No. 23992

# MICHAEL COMELLA ET AL. v. DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY ET AL.

*Submitted March 21, 1933. Decided November 1, 1933*

Rates charged on bananas, in carloads, from New York, N.Y., to points in Canada, found unreasonable but not otherwise unlawful. Reparation awarded.

*Pearle P. Cramer* and *R. S. Fowler* for complainants.
*W. J. Larrabee* for defendants.

REPORT OF THE COMMISSION

DIVISION 5, COMMISSIONERS BRAINERD, PORTER, AND FARRELL

BY DIVISION 5:

The shortened procedure was originally followed herein but after service of the examiner's proposed report, to which complainants filed exceptions, the case was reopened on our own motion for oral hearing. Thereafter a second proposed report was served. Complainants filed exceptions thereto and the case was orally argued. Our conclusions differ from those proposed by the examiner.

Complainants[1] are individuals, firms, and copartners dealing in bananas at Canadian points. By complaint filed September 2, 1930, they allege that the rates charged on bananas, in carloads, shipped between March 1927 and March 1930, inclusive, from New York, N.Y., to Toronto, Hamilton, Kingston, Belleville, Oshawa, Port Hope, and Cobourg, Ontario, Canada, were inapplicable, in violation of the long-and-short-haul provision of section 4 of the Interstate Commerce Act, unreasonable, and unduly prejudicial. An informal complaint filed by complainants April 13, 1929, contained the allegations that the rates charged on shipments delivered within the statutory period were inapplicable and unreasonable. An informal complaint filed March 18, 1929, by complainants covered 18

[1] Complainants are John Christopher, G. B. Ciceri & Company, Joe Cira, M. Comella, A. Cosentino, S. Curreri, McWilliams & Everist, Limited, Joe Polito, Louis Rich, V. Rico & Brothers, Nicola Rico, Sam Sanci, White & Company, Limited, Sam Rostivo, Jas. Vince, A. Calderone, G. Polito, Amodeo Brothers, A. Melchier & Sons, S. Domenico & Son, Ed. A. Kelleway, J. Fardella & Son, Phillips & Greenway, Frank Gerace, P. Catalano, Wright Fruit Company, Limited, A. C. Sansone & Company, Stevenson Fruit Company, Limited, Laschiavo & Sansone, J. Lopresti Fruit Company.

specified shipments delivered after March 18, 1927, and contained allegations of inapplicability and unreasonableness. The informal complaints were denied March 7, 1930. Claims for reparation under section 1 on shipments delivered prior to April 13, 1927, and which were not covered by the second informal complaint are barred by the statute. Claims for reparation under sections 3 and 4 are barred on shipments delivered prior to September 2, 1928. Only evidence of shipments to Toronto, Belleville, and Oshawa, 498, 613, and 537 miles, respectively, distant from New York over the routes of movement, was offered by complainants.

Defendants contend, since this traffic originated in a foreign country, passed through the United States, and continued to another foreign country, that it is foreign commerce over which we have no jurisdiction.

The bananas originated at ports in Costa Rica and Cuba. They were forwarded by the producers to their sales representatives, Fruit Dispatch Company, Banana Sales Corporation, or Di Giorgio Corporation, at New York. While the ships were en route to New York or after their arrival at that port, complainants placed their orders with the New York firms. There is no storage of bananas at New York. After the local requirements of the New York market are satisfied, the orders from other points are filled. Any bananas remaining unsold are loaded into cars, and are consigned to some destination, usually Buffalo, N.Y., for diversion to ultimate destination after a buyer has been obtained. However, the shipments here considered were billed directly from New York to points in Canada.

The considered shipments were parts of various cargoes. They were unloaded from the ships into cars on car floats alongside and reshipped on domestic bills of lading within 12 hours after the ship docked. Some of them moved in bond from New York, and all of them moved over the Delaware, Lackawanna and Western Railroad Company to Black Rock, N.Y., and the Canadian National Railways beyond. Defendants did not publish or apply a rate for that part of the transportation which took place within the United States but assessed and collected a joint third-class rate of 72 cents, minimum 20,000 pounds. During the period the shipments moved, the Lackawanna published in one of its tariffs a joint rate of 66.5 cents from New York to Montreal applicable over the route formed by its line to Black Rock and the line of the Canadian National Railways beyond. Prior to August 26, 1927, this tariff contained a reference to rule 77 of our Tariff Circular 18-A, but during the periods from August 26, 1927, to January 23, 1928, and after April 18, 1929, no reference to that rule appeared in the above-mentioned tariff. From January 24, 1928, to April 18, 1929, a tariff published by the Lacka-

wanna provided that the rate of 66.5 cents named therein from New York to Montreal over the route via Black Rock would apply as a maximum to intermediate points on that route. Thus during the last-mentioned period, a rate of 66.5 cents was applicable under the terms of the existing tariff to intermediate points on the route via Black Rock. The shipments under consideration moved to intermediate points on that route.

