No. 29087

# LIBERTY INDUSTRIAL SALVAGE COMPANY v. DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY ET AL.

*Submitted September 16, 1944. Decided April 30, 1945*

1. Interstate charges collected on cranes, in carloads, from Pittsburgh, Pa., to Penn Allen, Pa., and from the latter point to New Village (Washington), N. J., found inapplicable. Applicable charges determined. Shipments found undercharged.
2. Interstate charges collected on a carload of contractors' outfits from Pittsburgh to Penn Allen found inapplicable. Applicable charges determined. Shipment found undercharged. Charges collected on a carload of contractors' outfits from Penn Allen to New Village (Washington) found applicable.
3. Applicable charges found not shown to have been unreasonable. Complaint dismissed.

*C. Peyton Collins* for complainant.

*L. W. North* and *A. S. Knowlton* for defendants.

REPORT OF THE COMMISSION

DIVISION 2, COMMISSIONERS MAHAFFIE, SPLAWN, AND ROGERS

BY DIVISION 2:

The shortened procedure was followed. Complainants filed exceptions to the report proposed by the examiner.

Complainants,[1] with principal office at Pittsburgh, Pa., are dealers in scrap materials and also dismantle condemned buildings and other structures. By complaint filed February 7, 1944, they allege that the charges collected and sought to be collected on two shipments of so-called contractors' equipment which moved over interstate routes, one from Pittsburgh to Penn Allen, Pa., and the other from Penn Allen to New Village (Washington), N. J., were and are unreasonable. The Commission is asked to prescribe lawful rates[2] and charges for the future and to award reparation.

The shipments considered, hereinafter called shipment No. 1 and shipment No. 2, consisted of used cranes, contractors' tools, and other miscellaneous contractors' equipment. Each shipment required two open cars, one for the cranes and one for the other lading. Complain-

[1] Complainants are Howard, Harry, Jack, and Albert Buncher, copartners doing business as Liberty Industrial Salvage Company.

[2] Rates in this report will be stated in amounts per 100 pounds.

ants orally ordered one 50-foot flatcar and one 50-foot gondola car for shipment No. 1, and placed a written order for one 50-foot flatcar and one 65-foot gondola car for shipment No. 2. Two flatcars, one 48 feet, 6 inches, and the other 41 feet, 2 inches, in length, and two gondola cars each 65 feet, 6 inches, were furnished by defendants. The minimum under rule 34 of the classification for cars of the sizes furnished are 38,880 and 28,080 pounds for the flatcars, respectively, and 48,000 pounds for each of the gondola cars.

During the period of movement and at the present time, cranes or derricks, n. o. i. b. n., or dragline excavators, were and are rated column 40, 40 percent of first class, in official territory, minimum 24,000 pounds, subject to rule 34.[3] This item is also subject to a note which provides that one trailer truck may be loaded with each crane, derrick, or dragline excavator. When these articles are moved on their own wheels, that is, mounted on and permanently attached to railway car or railway trucks, the rating is column 30, subject to the actual weight of crane or derrick together with weight of all cars, gears, trucks, or mountings used in connection therewith, minimum 60,000 pounds. The latter description is subject to a rule, among others, that if additional cars are required on account of detached or overhanging parts, the minimum weight shall be increased 24,000 pounds for each additional car. This rule does not apply on cranes or derricks not moved on their own wheels as above described.

Outfits, bridge builders', contractors', or graders', n. o. i. b. n., are rated fifth class in the same territory, minimum 24,000 pounds, subject to rule 34. This item embraces mixed carloads of second-hand (used) implements, machinery, or tools which are an essential part of working outfits required in connection with construction work, commonly known as contractors' outfits.

Shipment No. 1 originated at Pittsburgh on May 13, 1943, and moved over the lines of The Pennsylvania Railroad Company to Martins Creek, Pa., and the Lehigh and New England Railroad Company to Penn Allen. It consisted of two cranes, weighing 97,500 pounds, which were loaded on a flatcar 48 feet 6 inches in length, and contractors' equipment weighing 17,000 pounds loaded on a gondola car 65 feet 6 inches in length. Charges were collected in the amount of $435.10, computed on the total weight of 114,500 pounds at the fifth-class rate of 38 cents applicable on contractors' outfits. Shipment No. 2 originated August 9, 1943, at Penn Allen on the Lehigh & New England and moved over that line in connection with the line of The Delaware, Lackawanna and Western Railroad Company to New

[3] Rule 34 of the Consolidated Freight Classification provides for the application of minimum weights on cars ordered by a shipper, or furnished by the carrier in lieu of those ordered.

