No. 28996

NEW JERSEY FLOUR MILLS COMPANY v. DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY, ET AL.

Submitted January 22, 1944. Decided September 26, 1944

Rates on wheat, in carloads, from East Buffalo, East Bethany, and Groveland, N. Y., to Clifton, N. J., and on the milled products thereof from Clifton to destinations in northeastern New Jersey, found not to have been unreasonable, and complainant found not to have proven damage by reason of alleged undue prejudice. Complaint dismissed.

Eric Eugene Ebert for complainant.

J. P. Canny and *H. L. Main* for defendants.

REPORT OF THE COMMISSION

DIVISION 2, COMMISSIONERS AITCHISON, SPLAWN, AND ALLDREDGE

BY DIVISION 2:

The parties filed exceptions to the report proposed by the examiner. Our conclusions differ from those recommended by him.

Complainant corporation, operating a flour mill at Clifton, N. J., alleges by complaint filed July 1, 1943, that the rates[1] charged on numerous carloads of wheat shipped between July 1, 1939, and May 10, 1940, from East Buffalo, East Bethany, and Groveland, N. Y., to Clifton, there milled in transit and the products reshipped, in carloads, to destinations[2] in northeastern New Jersey, were unreasonable and unduly prejudicial. By an informal complaint[3] covering the same shipments, originally received August 16, 1941, and closed March 23, 1943, complainant alleged violations of sections 2 and 3 only of the Interstate Commerce Act. Complainant asks us to award it reparation on shipments delivered during the 2 years preceding the filing of the informal complaint.

Defendants take the position that as a violation of section 1 was not alleged in the informal complaint, the claim founded upon the allegation of unreasonableness is barred by the limitation provisions of the act. In a letter in the informal proceeding received March 19, 1942, the practitioner representing complainant stated that "complainant alleges that it has been charged a rate that was unjust and unreason-

[1] Rates and differences in rates stated in this report are per 100 pounds.

[2] Andover, Boston, Lafayette, Little Falls, Orange, Passaic, and Washington, N. J.

[3] No. 170512.

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able." The scope of the informal complaint was broadened accordingly as of that date. To the extent that it embraces shipments delivered on or after March 19, 1940, therefore, the claim based on alleged unreasonableness is not barred.

Rates of 17 cents or 18 cents, depending upon the origin, were charged on the shipments of wheat into Clifton. When the milled products were shipped out-bound additional charges of 2 cents or 3 cents per 100 pounds, and a transit charge which is not in issue, were collected. The additional transportation charges represented the balance of the joint rates of 20 cents on grain and grain products then in force for the described through service from points in the so-called Niagara frontier, or Buffalo, rate group. The destinations named are points on lines of The Delaware, Lackawanna and Western Railroad Company, hereinafter called the Lackawanna. All but 7 of the freight bills surrendered, in conformity with the transit arrangement, when the 99 shipments on which reparation is sought were tendered for movement out of Clifton represented grain that had been transported to that point at the 18-cent rate over the line of the Erie Railroad Company from East Buffalo, 409 miles; 2 represented tonnage from East Bethany at the 17-cent rate over the 2-line route of the Lackawanna and Erie through Elmira, N. Y., 367 miles; and 5 covered shipments from Groveland at the 17-cent rate over the Lackawanna and Erie, 338 miles. From Clifton, the shipments were handled by the Erie to Croxton, N. J., and by the Lackawanna beyond. The average distances from Buffalo to the destinations of the shipments are 370 miles over the Lackawanna direct, 374 miles over the Erie-Lackawanna route through Elmira, and 457 miles over the Erie-Lackawanna route through Clifton and Croxton. The weighted-average haul from the origins of the grain to the destinations of the milled products was approximately 439 miles.

When the shipments moved, the 18-cent rate, subject to milling in transit, was the key rate voluntarily maintained for the transportation of grain and grain products over all competitive rail routes from Buffalo, N. Y., to New York, N. Y. After several years of unsuccessful effort by complainant to secure the application of the Buffalo-New York rate on the traffic under consideration, that rate was established over the routes through Clifton and Croxton on May 10, 1940.

