

practical effect of allowing a 3-year period for the filing of all classes of complaints seeking reparation.

Consideration of the claim in respect of charges on the shipment concerned upon the ground of unreasonableness is admittedly barred.

We find that the rate assailed was applicable. The complaint must be dismissed.

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No. 27268 <sup>1</sup>

**A. P. SMITH MANUFACTURING COMPANY v. DELAWARE,  
LACKAWANNA & WESTERN RAILROAD COMPANY  
ET AL.**

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*Submitted December 3, 1936. Decided January 26, 1937*

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1. Rates on so-called industrial sand, in carloads, between certain points in official territory, prior to July 1, 1935, found to have been unreasonable in certain instances and not shown to have been unreasonable in others. Reparation awarded.
2. Interstate rates on sand, in open-top cars, from Michigan City, Ind., to certain destinations in Illinois and Missouri, and from Polk and Utica, Pa., to certain destinations in Pennsylvania and New York, found unreasonable. Reasonable rates prescribed for the future.

*C. B. Ackerman, A. O. Ohlemacher, Edgar O. Anderson, Robert De Kroyft, D. L. Bennett, L. V. Brandt, Edwin Brooker, Thos. F. Lynch, F. B. McElroy, John T. Money, Abner Pollack, John Andrew Ronan, Chas. S. Belsterling, R. W. Schapanski, and Leo Tessler* for complainants and intervener.

*K. S. Bailey, H. E. Boynton, Windsor F. Cousins, Donald D. Dart, L. P. Day, George C. Doering, J. A. Eisenhort, J. E. Flansburg, Charles A. Halpin, J. P. Harrington, F. N. Hiller, E. J. Hyett, Carleton W. Meyer, J. C. Miller, H. Merle Mulloy, O. J. Norris, W. T.*

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<sup>1</sup>This report also embraces No. 27309, Oil Well Supply Company v. Pennsylvania Railroad Company; No. 27309 (Sub-No. 1), Same v. Erie Railroad Company; No. 27310, Flynn & Emrich Company of Baltimore City v. Pennsylvania Railroad Company et al.; No. 27310 (Sub-No. 1) Kennedy Corporation et al. v. Pennsylvania Railroad Company et al.; No. 27317, Midvale Company v. Chicago, Rock Island & Pacific Railway Company et al.; No. 27323, Continental Roll & Steel Foundry Company (Duquesne Steel Foundry Division) v. Baltimore & Ohio Railroad Company et al.; No. 27342, Atlas Foundry Company v. Delaware & Hudson Railroad Corporation et al.; No. 27345, Newnam Foundry Company v. Cleveland, Cincinnati, Chicago & St. Louis Railway Company et al.; No. 27346, Fay & Scott v. Maine Central Railroad Company et al.; No. 27348, Producers Core Sand Corporation v. Michigan Central Railroad Company et al.; No. 27358, Bullard Company v. New York, New Haven & Hartford Railroad Company et al.; No. 27388, Hart-Carter Company v. Boston & Maine Railroad et al.; No. 27398, Industrial Silica Corporation v. Erie Railroad Company et al.; and No. 27406, Reed Foundry & Machine Company v. Reading Company et al.

*Pierson, C. C. Plummer, C. N. Richards, H. W. Schaffer, Simon Shapiro, B. G. Stackhouse, Arthur Van Meter, and J. W. Weist* for defendants.

#### REPORT OF THE COMMISSION

##### DIVISION 2, COMMISSIONERS AITCHISON, TATE, AND SPLAWN

###### BY DIVISION 2:

Exceptions were filed by certain of the parties, except in nos. 27317 and 27348, and oral argument was had. Our conclusions differ in part from those recommended by the examiner.

The Producers Core Sand Corporation, complainant in no. 27348, operating sand pits at Michigan City, Ind., alleges that the rates on sand, in open-top cars, from Michigan City to destinations in Illinois, Wisconsin, Missouri, Pennsylvania, and West Virginia, are unreasonable and unduly prejudicial to Michigan City and unduly preferential of Gary, Miller, and Willow Creek, Ind., and points in the Chicago switching district. We are asked to prescribe reasonable and nonprejudicial rates for the future. Copy of this complaint was served on the Governor of Illinois and the Illinois Commerce Commission.

