No. 31979

LONG ISLAND RAIL ROAD COMPANY v. DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY ET AL.

Decided January 22, 1958

Motor-vehicle transportation of freight in trailers by defendants between their respective rail terminals in New Jersey and the premises of consignors and consignees in the Borough of Queens, New York, N. Y., incident to the line-haul movement of such freight in trailer-on-flatcar service, found to be bona fide terminal-area collection-and-delivery service incidental to transportation by railroad within the meaning of section 202 (c) of the Interstate Commerce Act, which may be lawfully performed without a certificate issued under part II of the act. Schedules providing for such service found not shown to be unlawful. Complaint dismissed.

Otto M. Buerger, *William A. Colton*, and *James T. Gallagher* for complainant.

John F. Finerty, *Peter Campbell Brown*, *James T. Thornton*, *G. Burchard Smith*, *Harold W. Weidner*, and *Thayer Chapman* for interveners in support of complainant.

Richard E. Costello, *J. T. Clark*, and *M. R. Warnock* for defendants.

REPORT OF THE COMMISSION

DIVISION 3, COMMISSIONERS TUGGLE, MURPHY, AND MINOR

BY DIVISION 3:

Exceptions to the report proposed by the examiner were filed by the complainant and an intervener, to which the defendants, except the Lehigh Valley Railroad Company, 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.

By complaint filed on April 13, 1956, The Long Island Rail Road Company, hereinafter called the complainant or the Long Island, seeks a finding that schedules filed by the defendants, The Delaware, Lackawanna and Western Railroad Company, the Erie Railroad Company, and the Lehigh Valley Railroad Company, hereinafter called the Lackawanna, the Erie, and the Lehigh Valley, respectively, providing for the performance of the service here in controversy, are unlawful, and the entry of such order or orders as may be deemed proper. The service complained of is the transportation of freight over the public highways in motor trailers between the rail terminals

of the defendants in New Jersey and the premises of the consignors and consignees in the Borough of Queens,[1] New York, N. Y., in connection with the movement of the loaded trailers on rail flatcars. It is alleged, among other things, that the service proposed is not transportation by motor vehicle incident to rail transportation in the performance within terminal areas of transfer, collection, or delivery service within the meaning of section 202 (c)[2] of the Interstate Commerce Act, but constitutes an extension of the defendants' lines of railroad without the certificates of convenience and necessity required by section 1 (18)[3] of the act; or that the operation being line-haul in nature, it is unlawful without the certificates of convenience and necessity for motor service required by section 206 (a).

The Lehigh Valley did not actively participate in the proceeding except to state its position, as will later appear. The Brooklyn Eastern District Terminal, hereinafter called BEDT or the intervener, intervened in support of the complainant. The City of New York, Borough of Queens, Chamber of Commerce of the Borough of Queens, County of Nassau, N. Y., Nassau County Village Officials Association, and Suffolk County Village Officials Association, filed briefs in support of the complaint.

The schedules here assailed were filed by the defendants late in 1955. Upon protest of the Long Island and BEDT, the operation of the schedules was suspended to June 16, 1956, and later. Subsequently, division 2 vacated the suspension orders, but in obedience to a temporary restraining order of the court, the schedules were resuspended.

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[1] The Erie proposed to extend its service to that part of the borough north of Jamaica Bay, and the Lackawanna and Lehigh Valley to a substantially lesser area.

[2] The pertinent provisions of that section are as follows:

"(c) Notwithstanding any provision of this section or of section 203, the provisions of this part, except the provisions of section 204 relative to qualifications and maximum hours of service of employees and safety of operation and equipment, shall not apply—

"(1) to transportation by motor vehicle by a carrier by railroad subject to part I, * * * incidental to transportation or service subject to such parts, in the performance within terminal areas of transfer, collection, or delivery services; but such transportation shall be considered to be and shall be regulated as transportation subject to part I when performed by such carrier by railroad, * * *."