The Buffalo-New York rate was reduced from 21.5 cents to 17.5 cents in July 1934, and became 18 cents following the general increase authorized by the Commission on March 8, 1938. The 4-cent reduction was compelled by the competition of water and motor carriers. Until June 1941, the reduced rate was published subject to stated expiration dates. It still is designated in the tariffs as a

competitive rate, but its continued maintenance indicates that it now is recognized to be a permanent part of the general grain-rate structure. It is substantially lower than the corresponding sixth-class rate, being about 16.5 percent of first class. Because of its continued maintenance and wide territorial application, complainant submits that even though it was a depressed competitive rate when first established, it had become just and reasonable when the shipments under consideration were made. It is maintained voluntarily over many single-line and joint-line routes to New York much longer than the average distance of 457 miles over the Erie-Lackawanna routes through Clifton and Croxton to the New Jersey destinations. For example, it applies, subject to milling in transit, over at least 6 single-line routes ranging in length from 406 to 782 miles, and over at least 28 routes embracing the lines of 2 or more carriers for distances ranging from 400 to 558 miles.

Defendants regard the routes through Clifton and Croxton as special or abnormal routes. These routes are not open in connection with class rates and commodity rates generally. In November 1929, the Erie and the Pennsylvania Railroad Company undertook to close their route from Buffalo through Clifton and Croxton to points on lines of the Pennsylvania in New Jersey, among other States. Closing that route would have meant leaving in effect on grain and grain products combinations of rates to and beyond Croxton which ranged from 9.5 to 27 cents higher than the joint rates then maintained. In *Grain and Grain Products*, 161 I. C. C. 709, division 3 found that the closing of the route, and the consequent rate increases, had not been justified. The complainant herein was a protestant in that proceeding.

The average weight of the 65 shipments to Passaic was 60,443 pounds, and that of the 34 shipments to the other destinations named was 42,200 pounds. The earnings under the assailed 20-cent joint rates ranged from 8.2 to 9.3 mills per ton-mile, and, except on the shipments to Passaic, from 16.6 to 19.5 cents per car-mile; on the heavier shipments to Passaic the car-mile earnings averaged slightly more than 28 cents. Complainant urges that the weights of the inbound shipments of wheat should have been employed in computing the car-mile earnings. This contention ignores the underlying theory of all transit arrangements, that of continuous movement of the manufactured product from the origin of the raw material to the transit destination.

Prior to May 10, 1940, complainant had to absorb the difference between the assailed 20-cent rates and the 18-cent rates which were available to competing millers at Buffalo and at transit points between Buffalo and the New Jersey destinations. That difference represents

the measure of the damage claimed on the shipments under consideration.

In order to be entitled to reparation by reason of undue prejudice, a claimant must show, with the same certainty as would be required to sustain recovery in a court of law, that he has been damaged by the wrong committed by the carriers, and the amount of his damage. *Pennsylvania R. Co.* v. *International Coal Mining Co.*, 230 U. S. 184. Complainant's proof of damage consists only of statements that it competes with millers at Buffalo and intermediate points having the benefit of rates 2 cents lower than those charged on its shipments, and that it could not obtain a higher price, generally, than one based on the freight rate available to those competitors. This evidence does not constitute the definiteness needed to prove damage under section 3 of the act. In *Interstate Commerce Commission* v. *United States ex rel. Campbell*, 289 U. S. 385, the Supreme Court said:

> The rulings of the Commission are consistent to the effect that the absorption by a complainant of a discriminatory charge does not avail to establish damage, or to measure its extent, in the absence of a showing that prices were affected by the differential rate. There must be full disclosure of the conditions of the business, or of those affecting competition, including, in particular, the capacity of the preferred producers to fix the prices for the market. Only then will the ultimate fact of damage emerge from the evidentiary facts as an appropriate conclusion.

The complainant has not made such a showing herein. Compare *Associated, Bristol, Tenn., Retail Coal Dealers* v. *S. Ry. Co.*, 255 I. C. C. 228, and *Mohawk Petroleum Co.* v. *Atchison, T. & S. F. Ry. Co.*, 216 I. C. C. 155.

We find that the rates assailed are not shown to have been unreasonable. The record will not support an award of reparation based on any undue prejudice that may have existed at the time complainant's shipments were made. The complaint will be dismissed.