

No. 30698

NATIONAL MALTING COMPANY v. DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY ET AL.

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*Submitted January 3, 1952. Decided June 17, 1952*

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Rate on barley shipped from Buffalo, N. Y., milled in transit into barley malt at Paterson, N. J., and exported through the port of New York, N. Y., found not shown to be unreasonable or otherwise unlawful. Complaint dismissed.

*Parker McCollester and Frank J. Clark* for complainants.

*Alfred S. Knowlton, E. A. Hodgkinson, J. P. Canny, and Harold J. Gilmartin* for defendants.

REPORT OF THE COMMISSION

DIVISION 2, COMMISSIONERS AITCHISON, SPLAWN, AND ALLDREDGE

BY DIVISION 2:

Exceptions to the examiner's proposed report were filed by the parties, replies were made, and the issues were orally argued before us. Our conclusions differ from those recommended by the examiner. Exceptions and requested findings not discussed in this report nor reflected in our findings or conclusions have been considered and found not justified.

The complainant, a partnership operating a malting plant at Paterson, N. J., alleges by complaint filed on October 23, 1950, that the rate on barley malt from Buffalo, N. Y., to New York, N. Y., applicable on barley from Buffalo to Paterson, there milled in transit into barley malt, and shipped therefrom to New York for export, is unjust and unreasonable, and unduly prejudicial, as compared with the rates on grain and grain products, including barley malt, from Chicago, Ill., and Milwaukee, Wis., to New York and to New Orleans, La., for export. We are asked to prescribe just, reasonable, and nonprejudicial rates for the future.

The complainant purchases barley at Buffalo, Chicago, and Minneapolis, Minn., and in other Western States and Canada. From Buffalo the barley is shipped over the lines of The Delaware, Lackawanna & Western Railroad Company or the Erie Railroad Company to Paterson, where it is converted into malt and reshipped under transit arrangements to New York for export and for domestic use. In 1950,

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the barley received by the complainant at Paterson averaged 100,214 pounds per carload, and the out-bound shipments of malt averaged 74,800 pounds. In the last half of 1950, the complainant received 240 carloads of barley from Buffalo, averaging 97,171 pounds per car, and reshipped 297 carloads of malt, averaging 74,389 pounds. Approximately 85 percent of the malt produced by the complainant is exported. The rate on domestic traffic is not assailed.

The rate on barley malt from Buffalo to New York is 28 cents<sup>1</sup> on both domestic and export shipments. On in-bound shipments of barley from Buffalo the complainant pays the local rate thereon to Paterson, and after it has been converted into malt and reshipped to New York the charges are adjusted to the basis of the rate on malt from Buffalo to New York, plus a transit charge of 0.89 cent.

About one-third of the barley harvested in the United States is suitable for malting purposes, and most of this is produced in North Dakota, South Dakota, Minnesota, and Montana. Generally, the rail rates on barley from these producing areas to Minneapolis are the same as those to Duluth, Minn. Barley which the complainant purchases in these Midwestern States and in Canada is shipped by boat over the Great Lakes to Buffalo for storage and later reshipped to Paterson for malting. The charge for transporting barley by water from Duluth and placing it in storage elevators in Buffalo is said to approximate 31 cents, composed of about 26 cents for water transportation, 2 cents for insurance, and 3 cents for elevation. This charge, plus the rate of 28 cents on malt from Buffalo to New York and the transit charge of 0.89 cent, results in a total charge of 59.89 cents. The rate on barley originating in Canada and shipped to Buffalo for storage is not shown.

The complainant is in competition with malt producers at Milwaukee and Chicago. Barley which originates beyond Minneapolis may be shipped therefrom to Chicago at a proportional rail rate of 20.5 cents, and the proportional export rates on malt from Chicago are 32 cents to New York and 29 cents to Baltimore, Md., resulting in export rates of 52.5 cents to New York and 49.5 cents to Baltimore. The rate from Minneapolis on barley originating beyond, when converted into malt at Chicago and reshipped to New Orleans for export, is 49.5 cents, the same as to Baltimore. Since barley malt is sold by all producers at prices published in the Brewers Bulletin, the complainant asserts that it is necessary to absorb the difference in the costs for moving barley by water from Duluth to Buffalo and by rail to Paterson for malting and reshipment to New York for export, and

<sup>1</sup> Rates and charges herein are stated per 100 pounds, and do not include general increases authorized in 1951 or later.

for moving barley by rail from Minneapolis to Chicago for malting and reshipment to New York or New Orleans for export.

