

No. 29726

WALTER KIDDE & COMPANY, INC., ET AL. v. DELAWARE,
LACKAWANNA & WESTERN RAILROAD COMPANY
ET AL.

Submitted March 29, 1948. Decided June 8, 1948

Rates on carbon dioxide gas, liquefied, in cylinders, in less than carloads and carloads, from Belleville and Bloomfield, N. J., to Portland, Oreg., and Oakland, Richmond, San Francisco, South San Francisco, and Wilmington, Calif., found not shown to have been or to be unreasonable or otherwise unlawful. Complaint dismissed.

L. V. Brandt for complainants.

J. E. Lyons and *James M. Souby, Jr.*, for defendants.

REPORT OF THE COMMISSION

DIVISION 3, COMMISSIONERS MILLER, PATTERSON, AND BARNARD

BY DIVISION 3:

The shortened procedure was followed. Complainants filed exceptions to the report proposed by the examiner, and defendants replied thereto. Exceptions and requested findings not specifically discussed in this report have been given consideration and found not justified.

Complainant, Walter Kidde & Company, Inc., is engaged in the handling, sale, and distribution of fire protection products. Complainant, Freight Transportation Engineers, Inc., renders traffic service to shippers and is an assignee of a portion of damages which may have accrued on shipments involved in this proceeding. By complaint, filed April 10, 1947, they allege that the rates¹ charged on less-than-carload and carload shipments of carbon dioxide gas, liquefied, in cylinders, from Belleville and Bloomfield, N. J., to Portland, Oreg., and Oakland, Richmond, San Francisco, South San Francisco, and Wilmington, Calif., since March 20, 1944, were and are unjust and unreasonable, unduly preferential and prejudicial. Complainants ask us to award reparation and to prescribe lawful rates for the future. Informal complaints concerning these shipments were filed on March 25, May 27, and August 26, 1946, but, not being susceptible of informal adjustment, the files were closed in January 1947.

¹ Rates are stated in amounts per 100 pounds.
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Shipments delivered or tendered for delivery on or before March 24, 1944, are barred by the statute.

Complainants presented evidence of 26 representative shipments, moved between March 20, 1944, and October 30, 1945. Five of these shipments were less-than-carload lots, 4 of which were charged a third class rate of \$4.38. Pursuant to the provisions of rule 15 of the governing classification the other less-than-carload shipment was charged a combination rate of \$3.59 consisting of a fourth-class rate of 84 cents from origin points to Chicago and an all-commodity rate of \$2.75 beyond. Such combination rate was also charged on the 21 carload shipments. The rates charged were applicable.

During the same period, defendants maintained a joint through commodity rate of \$1.79, minimum 30,000 pounds, on various commodities under the head of "Drugs, Medicines, Chemicals and other Articles," including carbon dioxide, solidified, from the origins to the destinations under consideration herein. Complainants contend that the rates charged were unreasonable to the extent they exceeded the \$1.79 rate, and were unduly preferential to shippers of carbon dioxide, solidified, and unduly prejudicial to Walter Kidde & Company, Inc., as a shipper of carbon dioxide gas, liquefied.

Carbon dioxide gas, liquefied, in cylinders, was sold and shipped for industrial use in fire-extinguishing equipment. Also, by the addition of certain parts, the cylinders and contents became fire-extinguishing equipment. The cylinders shipped, and their contents, varied in weight as indicated in the following table:

Cylinder model number	Weight of cylinder	Weight of carbon dioxide gas, liquefied	Cylinder model number	Weight of cylinder	Weight of carbon dioxide gas, liquefied
	<i>Pounds</i>	<i>Pounds</i>		<i>Pounds</i>	<i>Pounds</i>
2.....	9	2	20.....	35	20
4.....	13	4	50.....	111	50
10.....	27	10	75.....	143	75
15.....	30	15	100.....	195	100

Cylinder model No. 15 was valued at \$49.27 and contained carbon dioxide gas, liquefied, valued at \$3.25; cylinder model No. 50 was valued at \$63.50 and its contents were valued at \$6.50. The record does not indicate the value of the other cylinders shipped.

The shipments considered herein produced average earnings of \$1,506.79 per car, 47.65 cents per car-mile, and 22.7 mills per ton-mile, based on an average weight of 42,845 pounds and an average distance of 3,162 miles. Under the rate sought the average earnings would have been \$765.29 per car, 24.20 cents per car-mile, and 11.3 mills per ton-mile.

