No. 30358

COMMERCE AND INDUSTRY ASSOCIATION OF NEW YORK, INC., v. DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY ET AL.

Submitted January 11, 1951. Decided April 17, 1951

Storage charges during a longshoremen's strike at the port of New York, collected on traffic destined for export, found applicable and not shown to have been unreasonable. Complaint dismissed.

George E. Mace for complainants.

James W. Grady, *J. Edgar McDonald*, and *John F. Reilly* for defendants.

REPORT OF THE COMMISSION

DIVISION 3, COMMISSIONERS PATTERSON, JOHNSON, AND CROSS

BY DIVISION 3:

The modified procedure was followed. Exceptions to the report proposed by the examiner were filed by the complainant, and the defendants replied. Exceptions and requested findings not specifically discussed in this report nor reflected in our findings or conclusions have been considered and found not justified.

The complainant alleges, by complaint filed September 15, 1949, on behalf of three member corporations, that the storage charges collected by the defendants on certain carload shipments detained during a longshoremen's strike at the port of New York in November 1948, were inapplicable, and if found to have been applicable, were unreasonable. We are asked to award reparation.

The members of the complainant on whose behalf this complaint was filed are A. Dishington & Company, hereinafter referred to as Dishington; Bluefries-New York, Inc., hereinafter called Bluefries; and Cardinal Export Company, referred to as Cardinal.

The facts which constitute the controversy arose during a longshoremen's strike at the port of New York. The strike began at 12:01 a. m. on November 13, 1948, and continued to November 29, 1948. However, wildcat strikes occurred at a number of piers, beginning at 12:01 a. m. on November 10 and continued until the strike became officially effective on November 13, 1948.

The shipments embraced in this proceeding moved from inland points, consigned to the complainant's member corporations at New York, for export, lighterage free. Some of the cars arrived before and others after the official commencement of the strike. The defendants did not perform lighterage service during the strike, causing these consignments to be held beyond the free time.

The Dishington shipment consisted of three carloads of textile machinery from Dexter, Maine, to New York Harbor for export. The pertinent tariff provisions are found in tariff I. C. C. No. F–3700 of the New York, New Haven & Hartford Railroad Company, hereinafter referred to as the New Haven. Rule 200 (b) 1, page 25, provided: "This tariff will apply on all freight for export, whether billed direct to a point in a foreign country or to a border point . . ." Rule 200 (b) 4, supplement 151, page 7, provided that freight entitled to free lighterage, consigned for export, would be held free of charge for 7 days; that free time would commence from the first 7 a. m. after the day on which notice of arrival is sent or given to the consignee; and that, in computing free time, Sundays and legal holidays would be excluded. Rule 200 (b) 11 provided that after expiration of the free time, storage charges would be collected at the rate of 5 cents per 100 pounds for the first 10 days, or fraction thereof, and 1.75 cents per 100 pounds for succeeding 10-day periods. Rule 110 (b), page 14, provided that "delivery orders and vessel permits limiting the time for delivery will only be accepted with the understanding that same will be accomplished with as reasonable despatch as conditions and the general business of the company will permit."

The shipment arrived at the New Haven's yard on October 29, 1948. Arrival notices were sent the same day. Free time began on October 30, and expired on November 9, 2 Sundays and an election day intervening. On November 8, within the free time, Dishington gave the New Haven instructions which specified that delivery must be made to the steamship on or before November 12. In accordance with the instructions, the New Haven made arrangements for delivery of the freight to pier 58 on November 12. On November 10 the defendant was advised by an employee that a wildcat strike had begun that day at pier 58. On account of the strike, the defendant countermanded the delivery preparations and the freight remained in its possession until December 2. Storage charges were collected for the period between November 9 and December 2, in the amount of $102.11, based on the rate of 5 cents per 100 pounds for the first 10 days and 1.75 cents per 100 pounds for succeeding 10-day periods, or fractions thereof.

Dishington contends that the New Haven collected storage charges on its shipment without tariff authority. It claims that nowhere in

the tariff, including rule 200, was there a provision that storage charges might be collected from consignees on export shipments which were consigned lighterage free, when the consignee delivered lighterage orders within the free-time period. Rule 200 (b) 1 provided that "this tariff will apply on all fright for export . . ." Rule 200 (b) 11 authorized the collection of storage charges after the expiration of the free time. There was no published provision that the mere tender of a lighterage order which did not result in the removal of the freight would stop the accrual of storage charges. The contention that there was no tariff authority for the charges collected on this shipment has no substantial merit.