The export rates on ex-lake grain from Buffalo and other ports on the Great Lakes to New York are lower than the corresponding domestic rates. For example, from Buffalo to New York the export rates are 22.63 cents on barley and 19 cents on wheat, which rates include an allowance of 1.5 cents per bushel for elevation and transfer at Buffalo, as compared with the domestic rate of 28 cents on both commodities. On wheat flour milled from ex-lake grain, the export rate from Buffalo to New York is 25.5 cents and the domestic rate is 28 cents. From Chicago to New York the proportional export rates are 27 cents on barley and wheat, 32 cents on malt, and 38.5 cents on wheat flour, and the proportional domestic rates are 41.5 cents on barley and wheat, and 42 cents on malt and wheat flour. These rates, among others, are referred to by the complainant in support of its contention that it is unjust and unreasonable to maintain the same rate on export as on domestic shipments of barley malt from Buffalo to New York.

The following table shows the rates and rate differences since 1939 from Chicago and Buffalo on barley, wheat, barley malt, and wheat flour to New York for export:

| Commodity        | Year      | Rates                     |                    | Rate differences |
|------------------|-----------|---------------------------|--------------------|------------------|
|                  |           | From Chicago <sup>1</sup> | From Buffalo       |                  |
|                  |           | <i>Cents</i>              | <i>Cents</i>       | <i>Cents</i>     |
| Barley.....      | 1939..... | 17.5                      | <sup>2</sup> 14.02 | 3.48             |
|                  | 1947..... | 20                        | <sup>3</sup> 16.08 | 3.92             |
|                  | 1948..... | 24.5                      | <sup>3</sup> 20.63 | 3.87             |
|                  | 1949..... | 27                        | <sup>3</sup> 22.63 | 4.37             |
| Wheat.....       | 1939..... | 17.5                      | <sup>2</sup> 12.17 | 5.33             |
|                  | 1947..... | 20                        | <sup>2</sup> 13.67 | 6.33             |
|                  | 1948..... | 24.5                      | <sup>2</sup> 17.50 | 7                |
|                  | 1949..... | 27                        | <sup>2</sup> 19    | 8                |
| Barley malt..... | 1939..... | 26                        | 18                 | 8                |
|                  | 1941..... | 22                        | 18                 | 4                |
|                  | 1947..... | 25                        | 20.5               | 4.5              |
|                  | 1948..... | 32                        | 25.5               | 6.5              |
|                  | 1949..... | 35                        | 28                 | 7                |
| Wheat flour..... | 1950..... | 32                        | 28                 | 4                |
|                  | 1939..... | 25                        | 14.5               | 10.5             |
|                  | 1947..... | 28.5                      | 18.5               | 10               |
|                  | 1948..... | 35                        | 23                 | 12               |
|                  | 1949..... | 38.5                      | 25.5               | 13               |

<sup>1</sup> Proportional rates, ex-lake, ex-rail, or ex-river.

<sup>2</sup> Ex-lake rate; includes 1 cent per bushel for elevation and transfer at Buffalo.

<sup>3</sup> Ex-lake rate; includes 1.5 cents per bushel for elevation and transfer at Buffalo.

It will be noted that the spreads in the rates on barley, wheat, and wheat flour generally widened as the rates on those commodities were increased, but the spread in the rates on malt in 1950 was the same as it was in 1941 and less than it was in any of the other years shown

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The complainant also shows that to New York the rate on barley malt from Buffalo was 55 percent higher in 1950 than in 1939, whereas from Chicago, Cleveland, Ohio, and Detroit, Mich., the respective increases in the barley malt rates, 1950 over 1939, were 23, 41, and 46 percent.

