No. 30977

GEORGE A. MIEL COMPANY, INCORPORATED, ET AL. v. DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY

Submitted July 22, 1952. Decided September 8, 1952

Demurrage charges sought to be collected for the detention of tank cars found applicable, and their application found not shown to have been unreasonable. Complaint dismissed.

George A. Miel and *Abner Pollack* for complainants.
Harold J. Gilmartin and *Walter J. Hamm* for defendant.

REPORT OF THE COMMISSION

DIVISION 3, COMMISSIONERS PATTERSON, JOHNSON, AND KNUDSON

BY DIVISION 3:

The parties agreed to disposition of this proceeding under the shortened procedure, thereby waiving oral hearing and cross-examination, and this procedure was followed. Exceptions were filed by the complainant to the proposed report of the examiner, and the defendant replied. 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 corporations, by complaint filed January 16, 1952, allege that the demurrage charges sought to be collected for the detention of 15 tank cars delivered by the defendant at Lyndhurst (Kingsland), N. J., during December 1950 and January 1951 were unreasonable and inapplicable in violation of sections 1 and 6 of the Interstate Commerce Act. The complainant's prayer is for a grant of authority to the defendant to waive collection of the undercharges. An informal complaint containing allegations as made in the formal complaint was filed on April 18, 1951, and closed on December 16, 1951, as not susceptible of informal adjustment.

Demurrage charges totaling $6,710 are sought to be collected for detention of these tank cars. The complainants have tendered payment of $507.53, the charges deemed to be applicable and reasonable on 14 of the 15 cars in issue, based upon 365 car-days at the rate of $1.35 per car per day. They allege that tank car No. ISTX 181, the remaining car in issue on which demurrage charges were $660, was a

leased car, and should be released from demurrage charges. The freight charges were paid by complainant Industrial Raw Materials Corporation; the delivery of the shipments was made through the complainant George A. Miel Company, Inc. The latter complainant and the defendant had entered into an average agreement as to demurrage as authorized in rule 9 of the tariff published by Agent L. C. Schultz, I. C. C. No. 4257. Reference hereinafter to "complainant" will mean the Industrial Raw Materials Corporation or George A. Miel Company, Inc., acting as agent for Industrial Raw Materials Corp.

The complainant is engaged in the manufacture and sale of wax products operating a small wax-compounding plant at Lyndhurst, N. J. On or about October 1, 1950, it entered into a special contract with the United States Government by which it agreed to process a large quantity of dip sealing wax compound for the United States Raritan Arsenal. The Government purchasing agencies insisted that deliveries of the finished product be expedited, and the necessary priority was granted. The complainant arranged for the production of special runs of petroleum wax at one or more of the refineries at the points of origin for processing in the complainant's plant.

Prior to October 1950 the complainant received an average of approximately two tank-car shipments of petroleum wax per month from all interstate origins. In the 4 months, October 1950 to January 1951, inclusive, pursuant to the Government contract, 61 tank-car shipments of petroleum wax were purchased and shipped to complainant's plant which arrived at the rate of 3 or 4 cars per week. These tank cars averaged approximately 8,000 gallons each.

To take care of this increased production, it was necessary for the complainant to have built at Lyndhurst two additional wax storage tanks having a capacity of approximately 105,000 gallons. The contract was made with "Mahoney for Machinery" and provided that the tanks be completed not later than November 30, 1950. The complainant's normal tank storage capacity had been approximately 53,000 gallons up to that time. The tank manufacturers in turn contracted with the Butler Manufacturing Company to supply the steel plate to be used in the erection of the two storage tanks, the material to be delivered in ample time so that the requirement that they be completed on November 30, 1950, could easily be met. However, developments in the interim compelled the Butler Manufacturing Company to relinquish the allotted steel by reason of "higher Government priorities," and as a result the delivery of the steel plate to complainant's plant was delayed approximately 60 days.

When this steel did arrive at Lyndhurst, severe winter weather, including snow, hail, and rainstorms, had set in, which further inter-

fered and delayed the erection of the storage tanks, so that the tanks were not completed until February 10, 1951. During the time in which these cars were received, complainant repeatedly requested the shippers to retard the loading of tank cars, but the shippers failed to comply. The delay in the completion of the storage tanks forced the complainant to make an exhaustive effort to purchase drums and other containers into which to unload the tank cars. Due to the shortage of materials available to United States manufacturers of containers suitable for this wax, complainant was compelled to purchase the containers at much higher than normal prices in the Canadian market. Upon receipt of the containers the unloading of the tank cars progressed as expeditiously as possible.

