable, un-

¹This report also embraces No. 23347 (Sub-No. 1), National Slate Association, Incorporated, et al., v. Akron, Canton & Youngstown Railway Company et al., and No. 23347 (Sub-No. 2), Western Slate Company et al. v. Delaware, Lackawanna & Western Railroad Company et al.

²Except that the National Slate Association is composed of persons and organizations interested in the slate industry.

justly discriminatory, unduly prejudicial and in violation of section 4 of the interstate commerce act.³ Lawful rates for the future and reparation are sought. Informal complaints previously filed by certain complainants contain the same allegations as to the past as the formal complaints and are being held in abeyance pending the disposition of these cases. Claims respecting (a) the applicability of the rates charged, and (b) those arising by reason of the other above-mentioned allegations are barred by statute relative to shipments delivered or tendered for delivery more than three years and more than two years, respectively, prior to the filing of the informal complaints. On June 13, 1930, the Liquid Carbonic Corporation of Chicago, Ill., manufacturing store counters from slate slabs shipped from the origin territory considered, intervened. It seeks the same measure of relief as complainants and will be similarly dealt with herein. Rates will be stated in cents per 100 pounds.

The record is devoid of any evidence concerning rates applying to destinations in Canada or points south and west of central territory. Consequently the findings hereinafter made will be restricted to rates applicable from considered origins in trunk-line and New England territories to considered destinations in central territory, it being presumed that complainants have abandoned their complaints in so far as rates to the other points are concerned. At the hearing the Delaware & Hudson Railroad Corporation, hereinafter termed the Delaware & Hudson, filed motions of severance on the ground of misjoinder, in that in addition to assailing rates applying from producing points on its lines, complainants also assail rates in which that defendant does not in any manner participate. Its rates, however, are related to the latter rates and complainants point out that if the motions were granted, and another hearing had, there would practically be a duplication of testimony. The ruling of the presiding examiner overruling these motions is sustained. A somewhat similar motion was made by the Bangor & Aroostook Railroad Company, hereinafter termed the Bangor & Aroostook, a defendant in all three cases. It appears that the reasonableness of the commodity rates applying from points on its line is not assailed, but that such rates are assailed in these proceedings under section 3. This motion also is denied.

The origins are located in three rate groups, and are principally as follows: (1) Wind Gap, Pen Argyl, Bangor, and Slatington, Pa., on the rails of the Delaware, Lackawanna and Western Railroad Company; (2) Fair Haven, Hydeville, and Castleton, Vt., and Gran-

³ With the exception that no allegation under section 4 was made in Sub-No. 1.

ville and Middle Granville, N. Y., on the Delaware & Hudson; and (3) Monson Junction, Blanchard, Brownville, and Shirley, Me., on the Bangor & Aroostook, and Portland, Me., on the rails of the Boston and Maine Railroad and the Maine Central Railroad Company. The principal destinations are Muskegon and Chicago. The latter will be considered as representative of all the destinations. The Pennsylvania points take Philadelphia, Pa., and the Vermont and New York origins take Glens Falls, N. Y., base rates. The rates in issue from origins in Maine, New York, and Vermont apply over routes partly through Canada, such routes being hereinafter designated as differential routes to distinguish them from standard routes wholly within the United States. Except from the Pennsylvania origins, all of complainant's shipments moved over differential routes.

Slate is quarried in blocks weighing 3 or 4 tons each. These blocks, which break smoothly, are split or cut into slabs of various sizes ranging in dimensions from $\frac{7}{8}$ to 2 inches thick by 2 to 7 feet long by 1 to 5 feet wide. Slate slabs are ordinarily shipped in rough condition as split from the quarry blocks. Unfinished slabs of the above sizes are classed as mill stock from which are manufactured blackboards, billiard and other table tops, mantels, floor tiles, steps, wainscoting, hearths, well caps, laundry tubs, window sills, platforms, and other interior and exterior building construction work. The shipments considered consisted of rough-quarried slate slabs 1-inch thick, sawed on four sides or less, or sawed as mentioned and sand rubbed on one side. Material of this character is shipped loose in box cars with only sufficient packing and bracing to prevent shifting of the lading in transit. Loss and damage claims are negligible. Only a small portion of the evidence dealt with lettered, polished, or traced slate. On brief, the issues were confined to slate slabs, rough quarried, sawed four sides or less, or sand rubbed, and in view of this fact, this report will be restricted to slate in these stages of finish.