The transportation described therein is exempt, among other things, from the following provision of part II appearing in section 206 (a):

"(1) * * * no common carrier by motor vehicle subject to the provisions of this part shall engage in any interstate or foreign operation on any public highway, * * * unless there is in force with respect to such carrier a certificate of public convenience and necessity issued by the Commission authorizing such operations: * * *."

[3] Section 1 (18) provides in part: "* * * no carrier by railroad subject to this part shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this part over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, * * * of such additional or extended line of railroad, * * *."

Thereafter, the present complaint was filed and orders were entered referring to that fact and discontinuing the proceeding in Investigation and Suspension Docket No. 6512.

The Lackawanna inaugurated its service on July 6, 1956, and the Erie 3 days later. The Lehigh Valley presently provides trailer service to and from the borough by interchange with the Long Island under through-route and joint-rate arrangements, and for that reason has taken no active part in these proceedings. It announced at the hearing that if the position of its codefendants is sustained, it will then review its tariffs and take action, if necessary, to enable it to compete in Queens. For convenience, the services instituted under the assailed schedules will be referred to sometimes as the proposed services.

On June 15, 1956, the Long Island commenced a court suit against the defendants to restrain and enjoin the alleged unauthorized extension to Queens, on the ground that no certificates had been obtained as required by either section 1 (18) or section 206 (a) (1) of the act. On July 10, 1956, the court entered an order denying both the plaintiff's motion for a preliminary injunction and the defendants' motions to dismiss, and retained jurisdiction pending an administrative determination in the instant proceeding of whether the services in controversy are within the exemption of section 202 (c) (1). The court held that the determination of whether extentions of lines of railroad within the scope of section 1 (18) are involved is within the exclusive jurisdiction of the court. *Long Island R. Co.* v. *Delaware, L. & W. R. Co.*, 143 F. Supp. 363, 365. The Long Island announced at the hearing that it would not submit evidence upon or litigate that matter in this proceeding, but the intervener argues elaborately on exceptions that the Commission has and should make a finding regarding the section 1 (18) question. In *Texas & P. Ry. Co.* v. *Gulf, C. & S. F. Ry. Co.*, 270 U. S. 266, 273, and *Powell* v. *United States*, 300 U. S. 276, 287, both cited by the district court, the Supreme Court held that the ultimate determination of whether certain facilities constitute an extension of a line of railroad subject to section 1 (18) is within the exclusive jurisdiction of the courts, either in a suit to set aside an order granting a certificate or in a suit under section 1 (20) to enjoin a violation of section 1 (18). See also *Central R. Co. of New Jersey Construction*, 224 I. C. C. 170, 174; *Practices Affecting Dillonvale & S. Ry.*, 229 I. C. C. 687, 693; and *Pittsburgh Steel Co. Terminal Allowance*, 241 I. C. C. 562, 567. Further discussion herein will be confined to the question of whether the proposed services take place within the defendants' terminal areas, and are thus within the exemption of section 202 (c) (1).

At the hearing, and on brief and exceptions, the complainant objected to the admission in evidence of testimony and certain documents offered by the defendants to show the limits of the New York City commercial zone, the pickup and delivery and lighterage services performed by the Erie at New York City, and the areas within which transfer, collection, and delivery services are offered by the railroads and motor carriers at stations, cities, or towns other than New York City, on the ground that such evidence is irrevelant and immaterial. The described evidence was offered for comparative purposes and has some, although not a significant, bearing on the issue in this proceeding. The evidence, therefore, properly was received, and the objections are overruled.

Heretofore, the complainant and BEDT were the only rail carriers serving the Borough of Queens beyond the water's edge. Other railroads served points in Queens inaccessible by water only by through-route and joint-rate arrangements with the complainant and BEDT. The complainant disclaims any desire to prevent rail-trailer service to Queens. It has offered to cooperate with the defendants in establishing joint rates and through routes to provide such service; it now has such arrangements with The Pennsylvania Ralroad Company and the Lehigh Valley. The complainant's offer was not accepted because of the proprietary interest of the Pennsylvania Railroad in the Long Island, and because it was conditioned upon the withdrawal of the schedules providing for the considered service.

