

privations and expense to the shipping public. The object of the service orders was to expedite release of cars and thus to secure the greatest good to the greatest number. Throughout the war emergency all shippers were subject to the service orders. Caution must be observed in relaxing their requirements; else their purpose would be impaired and discriminations among shippers would result.

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

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No. 31309

HOLLAND AMERICAN MERCHANTS CORPORATION v.  
DELAWARE, LACKAWANNA & WESTERN RAILROAD  
COMPANY

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*Submitted January 12, 1954. Decided March 12, 1954*

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Demurrage charges sought to be collected for the detention of tank cars loaded with inedible fats at Jersey City, N. J., during a strike of longshoremen found not shown to have been unreasonable. Complaint dismissed.

*James A. Thomas, Jr.*, for complainant.

*John F. Reilly* for defendant.

REPORT OF THE COMMISSION

DIVISION 3, COMMISSIONERS KNUDSON, ARFAIA, AND CLARKE

BY DIVISION 3:

The modified procedure was followed. No exceptions were filed to the report proposed by the examiner. The charges complained of were the subject of an informal complaint filed on December 19, 1952, which was closed on May 26, 1953, as not being susceptible of informal adjustment.

The complainant is a corporation engaged in the business of exporting fats and oils, with its principal offices in New York, N. Y. By complaint filed on July 8, 1953, it is alleged that demurrage charges sought to be collected for the detention at Jersey City, N. J., of 17 tank cars loaded with inedible fats shipped to the complainant at that point from specified inland points for transshipment to overseas destinations, are unreasonable. We are asked to prescribe reasonable charges for the detention and to relieve the complainant of demurrage charges in excess of those found reasonable.

The cars arrived at the defendant's yards in Jersey City on and between October 15 and November 15, 1951, and notice of arrival was given promptly. Six of the cars were released on November 23 and the remaining 11 on November 29.

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The assailed charges, amounting to \$3,188, are determined pursuant to the provisions of the defendant's demurrage tariff, Agent Schuldt's I. C. C. No. 4442, and of Service Order No. 865, as amended, issued by the Commission to relieve a car shortage. The service order, during the period of the detention of these cars, provided demurrage rates substantially higher than the normal rates provided by the tariff, except that, under the provisions of amendment No. 17 thereof, the normal tariff rates applied from November 1 to November 15, 1951, on cars detained at ports where there was interference to loading or unloading due to a strike of longshoremen. The applicability of the assailed charges is not questioned. The sole question is whether, as claimed by the complainant, the so-called "penalty portion" of the assailed charges is unreasonable on the ground that the detention of the cars was due to circumstances over which the complainant had no control and which it made diligent efforts to avoid. The complainant requests a finding either that the assailed charges as a whole are unreasonable or, in the alternative, that they are unreasonable to the extent of their excess over the normal demurrage rates.

The complainant contracted to buy 6 tank-car loads of yellow grease on September 25, 1951, and 11 tank-car loads of fancy tallow on or about October 1. On October 5 the suppliers were instructed to ship the grease in time to arrive at Jersey City between October 25 and October 30. On October 22, the suppliers were instructed to ship the tallow to arrive at Jersey City between November 9 and November 15. Tank space had been booked for the grease on an outgoing ocean vessel scheduled to load at New York on November 1 or November 2, and for the tallow on a vessel scheduled to load on November 16 and 17.

From October 14 to November 9, there existed at the port of New York a strike of longshoremen. All but one of these shipments left their points of origin subsequent to the start of the strike, and all of the shipments arrived at Jersey City during or shortly after the end of the strike. When informed that the shipments could not be loaded aboard ship as scheduled, the complainant attempted unsuccessfully for sometime to find substitute cargo space on other ships or land tank storage for the merchandise at the port of New York. It was not until November 23 and 29 that loading on substitute vessels was accomplished and the tank cars released.

It is contended that the charges are unreasonable under the doctrine recognized in *Commerce & Industry Assn. of N. Y., Inc., v. B. & O. R. Co.*, 281 I. C. C. 655, 662, wherein division 2 said:

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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, had 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 carrier by reason of the detention.

The defendant contends that the complainant failed to exercise due diligence in neglecting to halt or reroute the incoming shipments, and that consequently the proximate cause of the detention was the complainant's own negligence. The defendant contends further, that the complainant took a calculated business risk and that it should not be relieved of the consequences of its own act.

The complainant argues that it had reasonable grounds for assuming that the incoming shipments could be loaded aboard ship without undue delay. It is shown that it was possible to load similar commodities aboard ship during the strike, since the loading of bulk liquid cargo did not require the assistance of longshoremen. The record is not clear as to why the instant shipments could not be loaded. The complainant states that it was informed only a short time prior to the loading dates that the vessels would be unable to load because of the strike. At least 1 day prior to November 1, the original sailing date of the first vessel, the complainant was notified that the ship could not be loaded as scheduled. There were at that time 6 cars on hand, 9 tank cars had not yet left their points of origin, and 2 apparently were in transit. No attempt was made to divert these shipments, or to halt the loading of additional shipments which were forwarded as much as 10 days thereafter. It should have been apparent that the shipments would be unduly delayed, since neither of the vessels on which space was booked would load at that port. The complainant's contention that it did everything in its power to avoid detention of the cars is not persuasive.

Service orders are promulgated as an emergency measure in order to prevent or reduce car shortages and congestion of traffic. Exemptions from the provisions of such orders can be made only where it is clear that the detention was entirely beyond the control of the shipper or consignee so that the exaction of a penalty would have been futile as a deterrent against excessive detention.

We find that the complainant has not shown that it exercised due diligence in attempting to avoid the detention to these cars, and that the assailed charges are not shown to have been unreasonable. The complaint will be dismissed.

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