The Industrial Silica Corporation, complainant in no. 27398, operating sand pits at Polk and Utica, Pa., and other points, alleges that the interstate rates on sand, in open-top cars, from Polk and Utica to destinations on lines of the New York Central Railroad Company and Erie Railroad Company in Pennsylvania and New York, are unreasonable. We are asked to prescribe reasonable rates for the future.

Complainants in the other proceedings are corporations operating foundries at Peoria, Ill., Kalamazoo, Mich., Kendallville, Ind., Nicetown, Philadelphia, Oil City, and Coraopolis, Pa., Baltimore, Md., Bloomfield and Irvington, N. J., Bridgeport, Conn., and Dexter, Maine. They allege that the rates assessed prior to July 1, 1935, on carload shipments of silica sand to Nicetown and Philadelphia, Pa., from Ottawa, Ill., and to Kalamazoo from Glenside, Pa.; on core sand to Kendallville from Juniata, Mich., on sand shipped by the Industrial Silica Corporation to Oil City and Coraopolis from origins in Ohio, on naturally bonded molding sand to Kendallville from Ohio and New York and to Peoria, Bloomfield, and Irvington from New York and to Baltimore, Bridgeport, and Dexter from New York and New Jersey, and on sand for other industrial purposes to the last three destinations from New Jersey, and to Baltimore from South Danville, Pa., were unreasonable and seek reparation. William G. Scarlett, an individual conducting a seed business at Baltimore under the trade name of Wm. G. Scarlett & Company, inter-

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vened at the hearing in nos. 27310 and 27310 (sub-no. 1) on June 2, 1936, and asks reparation on shipments to Baltimore from Manumuskinnick and Millville, N. J. Nos. 27309 and 27309 (sub-no. 1) were presented on the shortened procedure. Rates will be stated in amounts per net ton and do not include the authorized emergency charges.

The details of the shipments on which reparation is sought, compiled from exhibits of record, are set forth in appendix I and include the docket number, the name of the complainant, the earliest filing date of the formal or informal complaint, the origin, destination, distance traversed, and rate-making distance, and what the rate would be on the so-called appendix H bases prescribed in *Industrial Sand Cases, 1930*, 188 I. C. C. 99.

Competent evidence as to the nature of the commodity, loading, value, equipment, routing, and distances was adduced by the respective complainants and intervener. In addition witnesses having personal knowledge of the facts testified that the sand was purchased f. o. b. origins and that complainants and intervener received the shipments and paid and bore the freight charges. The shipments all moved in box cars unless otherwise indicated in appendix I. The value of the core sand ranged from 50 cents to \$1.25 and of the other sand from 75 cents to \$4 a ton. The average loading ranged from 38 to 62 tons, except the sand received by intervener William G. Scarlett, which loaded only 28 tons, was packed in bags, and had transportation characteristics similar to ground sand, for which the higher scale I was prescribed. The other shipments on which reparation is sought, including those moving from Ohio to Oil City and Coraopolis, from Glenside to Kalamazoo, and from South Danville to Baltimore, came within the range, as to value, loading, and other transportation characteristics, of shipments on which scales II and III were prescribed for reparation purposes in box cars and open-top cars respectively.

Defendants compare the rates assailed with the rates on other commodities of higher value and lighter loading. They also point out that the rates assailed prior to July 1, 1935, were part of a long-standing group adjustment and that they generally represented rates in effect prior to June 25, 1918, as increased 20 cents on that date and as modified by the subsequent general increases and reduction, and that certain of them were found not unreasonable in prior cases. Defendants also refer to the fact that, for the longer hauls, the rates assailed yielded relatively low ton-mile earnings. For example, the 643-cent rate assailed from Ottawa to Philadelphia, 1,008 miles, yielded ton-mile earnings of only 6.4 mills, but even this rate yielded car-mile earnings of over 25 cents, while even higher car-mile earnings were yielded by the other rates assailed.

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The Commission has found that the rates on so-called industrial sand between numerous points in official territory were unreasonable prior to July 1, 1935, to the extent that they exceeded the appendix H bases, where the basic facts were established by competent evidence, except where the rate asailed was actually prescribed in prior cases and certain exceptions not here material. See *Hartford Electric Steel Corp. v. Pennsylvania R. Co.*, 210 I. C. C. 571, and cases cited therein. In nos. 27309 and 27328 reparation is sought on the basis of the West Penn scale. In the other complaints reparation is sought on the appendix H bases.