The Long Island, incorporated in 1834, has for many years engaged in the transportation of passengers and freight by rail. Its railroad extends approximately 116 miles over 3 main lines and 11 branches throughout the length of Long Island. The Boroughs of Brooklyn and Queens occupy the western end of the island where its population and business establishments are concentrated. The complainant's passenger service, from which it derives about 75 percent of its revenues (largely from morning and evening commuter traffic), extends from the Flatbush Avenue Station in Brooklyn through tunnels to the Pennsylvania Station in Manhattan. Its freight service, the source of about 20 percent of its revenues, is mostly interline, interchange being made with other railroads principally at the waterfront in Long Island City, Queens, by car floats and float bridges. Operating revenues from freight for 1954 were $12,994,105; for 1955, $13,244,424; and for the first 5 months of 1956, $5,861,087. Total revenues for 1955 were approximately $65,000,000, and net revenue, $1,689,039. Net income, if any, from freight business is not of record. Miscellaneous revenues are 5 percent of the total. Its freight traffic is concentrated largely on the western end of its road, with a substantial volume in the Borough of Queens.

Suffering financial difficulties in 1949, the complainant petitioned for reorganization under section 77 of the Bankruptcy Act. In 1954, the New York Legislature enacted a special law for the rehabilitation improvement, and continued operation by private enterprise of domestic railroads involved as debtors in proceedings under the Federal Bankruptcy Act. Under this law, the complainant acquired the status of a railroad redevelopment corporation. A 12-year $65,613,000 program of rehabilitation and modernization, approved by the New York Public Service Commission and the Long Island Transit Authority, calls for the expenditure of nearly $5,500,000 annually. Partial tax exemptions were granted, realty and other taxes were substantially reduced, a passenger-fare increase was granted, certain liability for the cost of grade-crossing elimination was decreased materially, and the holders of stock and obligations, during the redevelopment period, agreed to forego payments of principal, interest, and dividends, and to advance a further sum of $5,500,000. The complainant emerged from the reorganization proceeding in 1954. By careful management, the program has been proceeding on schedule, resulting in improvements in property and services. However, increasing prices of labor, materials, and supplies have since forced a rise in passenger fares, and another increase is imminent. Each adverse change in its income and expenses endangers "the success of the finely attuned rehabilitation program." In this situation, the complainant is seriously concerned over the threatened loss of substantial freight revenues, estimated at $390,000 per year, which it believes is inevitable if the defendants are permitted to "invade" the Queens area.

The city of New York, the Borough of Queens, and the county of Nassau assert that the Long Island is one of the principal means of transportation on the island and between the island and Manhattan, and is essential to the growth and prosperity of the area; and that any diversion of traffic and loss of revenue will result in further increases in passenger fares or curtailment of service, interfere with the road's rehabilitation to which the city and county have contributed by tax relief, and jeopardize its ability to pay even the reduced taxes. Similar positions are taken by the Village Officials Associations of Nassau and Suffolk Counties, and the Chamber of Commerce of Queens.

The Lackawanna's rail lines terminate at Hoboken, N. J., and the Erie's and Lehigh Valley's at Jersey City, N. J., just across the Hudson River from Manhattan. As noted above, each served inland Queens only by interchange with BEDT or the Long Island, or both. Eleven of the complainant's stations are within the area in Queens to which the Lackawanna proposed to extend its service.

During January 1956, the complainant originated or terminated 4,499 carloads at the 11 stations under through-route and joint-rate

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arrangements, with revenue of $235,591; 9,652 carloads were originated or terminated at its other stations, with revenue of $699,731. In April 1956, 4,732 carloads were originated or terminated at the 11 stations, with resulting revenue of $267,404, while 11,021 carloads were originated or terminated at its other stations, with revenue of $911,439. In the 2 respective months, the number of carloads interchanged with other carriers and moved to or from the 11 stations constituted 31.7 and 30 percent of the total number of interchanged carloads handled. The area in Queens proposed to be served by the Erie encompasses 19 of the complainant's stations, but the relation of the interchanged carloads handled at such stations to the total is not of record.