The volume of movement to Canadian points is irregular. The sales representatives advise buyers two or three days in advance of arrival that a steamer containing bananas from a certain point will arrive on a certain date. It appears from the record that buying orders from Canadian points are accepted subject to the demands of local and domestic markets and, further, to the condition that the bananas are not overripe for shipment to Canada. In cases of this kind the actual movement and character of the shipments are the governing elements. In the instant case it is clear that there was no intention as to the ultimate destinations of the bananas until after termination of the movement to the sales agents of the shippers, or in other words, until after the bananas arrived in New York. Then, for the first time, the ultimate destinations were determined. Although the bananas were not stored in New York, and the actual delay at that point was very short, a few hours in most cases, that delay coupled with the facts previously stated, constituted a break in the continuity of movement of this traffic. It can hardly be argued that this is essentially traffic from a foreign country to a foreign country when the sales agents at New York have not only the opportunity but also attempt to sell the bananas within the United States. In view of all the circumstances we conclude that we have jurisdiction over the complaint.

Complainants seek reparation to the basis of the commodity rate of 66.5 cents published to apply over the Lackawanna and Canadian National to Montreal. They cite *Bananas from Gulf Ports*, 123 I.C.C. 181, where division 1 suggested a scale of rates on bananas from Gulf ports to points in southern territory and to Ohio River crossings. Under that scale the rate would be 66 cents for a distance not exceeding 500 miles. Complainants contend that Toronto is in central territory and is therefore entitled to a lower rate than applies in the South for a similar distance.

Defendants state that the Montreal rate of 66.5 cents was established to meet the rate published by the New York Central Railroad Company for application from New York to Montreal via Rouses Point, N.Y., 394 miles. The distance between the same points through Black Rock is 833 miles. Defendants also show that class

rates generally applied on this traffic in the territory under consideration.

The evidence shows that during the entire period the shipments in question moved, a joint commodity rate of 66.5 cents was published and maintained from New York to Montreal over the route of the Lackawanna to Black Rock and Canadian National Railways beyond. This joint rate was 5.5 cents lower than the rate assessed on the considered shipments, which moved to intermediate points on the above route. We are of the opinion that under the facts disclosed the rates assessed were unreasonable to the extent that they exceeded 66.5 cents and that reparation should be awarded to that basis.

The existence of undue prejudice is not established by the evidence.

We find that the rates charged on shipments since March 18, 1927, were unreasonable to the extent that they exceeded 66.5 cents, but that they were not otherwise unlawful; that complainants received the shipments as described, and paid and bore the charges thereon; that they have been damaged in the amount of the difference between the charges paid and those which would have accrued at the rate herein found reasonable; and that they are entitled to reparation with interest. Complainants should comply with rule V of the Rules of Practice.

PORTER, *Commissioner*, dissenting:

I am of opinion that this complaint should be dismissed for want of jurisdiction.

The facts presented clearly indicate that there was an original and continuing intention to ship these bananas to Canada, and that there was no interruption of the journey at the port other than that necessary for reshipment beyond New York. However, those matters need not be discussed in detail here, because this Commission has found that bananas identically handled through the port of Galveston, Tex., were through shipments from foreign points of origins, and not domestic traffic from the port. *Southern Produce Co.* v. *Denison & Pac. S. Ry. Co.*, 165 I.C.C. 423, 428. The shipments considered in that case were destined to points in Texas, and we therefore, were without jurisdiction over the rates from Galveston unless the shipments constituted import traffic. In assuming jurisdiction we found that the shipments were import in character. If the majority of this division is correct in finding that the traffic here considered is not traffic moving in continuous carriage from one foreign country to another, then the entire Commission erred in that case in finding that the shipments through Galveston moved continuously from the foreign origins to final destinations. In

effect, therefore, the majority here overrules the finding of the entire Commission, made in the same state of facts in the cited case.

Following that case, the shipments here involved should be found to have moved " from a nonadjacent foreign country, through the United States, to destinations in an adjacent foreign country." *Seymour* v. *M. L. & T. R.R. & S. Co.*, 35 I.C.C. 492. We there stated that although the regulatory power of Congress undoubtedly extends to such transportation within this country, it has not been placed within our jurisdiction. In a number of other cases, decided over a period of many years, we have found that we are without jurisdiction over such traffic. *Canales* v. *Galveston, H. & S. A. Ry. Co.*, 37 I.C.C. 573; *Quintal & Lynch* v. *F. E. C. Ry. Co.*, 57 I.C.C. 289; *U. S. Steel Products Co.* v. *Director General*, 88 I.C.C. 57; and *Fernandez & Co.* v. *S. P. R.R. Co.*, 104 I.C.C. 193.