Village. It consisted of the same cranes and contractors' equipment embraced in shipment No. 1, plus an additional amount of tools. The cranes, weighing 96,800 pounds, were loaded on a flatcar, 41 feet 2 inches in length, and the contractors' equipment, weighing 24,500 pounds, was loaded on the gondola car, 65 feet 6 inches in length. Charges were collected in the amount of $217.20, based on the fifth-class rate of 15 cents, applicable on contractors' outfits, computed on the weight of the lading on the flatcar, and 48,000 pounds, the minimum under rule 34 for the size of the gondola car used. In both instances above described, the gondola cars were fully loaded. The lading on the flatcars above indicated is described in the bills of lading as "contractors equipment, cranes." The gondola cars and lading are described as "Idler or excess car, contractors equipment, including booms for cranes." It is stated in complainants' memorandum of facts and argument, however, that the cranes were partially dismantled and that the booms were shipped on the flatcars with the cranes, and that the cabs of the cranes were shipped in the gondola cars with the contractors' equipment. In their exceptions to the proposed report complainants assert that the statement with respect to the cabs was an error and that only the booms were detached and shipped in the gondola cars, as indicated in the bills of lading.

Subsequently, defendants sought to collect additional charges in connection with shipment No. 1, based upon a minimum of 48,000 pounds for the gondola cars, instead of 17,000 pounds, the actual weight of the lading. Complainants refused to pay the alleged undercharges and filed the instant complaint.

Complainants contend that the traffic here considered in each instance constituted one shipment of contractors' equipment; that by reason of the overhanging or detached parts of the shipments it was entitled under rule 29 of the consolidated classification [4] to the use of an additional or excess car; and that the charges collected or sought to be collected should not have exceeded or exceed those computed on the fifth-class rates for the total weight of the lading in both cars. They seek waiver of the alleged undercharges on shipment No. 1 and reparation in connection with shipment No. 2. On the other hand, defendants assert that both shipments were undercharged; that the legal charges on shipment No. 1, based on the actual weight and the column 40 rate of 43 cents for the cranes, and the fifth-class rate of 38 cents for the contractors' equipment, minimum 48,000 pounds for the car used, should have been $601.65, and that the charges on shipment No. 2, based on the actual weight and the column 40 rate of 18 cents [5]

[4] Hereinafter set forth insofar as pertinent to this proceeding.

[5] A check of the applicable tariffs reveals that the column 40 rate is 17 cents instead of 18 cents.

for the cranes, and the fifth-class rate of 15 cents for the contractors' equipment, minimum 48,000 pounds for the car used, should have been $246.24.

The preliminary questions to be determined are: (1) Was the traffic in each instance one carload shipment of contractors' outfits which on account of length required the use of more than one car; or (2) were the shipments composed of two carloads of contractors' outfits, or of one carload of cranes and one carload of contractors' outfits?

Rule 14 of the consolidated classification defines a carload of freight as follows:

> Carload ratings or rates apply only when a carload of freight is shipped from one station, in or on one car, except as provided in Rule 24, in one calendar day from midnight to midnight, by one shipper for delivery to one consignee at one destination and is loaded by shipper and unloaded by consignee. Only one bill of lading from one loading point and one freight bill shall be issued for such CL shipment. The minimum CL weight provided is the lowest weight on which the CL rating or rate will apply.

Rule 24 which provides for freight in excess of full carloads does not apply on freight the minimum carload weight for which is subject to rule 34. Owing to the war, emergency rule 24 was suspended by the Commission's Service Order No. 68 of January 30, 1942, effective February 15, 1942. By the same order, rule 34, insofar as it permits railway freight cars to be used for the shipment of carload freight otherwise than subject to the carload minimum weight for each car used, was also suspended.

Rule 29 of the classification which relates to shipments requiring two or more open cars and for long or bulky articles in or on one car provides, among other things:

> Section 1. When a carload shipment requires, on account of length, two or more open cars, the minimum weight to be charged for the series of cars shall be determined as follows, subject to aggregate actual or authorized estimated weight, if greater:
>
> (a) If the article or articles shipped are subject to Rule 34, take the minimum weight prescribed for the longest car used and add for each additional car either 24,000 pounds or the minimum weight prescribed for such additional car, whichever is lower, it being further provided that if articles are of such length as could have been loaded on cars of length ordered, the minimum weight for such cars will apply.

It is clear that the above provisions of rule 29 only apply when because of length of the load more than one car is required. See *Furnishing Cars of Extra Length*, 196 I. C. C. 317. The articles comprising the shipments here considered did not require on account of length more than one car. The cranes, as shipped, were completely contained on the flatcars, and the contractors' equipment, including the booms of the cranes, was completely contained in the gondola

cars. The cranes in the considered shipments cannot be rated as parts of contractors' outfits as these cranes moved in straight carloads in separate cars, not containing other articles, whereas the rating on contractors' outfits is limited to mixed carloads. Each of the cars used contained a separate and distinct shipment of articles on which specific carload ratings and rates were applicable.

Complainants assert that cranes and derricks may be used for various purposes, and that by adding a clamshell they may be used for excavating the same as power shovels which, whether moved on own wheels or otherwise, are entitled under the classification to the use of additional cars for overhanging or detached parts, and that the minimum for such a shipment under rule 29 would be computed on the minimum weight allowed for the longest car used plus 24,000 pounds for each additional car. From this they argue that their shipments should be accorded the same treatment as power shovels. Complainants' argument is unsound. There is no showing that cranes, with detached or overhanging parts, requiring the use of more than one car would be treated any differently than power shovels. Complainants' shipments did not consist of cranes alone, but, as previously stated, of separate and distinct articles, namely cranes and contractors' equipment, on which specific carload ratings were applicable and each of which moved in separate cars.

