No. 27487 [1]

ACME FAST FREIGHT, INCORPORATED, v. DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY ET AL.

Submitted October 6, 1937. Decided November 26, 1937

Rates charged on various kinds of merchandise, in mixed carloads, from New York, N. Y., to Detroit, Mich., and between Chicago, Ill., and New York, found to have been in violation of the aggregate-of-intermediates provision of section 4 of the act, but not unreasonable. Complaints dismissed.

J. R. Turney for complainant.

L. H. Strasser and *W. J. Larrabee* for defendants.

REPORT OF THE COMMISSION

DIVISION 4, COMMISSIONERS MEYER, PORTER, AND MAHAFFIE

BY DIVISION 4:

The shortened procedure was followed. Complainant filed exceptions to the examiner's report, followed by oral argument.

Complainant corporation alleges that the rates charged on various kinds of merchandise, in mixed carloads, shipped between July 24, 1934, and September 3, 1935, from New York, N. Y., to Detroit, Mich., and by complaint in No. 27487 (sub-no. 1), filed August 17, 1936, that rates on similar shipments since August 17, 1934, between Chicago, Ill., and New York were and are in violation of the aggregate-of-intermediates provision of section 4 of the Interstate Commerce Act and unreasonable. Rates are per 100 pounds and do not include emergency charges.

Defendants, having no container equipment, established so-called omnibus rates, applicable to commodity mixtures in box cars, and more or less comparable to the rates of certain competitors for movements in containers. The shipments, averaging about 50,000 pounds, moved over defendants' lines 621 miles, from New York to Detroit, at the third-class rate of 86 cents, and 909 miles, between Chicago and New York, at the third-class rate of $1.06, minimum 30,000 pounds. The claimed fourth-class rates are 62 and 76 cents respectively.

The rate from New York to Detroit was canceled, effective November 25, 1935, whereupon a combination of intermediate rates

[1] This report also embraces No. 27487 (Sub-No. 1), Acme Fast Freight, Incorporated, *v.* Same.

became applicable. These were 40 cents, minimum 30,000 pounds, from New York to Buffalo, N. Y., and 35 cents, minimum 35,000 pounds, from Buffalo to Detroit, aggregating 75 cents. Between Chicago and New York, there were contemporaneously applicable rates of 30 cents, minimum 35,000 pounds, from Chicago to Detroit, 35 cents, minimum 35,000 pounds, from Detroit to Buffalo, and 40 cents, minimum 30,000 pounds, from Buffalo to New York, aggregating $1.05, which intermediate rates are still in effect. These rates were applicable over the same routes as the through rates. The rates charged were in violation of the aggregate-of-intermediates provision of section 4 of the act. Defendants should promptly remove the violation, which still continues on shipments between Chicago and New York.

In addition to the latter showing, complainant compares the assailed rates with the container rates established by competing carriers, to the intermediate points herein considered, identical in amount with defendants' rates, which container rates the carriers had voluntarily reduced below fourth class, minimum 6,500 pounds.

The rates assailed are 70 percent of first class. Complainant shows that omnibus rates applying in New England territory, between New England territory and trunk-line territory, in trunk-line territory, and in central territory average about 40 percent of first class; and in western trunk-line territory, in southwestern territory, and between these territories and central territory they average about 44 percent of first class when the minimum is 24,000 pounds or more.

Defendants maintain that all the compared rates are depressed to meet motortruck competition. But complainant avers that motortruck competition with respect to movements covered by the through rates, exist in equal degree with respect to the movements which were covered by the intermediate rates. To substantiate this, complainant states that, during the entire period covered by these proceedings, there were a number of responsible motortruck carriers operating daily service between New York and Detroit and between New York and Chicago on schedules equal to and faster than those of defendants. The potential competition to the through traffic does not prove that it actually existed to the same extent as that from and to the intermediate points.

Defendants have analyzed some of the shipments used by complainant as typical, to show that the classification of the lading, as per revenue billing, at the assailed rate resulted in charges averaging approximately $200 per consignment below the less-than-carload basis on the same lading. For defendants' convenience complainant's shipments were divided into a number of consignments which

apparently moved as less than carload. In some instances, approximately 90 percent of the weight was made up of tonnage rated first class or higher, in less than carload, and some of it had no carload ratings.

The Commission said in *Container Service*, 173 I. C. C. 377, 446, that it was not warranted in approving any basis of container rates which was lower than third class. Even conceding that container rates generally should be higher than the rates on mixed carloads, complainant's comparisons are with other rates which are not upon a maximum reasonable basis. Carriers may accord rates which the Commission may not require, and their doing so does not of necessity afford a criterion for testing the propriety of the refusal of the carriers to accord similar treatment to other commodities under other conditions or in other territories. *Western Paper Makers' Chemical Co.* v. *Ann Arbor R. Co.*, 109 I. C. C. 133, 137.

In *National Carloading Corp. v. Erie R. Co.*, 210 I. C. C. 216, division 5 found the 86-cent rate, here in issue, between Detroit and New York to be in violation of the aggregate-of-intermediates provision of section 4, but not unreasonable. The mixed-carload rates there assailed were originally established to meet competition of the so-called container-service rates of other rail carriers operating in the same general territory, and it was stated that motortruck competition subsequently forced the carriers to reduce this line of rates below the minimum reasonable level previously prescribed. The 86-cent rate applicable between Detroit and New York is the same in amount as the third-class rate prescribed between these points in the eastern class-rate revision. The factors sought, to and from Buffalo, were stated in the tariff to be depressed by motortruck competition and were substantially lower than $1.24, the sum of the prescribed third-class rates for the distances to and from Buffalo. These facts were found to rebut the presumption of unreasonableness. What was said in regard to the 86-cent rate applies with equal force to the through rate of $1.06 also here in issue.

We find that the assailed rates were in violation of the aggregate-of-intermediates provision of section 4 of the act, but are not shown to have been or to be unreasonable.

The complaints will be dismissed.