No. 29889

STANDARD CAP & SEAL CORPORATION v. DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY ET AL.

Submitted April 13, 1949. Decided June 14, 1949

Rates on wood pulpboard, on skids, in carloads, from Beaver Falls, N. Y., to Jersey City, N. J., found to have been unreasonable. Reparation awarded.

William W. Rouse and *Harry Teichner* for complainant.
Harold J. Gilmartin and *J. Edgar McDonald* for defendants.

REPORT OF THE COMMISSION

DIVISION 3, COMMISSIONERS MILLER, ROGERS, AND PATTERSON

BY DIVISION 3:

The defendants filed exceptions to the report proposed by the examiner, and the issues were argued orally. Exceptions and requested findings not discussed in this report nor reflected in our findings or conclusions have been given consideration and found not justified.

The complainant, a corporation, by complaint filed December 8, 1947, alleges that the rates[1] charged on numerous carload shipments of wood pulpboard, on skids, from Beaver Falls, N. Y., routed over the lines of The Lowville and Beaver River Railroad Company to Lowville, N. Y., thence The New York Central Railroad Company to Utica, N. Y., thence The Delaware, Lackawanna and Western Railroad Company[2] to Jersey City, N. J., and delivered during the period May 4, 1943 to May 1, 1946, were unreasonable, unjustly discriminatory, and unduly prejudicial to the complainant and its shipments, and that its competitors at Jersey City on railroads other than the Lackawanna were unduly preferred, in violation of sections 1, 2, and 3 of the Interstate Commerce Act. We are asked to award reparation.

Some of the shipments were included in a complaint presented informally by L. V. Brandt, a registered practitioner, on March 4, 1946, with an allegation that the charges collected were in violation of sections 1 and 3 of the act. The defendants urge, as to shipments not delivered within 2 years prior to the filing of the formal complaint,

[1] Rates will be stated in this report in amounts per 100 pounds.
[2] Hereinafter called the Lackawanna.

that the latter complaint was not seasonably filed, because not filed within 6 months[3] after the notification contained in letter of August 14, 1946, from the Commission's secretary, in which Brandt was advised as follows:

> In view of your statement to the effect that the shipments covered by the instant complaint are also included in Rule 5 statements which have been submitted in connection with Docket 29262, Standard Cap and Seal Corporation v. Delaware, Lackawanna and Western Railroad Company, decided January 23, 1946, it does not appear that any good purpose would be served by further handling of the instant complaint on the informal docket. We are accordingly closing our file in connection with this complaint.

However, upon advice from the defendants that in their opinion the matter could not properly be disposed of in No. 29262, the informal complaint was again actively handled, and the informal file had not been closed when this formal complaint was received. In its report on further hearing in No. 29262, *Standard Cap & Seal Corp.* v. *Delaware L. & W. R. Co.*, 270 I. C. C. 559, division 3 found that that complaint did not embrace the shipments covered by the instant proceeding. The formal complaint here considered was seasonably filed as to claims covering all shipments embraced in the informal complaint delivered or tendered for delivery subsequent to March 3, 1944, insofar as it alleges violations of sections 1 and 3 of the act, provided Brandt had authority to file the informal complaint on behalf of the complainants. No evidence was presented in support of the allegations of unjust discrimination and undue prejudice and preference, and those allegations will not be further considered.

At the hearing the defendants demanded proof of authority and an opportunity to examine the power of attorney under which Brandt claimed to be acting. In their brief they contend that unless at the time of filing the informal complaint he had authority to represent the complainant in matters respecting the reasonableness of rates, as distinguished from overcharges, his filing did not operate to toll the statute. Brandt stated that he had the power of attorney with him. The defendants asked the examiner to instruct him to produce it so that they might determine the extent of his authority. An objection on Brandt's behalf made by the practitioner who was presenting the case was overruled by the examiner, and Brandt was instructed that the examiner and the Commission would want to know the scope of his authority. Brandt refused to respond to this request, contenting himself with the assertion that he was willing to make a statement under oath that "I have been authorized to handle this matter and I refuse to surrender any contracts or documents we have in connection

[3] Rule 25 (f) of the Commission's General Rules of Practice.

with them." He had not been requested to surrender the power of attorney, but only to permit examination thereof. The situation appears to be one falling within rule 17 of our General Rules of Practice. That rule provides in part:

> If a party is represented by a practitioner, each pleading, document, or paper of such party shall be signed in ink by one such practitioner whose address shall be stated. The signature of a practitioner constitutes a certificate by him that he has read the pleading, document, or paper; that he is authorized to file it; * * *; and that, with respect to a complaint, he files it with the distinct knowledge and specific consent of complainant.

