No. 30208

BENGAL COMPANY v. DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY ET AL.

Submitted December 19, 1949. Decided March 28, 1950

Storage and redelivery rates charged on a less-than-carload shipment of paint shipped from Vestal, N. Y., over an interstate route to New York, N. Y., stored in Jersey City, N. J., and redelivered to New York, found applicable in certain instances and inapplicable in others. Reparations awarded.

Robert H. Hannes for complainant.

Rowland L. Davis, Jr., and *John F. Reilly* for defendants.

REPORT OF THE COMMISSION

DIVISION 3, COMMISSIONERS PATTERSON, JOHNSON, AND CROSS

BY DIVISION 3:

The parties agreed to the disposition of this proceeding under the shortened procedure, thereby waiving oral hearing and cross-examination, and this procedure was followed. Complainants filed exceptions to the report proposed by the examiner. Exceptions and requested findings not discussed in this report nor reflected in our findings or conclusions have been given consideration and found not justified.

Complainants, Robert Hannes and Hillel Hannes, partners, trading as The Bengal Company, are engaged in operating a retail paint store in New York, N. Y. By complaint filed March 8, 1949, they allege that defendant's failure to make store-door delivery within the commercial zone of New York on a less-than-carload shipment of paint, shipped June 27, 1947, from Vestal, N. Y., over an interstate route to New York, and the subsequent delivery and collection of storage and redelivery charges, resulted in charges which were and are unjust and unreasonable. We are asked to require defendants to cease and desist from the alleged violations and to pay reparation. An informal complaint containing substantially the same allegations as the formal complaint was filed September 9, 1947, and, not being susceptible of informal adjustment, was closed December 24, 1947.

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The shipment consisted of 11 cartons of paint weighing 545 pounds. It moved over the lines of The Delaware, Lackawana and Western Railroad Company from Vestal, through the State of New Jersey, to New York, The freight bill issued by this defendant shows, as the destination of the shipment, 214 St. Nicholas Avenue, New York.

Delivery service was performed by the Harlem Transfer Company, a defendant herein and an agent of the defendant rail carrier. On July 9, 1947, delivery of the shipment was attempted, but no one was at the designated address to accept delivery. Later in the same day the shipment was tendered for delivery at the same address, but was refused by one of the complainants. The shipment was returned to the railroad's freight house, and defendants sent an arrival notice to the complainants stating where the freight was being held, subject to storage charges. On July 31, 1947, the complainants requested and received delivery of the shipment at 570 West One Hundred and Thirty-first Street, New York. Charges totaling $6.13, composed of storage charges in the amount of $4.39 and redelivery charges, including Federal tax, in the amount of $1.74, were collected. It is claimed that the rail defendant failed and refused to perform store-door delivery in accordance with the provisions of its published tariff. An award of reparation in the amount of $6.13 is sought.

The testimony as to what transpired at the time of the attempted delivery is conflicting. The truckman stated that he drove the truck alongside the curb in front of complainants' store and that the 11 cartons of paint were loaded on a dolly or skid provided by one of the complainants. The truckman further stated that he pushed the dolly to complainants' doorway and tendered the delivery receipt for signature, whereupon he was requested to deliver the shipment inside the store, which he refused to do. The representative of the complainants present thereupon refused to sign a receipt for the shipment, and it was returned to the rail carrier's freight house.

One of the complainants states that, after the dolly was loaded at the curb, he requested the truckman to aid him in pushing or pulling the loaded dolly to the door of the store. Upon the truckman's refusal to do so, delivery at the curb was rejected, and the truckman returned the shipment to the freight house. This testimony was corroborated by the sworn statement of a witness who was present at the time.

At the time of movement, the rail defendant's governing tariff provided as follows:

Item 15:

"Delivery" as used in this tariff, refers to the service of the carriers involved in transporting freight from the premises of the carrier's freight station and delivery thereof to a receiving room, platform, or doorway, directly accessible

to trucks at a warehouse, factory, store, place of business, or private residence.
Item 35:

Nothing in this tariff shall require the carrier to * * * deliver freight at locations at which, on account of conditions of highways, streets or alleys, it is impracticable to operate vehicles.

Item 40:

* * * Only one tender of shipment will be made, and such tender will constitute service as contracted at rates shown herein. If delivery cannot be accomplished such shipment will be returned to the freight station and will be held subject to disposition by the owner or consignee. (See Item 41). * * * While in possession of the carrier, such shipment will be subject to storage rules and charges * * *.

Item 41:

If a shipment is once tendered for delivery as defined in Items 15 and 40, and through no fault of the carrier, such delivery cannot be accomplished, no further effort will be made to effect such delivery, except on request, and at an additional charge * * *.

Complainants contend that under the provisions of this tariff they were entitled to delivery of the shipment at their store door, and that tendering of the shipment at the curb did not constitute valid delivery within the meaning of the provisions of the tariff. There is no question that the truckman placed his truck beside the curb directly in front of the complainants' store. The curb and sidewalk, which was about 12 feet wide, made it impracticable to back the truck any closer to the complainants' store door.

In *Houses, Inc.*, v. *New York Central R. Co.*, 266 I. C. C. 41, it was found that there was no duty upon the defendant carrier therein to make delivery of a less-than-carload shipment of feed to complainant's garage in the rear of its residence, about 145 feet from the curb of the street serving the complainant's premises. The garage could have been reached only through a crooked alley too narrow to be negotiated by the medium-sized truck customarily employed by the defendant carrier in making deliveries of shipments in that area. Defendant's driver offered to make delivery at the entrance of the driveway or to assist the consignee in moving the shipment to the storage place in complainant's own vehicle, which was small enough to be driven through the alley. In discussing that offer in connection with the applicable tariff provisions, which were identical with those above shown, the following appears, page 43:

As indicated, one tender of delivery was made by defendant, and when such tender of delivery at the front gate was refused by consignee, the shipment was returned to the carrier's freight house. Such tender constituted all of the service authorized by the above tariff provisions.

While the instant facts differ somewhat from those in the foregoing proceeding, we think the conclusions must be the same. As stated,

the parties are agreed that the shipment was loaded onto the dolly at the curb in front of complainants' place of business. The dolly was furnished by the complainants, and the store entrance was at the sidewalk level. The difficulty of moving the shipment on the dolly the short distance across the sidewalk to the store door appears to us to have been insufficient reason for refusing the delivery tendered. We find that the delivery tendered was in compliance with the governing tariff provisions.

In computing storage charges under the governing tariff, any fractional part of 100 pounds is computed as 100 pounds. The charge of $4.39 collected for storage, based on a weight of 600 pounds, was computed as follows: 2¼ cents per day for the first 5 days, or 68 cents, and 4¾ cents per day for the remaining 13 days, or $3.71, a total of $4.39. The examiner in his proposed report pointed out that the rate of 4¾ cents for the last 13 days was inapplicable and that the applicable rate was 4 cents a day. In their exceptions, defendants concur in this recommendation of the examiner. Complainants were thus overcharged in the amount of 59 cents. The applicable rates and rules as published in the governing tariffs are not assailed.

We find that the storage and redelivery rates charged on complainants' shipment were applicable, except as indicated in the next preceding paragraph; that complainants made the shipment as described and paid and bore the storage charges thereon at the rate herein found inapplicable; and that they were damaged thereby and are entitled to reparation in the amount of 59 cents, with interest. An order awarding reparation will be entered.

277 I. C. C.