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Complainants compare the rates assailed and earnings thereunder with lower rates and earnings on 17 other commodities, including carbon dioxide, solidified, and various acids, oils, or other liquids, for transcontinental hauls. With the exception of a rate of 187 cents on anhydrous ammonia, in steel cylinders, carload minimum 36,000 pounds, the rates on such commodities were equal to or less than the sought rate of 179 cents.

There is no showing of a similarity of transportation conditions between carbon dioxide gas, liquefied, in cylinders, and the compared commodities. On the contrary, the evidence indicates that the transportation characteristics are dissimilar, as the cylinders containing the carbon dioxide gas, liquefied, are of much greater value than the contents whereas the same is not indicated to be true in the case of the compared commodities. The cylinder was an integral and more valuable part of the commodity shipped, which is illustrated by the fact that otherwise it would have been economically unsound to ship 2 pounds of the gas in a cylinder weighing 9 pounds, a ratio of 4.5 to 1, when 100 pounds could be shipped in a cylinder weighing 195 pounds, a ratio of 1.95 to 1.

Complainants' shipments were destined for use in connection with war-production activities, particularly shipbuilding. The cylinders were installed as part of the fire-protection systems on ships. Soon after the cessation of hostilities practically all of the shipbuilding activities were discontinued. Most of the consignees of those shipments are no longer in business. Complainants have not shown a movement of this commodity prior to 1944. The plant at Bloomfield has not been operated since October 30, 1945. No carload shipments have moved from the plant at Belleville to the Pacific coast since 1945, nor is there any definite indication of a probable movement in the future. As a general rule commodity rates are established only when there are sustained movements in sufficient volume to justify a lower basis than the applicable class rates.

Complaints do not attack the reasonableness of the classification ratings or the combination rate charged in and of themselves, but they take the position, as noted above, that their shipments are reasonably entitled to rates not in excess of those maintained on carbon dioxide, solidified, under the head of "Drugs, Medicines, Chemicals, and Other Articles." Class rates on a commodity are not unreasonable where the movement is not sufficient to warrant the establishment of a commodity rate and it is not shown that the commodity was or is improperly classified or that the class rate, as such, was or is too high. *Chester Franzell & Co. v. Central of Georgia Ry. Co.*, 215 270 I. C. C.

I. C. C. 661. The combination rate of \$3.59 charged on the carload shipments is 13 cents less than the fourth-class rate of \$3.72 which it displaced. No evidence was submitted to show that the third-class rate applicable on the less-than-carload shipments was or is unreasonable or otherwise unlawful.

A history of the commodity rate on drugs, medicines, and chemicals from transcontinental origin group A, embracing Belleville and Bloomfield, to Pacific coast destinations is shown of record, which shows that, effective March 1, 1924, it was reduced from \$2.775, minimum 24,000 pounds, to \$2.10, minimum 30,000 pounds. The latter rate remained in effect until July 15, 1933, when it was reduced to \$1.64 in a further effort to meet the competition of water carriers operating through the Panama Canal. On October 1, 1933, it was reduced to \$1.62 and subsequently increased to \$1.79, the present rate.

Rates depressed by water competition are not fair measures of reasonableness. See *Columbia Paper Co. v. Norfolk & W. Ry. Co.*, 223 I. C. C. 383, by division 4; and *Rathkamp Bros. Co. v. Norfolk & W. Ry. Co.*, 179 I. C. C. 25, by division 3. There is no showing of water-carrier competition in connection with complainants' shipments of carbon dioxide, liquefied, and, as indicated, the reasonableness per se of the rates charged of which complaint is made is not assailed.

In support of their position the complainants cite *Cardox Corp. v. Ahnapee & W. Ry. Co.*, 266 I. C. C. 707, wherein the Commission prescribed ratings and rates on controlled low-temperature liquid carbon dioxide in official territory and western classification territory (exclusive of transcontinental and mountain-Pacific rate adjustments) the same as maintained on solidified carbon dioxide. In that proceeding the Commission was dealing with ratings and rates on controlled low-temperature liquid carbon dioxide, in tanks cars. The conclusions reached therein, therefore, are not controlling in the instant proceeding because the commodity under consideration herein was shipped in cylinders under high pressure, and the transportation characteristics are entirely different from those of the commodity under consideration in the proceeding cited.

No evidence of probative value was submitted in support of the allegations of undue preference and prejudice.

We find that the rates assailed are not shown to have been or to be unreasonable or otherwise unlawful. The complaint will be dismissed.

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