Much evidence of the complainant is devoted to the territorial and political changes in Queens since 1683, the nature of its land area of 117 square miles, its growth in population from 469,042 in 1920 to an estimated 1,695,000 in 1956, and the development of internal and intercommunity transportation facilities, as contrasted with that of the contiguous Borough of Brooklyn, for the purpose of establishing the lack of homogeneity between Queens and the other 4 boroughs of the city.

The complainant insists that the city is a heterogeneous congregation of "metropolitan" areas, of which Queens is one, and differs in every conceivable way from a city community "typical of the remainder of the United States." It covers an extremely large geographical area of over 300 square miles spread over Manhattan, Staten Island, Long Island, and the mainland. It consists of five boroughs, including Queens, each of whose boundaries coincides with those of a county of the State. Although the five were joined to form the city, each still retains its identity as a borough and a county. Each has a borough president, its own administrative offices, and its own courts and legal officers. Although police, fire, sanitation, and school departments are citywide, each borough has a separate suborganization. Many distinct suburban communities, some of which, such as those in Queens, still retain their local identities and are served by local post offices, were gathered into the city. Little is said of the interrelationship between business and industry in Queens and in the other parts of the city.

It is urged by the complainant that the avoidance of unfair and destructive competition is an important factor in determining the area within which a railroad may perform a bona fide collection and delivery service. It points out that the proposed services are not in the nature of gradual extensions of transfer, collection, and delivery service to meet the needs of an expanding population and business, as was the case in Brooklyn, but amount to an appropriation by the defendants of opportunities already developed in a large measure by the Long Island. The latter fears that the interchange traffic originating

at or destined to its 19 stations located within the area of the defendants' proposed service might be lost to the defendants, and that if the defendants are permitted to extend their services, other railroads with whom it now has joint-rate and through-route arrangements in conventional rail service will do likewise. An analysis of the Long Island-Pennsylvania Railroad joint "piggyback" service for the period March through August 1, 1956, shows that of 210 trailer loads inbound to Queens and of 76 outbound, 71 inbound and 60 outbound, representing 46 percent of the total, had been diverted from conventional rail service; that 104 of these were handled to or from industries with rail sidings; that 162 (or 56 percent) moved on rates lower than conventional rail rates, 122 (or 43 percent) on rates the same as rail rates, and 2 (or 1 percent) on rates higher than rail.

The intervener operates three terminals on Long Island; namely, the Kent Avenue and the New York Naval Shipyard terminals in Brooklyn, and the Pidgeon Street terminal at Long Island City in Queens. At the latter, it maintains a yard with about 2.25 miles of tracks, including team tracks for motortrucks. The yard has a capacity of about 100 rail cars, and the team tracks, a capacity of 40 to 50 cars. Industrial sidings serving the National Sugar Refining Company and the H. M. Rubin Company have a capacity of approximately 30 cars and 7 cars, respectively. Holding tracks for the Sugar Company accommodate about 15 cars. The intervener operates 3 tugboats and 10 car floats to move all of its traffic, consisting of rail cars and their ladings, between the terminals mentioned and the respective terminals of the 2 defendants and 7 other railroads located on the mainland. A typical movement is as follows: Loaded cars inbound for Long Island from the Lackawanna's terminal at Hoboken are loaded on a float and conveyed to the Kent Avenue station. At that point all cars bound for Queens are assembled and loaded on a float, and moved to its Pidgeon Street terminal, where they are removed by means of float bridges to the intervener's railroad team tracks or sidings. The movement of outbound cars is the reverse of that described, except that the cars are assembled on the floats in accordance with deliveries to the rail terminals of the respective railroads. Such traffic is interchanged with the railroads under joint-rate and through-route arrangements. The intervener performs no line-haul service on land. Transportation between the Pidgeon Street terminal and points in Queens is handled by the shippers and consignees or their agents by motor vehicles.