Complainants state that in the past these same cranes have been shipped separately with other miscellaneous equipment and that they had intended to load the instant shipments in the same manner, but that they relied upon the advice of defendants' representatives that these shipments could be loaded in two cars in the manner hereinbefore described and that charges would be based on the actual weight of the shipments at the rate on contractors' outfits. In rebuttal, defendants filed sworn statements by the representatives concerned, denying that they had advised complainants as to what kind of cars to use or order, how such cars should be loaded, or with respect to rates and charges on the shipments. Regardless of the assertions and denials of the parties, every shipper is presumed to know the lawful rates on his shipments, which rates must be collected.[6] The Commission is without authority to award reparation or authorize waiver of undercharges merely upon a contention or showing that the shipper relied upon erroneous information given by a carrier's agent.[7]

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[6] See *Underwriters Salvage Co.* v. *Louisville & N. R. Co.*, 115 I. C. C. 585; *Bowman Dairy Co.* v. *American Ry. Exp. Co.*, 118 I. C. C. 529, and *Carpenter* v. *Central Vermont Ry. Co.*, 147 I. C. C. 373.

[7] See *Merriam, Hall & Co.* v. *Boston & M. R.*, 42 I. C. C. 435, and *United Shoe Machinery Co.* v. *Boston & M. R.*, 51 I. C. C. 28.

We find that the charges collected on the shipments of cranes from Pittsburgh to Penn Allen and from Penn Allen to New Village were inapplicable; that the applicable charges were and are those based on the column 40 rates of 43 and 17 cents, respectively, applied to the actual weights of the shipments; and that the shipments were undercharged.

We further find that the charges collected on the shipment of a contractor's outfit from Pittsburgh to Penn Allen were inapplicable; that the applicable charges were and are those based on the fifth-class rate of 38 cents, applied to the minimum weight of 48,000 pounds; that the shipment was undercharged; and that the charges collected on the shipment of a contractor's outfit from Penn Allen to New Valley were applicable.

The record contains no evidence to support a finding that the applicable rates were or are unreasonable. The complaint will be dismissed.

SPLAWN, *Commissioner*, dissenting:

The shipments which are the subject of this complaint consisted of equipment used in connection with wrecking activities, and were being moved from one job to another. Each consignment consisted of two cranes, tools, and equipment, and was shipped under a single bill of lading in which the shipment was described as "contractors equipment." The cranes, other than one or both of the booms, were necessarily loaded on a flatcar, and the boom or booms and other equipment were loaded in a gondola car. Each carload, therefore, consisted of a portion of a single lot of contractors' equipment and was treated as such at the time of shipment by the shipper and carriers and fifth-class rates were charged and paid. Upon complaint of the shipper that the minimum weights used in connection with the fifth-class rates resulted in unreasonable charges, the majority finds that each carload was a separate shipment, and that higher column 40 rates were applicable on the so-called "straight carloads" of cranes "not containing other articles." In my opinion, in each instance the shipper made an undivided shipment consisting of two carloads of contractors' equipment upon which fifth-class rates were applicable.

The essential issue raised by the complaint is that it was unreasonable for the defendants to base charges on a minimum of 48,000 pounds for each gondola-car load, containing, respectively, 17,000 and 24,500 pounds, inasmuch as the shipments aggregated 114,500 and 121,300 pounds, respectively.

The overall length of the larger crane when assembled was between 68 and 70 feet. The boom was approximately 58 feet or about 10 feet longer than the flatcars furnished. Neither of these shipments

could have been loaded in one car. It is apparent that if the larger crane had been shipped completely assembled it would have been necessary, because of its length, to use one or more additional cars, and under rule 29 (the shipments being subject to rule 34), the minimum for each shipment would have been 48,000 pounds for the gondola cars plus 24,000 pounds for each additional car. Under this rule, even if three cars had been necessary the minimum would not have exceeded the aggregate weight. The shipper, however, acting under a misapprehension as to the method of loading which would secure the lowest rate, dismantled the boom, thereby making each carload physically separate. Defendants refer to no transportation or other conditions which warranted higher charges on these shipments than would have applied if they had been within the terms of rule 29. It appears, therefore, that the shipments were loaded in a manner that was at least as advantageous to the carriers as under the method necessary to receive the benefit of the lower charges under rule 29. It also appears that within the territory involved, shipments similar to those herein considered but loaded in the manner described in rule 29 are moved at the claimed basis of charges, and that when other articles substantially similar to cranes require additional cars for detached parts, as here, the minimum is increased 24,000 pounds for each additional car used.

Under the peculiar circumstances of this case, in my opinion, it was unreasonable to charge more for these shipments of contractors' outfits than would have been charged if the cranes had been shipped completely assembled.



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