Complainant in no. 27310, filed February 11, 1936, refers to its informal complaint filed November 7, 1935, and subsequently this same complainant joined in no. 27310 (sub-no. 1), filed April 11, 1936, in which it refers to an informal complaint filed May 29, 1931, which was held in abeyance pending the final decision in *Industrial Sand Cases, 1930*, 188 I. C. C. 99, 204 I. C. C. 159. Defendants argue that the latter informal complaint should be considered as having been abandoned, and that the claim on shipments covered thereby is barred by the statute. This position is untenable. Complainant's failure to refer to the informal complaint filed May 29, 1931, in the formal complaint filed February 11, 1936, cannot be said to constitute an abandonment of the informal complaint. Reparation on shipments received by this complainant at Arlington station, Baltimore, from Mount Holly and South Vineland, N. J., during the year ending March 1, 1931, is precluded, because the rates from and to those points were prescribed on the special docket and it manifestly would be inconsistent to award reparation in the instant proceedings on shipments moving over the same routes prior to March 1, 1931, from these and the more distant origins in New Jersey to Arlington station. *Tennessee Eastman Corp. v. Louisville & N. R. Co.*, 203 I. C. C. 436, *Tovrea Packing Co. v. Atchison, T. & S. F. Ry. Co.*, 197 I. C. C. 494, *Industrial Sand Cases, 1930*, 204 I. C. C. 159, 180.

In no. 27358 reparation was sought on shipments to Bridgeport, Conn., from Humaston (Blossvale), N. Y., by informal complaint filed December 4, 1930; on five specific shipments from New Jersey by informal complaint filed June 7, 1933; and on shipments from certain points in New Jersey by formal complaint originally received February 12, 1936. Four shipments from New Jersey delivered more than two years prior to the receipt of the formal complaint are therefore barred. In no. 27388, five shipments to Peoria from Elnora and Ushers, N. Y., moved as routed by the shipper for distances of 1,034 to 1,086 miles, although shorter routes were available in connection with the originating carrier. For these distances, the rate under the appendix H bases is the same as the rate charged, namely, 480 cents. This situation is distinguished from that pre-

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sented in *Sessions Foundry Co. v. New York, N. H. & H. R. Co.*, 206 I. C. C. 482, and *Abendroth Bros. v. Boston & A. R.*, 203 I. C. C. 421, cited by complainant, for there the shipments in question moved over the shortest route available in connection with the originating carrier.

Nos. 27348 and 27398 deal only with rates for the future. In the report on further hearing in *Industrial Sand Cases*, the Commission said that naturally bonded molding sand has the highest value, and lake sand as produced in the Michigan City group has the lowest value of any of the unground sands, and that certain of the output of the Industrial Silica Corporation has the same characteristics and uses as common sand. These statements are confirmed by the records in the instant cases. In *Industrial Sand Cases* the Commission prescribed a basic distance scale for the future averaging about 20 percent higher than the so-called common-sand scales, and commencing with a rate of 80 cents for 10 miles and less and grading up at the rate of 10 cents for each 15 miles to 100 miles, 25 miles to 400 miles, 30 miles to 500 miles, and 40 miles thereafter until a rate of \$5.50 is reached for the 40-mile block ending with 1,500 miles. An exception was provided for the application of the so-called common-sand scales on sand (other than naturally bonded or ground and pulverized), in open-top cars, (a) the Buckland scale<sup>2</sup> for distances of 200 miles and less from origins east of the north-and-south line through Cumberland, Md., (b) the Ohio scale<sup>3</sup> for like distances from origins west of that line to destinations in Ohio, Michigan, Indiana, and Wisconsin, (c) the West Penn scale<sup>4</sup> for like distances from origins west of that line to the other destinations, and (d) a so-called buffer scale grading into the basic one for distances of 201 to 300 miles. Upon ground or pulverized sand, rates 10 percent higher than the basic scale were prescribed. Reasonable grouping and differential provisions were prescribed or authorized and certain arbitraries were authorized for the haul or portion of the haul, if any, through (a) New York Harbor, (b) Long Island, and (c) New England. With respect to the allegation of undue prejudice as between the Ottawa district, on the one hand, and the Michigan City group and other origins, on the other, the Commission, at 204 I. C. C. 180, admonished defendants as follows:

The relation in the interstate rates between the producing and consuming points under the scale prescribed herein should be maintained except where different relations result from such reasonable group and differential adjustments as may be established, or where lower rates are required to meet competition with other forms of transportation.