The complainant urges that the revenues yielded by the domestic rate of 28 cents on barley from Buffalo to New York, which is the same as that applicable when the barley is malted at and reshipped from Paterson for export, are unreasonably high, particularly as compared with the revenues yielded by the ex-lake export rates on barley, wheat, and wheat flour from Buffalo and Chicago to New York. The following table shows the revenues under the domestic and export rates to New York:

| From—               | Distance     | Rate              | Weight <sup>1</sup> | Revenue      |              |
|---------------------|--------------|-------------------|---------------------|--------------|--------------|
|                     |              |                   |                     | Car-mile     | Ton-mile     |
|                     | <i>Miles</i> | <i>Cents</i>      | <i>Pounds</i>       | <i>Cents</i> | <i>Mills</i> |
| Buffalo, N. Y.----- | 406          |                   |                     |              |              |
| Barley-----         |              | <sup>2</sup> 28   | 100,214             | 69.1         | 13.8         |
| Wheat-----          |              | <sup>3</sup> 19.5 | 100,214             | 48.1         | 9.6          |
| Barley malt-----    |              | <sup>2</sup> 28   | 107,400             | 73.8         | 13.8         |
| Wheat flour-----    |              | <sup>4</sup> 16.5 | 107,400             | 43.6         | 8.1          |
| Barley malt-----    |              | <sup>5</sup> 28   | 74,800              | 51.6         | 13.8         |
| Wheat flour-----    |              | <sup>2</sup> 28   | 65,140              | 44.9         | 13.8         |
| Wheat flour-----    |              | <sup>6</sup> 25.5 | 65,140              | 41           | 10.9         |
| Chicago, Ill.-----  | 890          |                   |                     |              |              |
| Barley-----         |              | <sup>7</sup> 41.5 | 100,214             | 46.7         | 9.4          |
| Wheat-----          |              | <sup>8</sup> 27   | 100,214             | 30.4         | 6.1          |
| Barley malt-----    |              | <sup>7</sup> 41.5 | 107,400             | 50.1         | 9.4          |
| Wheat flour-----    |              | <sup>8</sup> 27   | 107,400             | 32.6         | 6.1          |
| Barley malt-----    |              | <sup>7</sup> 42   | 74,800              | 35.3         | 9.5          |
| Wheat flour-----    |              | <sup>8</sup> 32   | 74,800              | 26.9         | 7.2          |
| Wheat flour-----    |              | <sup>7</sup> 42   | 65,140              | 30.7         | 9.5          |
| Wheat flour-----    |              | <sup>8</sup> 38.5 | 65,140              | 28.2         | 8.7          |

<sup>1</sup> Based on complainant's average loading during 1950 on barley and malt, and on average loads from Great Lakes region in 1949 on wheat and wheat flour.

<sup>2</sup> Domestic rate.

<sup>3</sup> Ex-lake, export rate, net after deducting allowance of 1.5 cents per bushel, equivalent to 3.13 cents per 100 pounds.

<sup>4</sup> Ex-lake, export rate, net after deducting allowance of 1.5 cents per bushel, equivalent to 2.5 cents per 100 pounds.

<sup>5</sup> Applicable on domestic and export shipments.

<sup>6</sup> Export rate when milled from ex-lake wheat.

<sup>7</sup> Ex-rail, ex-lake, or ex-river proportional domestic rate.

<sup>8</sup> Ex-rail, ex-lake, or ex-river proportional export rate.

In addition to the rates mentioned above, the rail lines maintain from Chicago to New York flat (or proportional) rates on malt and wheat flour of 56 cents on domestic traffic and 53.5 cents on export traffic.

According to the complainant, the export rate on barley malt from Buffalo to New York for application on barley malted at Paterson and reshipped to New York for export should not exceed 20 cents. This rate is approximately 63 percent of the proportional export rate of 32 cents on malt from Chicago to New York, which is the percentage relation between the scale rates of 99 cents for 400 miles and \$1.55 for

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890 miles prescribed in the eastern class rate investigation. Based on 74,800 pounds, a rate of 20 cents from Buffalo to New York would yield revenues of 36.8 cents per car-mile and 9.8 mills per ton-mile.

The complainant admits that the transit arrangements at Paterson can be used in connection with the export proportional rate on malt from Chicago to New York, but claims it is impracticable to obtain barley at Chicago for malting at Paterson. The complainant's storage facilities at Paterson are limited, and it has been necessary to utilize storage space at other points. The reason assigned for storing barley at Buffalo is that it is closer than Chicago to Paterson and there is less likelihood of delays in transit from Buffalo than from Chicago due to strikes and to snowstorms and ice in the winter months.

