No. 31789

AMERICAN HOME FOODS, INC., v. DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY ET AL.

Decided February 15, 1957

Rate collected on dry extract of coffee (condensed), in carloads, from Morris Plains, N. J., to Houston, Tex., found applicable in some instances and inapplicable in others. Applicable rates determined, and found not shown to have been unjust or unreasonable. Reparation awarded.

C. B. Roeder for complainant.
Richard E. Costello for defendants.

REPORT OF THE COMMISSION

DIVISION 2, COMMISSIONERS FREAS, WINCHELL, AND MURPHY

BY DIVISION 2:

The modified procedure was followed. Exceptions to the examiner's proposed report were filed by the defendants, and the complainant replied. Our conclusions differ in part from those recommended by the examiner. Requested findings and exceptions not specifically discussed herein nor reflected in our findings or conclusions have been considered and found not justified.

The complainant, a corporation, by complaint filed on May 7, 1955, as amended, alleges that the rate [1] charged on 40 carloads of dry extract of coffee (condensed), called instant coffee, shipped on and between May 5, 1953, and January 4, 1955, from Morris Plains, N. J., to Houston, Tex., was inapplicable, and if applicable, was unjust and unreasonable. We are asked to determine the applicable rate and to award reparation.

Charges were collected at a rate of $2.18 based on an exceptions rating of class 35, minimum 36,000 pounds. The complainant contends that a rate of $1.92 was applicable, based on a classification rating of class 40, minimum 30,000 pounds. Thirty of the shipments weighed in excess of 36,000 pounds, and the remaining 10 weighed more than 30,000 pounds, except 2 which weighed 20,633 and 28,764 pounds, respectively.

On May 30, 1952, the rail uniform classification and the class rates governed thereby, commonly referred to as the No. 28300 class rates,

[1] Rates are stated per 100 pounds, and do not include the general increases authorized in Ex Parte No. 175 or later.

became effective. The uniform classification provided 2 ratings; namely, class 40 and class 55, on instant coffee, minimum 30,000 pounds. The class 40 rating was subject to a released value not exceeding 50 cents a pound, and the class 55 rating was not subject to a released value. The class rates subject to these ratings resulted in rates of $1.92 and $2.64, respectively, from and to the considered points. The class rates, however, had limited application in that they did not apply where there was in effect a commodity rate, classification exception, or column rating from and to the same points over any route on the same commodity. On the same date, the defendants maintained an exceptions rating of class 45, minimum 36,000 pounds, on instant coffee from Morris Plains to Houston. This rating was not subject to any declared or released value, and it resulted in a rate of $2.81.[2] The exceptions rating was reduced to class 35 on August 1, 1952, which resulted in the rate of $2.18 on which the charges were collected. The latter rates did not alternate with those governed by the uniform classification.

The released-value provisions in connection with the class 40 rating in the uniform classification was authorized by our orders No. 1104 of May 1, 1952, and No. 1113 of December 10, 1953, the latter superseding the former. Both the governing tariff and the second order provided that the rates based on the released rating would take precedence over all other rates not subject to released value, provided the released rates resulted in lower freight charges; and that if lower freight charges did not result, the release would be deemed not to have been executed and the released rating would have no application.

Each of the shipments was tendered to the originating carrier on a straight bill of lading bearing the notation: "The agreed or declared value of the property is hereby specifically stated by the shipper to be not exceeding 50 cents a pound." By releasing the value of the shipments, the complainant sought the application of the rate of $1.92, and originally prepaid the charges at that rate on 37 of the shipments. Later, on May 27, 1955, at the request of the defendants, additional charges were paid on the basis of the rate of $2.18, without prejudice to the complainant's contention that the rate of $1.92 was the legal and lawful rate.

The complainant points out that the rate assailed was not subject to a released-value provision, and because of this it asserts that the exceptions rating removed from the classification only the class 55 rating which likewise was not subject to a released value, and did not affect the class 40 rating subject to released value. It contends that the

[2] This rate was subject to an aggregate-of-intermediates rule, and a combination of rates of $1.19 from Mount Morris to Cairo, Ill., and of $1.16 beyond produced a through rate of $2.35.

latter rating, because of the value limitation in connection therewith, was applicable on a commodity separate and distinct from that which was subject to the class 55 rating. In the event that a higher rate was applicable, the complainant urges that it was unjust and unreasonable to the extent it exceeded $1.92.