In official classification, slate, under that general heading, is rated sixth class, minimum 36,000 pounds, in blocks, pieces, or slabs, n. o. i. b. n., loose or in packages.⁴ Slate is not specifically mentioned in the classification under the heading of natural stone. Under the heading of natural stone, in blocks, pieces, or slabs, n. o. i. b. n., granite, jasper, marble, and onyx, and other than granite, jasper, marble, or onyx, rough quarried, or sawed on four sides or less, minimum 36,000 pounds, are rated sixth class. Sixth-class rates, for example,

⁴ Since June 21, 1905, by exceptions to the official classification, slate slabs or flagging, curbing, fencing, lintels, window sills, coping, stairways, floor tiles, ridgepoles, billiard and pool table tops, not boxed or crated, take sixth-class rates.

45.5 cents over standard routes, and 44.5 cents over differential routes, from Wind Gap, Pen Argyl, and Fair Haven to Chicago were and are collected on slate slabs, except that from Monson Junction and points on the Bangor & Aroostook a commodity rate of 38 cents, which is less than the sixth-class basis, applies. Complainants seek commodity rates which were and are applicable to building stone under the commodity description hereinafter set forth, and they also contend that in any event the sixth-class rates assailed were and are unlawful to the extent that they exceeded or may exceed rates contemporaneously maintained on granite, marble, and/or stone.

On January 2, 1925, commodity rates approximately 70 per cent of sixth class were established from points in the Philadelphia rate group to destinations in central territory under the following description:

STONE.

Building, classified sixth class in official classification (other than Granite, Jasper, Marble or Onyx). Will not apply from stations shown in Note 60.

On October 15, 1929, the foregoing commodity description was amended to read as follows:

Stone, viz:

Building

Rough Quarried, loose or in packages, minimum weight 36,000 pounds.
(Will not apply from stations shown in Note 60.)

Sawed, four sides or less, loose or in packages, minimum weight 36,000 pounds. (Will not apply from stations shown in Note 60.)

With respect to the application of note 60, the tariff provided:

Where reference to this note is made: Philadelphia basis will apply from the following stations, Camden, N. J., Chester, Pa., Marcus Hook, Pa., Philadelphia, Pa., Wilmington, Del.

In view of this note it is apparent that the commodity rates under those items did not and do not apply from Philadelphia. However, the tariff shows that the Pennsylvania group points take the Philadelphia rate basis, and as no exception is made through the medium of the note, or otherwise, that basis, as above indicated, applies from points in the Pennsylvania group.

To illustrate, under the foregoing commodity items, the present rates from Pen Argyl to Chicago are 32.5 cents on stone, rough quarried or sawed on four sides or less, and 38.5 cents on sand-rubbed building stone, other than granite, jasper, marble, or onyx.

Complainants contend that, except as otherwise limited, the generic term "stone" embraces all kinds of natural stone, including slate, and furthermore, as slate is extensively used both for exterior and interior building construction, that the rates in effect on natural stone were and are applicable to slate slabs. They rely on *Crane Co.*

179 I. C. C.

v. *D., L. & W. R. R. Co.*, 102 I. C. C. 119, in which division 4 found that rates on "stone, natural, * * * slabs. * * * Other than Granite, Marble, Jasper or Onyx, rough-quarried, sawed, * * * sand rubbed," were applicable on shipments of sand-rubbed slate slabs. In *McClamrock Co. v. Atlantic & Y. R. Co.*, 178 I. C. C. 445, division 5 found that commodity rates published to apply on "Marble, granite, and stone, viz: Blocks or slabs" were applicable on slate slabs. In *Crown Willamette Paper Co. v. Nelson & A. Ry. Co.*, 147 I. C. C. 93, we found that soapstone blocks cut or sawed in conformity with specifications to various shapes and sizes for use as furnace linings, and billed as such, were comprehended within the generic commodity description of natural stone "Other than Granite, Marble, Jasper or Onyx; Rough-quarried, sawed, chiseled, dressed, hammered or sand-rubbed," and that such commodity description removed the application of the class rates between the same points under the western classification wherein that commodity was separately rated class E under "Soapstone or Talc: Linings, Fire Box or Furnace, Loose or in Packages, c. L. Minimum 40,000 lbs."