The informal complaint, as well as the formal complaint, was signed by Brandt. The rule followed by the courts is that the appearance in court of a licensed attorney creates a presumption that he has authority to act, and the law casts the burden of proving the contrary upon the one asserting it. His appearance is prima facie evidence that he was duly authorized to represent and act for his client, and this presumption is conclusive in the absence of countervailing evidence. See *Bowles* v. *American Brewery*, 146 Fed. (2d) 842, 847, and *Bonnifield* v. *Thorp*, 71 Fed. 924, 927. In exceptions to these conclusions in the proposed report, the defendants rely upon *Sterling Oil & Refining Co.* v. *Midland Valley R. Co.*, 146 I. C. C. 761; *McConnell & Co., Inc.*, v. *New York, N. H. & H. R. Co.*, 179 I. C. C. 108; and *Romeo Stores Co.* v. *Union Pac. R. Co.*, 210 I. C. C. 513, which they contend does not support this conclusion. In the first two proceedings referred to by the defendants the record revealed authority limited to claims for overcharges, and in the third of those proceedings there was nothing to show that complainant's representative or agent had authority to seek damages caused by unreasonable rates. In the instant proceeding, Brandt stated, in substance, that the power of attorney which he held was sufficiently broad to include the filing of a complaint under section 1 of the act. The proceedings cited by the defendants were decided prior to September 15, 1942, the date on which the above-quoted rule 17 became effective. No appropriate action was taken, or evidence on the subject presented by the defendants, which rebutted the presumption created. Additionally, in reply to defendants' exceptions, the complainant attached an affidavit of its assistant treasurer to the effect that the complainant on July 13, 1944, gave Brandt full power of attorney to file, prosecute, and verify a formal or informal complaint or complaints before us as to these shipments. Pursuant to this authority, and the rule above quoted, Brandt's authority is presumed to have been adequate.

In the eastern class rate investigation the Commission prescribed maximum reasonable first-class rates, and various percentages thereof

for the lower classes, for interstate application over class I carriers between all points in official classification territory; and further found that maximum reasonable class rates to and from points on other railroads should be made on the same basis, plus distance arbitraries. The defendants herein, except the Lowville & Beaver River, are class I carriers. Complainant's factory at Jersey City is in the same building as the Lackawanna freight station, and shipments delivered thereat by rail must move over the Lackawanna in line-haul service, as that carrier has no track connections with other carriers at Jersey City. During the period in which these shipments moved, the joint class rates published on the basis prescribed in the eastern class-rate investigation were subject to routing guides which authorized no route between Beaver Falls and Jersey City in connection with the Lackawanna. The joint column 25–J [4] rate applying on wood pulpboard, applicable between these points over certain lines, was 27 cents, but these shipments were charged the applicable combination column 25–J rate of 37 cents, made 27 cents to Bergen Junction, N. J., and 10 cents beyond. The complaint, in substance, is directed against the failure of the defendants to maintain the joint rate of 27 cents in connection with the Lackawanna.

As evidence of unreasonableness of the rate assailed the complainant shows that the distance over the route of movement is 354.2 miles; and that the routing guide authorized application of the joint rate not only over the shore-line route of 293.9 miles, but also over five other routes of 296.9, 428.3, 565.6, 582.2, and 611.2 miles. The average of these six routes is 463 miles. The 27-cent rate, at the average loading of 49,525 pounds (the average of 195 carloads embraced in the complaint), produces $133.72 a car, and revenues ranging from 45.5 to 21.9 cents a car-mile and 18.4 to 8.8 mills a ton-mile over the 6 authorized routes. It would produce 37.8 cents a car-mile and 15.2 mills a ton-mile over the route of movement of these shipments, whereas the 37-cent rate produced $183.24 a car, 51.7 cents a car-mile, and 20.9 mills a ton-mile.