It is also contended that the storage charges were unreasonable where they resulted from the New Haven withholding lighterage delivery after the receipt of lighterage orders. The New Haven did not carry out the complainant's instructions on November 8 or 9, but waited until November 11, the day before the steamship permit expired. It had been informed on November 10 that pier 58 was closed by a wildcat strike. Rule 110 (b) of the tariff provided that delivery orders would be accomplished with reasonable despatch. Dishington is presumed to have had knowledge of the 7 days' free time allowed by the tariff. It ordered its freight to be delivered on or before November 12, which date was beyond the free time. It cannot be said that the defendant failed in the exercise of due diligence when it failed to accomplish delivery of the cargo prior to November 10. The evidence warrants a finding that the defendant was justified in withholding delivery because of the wildcat strike at pier 58. The allegation of a lack of due diligence is not sustained.

Defendants, Delaware, Lackawanna & Western Railroad Company, referred to as the Lackawanna, and New York Central Railroad Company, called the Central, collected from Bluefries and Cardinal storage charges based on Agent C. W. Boin's tariff I. C. C. No. A–856. Rule S–20, item 8475–A, provided that freight entitled to free lighterage, consigned for export, would be held without charge on the carriers' premises for a period not to exceed 7 days. Rule S–25, item 8540, provided that free time would be computed from the first 7 a. m. after the day on which notice of arrival was sent to the consignee, excluding Sundays and legal holidays and the day on which delivery of the property was sought. Rule 30, item 8550–B, provided: "If the freight subject to this rule is not ordered for delivery by consignee or owner at the expiration of the prescribed free time. . . .," charges at the rate of 5 cents per 100 pounds for the first 10 days, or fraction thereof, will apply and 1.75 cents per 100 pounds for succeeding 10-day periods.

Bluefries and Cardinal state that their freight was ordered for delivery at the expiration of the prescribed free time, and therefore that the Lackawanna and the Central cannot legally charge them for storage.

Bluefries' shipment consisted of 16 carloads of tin plate shipped from Irvin, Pa., to New York Harbor, for export. Arrival notices on 9 of the 16 cars were sent to Bluefries on November 18; the notices on the remaining 7 cars were sent on November 19. Free time began on November 19 as to the shipments on which notices were sent on November 18, and excluding Sundays, the free time expired at 7 a. m. on November 27. As to the notice sent on November 19, free time began to accrue on November 20, and excluding Sundays, expired at 7 a. m. on November 28.

On November 26, within the free-time period, an employee of Bluefries tendered to the Lackawanna lighterage instructions, including a steamship permit, authorizing delivery of the cargo to a steamship. Bluefries and the Lackawanna disagree as to the date specified on the steamship permit. Bluefries contends the date specified was November 29; the Lackawanna states the permit authorized delivery on December 1. In view of the findings hereinafter made, it is unnecessary to determine this issue. The defendant refused to accept the lighterage instructions because of an embargo issued on November 15, 1948, by G. C. Randall, representing the Car Service Division of the Association of American Railroads, at the request of all railroads serving North Atlantic ports. The embargo provided that no orders for lighterage delivery of freight to steamship lines were to be accepted by New York Harbor carriers until the steamship lines were in a position to accept promptly freight tendered by the railroads. The embargo was placed to enable the railroads to maintain lighterage service on freight not affected by the strike.

Bluefries contends that the tender of lighterage instructions on November 26, within the free time, was an order for delivery at the expiration of the prescribed free time. It contends also that there was nothing in the storage rules which indicated that the date authorizing delivery to the steamship must be within the free-time period. It is a general rule of tariff interpretation that the words used must be taken in the sense in which they are generally understood. With this in mind, it appears that the crucial words in rule 30, " . . . ordered for delivery . . . at the expiration of the prescribed free time . . .", contemplated that the date authorizing delivery to the steamship must fall within the free-time period, and the expression "ordered for delivery" meant a delivery order capable of being ex-

ecuted within the free-time period. Assuming November 29 to be the date specified for delivery to the steamship company, as Bluefries contends, the freight was not ordered for delivery within the free time, which expired at the latest on November 28.

Delivery was made to the steamship on December 1. Storage charges were collected in the amount of $803.36, based on the rate of 5 cents per 100 pounds for the first 10 days, or fraction thereof. The defendant was authorized to collect storage charges on this shipment for the period from the expiration of the free time on November 27 or 28 to either November 29 or December 1. As rule 30 provided a flat rate for the first 10 days or fraction thereof, it is not necessary to determine whether the steamship delivery date was November 29 or December 1, inasmuch as either date was beyond the free time.