Defendants concede that slate falls within the geological definition of natural stone. But they maintain that slate and stone are not synonymous terms as understood in the trade. One of defendants' expert witnesses, employed as an architect and building inspector, asserted that from an architectural viewpoint slate is considered entirely distinct from stone, and that if building plans specify stone, slate would not be used. They further contend that from a tariff standpoint slate is not entitled to the benefit of commodity rates on building and natural stone, for the reason that since January 1, 1907, slate slabs have been separately classified under the heading of slate in substantially the same manner as it appears in the current classification. This they state clearly indicates that there has been a long-standing classification distinction between slate and stone. They rely on *Keathly v. Louisville & N. R. Co.*, 155 I. C. C. 371, wherein on reconsideration it was concluded that crushed bituminous rock was not entitled to commodity rates applicable to crushed stone. In that report a number of cases are cited with approval in which it was stated that (a) when commodity descriptions are not specific, the meaning that is understood commercially should be applied; (b) commodity descriptions must be strictly applied, and only the article or articles clearly embraced within the description could be considered as having been removed from the classification; and (c) that where provision is separately made in the classification for two articles closely resembling each other in form and nature, and a commodity rate is established naming one of such articles, the commodity rate so established can not be applied on the similar

179 I. C. C.

article specifically named in the classification but not specifically named in the commodity tariff. Although in two cases cited above rates published to apply on stone slabs were found to be applicable on shipments of slate slabs, such cases are not controlling here. The rates on stone from the Pennsylvania group were published to apply on building stone. It is apparent that slate is not commercially recognized as building stone but that to the contrary it is generally considered to be an entirely separate and distinct class of material. The rates on building stone as restricted by the terms of the tariff items above described are not applicable on slate slabs.

A somewhat different tariff situation is presented relative to rates from Fair Haven and group. Prior to June 25, 1929, commodity rates were provided from Fair Haven and origins taking Glens Falls basis to the considered destinations on "Granite, Marble and Stone, Natural (other than Bituminous Asphalt Rock) n. o. i. b. n., in Official Classification, Blocks, Pieces or Slabs". On that date the item was amended to read as follows:

Granite or Marble:

Stone, Natural (other than Bituminous Asphalt Rock); In Blocks, Pieces or Slabs, n. o. i. b. n., in Official Classification, viz:

Minimum Weight in Straight or mixed carloads 36,000 pounds. * * *

Sawed more than four sides, * * * or Sand Rubbed, loose or in packages.

Rough quarried, loose or in packages; sawed on four sides or less, loose or in packages; curbing, flagging or paving. * * *

Since June 25, 1929, a rate of 30.5 cents has applied on commodities covered by the foregoing description from Fair Haven to Chicago over differential routes. The particular routes over which the shipments here considered moved are not definitely disclosed. However, under the tariffs, similar routes were and are available for traffic moving under the class rates assailed and the commodity rates sought to be applied. Since slate slabs are specifically named in the official classification under the general description of "slate", obviously that commodity may not reasonably be considered as included within the terms of the above commodity descriptions.

Complainants, in line with their claims of applicability, contend that there are a number of fourth-section departures arising from the maintenance of building and natural stone rates over routes through their points of origin. A typical instance is a rate of 31.5 cents on granite, marble, and natural stone from Boston and Westfield, Mass., and Poughquag and West Farms, N. Y., to Chicago over routes via which some of the Pennsylvania origins are intermediate. Admittedly, the departures exist only in the event that the rates on building and natural stone are applicable to slate slabs, and in view

179 I. C. C.

of the contrary conclusions reached herein, this feature of the case need not be further considered.

