

No. 27434

FUEL SALES CORPORATION v. DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY

Submitted September 2, 1937. Decided November 5, 1937

Complainant's shipments of anthracite, billed at origin weights, were, on request of complainant, reweighed by defendant at or near destination and found to weigh substantially less than the billed weight. Under an ambiguous and impractical tariff rule concerning the applicable weight under such circumstances, complainant found to be entitled to the benefit of the lower weight. Overcharges found to exist. Reparation awarded.

Herbert A. Kuvin for complainant.

W. J. Larrabee for defendant.

REPORT OF THE COMMISSION

DIVISION 2, COMMISSIONERS AITCHISON, SPLAWN, AND CASKIE

BY DIVISION 2:

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

Complainant is a corporation engaged in the marketing of coal, with principal office at Springfield, N. J. By complaint filed June 12, 1936, it alleges that the freight charges paid by it for the transportation of 11 carloads of anthracite from Winton, Pa., to points in New Jersey during 1935 were unjust and unreasonable by reason of the substantially lesser weight of the coal at destination than the billed weight. Damages are sought, based on the difference between the charges paid and those which would have accrued on the destination weights, plus the value of the coal represented by the difference in the origin and destination weights.

The coal under consideration was washed at the breakers, immediately loaded for shipment, and weighed. Under defendant's applicable tariff, percentage deductions in weight of from 1 to 5 percent, depending on the size of the coal, are provided to take care of the wet condition of the coal and thus secure what is considered an equitable net weight for the assessment of the freight charges. In the appendix hereto are set forth complainant's shipments, showing the gross weights, the allowance made for the water in the coal, the billed weights, and the destination weights. Allowances or deductions from the weight of the coal or from 1,008 to 5,936 pounds were made in order to secure the billing weights. At complainant's request

225 I. C. C.

these shipments were reweighed by defendant at Morristown, N. J., a point near the destinations, with the result that the weights were found to be from 1,292 pounds to 9,156 pounds less than the billed weights. The weights of 8 of the 11 cars obtained by reweighing were over 3,000 pounds less than the billing weights and averaged more than 4,429 pounds per car less than the billing weights.

Complainant does not definitely assail the tariff rule providing for the water allowance, but asserts several times of record that it is primarily interested in the loss and damage sustained. Defendant rightly objects to the Commission assuming jurisdiction if complainant is relying on loss in transit, as it is well settled that our jurisdiction does not extend to loss and damage claims. It also objects to consideration of the water-allowance rule because it is not put in issue. Defendant submitted no evidence at the original hearing.

Even if the complaint were to be liberally construed as attacking the water-allowance rule as being unreasonably inadequate, nevertheless we would not be justified in condemning the rule on such a meager record as is here before us. Here are presented only 11 shipments from one point of origin, over a period of three months, without any showing as to the many other shipments that must have moved during the same period.

Following the original hearing, a proposed report was issued in which the examiner called attention to defendant's tariff I. C. C. no. 23415, which contained rules with respect to the reweighing of coal and the weight that should govern when a discrepancy appeared between the origin weight and such reweight. The ambiguity of this tariff was criticised in such proposed report and it was recommended, following what was believed to be the intent of such tariff, that the reweight should govern in the assessment of the freight charges on complainant's shipments. In its exceptions, and again at the argument, defendant objected to consideration of this tariff, inasmuch as it had not been introduced in evidence. At the argument, defendant was advised that if it so desired the case would be reopened for further hearing with respect to the terms of this tariff and it was given 10 days in which to make the request. Request was duly made and the case was reopened for further hearing without limitation. At the further hearing not one word of testimony was introduced by defendant with respect to the tariff carrying the reweighing rules. In fact, defendant seems to have studiously avoided discussion of the schedule in question. Defendant did submit, however, some testimony with respect to the water-allowance rules, stating that these allowances were not intended to represent all the water in the coal, but only to avoid casting "too big a burden on the person paying the freight." It was stated that the greater percentage of anthracite is shipped during the

winter months, and that much of it goes through in a frozen condition. Such shipments would, of course, carry a greater percentage of water than did complainant's shipments, which moved during the summer of 1935. This record is far from convincing that the water allowances are not intended to represent the normal and average amount of water in the coal. Defendant further stated that an examination of complainant's shipments at destination failed to show any loss of coal in transit. Accepting this latter statement as correct, and since there is no definite showing to the contrary, then the issue before us is simply a question of what were the correct weights and the applicable charges.

Insofar as here pertinent, defendant's tariff I. C. C. no. 23415, in effect at time of complainant's shipments, provided that upon request of the consignee cars would be reweighed "whenever practicable" and under the heading "Weights to Govern and Tolerance" the tariff reads as follows:

(a) Where shipments are check-weighed or reweighed enroute or at destination, no correction will be made in the billed weight except as provided below.

(b) If the difference between the original net weight and the weight obtained by reweighing does not exceed the tolerance provided in this rule, the first weight will not be changed. If such difference exceeds the tolerance, the car should be weighed a third time if practicable. If the third weighing confirms the original weight within the tolerance no change will be made. When it is impracticable to weigh the third time or the third weighing does not confirm the first weight within the tolerance, report must be made to the Coal Freight Agent for further investigation and instructions.

