No. 25663

FAIRLIE & WILSON COAL COMPANY, INCORPORATED, ASSIGNEE OF DELAWARE, LACKAWANNA & WESTERN COAL COMPANY v. CENTRAL RAILROAD COMPANY OF NEW JERSEY ET AL.

Submitted January 15, 1934. Decided April 7, 1934

Following *Central N. J. Coal Exc.* v. *Central R. Co. of N. J.*, 167 I.C.C. 723, unreasonable rates found to have been charged on various carload shipments of anthracite coal, from mines in Pennsylvania to Newark and Harrison, N.J. Reparation awarded.

Harry S. Elkins for complainants.
Howard B. Thomas and *W. J. Larabee* for defendants.

REPORT OF THE COMMISSION

DIVISION 3, COMMISSIONERS MCMANAMY, LEE, AND MILLER

BY DIVISION 3:

Exceptions were filed by complainant to the report proposed by the examiner.

In No. 20286, *Central N. J. Coal Exc.* v. *Central R. Co. of N. J.*, 167 I.C.C. 723, division 2 found, *inter alia*, that the rates on anthracite coal, in carloads, from mines in Pennsylvania to certain destinations, including those hereinafter named, were, and for the future would be, unreasonable to the extent that they exceeded $2.39 on prepared sizes and $2.27 on smaller sizes. It further found that complainants in no. 20286 (sub-no. 1), one of the proceedings there considered, made shipments as described and paid and bore the charges thereon; that they have been damaged thereby in the amount of the difference between the charges paid and those which would have accrued at the rates therein found reasonable; and that they were entitled to reparation, with interest. Complainants were directed to comply with rule V of the Rules of Practice. Defendants refused to certify the rule V statements and a further hearing was had solely to determine the amount of reparation due complainants under those findings.

Upon further hearing, reported in *Tegen & Weibke Co., Inc.*, v. *Central R. Co. of New Jersey*, 192 I.C.C. 655, decided May 3, 1933, division 3 found, among other things, that some of the shipments

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on which reparation was sought were purchased f.o.b. mines and that as to those the complainants, including the Fairlie & Wilson Coal Company, Incorporated, were entitled to reparation from defendants in specified amounts and an order awarding such reparation was entered. However, it also found that on certain other shipments made to that company by the Delaware, Lackawanna & Western Coal Company, hereinafter called the mining company, the charges were prepaid by the latter company and the evidence was not sufficient to support an award of reparation to the Fairlie & Wilson Coal Company, Incorporated. Reparation on such shipments was accordingly denied.

By an instrument dated January 14, 1932, the mining company assigned to Fairlie & Wilson Coal Company, Incorporated, all rights and interest which it might hold in reparation claims against the defendants herein in connection with shipments of anthracite coal "invoiced and/or billed" to the latter company at Harrison and Newark prior to December 1, 1930, and by agreement of the parties in the proceeding last referred to, subsequent to that hearing, this instrument was received in evidence. However, the division pointed out that the mining company was not a party complainant to such proceeding, also that the Fairlie & Wilson Coal Company, Incorporated, did not there seek reparation in its complaint as assignee of the mining company and that this claim was not considered in the original proceeding. For these reasons, reparation was also denied the mining company.

As a precautionary measure, on May 4, 1932, prior to the date of the last-named decision, the Fairlie & Wilson Coal Company, Incorporated, as assignee of the mining company, filed an informal complaint covering numerous shipments, including those herein considered, in which it, as such assignee, sought reparation. On August 2, 1932, in view of defendants' agreement, under which the assignment described was permitted to be filed as evidence in the other proceeding, complainant requested that the informal complaint be withdrawn. On August 6, 1932, complainant was advised that our file had been closed.

The instant formal complaint was originally filed on October 31, 1932, by the Fairlie & Wilson Coal Company, Incorporated, as assignee of the mining company, and the informal complaint above described was referred to therein and made a part thereof in accordance with our Rules of Practice. It is alleged therein that the rates charged on various carload shipments of anthracite coal from certain producing regions in Pennsylvania to Newark and Harrison were unreasonable. Reparation only is sought. Rates are stated in amounts per ton of 2,240 pounds.

By amendment at the hearing, the complaint was limited to shipments which moved between May 12, 1930, and November 22, 1930, inclusive, and as to these, despite defendants' apparent contention to the contrary, the running of the statute was thus checked by the filing and resubmission of the informal complaint. The rates charged were $2.65 on prepared sizes and $2.39 on the smaller sizes.

Through stipulation of the parties, complainant, by reference, incorporated into the present record the entire record in the previous proceedings. Defendants offered no testimony, although they seem to take the position that in no event may reparation be awarded here because the Fairlie & Wilson Coal Company, Incorporated, still adheres to its original claim that in its own right it ultimately paid and bore these freight charges. However, these matters afford no ground for here denying reparation to complainant, as assignee, of the mining company.

Following *Central N. J. Coal Exc.* v. *Central R. Co., of N. J., supra*, we find that during the period in question the rates here assailed were unreasonable to the extent that they exceeded $2.39 on prepared sizes of anthracite and $2.27 on smaller sizes. We further find that the shipments were made as described and that on those shipments received by the Fairlie & Wilson Coal Company, Incorporated, on which the mining company paid the charges, the Fairlie & Wilson Coal Company, Incorporated, as assignee of the mining company, was damaged 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. In view of the previous submission to defendants of rule V statements covering these shipments, complainant asks that we now enter an order directing the payment of the amount of reparation shown therein. However, no order may be entered until these claims have been subjected to a proper check, and the freight bills are not part of this record. Complainant, as assignee, should comply with rule V of the Rules of Practice. The record establishes that Tegen & Weibke Company, Incorporated, and William Bauer Company, Incorporated, also complainants in the original proceedings described, were dissolved April 1, 1930; that since such dissolution, the Fairlie & Wilson Coal Company, Incorporated, has operated branches of its business under the trade names of Tegen & Weibke Company and William Bauer Company; also that some of the shipments under consideration were invoiced and delivered to the Fairlie & Wilson Coal Company, Incorporated, under these trade names. Such shipments are to be considered as included among those embraced by the above findings.