In 1955, the intervener handled 4,237 carloads at Pidgeon Street, from which it derived revenue of $385,754, including 192 carloads, producing $13,937, consigned to the Sugar Company. In the same year, it handled 4,036 outbound carloads with revenue of $420,879,

including 3,779 carloads producing $397,360 shipped by the Sugar Company. It is apprehensive that it will lose a substantial amount of this traffic to the defendants, particularly if they maintain, in conjunction with the proposed services, rates alleged to be lower than conventional carload rates in order to compete with over-the-road motor carriers. It urges that it has already suffered the loss of an unknown amount of its sugar traffic to the defendants, and that about half of the sugar traffic has been lost to the motor carriers. Also, it would be affected seriously if the defendants and other railroads entered into joint-rate and through-route arrangements with the Long Island, similar to those now existing with the Lehigh Valley and the Pennsylvania. The intervener stresses that it can expeditiously handle the defendants' trailers on flatcars between the New Jersey terminals and Pidgeon Street under joint-rate and through-route arrangements. Under such arrangements, each railroad would perform its own collection and delivery service in Queens.

The Lackawanna first established rail-trailer service in July 1954. Extended from time to time, such service is now offered at 800 stations, including 30 major city areas on its own and connecting lines, from Boston, Mass., and Portland, Maine, to Denver, Colo., and other points in the West and Southwest. The extension to the Borough of Queens was motivated by the necessity of competing, as to both rates and service, with motor carriers which are free to provide pickup and delivery services anywhere within the New York City commercial zone, as defined by the Commission in *Commercial Zones and Terminal Areas*, 53 M. C. C. 451, 496. The zone extends considerably beyond the corporate limits of the city. Many industries in Queens, as in other parts of the city, are located off track.

A survey of Queens' traffic, made by the Lackawanna in 1955, indicated a great loss of traffic to motor carriers. Difficulty was experienced in securing traffic to Queens from various western and midwestern shippers, because of the lack of rail-trailer service which has enabled it to compete with highway carriers to Brooklyn, Manhattan, and the Bronx. It asserts that the extension of service to Queens jointly with the intervener is not practical, since it would not provide the necessary expeditious service.

The rates of the Lackawanna for rail-trailer service between Manhattan, Brooklyn, the Bronx, and Queens, and points in trunkline, western trunkline, and central territories are generally higher than conventional boxcar rates, thus preventing diversion of traffic from boxcar service. The shippers interested in the new service are primarily those who are off track, have no private sidings, and are using motor carriers.

The Lackawanna has provided direct lighterage service to and within Queens for more than 50 years. Inbound freight is transferred from cars at Hoboken to lighters which are towed to consignees' places of business in Queens. Traffic originating there is handled in the reverse manner. From 18 to 20 percent of its Queens business moves in lighterage service.

The rail-trailer traffic to and from Queens consists mostly of heavy-loading and high-rated manufactured and miscellaneous products, previously moving by motor carrier, contrasted with bulky, raw commodities which have been moving, and will continue to move, as boxcar traffic. The latter traffic, handled jointly with the BEDT and the Long Island, will not be affected appreciably by the proposed service because of the difference in rate levels. When the general increase authorized in Ex Parte No. 196 was applied, no corresponding increase having been made in motor rates, the Lackawanna suffered a loss of rail-trailer traffic to motor carriers. Subsequently, when the competing rates were equalized by increases and reductions, the lost traffic was regained. A study of the effect of rail-trailer service upon boxcar traffic to and from Manhattan, the Bronx, and Brooklyn, between July 12, 1954, and July 31, 1956, showed that only about 1.7 percent was diverted from boxcar service. Of 2,669 trailer loads handled to and from Brooklyn, which is served by the complainant and the intervener, only 46 loads or 1.72 percent were determined to have been diverted from regular rail service. Between July 5 and August 31, 1956, the Lackawanna handled 41 trailer loads to and from Queens, none of which was determined to have been diverted from boxcar service. In January 1956, the Long Island handled 4,499 carload shipments to and from the 11 Queens stations previously referred to, of which about 20 percent were interchanged with the defendants. Up to the time of the hearing, all of the traffic obtained by the Lackawanna from the Sugar Company in Queens for movement in rail-trailer service was diverted from motor-carrier service. The rail-trailer rates on sugar were established at the rate levels found to be moving the traffic by motor carrier.