<sup>2</sup> *Cumberland Cement & S. Co. v. Baltimore & O. R. Co.*, 151 I. C. C. 183.

<sup>3</sup> *Rates on Crushed Stone, Gravel, Sand, and Slag in Ohio*, 191 I. C. C. 206.

<sup>4</sup> *Pennsylvania Sand & Gravel Prod. Assn. v. B. & O. R. Co.*, 104 I. C. C. 717.  
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It will be noted that no rates were prescribed or approved from the Michigan City group to destinations in Illinois under either section 1 or section 3 of the act.

In schedules filed in purported compliance with the above findings, effective July 1, 1935, defendants published rates on the bases set forth therein from the entire Michigan City group but continued in effect rates on lower bases on the same kind of sand to destinations in Illinois and Missouri in connection with the Wabash Railway Company from the Chicago switching district and Calumet, Gary, and Willow Creek, Ind., in the Michigan City group, and to the other destinations in connection with the Indiana Harbor Belt Railroad Company and Baltimore & Ohio Railroad Company from Dune Park and Millers, Ind., and Gary, Miller, and Willow Creek, Ind., respectively, all in the Michigan City group, on "sand (except blast, core, engine, filter, fire or furnace, foundry, glass, grinding or polishing, loam, molding or silica), in open-top cars," the very description which was condemned by the Commission's findings. Appendix II is illustrative of the situation presented in no. 27348, the general basis applying from the Michigan City group being set forth in column A and lower basis continued in effect from certain origins in that group being set forth in column B. On sand and related commodities, the rates to destinations in Illinois and in Missouri on the west bank of the Mississippi River are in the nature of a group and differential adjustment prescribed or approved in numerous cases including *Sand, Gravel, and Crushed Stone*, 181 I. C. C. 373, and *Dolese Bros. Co. v. Atchison, T. & S. F. Ry. Co.*, 192 I. C. C. 763, and this is the basis for the lower rates in connection with the Wabash from Chicago and certain origins in the Michigan City group. With respect to these destinations, the situation complained of can and should be cured by establishing the latter rates from the entire Michigan City group. As to the other destinations, the situation complained of in no. 27348 can and should be cured by defendants complying with the above-quoted admonition of the Commission.

There remains for consideration the situation complained of in no. 27398. In applying the open-top scale prescribed in *Industrial Sand Cases*, defendants grouped Polk and Utica and Jones Siding, Pa., although the latter is a producing point of naturally bonded molding sand only, and applied the joint-line scale for the average distance, although the hauls from Polk to destinations on the New York Central and from Utica to destinations on the Erie are all single line. For example, the interstate single-line rates from Polk to Erie, Pa., and from Utica to Buffalo, N. Y., are 120 and 150 cents, or 10 and 20 cents higher than the single-line scale for the single-line distances of 108 and 157 miles respectively. This situation was not contemplated by

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the Commission's findings in *Industrial Sand Cases* and can and should be cured by according complainant the same treatment as the record shows is accorded its competitors in this area, namely, the establishment of the single-line open-top scale for single-line hauls, without any grouping.

In no. 27348, we find that the rates assailed to destinations in Illinois and Missouri are, and for the future will be, unreasonable to the extent that they exceed or may exceed the rates set forth in column B of appendix II and that the rates assailed to the other destinations are not unreasonable, and that any undue prejudice that may exist will be removed by compliance with these findings and with the above-quoted admonition in *Industrial Sand Cases*.

In no. 27398, we find that the single-line rates assailed for distances of 200 miles and less are, and for the future will be, unreasonable to the extent that they exceed or may exceed rates made under the so-called West Penn scale based on the single-line distances.

In the other complaints, we find that the rates assailed from Juniata to Kendallville in connection with the Pere Marquette Railway Company and New York Central from Phalanx, Ohio, in box cars, to Oil City and Coraopolis, and from points in New Jersey to the plant of intervener William G. Scarlett, at Baltimore, were not unreasonable, and that the other rates assailed were unreasonable to the extent that they exceeded those set forth as prescribed in appendix I. We further find that the respective complainants received shipments as described and paid and bore the charges thereon, were damaged thereby, and are entitled to reparation from defendants named in the accompanying order in the amounts set opposite their respective names, aggregating \$5,664.22, with interest.

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