No. 32231

PENN-DIXIE CEMENT CORPORATION v. DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY ET AL.

Decided March 24, 1958

Charges collected or sought to be collected on 37 carload shipments of cement from Penn-Allen, Pa., to New York Lighterage Station, N. J., found not shown to have been unjust or unreasonable. Complaint dismissed.

R. J. Janer for complainant.

No appearance for defendants.

REPORT OF THE COMMISSION

DIVISION 3 COMMISSIONERS TUGGLE, MURPHY, AND MINOR

BY DIVISION 3:

The modified procedure was followed. The complainant filed exceptions to the examiner's proposed report. Exceptions and requested findings not discussed in this report nor reflected in our findings or conclusions have been considered and found not justified.

By complaint filed on July 15, 1957, the complainant, a corporation engaged in the manufacture and sale of cement, alleges that the charges collected or sought to be collected on 27 carloads of "high early strength" portland cement, moved on and between April 15 and December 2, 1955, from Penn-Allen Pa., to New York Lighterage Station, N. J., destined to points within the lighterage limits of New York, N. Y., were unjust and unreasonable. Reparation on 19 shipments, and the waiver of the collection of undercharges on the remaining shipments, are sought. Special-docket applications filed with the Commission by the Lehigh and New England Railroad Company on December 13, 1956, and March 6, 1957, for authority to refund undercharges collected and to waive the collection of other undercharges, were denied on March 29, 1957.

At its plant in Penn-Allen, the complainant manufactures a cement known commercially as "Penn-Dixie High Early Strength Portland" cement. The use of this product enables the concrete mix to reach a high strength in a relatively short time. To obtain this objective, this type of cement is ground to an extreme fineness, almost twice that specified by the American Society of Testing Materials for regular portland cement. Because of its extra fineness, the cement entraps more air in loading and makes it impossible to load a container or other rail car to the same weight possible with regular portland cement.

The complainant, at times, uses air-activated container cars to ship cement destined for delivery by lighter in the New York Harbor area. These cars are of the gondola type equipped with air-activated containers. The issues presented in this proceeding relate to the 80,000-pound minimum applicable on the instant commodity in container cars. The complainant contends that 80,000 pounds of this type cement cannot be loaded into a single container car, and that thus the minimum results in unjust and unreasonable charges. It urges that charges on these shipments should have been based on the actual weight, subject to a minimum not in excess of 70,000 pounds. The tariff was amended, at the complainant's request, on January 28, 1956, subsequent to the period of movement, to provide that the actual weight, subject to a minimum of 70,000 pounds, will apply when container cars are used and loaded to capacity. The defendants entered no appearance in the proceeding.

The considered shipments moved in container cars furnished by The Delaware, Lackawanna and Western Railroad Company from its supply of 90 cars of this type owned by it, which comprise less than 1 percent of the more than 14,000 freight cars owned by this defendant. The Lehigh & New England does not own any such special equipment, but has available 99 cars of this type owned by the Lehigh Valley Railroad Company, which is less than 1 percent of more than 14,000 freight cars owned by that carrier. On shipments of cement requiring delivery by lighter, a lighterage minimum weight of 300,000 pounds must be met, and the shipper ordinarily orders and uses 4 container cars for each shipment.

Of the 37 cars used, 35 failed to load to the 80,000-pound minimum because of the described inherent nature of the commodity. The failure of the other two to load to the required minimum was due to a defective container on each of the cars. Freight charges were paid on the basis of the actual weights, and were prepaid. Immediately thereafter, the Lehigh & New England presented undercharge bills to the complainant seeking to collect charges based on the published minimum of 80,000 pounds. Undercharges of $253.79 were paid on 19 of the shipments, leaving an unpaid balance of $225.48 on those remaining. The carrier then filed the above-mentioned special-docket applications.

The complainant contends that, while the 80,000-pound minimum is satisfactory for application on ordinary portland cement loaded in regular freight cars, it is excessive for the commodity here considered because it violates the basic principle that charges per car should not be based on minimum weights which cannot be loaded in ordinary available equipment, and that it is unjust and unreasonable to base charges on minima which cannot be loaded. In support of this principle, it cites *Lee* v. *Colorado & S. Ry. Co.*, 276 I. C. C. 572,

Franklin Transformer Mfg. Co. v. *Baltimore & O. R. Co.*, 278 I. C. C. 349, and *Berry Door Corp.* v. *New York Central R. Co.*, 278 I. C. C. 479, hereinafter called, respectively, the *Lee*, *Franklin*, and *Berry* cases.