The Erie's situation in the New York City area is much the same as the Lackawanna's. It established rail-trailer service to reverse a 20-year trend of diversion of heavy-loading and high-rated traffic from the rails to the highway carriers. The traffic of shippers located off track has moved almost entirely by such carriers. Rail-trailer service is the one effective means, it is asserted, by which the railroads can recover some of the desirable traffic thus lost. The Erie's trailer service has grown from a limited operation in July

1954, between New York and New Jersey points, on the one hand, and, on the other, Chicago, Ill., to an operation now serving over 50 stations on its own lines and numerous points on connecting lines in New England, the Midwest, and the Southwest. Queens is served by rail-trailer service through the Erie's terminal in Jersey City. Joint rail service is maintained with the BEDT and the Long Island by the use of car floats. Direct lighterage service, similar to the Lackawanna's, is provided between the Jersey City terminal and industries in Queens. Joint operation of the trailer service with BEDT would be unsatisfactory because of the additional time required.

A study of the effect of the Erie's rail-trailer service to and from Brooklyn, Manhattan, and the Bronx, between July 12, 1954, and September 1, 1956, revealed that of 1,848 trailers handled, only 13, or 0.7 percent, were diverted from regular boxcar service, the remainder being diverted from motor carriers. Of 17 trailers handled from July 9 to August 31, 1956, none was diverted from boxcar service.

In *Trailers on Flatcars, Eastern Territory*, 296 I. C. C. 219, the Commission found, among other things, that the use of motor vehicles by the present defendants and other eastern railroads between their rail terminals in New Jersey and the premises of consignors and consignees in the Boroughs of Manhattan, Brooklyn, and the Bronx, were bona fide terminal-area collection-and-delivery service incidental to line-haul transportation of trailers by railroad, which lawfully could be performed without certificates issued under part II of the act. BEDT, with other terminal carriers serving Brooklyn, was a protestant in that proceeding. The past definitions of terminal areas, the changing concept thereof in the face of the commercial and industrial expansion of the country's metropolitan areas, and the correlative need for the extension of transportation services, discussed in that report, could aptly be repeated here. The only distinction of substance between the facts present therein and in the instant proceeding is that the carriers had maintained stations and performed pickup and delivery service in those boroughs for years, while their service to Queens, as noted, has been confined to the water's edge. While the prior service was mentioned in the report in the cited proceeding, its bearing on the ultimate findings was not significant. Any doubt in this respect should be dispelled by the Commission's report on further hearing in *Pickup and Delivery Limits at Los Angeles, Calif.*, 299 I. C. C. 347, wherein the respondent admitted that, with minor exceptions, it had not theretofore rendered service in the considered area of extension. In that proceeding, numerous separate communities and municipalities were found to be so related to the

base municipality as to constitute integral parts of an industrial and business metropolis and to justify their inclusion in the terminal area of a railroad serving the base community. A similar conclusion is warranted here.

We find that the motor transportation of freight in truck trailers by the defendant railroads over the public highways between their respective rail terminals in New Jersey and the premises of consignors and consignees in the Borough of Queens, New York City, incident to the line-haul movement of such freight in trailer-on-flatcar service, is bona fide terminal-area collection-and-delivery service incidental to transportation by railroad within the meaning of section 202 (c) of the act, and lawfully may be performed without certificates issued under part II of the act; and that the tariffs of the defendants providing for such services are not shown to be unlawful. The complaint will be dismissed.