Finally, the complainant contends that foreign producers of malt have an advantage because the export rates on barley are lower than on malt. The complainant's plant has grown steadily and has been operated at capacity, and in several instances orders from customers in South America have been declined for lack of malt.

In support of their position that the rate assailed is not unreasonable or otherwise unlawful, the defendants compare that rate and the revenue therefrom, 51.6 cents a car-mile based on 74,800 pounds and 406 miles, with the rates and revenues on various commodities which move in substantial volume in official territory; namely, aplite rock, asphalt, cement, ball or china clay, feldspar, fertilizer, lime, phosphate rock, plaster, salt, sulphur, sulphuric acid, and waste materials. Based on a distance of 424 miles, the rates on the compared commodities range from 23 cents on sulphur to 56 cents on waste materials, and the car-mile revenues range from 54.2 cents on 62,124 pounds of plaster to 136.1 cents on 103,060 pounds of waste materials. Under the rate assailed, the ratio of the freight charges to the value of the commodity ranged from 6 to 7 percent in 1934 and was about 4.9 percent in February 1951.

The defendants state that the proportional export rate on barley malt from Chicago to New York is a depressed rate, made with relation to the water-competitive rates from Chicago to New Orleans on grain and grain products, including malt. There is no evidence of any water transportation of malt from Chicago, but as indicated above the rates from Minneapolis to New Orleans and Baltimore for export are the same on barley originating beyond Minneapolis and converted into malt at Chicago, and there is a definite relationship, not here assailed, between the export rates on this traffic to New York and to Baltimore.

The defendants emphasize the availability of transit at Paterson in connection with the proportional export rates from Chicago to New York. They say this demonstrates that Paterson is not unduly

prejudiced as compared with Chicago. It is of course apparent that the time in transit to Paterson is greater from Chicago than from Buffalo, but the record is not convincing that there would be more delays on shipments from Chicago than from Buffalo because of strikes or weather conditions.

While the proportional export rate on barley malt from Chicago to New York is on a lower level than the rate assailed, that rate appears to be depressed by competitive conditions which differ materially from the conditions which affect the rate under attack. From Chicago to New York the proportional export, the proportional domestic, the flat export, and the flat domestic rates on malt are, respectively, 4, 14, 25.5, and 28 cents higher than the rate assailed. Thus, as compared with domestic shipments of barley milled into malt at Chicago and shipped to New York, the complainant benefits by the use of barley moved from Duluth to Buffalo and malted by it for movement to New York. As stated, the charges for moving barley by water from Canada to Buffalo are not of record and no comparison can be made between such a movement when transited at Paterson and all-rail movements from Minneapolis when transited at Chicago.

For many years the defendants have maintained ex-lake, export rates on grain from Buffalo to New York which are lower than the domestic rates. See *Ex-Lake Grain to North Atlantic Ports*, 235 I. C. C. 415, decided in 1939. On the other hand, the record indicates that generally they do not maintain export rates lower than the domestic rates on grain products from Buffalo to New York. The only exception shown is an export rate of 25.5 cents on wheat flour which is 2.5 cents lower than the domestic rate of 28 cents. The history of this rate is not revealed, but there is no claim of competition between wheat flour and barley malt.

In *Bunge Corp. v. Ann Arbor R. Co.*, 283 I. C. C. 617, we found unjust and unreasonable the export rates on buckwheat to New York when moving from or through Chicago, Milwaukee, or Minneapolis, in that they were different from the export rates concurrently maintained on barley, corn, oats, rye, and wheat. We there pointed out that export traffic is not inherently entitled to lower rates than domestic traffic, but that ratewise the grains are considered as a homogeneous group which should not be disrupted except for clear and compelling reasons. Here, the defendants maintain from Buffalo to New York the same rate on all grain products for export, including malt, with the single exception of wheat flour. As indicated, there is no competition between barley malt and wheat flour.

We find that the rate assailed is not shown to be unreasonable or otherwise unlawful. The complaint will be dismissed.

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