The question of the reasonableness of applying rates on wood pulpboard, on skids, in carloads, from Beaver Falls to this complainant's factory at Jersey City and on waste paper, in bales, from the same factory at Jersey City to Beaver Falls, higher than the joint class rates on the basis prescribed in the eastern class-rate investigation, was before the Commission in No. 29262, *Standard Cap & Seal Corp.* v. *Delaware, L. & W. R. Co.*, decided January 23, 1946, mentioned but

[4] Column 25–J rate is made 2 cents over 25 percent of first class in effect March 27, 1938, subject to the 25 percent of first-class rate in effect March 28, 1938, as a minimum.

not printed in full, at 264 I. C. C. 801. The shipments therein considered also moved over routes not authorized in the routing guides, and were charged combination rates. Those routes were 296.3 and 417.1 miles in length. It was there found that the combination rates assailed were unreasonable to the extent that they exceeded the joint column 25–J rates in effect from and to the same points, and reparation to basis of the joint rates was awarded. On May 2, 1946, the defendants established a joint commodity rate of 27 cents in connection with the Lackawanna and over the route of movement of the shipments herein considered.

The complainant paid the transportation charges on the shipments embraced in the instant complaint, and ultimately bore all charges in excess of 27 cents per 100 pounds.

The defendants show that the application of a combination of rates from Beaver Falls by way of Utica and the Lackawanna to Jersey City was not peculiar to pulpboard, but that the same rate situation obtained as to newsprint paper, printing paper (not newsprint), and wrapping paper, and not only from Beaver Falls, but also from numerous other points in the State of New York, and still obtains, except from Beaver Falls. Joint class rates on those commodities were and are applicable over other routes for delivery on other railroads in Jersey City. Six of those other origins are pulpboard producing points, but the movement of pulpboard therefrom to Jersey City during the period embraced in this complaint consisted of only two carloads, from one origin.

Throughout this proceeding the defendants argue that to award reparation would in effect contravene the provisions of section 15 (4) of the act which limits the power of this Commission to prescribe through routes. They cite *Bucyrus-Erie Co.* v. *Delaware & H. R. Corp.*, 213 I. C. C. 738, and *R. C. Williams & Co., Inc.*, v. *New York Central R. Co.*, 269 I. C. C. 297, to support their contention that the effect of reparation would be to compel application of the lower joint rate over the route the instant shipments moved and short haul the New York Central. In the first proceeding referred to, division 3 found the combination of rates applying over the route of movement not shown to have been unreasonable although a lower point rate applied over other routes. In the second proceeding the Commission refused to compel the New York Central to open its so-called west-side line for delivery at the flat New York City rate on traffic handled in road-haul service by its competitors. However, in *Union Iron Works* v. *New York Central R. Co.*, 218 I. C. C. 607, the Commission pointed out that where it is not called upon to establish a new route, but rather to

determine what was a reasonable rate over the route used, the limitation covered by section 15 (4) of the act has no effect. In the instant proceeding, the route having been in effect when the traffic moved, it may not be denied that a shipper is entitled to a reasonable rate over that route. As indicated, subsequent to the movement of complainant's shipments, the defendants established the 27-cent rate over the route through Utica and the Lackawanna beyond. Although the subsequent establishment of a lower rate creates no presumption by itself of unreasonableness of a preexisting rate, such fact may be considered with others in determining whether the rate in issue was unreasonable.

We find that the rate assailed was unreasonable to the extent that it exceeded 27 cents; that the complainant made shipments, as described, paid the transportation charges thereon, and was damaged thereby in the amount of the difference between the charges collected and those which would have accrued at the rate herein found reasonable; and that it is entitled to reparation with interest. Complainant should comply with rule 100 of the General Rules of Practice.

274 I. C. C.