All complainants' evidence previously reviewed is relied upon by them in support of the claim of unreasonableness. In addition they seek the rates in effect on granite and marble where such rates were and are lower than the building and natural stone rates. The following table is illustrative of the rates applied on slate slabs, and other rates relied upon by complainants in support of the alleged unlawfulness of the rates assailed:

To Chicago, Ill., from—	Average distance	On slate	On building stone	On marble and granite
	<i>Miles</i>	<i>Cents</i>	<i>Cents</i>	<i>Cents</i>
Pen Argyl, Pa.	908	45.5	32.5	¹ 32.5
Fair Haven, Vt.	854	44.5	² 30.5	30.5
Portland, Me.	1,156	46.5	² 30.5	30.5
Monson Junction, Me.	1,124	38	² 62	62

¹ Philadelphia basis, not including Pen Argyl, is 29.5 cents.

² Applicable on granite, marble, and natural stone, n. o. i. b. n. in official classification.

On roofing slate consisting of slabs three-sixteenths inch in thickness, commodity rates less than sixth class are maintained from the Pennsylvania region to central territory. For example, from Wind Gap and Philadelphia to Chicago the rate is 38 cents. From Boston, Mass., New York, N. Y., Carthage, Mo., Granite Quarry, N. C., and Knoxville, Tenn., and various other points, to Chicago and near-by points the rates on granite, jasper, onyx, and marble range from 40 to 70 per cent of the corresponding sixth-class rates.

The average carload weights shown by the parties vary. Based on 51,824 pounds, which is fairly representative of the average loading of complainants' shipments, the rates assailed from Pen Argyl and Fair Haven to Chicago yield, respectively, 26 and 21.5 cents per car-mile, and from Fair Haven to the same destination the rate on marble produces 20.2 cents per car-mile based on 71,813 pounds. There is no movement of marble and granite from the considered Pennsylvania group. Defendant Delaware & Hudson, which serves complainants' Vermont and New York quarries, points out that in 1929 a total of 956 carloads of marble and granite originated on its line, as compared with 218 carloads of slate slabs, and shows that 79 carloads of the slate averaged less than 36,000 pounds. That defendant also showed that for the first six months of 1930 there were 785 carloads of granite and marble, and 43 carloads of slate slabs shipped from stations in Vermont on its line and on that of the Rutland Railroad Company.

The values of the slate slabs at the quarries range from 36 to 50 cents a square foot, except that some of the Maine slate is worth 80 cents. Because of the various thicknesses of the slabs and the fact that some sizes are used more than others, it is difficult to obtain the average value per cubic foot, but as an estimate it may be placed at \$3.26. Complainants introduced prices of 25 to 50 cents a square foot for marble slabs, sawed two to four sides, \$1.50 to \$3.50 a cubic foot for rough-quarried marble, and \$4 to \$6 a cubic foot for granite, sawed four sides or less. Some of complainants' witnesses estimated, in a more or less general way, that the values of marble are between 60 cents and \$1.20 a square foot.

Complainants stated that slate slabs are sold in keen competition with marble, but that by reason of its more attractive appearance, marble is preferred over slate in building construction. Because of this handicap, they assert that builders will not seriously consider using slate where marble may be utilized unless the delivered price of the former is at least 25 per cent less than that of marble. It will be observed that complainants' evidence is directed to the rate advantage which marble and granite have over slate slabs. Marble and granite load much heavier than slate slabs and possibly have somewhat higher values. The weight densities of the commodities are about the same, namely, 160 to 180 pounds per cubic foot, and the carload minima is uniformly 36,000 pounds. Slate slabs move in much smaller volume than marble and granite. Marble and granite do not originate at the Pennsylvania group points. The evidence is insufficient to sustain the allegations of either unjust discrimination or undue prejudice.

We find that the rates assailed were and are applicable and not unreasonable or otherwise unlawful. The complaints will be dismissed.

179 I. C. C.