(c) In deciding which is the more correct of two or more weights obtained on track scales, all of the conditions under which the several weighings were done must be taken into consideration, including the class of scale, condition, how recently tested, the manner of weighing, whether car was at rest or in motion, coupled or uncoupled, actual or stenciled tare used, the time of weighing, weather conditions and reliability of weigher, giving precedence to that weight obtained under the best conditions.

(d) The tolerance shall be one percent (1%) with minimum of five hundred (500) pounds when loaded in box cars and one and one-half percent (1½%) with minimum of five hundred (500) pounds when loaded in open cars. (See note.)

NOTE.—All provisions for tolerance in this rule are separate from the allowance on washed coal as published in C. & C. Circular No. 97, I. C. C. No. 23080, * * * or successive issues thereof.

(e) Weight of coal loaded wet, properly obtained at or near point of origin, should not be changed except as provided for in the tariffs of the carriers. If obvious error is discovered, each case should be dealt with upon its individual merits and reports made to the originating carrier with all of the facts.

It will be observed that a literal reading of this rule leaves any correction in weight wholly to the whim of the coal freight agent. So many elements are to be taken into consideration, any one of which

225 I. C. C.

would provide an excuse for disallowing the lower reweight, that no definite and determinable basis of settlement existed. Doubtless, however, the purpose of the rule was to afford the shipper a means of redress where the billed weight of his shipment was in dispute. The rule provided for a third weighing "if practicable," and inasmuch as the record fails to show a third weighing of complainant's shipments, it may be reasonably assumed that such third weighing was "impracticable." In the absence of any explanation by defendant, the reweights must be presumed to be at least as accurate as the billed weights, and it is well settled that a shipper is entitled to the benefit of the lower charge when there is conflict, or reasonable doubt exists as to the correctness of two disputed bases. As stated by the Circuit Court of Appeals for the Fifth Circuit in *Atlantic Coast Line R. Co. v. Atlantic Bridge Co.*, 57 Fed. Rep. (2d) 654:

* * * Tariffs * * * must be expressed in clear and plain terms, so that those dealing with and governed by them may understand them and act advisedly. * * * They may not be contrived in catch-penny terms to catch the ignorant and unwary. If they are ambiguous, or permit of two meanings, the shipper may construe them in the most favorable way to himself which the terms permit. * * * It is equally clear that a carrier may not, under a tariff couched in general terms, which if interpreted in one way, will produce a higher, in another a lower, rate, insist upon the interpretation which gives it the higher rate. In short, in a situation of that kind, the shipper who has to pay the freight may call the tune.

In the absence of evidence to the contrary, we find that the correct weights of complainant's shipments for determining the applicable transportation charges are those ascertained by the second weighing at or near destination; that complainant caused the shipments as herein described to be made, and paid charges thereon based on the origin weight; that it has been damaged thereby, and is entitled to reparation in the amount of the difference between the charges so paid and those which would have accrued, based on the destination weights, with interest. As the record does not definitely disclose the destination points involved nor the total charges collected, complainant should submit a certified statement in accordance with rule V of our Rules of Practice, upon the receipt of which an order will be entered. It should be said that the differences between the destination and origin weights on cars D. L. & W. 82320 and 80604 do not exceed the tolerance provided in the published tariff, and therefore no overcharge exists on these shipments and they should not be included in the rule V statement.

225 I. C. C.

APPENDIX

Car number	Kind of coal	Gross weight	Car weight	Gross weight of coal	Tariff allowance for water
		<i>Pounds</i>	<i>Pounds</i>	<i>Pounds</i>	<i>Percent</i>
D. L. W. 81712	Rice	147,540	38,900	108,640	2.25
D. L. W. 78339	do	147,260	40,300	106,960	2.25
S. & W. 10781	do	145,040	39,200	105,840	2.25
D. L. W. 81767	Barley	143,672	39,400	104,272	5.00
Erie 32816	Pea	137,904	38,000	99,904	1.25
D. L. W. 81976	Barley	159,492	40,100	119,392	5.00
D. L. W. 79254	Chestnut	142,592	40,000	102,592	1.00
D. L. W. 82320	Buckwheat	148,312	41,800	106,512	1.75
D. L. W. 80604	Chestnut	145,000	41,400	103,600	1.00
Erie 26421	Rice	152,320	42,000	110,320	2.25
Erie 31058	Barley	146,816	38,400	108,416	5.00

Car number	Kind of coal	Weight allowance for water shown on billing	Billed weight of coal	Destination weight	Shortage claimed
		<i>Pounds</i>	<i>Pounds</i>	<i>Pounds</i>	<i>Pounds</i>
D. L. W. 81712	Rice	2,464	103,176	101,300	4,876
D. L. W. 78339	do	2,352	104,608	101,600	3,008
S. & W. 10781	do	2,352	103,488	99,000	4,488
D. L. W. 81767	Barley	5,152	99,120	94,500	4,620
Erie 32816	Pea	1,232	98,672	95,300	3,372
D. L. W. 81976	Barley	5,936	113,456	104,300	9,156
D. L. W. 79254	Chestnut	1,008	101,584	99,204	2,380
D. L. W. 82320	Buckwheat	1,904	104,608	103,300	1,308
D. L. W. 80604	Chestnut	1,008	120,592	101,300	1,292
Erie 26421	Rice	2,464	107,856	103,900	3,956
Erie 31058	Barley	5,376	103,040	97,200	5,840

225 I. C. C.