Cardinal's shipment consisted of 16 carloads of flour, although the storage charges on only 9 are in issue in this proceeding. They were forwarded from North East, Pa., and moved under order notify bills of lading, consigned to the order of North East Flour Mills, Inc., notify Cardinal at New York. Each bill of lading carried a notation: "For loading on the 'SS Villar' of the Lamport & Holt, Ltd., Permit No. 16462, loading Nov. 12, sailing Nov. 19, 1948." Arrival notices on five of the nine cars were sent to Cardinal by the Central on November 15, 1948; notices on the remaining four cars were sent on November 16 and 17, two on each day. Free time began on November 16 where the notices were sent on the 15th; on November 17 where the notices were sent on the 16th; and on November 18 where the notices were sent on the 17th. Excluding Sundays, the free time expired on November 24, 25, and 26, respectively.

The president of Cardinal, who was abroad when this shipment moved, was the sole witness for the complainant as to the shipment. The employee who handled the details of the shipment has left Cardinal's employ and refused to testify or make a sworn statement. The witness stated the former employee told him that the Central refused to accept lighterage orders over the telephone on November 15. In *South Carolina Produce Assn.* v. *Aberdeen & R. R. Co.*, 205 I. C. C. 581, the Commission said, at pages 586 and 587:

> Here the particular facts which the complainant seeks to prove are said to be within the knowledge of only one person and that person was not produced as a witness. If we accept as evidence the statements of that person as reproduced in this exhibit by a witness having no knowledge of the facts, defendants are entirely without opportunity to cross-examine, either to test the accuracy of the particular facts adduced or the reliability of the real source of the information.

The complainant's witness placed in evidence copies of certain lighterage orders issued by Cardinal to the Central, pertaining to shipments

not involved in this proceeding. Such evidence does not corroborate the complainant's contention that the freight was ordered for delivery on November 15, within the free-time period.

On November 29, the Central received lighterage instructions from Cardinal, calling for delivery to the steamship on December 1. Storage charges were collected in the amount of $297.87, for the period from the expiration of the free time to December 1, based on the minimum 10-day period, as provided in rule 30.

Both Cardinal and Bluefries allege that the defendants Lackawanna and Central failed to exercise due diligence in refusing to accept lighterage orders on November 15 and 26. In support thereof, *Commerce & Industry Assn. of N. Y., Inc.*, v. *B. & O. R. Co.*, 272 I. C. C. 7, is cited. Therein, division 2 found that it would be unreasonable to collect from consignees the penalty portions of the applicable storage and demurrage charges when they exercised due diligence in attempting to release the railroads' equipment or facilities during a truck drivers' strike. The complainant argues that, in the absence of evidence that delivery could not have been made, the strike did not excuse the defendants from making a diligent effort to effect delivery aboard the steamships. This argument fails to take into consideration defendants' embargo, which instructed carriers operating in the port of New York to accept no lighterage orders for the duration of the strike. There is no indication that lighterage service was or could have been performed during the period of the strike by any carrier, except for deliveries to the armed services.

This proceeding is similar in character to *Balfour, Guthrie & Co.* v. *Chicago, M., St. P. & P. R. Co.*, 235 I. C. C. 437.[1] Therein, shipments intended for export were consigned from inland points to Portland, Oreg. Upon arrival the freight was held in the carrier's outer yard awaiting orders from the owners to deliver the cars to the dock for transshipment to a steamship. The shippers did not order the carriers to deliver the freight to the docks within the free-time period, inasmuch as the cars could not have been unloaded at the docks because of a longshoremen's strike. Demurrage accrued. The Commission found that the demurrage charges were unreasonable, but only to the extent that they included a penalty element. Similarly, in this proceeding neither Bluefries nor Cardinal ordered their shipments for delivery within the free time, and storage charges accrued. In general, the same principles apply to both demurrage and storage.

[1] Prior report, 223 I. C. C. 441, by division 2.

In circumstances such as those before us here, if the storage charges included a penalty and therefore exceeded an amount which would furnish the carriers reasonable compensation for the use of their facilities, they may be found unreasonable. However, there is upon this record no evidence which could afford a basis for a conclusion as to the existence of a penalty element, or as to the amount thereof, in these storage charges. In *Great A. & P. Tea Co.* v. *United States Maritime Comm.*, 273 I. C. C. 521, 532, the Commission dealt with storage charges which accrued in circumstances similar to those considered in the instant proceeding and found the charges not shown to have been unreasonable, in the absence of evidence as to the existence of a penalty element and the amount thereof.

We find that the storage charges assailed were applicable and are not shown to have been unreasonable. The complaint will be dismissed.