In the *Lee* case, the complainant sought to avoid the application of charges on shipments of tractor-grader plow combinations based on a 24,000-pound carload minimum applicable on agricultural implements generally. The commodity would not load much in excess of 20,000 pounds, but division 3 declined to require that charges be based on actual weights or on a lower minimum. The *Franklin* case concerned carload shipments of refrigerator doors ranging from 11,450 to 26,650 pounds per car, which moved at rates applicable on refrigerator parts, minimum 36,000 pounds. Division 2 prescribed as just and reasonable on past shipments rates, minimum 36,000 pounds, to alternate with the less-than-carload rates, whichever produced the lower charges. In the *Berry* case, a lower minimum to apply on carloads of aluminum garage doors was sought. This commodity could not be loaded to the stated minimum, and while division 2 indicated that the minima seemed high, on the limited evidence offered it declined to disturb the assailed minima.

The minimum here assailed applies also on common, hydraulic, masonry, mortar, and natural or portland cement, and according to the complainant, this minimum is satisfactory for shipments of regular portland cement, which it can and does load to an average of 100,000 pounds in an air-activated container car. We are not advised as to the loading possibilities of the other varieties of cement named. Weights ranging from 70,700 to 79,000 pounds were loaded on the 35 defect-free cars, and 58,400 and 62,100 pounds on the defective cars. The complainant requests that we make an exception in the case of its high early strength portland cement and find that the 80,000-pound minimum was unreasonable for application on that cement.

The complainant asserts that the assailed minimum was not designed primarily on revenue considerations. It points out that the Lehigh & New England provides a 50,000-pound minimum on cement shipped to the New York Harbor area for delivery other than by lighter. The rate on such shipments is the same as on those requiring lighterage service, the only difference being the minimum weight. Thus, they contend that if the rate is compensatory with a 50,000-pound minimum, it would necessarily be compensatory with a 70,000-pound minimum.

The establishment of a carload minimum on cement, a commodity embracing several types of different densities, necessarily reflects some element of compromise so as to reflect the general or average conditions in the industry on cement traffic taking the same rate. The complainant is subject, for example, to an 80,000-pound minimum on portland cement, a product admittedly capable of loading in excess of

100,000 pounds, and at the same time cannot load high early strength portland cement to the 80,000-pound minimum. In the *Lee* case, division 3 alluded to the basic principle that minimum weights should be based on the loading capabilities of the commodity, but stated (page 575) that—

> this principle is subject to the exception that the measure of carload minima is that which will best serve the general public and at the same time insure economic use of equipment. Minimum weights are made to meet general conditions and should not be lowered to meet the requirements of a particular manufacturer or product.

There is no indication that the minimum weight here assailed fails to meet the general conditions encountered in the transportation of cement, nor are we convinced that the 50,000-pound minimum alluded to by the complainant affords an adequate standard of what constitutes economic use of the rail equipment here concerned. The fact that the carriers subsequently reduced the minimum by voluntary action raises no presumption that the prior minimum was unreasonable.

As to the two cars with the defective containers, the complainant had the option of accepting or rejecting them. There was a general shortage of air-activated container cars at the time in the area of operation, but it is not clear whether such cars were the only type capable of handling this traffic. The complainant contends that, because of an acute shortage of air-activated container cars, its use of the defective cars benefited the carrier as well as the shipper and consignee. Viewing this in its most favorable light, the complainant still has the burden of showing at least that no suitable replacements were available at the time each item of defective equipment was furnished. It states: "To request a replacement for the car with the defective container would be futile as this type of equipment is normally scarce." But there is in this statement no indication that another type of car could not have been used for those particular shipments.

We are asked to devise a plan by which shippers would be free to use cars with defective containers under a minimum weight adjusted downward. Such a plan might encourage the use and reuse of defective equipment, and thus would be of doubtful propriety from the standpoint of either economy or safety. If such a plan were approved for application on cement, it is of course plain that the same principle would have to be extended to other commodities. Moreover, since only 2 defective cars were furnished the complainant over a period of 7½ months, the need for a special plan is not indicated.

We find that the assailed charges are not shown to have been unjust or unreasonable. An order will be entered dismissing the complaint.

303 I. C. C.