In its endeavor to accelerate the release of the tank cars the complainant also arranged with Harbor Tank & Storage Company, after great difficulty and at the earliest possible date, for the rental, at considerable additional expense, of bulk storage tanks for the emergency storage of this wax. Due to the delay in the erection of the necessary additional storage tanks, the complainant did not succeed in releasing more than about two-thirds of the cars despite the endeavors made. The 15 tank cars, as well as others remaining on complainant's siding, were unloaded and released when the new storage tanks were available.

One shipment of petroleum wax was delivered in car ISTX 181 which originated at Houston, Tex., on December 29, 1950, and was released at Lyndhurst on February 20, 1951. This private car leased to complainant throughout the period of this shipment and detained on the tracks of complainant-lessee was boarded with cardboard showing complainant's full name as lessee. Through inadvertence, however, the shipper failed to make notation on the bill of lading and shipping order before the car left Houston, Tex., that this car was leased to complainant. Complainant contends that this particular car should be granted full exemption from demurrage charges notwithstanding the adverse decision by the Commission involving a similar question in *Highland Co., Inc.*, v. *Chesapeake & O. Ry. Co.*, 251 I. C. C. 275. This contention is based on the ground that by the placarding the tariff was partly complied with whereas the shipper in that proceeding failed to placard the cars as required by the demurrage tariff. So far as is here pertinent, Alternate Agent Schuldt's Freight Tariff No. 4, I. C. C. No. 4442 provides as follows, in item 500 of rule No. 1:

> Section B.—The following cars are not subject to these demurrage rules:
>
> * * * * * * *
>
> Private cars must have the full name of the owner of Reporting Marks assigned to the owner by the Association of American Railroads (see the Official Railway Equipment Register, I. C. C. E. R. No. 294, issued by M. A. Zenobia,

Agent), or the full name of the lessee painted or stenciled thereon or must be boarded with wooden, metal or cardboards showing the full name of owner or lessee. If cardboarded for exemption while held for loading, the cardboard must also show the initials and numbers of the car and date of shipment. The application of this note to leased cars shall be subject to the following conditions:

(2) When a leased car is held for unloading, reconsignment or reshipment, it shall not be exempted from demurrage unless the name of lessee is on the car and that fact is evidenced by a notation on the bill of lading or shipping order before the car leaves point of shipment, except that such notation will not be required when evidence of lease is painted or stenciled upon the car.

As was provided in the item quoted, a leased car held for unloading was not exempt from demurrage unless in addition to having the name of lessee on the car, the fact that the car was leased to complainant was evidenced by a notation on the bill of lading or shipping order before the car left the point of shipment, except that such notation was not required when evidence of lease was "painted or stenciled upon the car." There having been no such evidence of lease, the required notation on the bill of lading was indispensable to the exemption of the car from demurrage.

It is the complainant's position that the detention of these tank cars was due to causes beyond complainant's control; that complainant exercised due diligence to avoid and abate the detention of the tank cars in issue; that there was no negligence on the part of the shippers as a contributing factor; and that there is no justification for a requirement that the penalty portion of the applicable demurrage charges be paid. In support of its position, complainant refers to the principle as stated by the Commission in *Commerce & Industry Assn. of N. Y., Inc.*, v. *B. & O. R. Co.*, 281 I. C. C. 655, at pages 662 and 663:

From the foregoing it appears that in recent years the rule that demurrage and storage charges are properly accrued against the shipper where the detention occurred through no fault of the carrier, and even though the shipper also was not at fault, has been modified in instances where the shipper could not have avoided or abated the detention by the exercise of due diligence. In such instances the exaction of the penalty portion of the applicable charges, where determinable, has been found unreasonable, and reparation has been awarded to the basis of the actual expenses incurred by the carriers by reason of the detention. This basis in the more recent demurrage cases has been $1.35 per car per day.

In *Apex Tire & Rubber Co.* v. *New York, N. H. & H. R. Co.*, 277 I. C. C. 1, division 3 said that complainant's redress is with the consignor and not with the railroads in situations where the consignor agreed to forward shipments only as directed and shipments were forwarded without regard to the agreement. The division found that the proximate cause of the detention was the consignor's action in forwarding the shipments in larger volume than could be unloaded by

the complainant. The consignors having failed to comply with the request of the complainant in the instant proceeding that the loading of the tank cars be retarded, the complainant's redress is with the consignors unless the failure to retard the loading as requested was justified under the contract made, in which event the proximate cause of the premature arrival of the shipments was the character of the contract with the consignor if there was no failure otherwise to exercise due diligence toward avoidance of the detention of the cars. There is no warrant in the stated circumstances for a conclusion that the application of the assailed penalty charges was unreasonable.

We find that the demurrage charges sought to be collected were applicable and that their application is not shown to have been unreasonable. The complaint will be dismissed.