The defendants deny that the rate of $1.92 was applicable on these shipments. They assert that there is only one commodity in issue; namely, instant coffee, and that it is a mere play on words to claim that the separate descriptions refer to separate commodities. They aver that the language in the exceptions item was all-inclusive; that there was nothing to indicate that the exceptions rating was not to displace both the released and unreleased ratings in the classification; and that the additional language concerning carrier liability in the released-rating item was of no legal consequence in determining the applicable rate as there were no commercial or transportation differences in the several items. They contend, therefore, that the exceptions rating displaced both ratings in the classification.

To support their position, the defendants refer to *Norwich Wire Works, Inc.*, v. *Boston & M. R.*, 229 I. C. C. 395, 232 I. C. C. 593, and *Animal Trap Co. of America* v. *Erie R. Co.*, 243 I. C. C. 171. Those proceedings concerned shipments of perforated steel sheets and copper-coated strip steel which were rated separately in the classification, along with strip steel, not otherwise indexed by name, under the heading of "Iron and Steel," and it was held that an exceptions rating on strip iron or steel embraced all of these articles. Released rates and ratings were not there in issue. The defendants also refer to *Dow Chemical Co.* v. *Chesapeake & O. Ry. Co.*, 296 I. C. C. 544, decided August 30, 1955, and *Upjohn Co.* v. *Pennsylvania R. Co.*, 297 I. C. C. 699, decided December 22, 1955. In the *Dow Chemical* case it was held that an exceptions rating on aniline oil requiring no value release was applicable even though it resulted in higher charges than those resulting from the classification ratings on shipments of released and unreleased aniline oil; and in the *Upjohn* case it was held that a commodity rate on drugs which made no distinction between these articles when released or when not released had the effect of removing from the classification the ratings on drugs whether or not contingent upon released value. A similar conclusion is warranted here; namely, that the exceptions rating on instant coffee removed the application of the classification ratings thereon whether released or not released.

As indicated, the exceptions class rate of $2.18 was established on August 1, 1952, and this rate was subject to a provision that if a combination of rates to and from intermediate points resulted in lower charges the latter would apply. On July 1, 1954, a rate of 83 cents, minimum 30,000 pounds, was established on instant coffee from Morris

Plains to Cairo, and this rate plus a rate of $1.16, minimum 30,000 pounds, from Cairo to Houston produced a combination through rate of $1.99. The defendants concede that the latter rate was applicable on 18 of the carloads which were shipped on and after July 6, 1954. On January 20, 1955, the exceptions rating on instant coffee was canceled and a reduced classification rating, without limitation as to value, of class 32.5, minimum 30,000 pounds, was established. This resulted in a rate of $1.56 from Morris Plains to Houston.

The complainant contends that the findings in the *Dow Chemical* case and the *Upjohn* case have no bearing on the instant shipments. It points out that the exceptions class rate of $2.81 was not applicable when the uniform classification became effective on May 30, 1952, as a lower combination rate produced lower charges. Two months after that date; namely, on August 1, 1952, the exceptions rating was reduced from class 45 to class 35, and the complainant asserts that the defendants at that time should have specifically limited the application thereof so as not to apply on instant coffee subject to a released value not exceeding 50 cents a pound. It maintains that the reason the exceptions class rate of $2.81 did not apply on instant coffee from Morris Plains to Houston on and prior to May 30, 1952, was because a lower combination rate produced lower charges, and the reduction in the exceptions rating from class 45 to class 35 resulted in a lower rate on instant coffee not released in value, although it was not as low as the class rate of $1.92 under the classification rating of class 40 on instant coffee subject to the released valuation. We see no substantial dissimilarity between the situation here and that dealt with in the two cases last cited. The mere fact that the applicable rates were subsequently reduced is inadequate support for a finding that they were unjust or unreasonable.

We find that the rate of $2.18, minimum 36,000 pounds, was applicable on the shipments which moved prior to July 1, 1954; that the rate of $1.99, minimum 30,000 pounds, was applicable on those which moved on and after July 6, 1954; and that the applicable rates are not shown to have been unjust or unreasonable. We further find that the complainant made the shipments as described and paid and bore the charges thereon, and that it has been damaged to the extent that the charges collected exceeded those which would have accrued at the rates found applicable. The complainant should comply with rule 100 of our General Rules of Practice.