No. 31789

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

Decided April 30, 1958

Upon reconsideration, rate collected on dry extract of coffee (condensed), in carloads, from Morris Plains, N. J., to Houston, Tex., found inapplicable. Applicable rate determined and reparation awarded. Prior report 300 I. C. C. 23.

Appearances as shown in prior report and, in addition, *Arthur A. Arsham* for complainant.

REPORT OF THE COMMISSION ON RECONSIDERATION

BY THE COMMISSION:

In the prior report, 300 I. C. C. 23, decided February 15, 1957, division 2 found that the rate [1] collected on 40 carloads of dry extract of coffee (condensed), popularly called instant coffee, moved from Morris Plains, N. J., to Houston, Tex., on and between May 5, 1953, and January 4, 1955, was applicable in some instances and inapplicable in others. The applicable rates were determined, and found not shown to have been unjust or unreasonable. Reparation was awarded. Upon petition by the complainant, the proceeding was reopened for reconsideration.

Requested findings and exceptions not specifically discussed herein nor reflected in our findings or conclusions have been considered and found not justified.

The charges ultimately collected on these shipments were based on a class 35 exceptions rating subject to the western classification and rate of $2.18, minimum 36,000 pounds. The complainant contends that a rate of $1.92, minimum 30,000 pounds, based on a class 40 rating provided by the uniform classification was applicable. In the prior report it was found that the assailed rate of $2.18 based on the exceptions rating of class 35 was applicable on shipments moved prior to July 1, 1954, and that thereafter a combination rate of $1.99, minimum 30,000 pounds, composed of a commodity rate of 83 cents to Cairo, Ill., and a rate of $1.16 beyond, applied.

During these movements the uniform classification provided 2 ratings on this commodity, 1 of class 55 not subject to an agreed or

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

declared released value, and the other class 40 subject to an agreed or declared released value not exceeding 50 cents a pound, referred to herein as a released value. The complainant contends that the exceptions rating, which was not subject to a released value, superseded only the classification rating of class 55, which also was not subject to a released value, and that the exceptions rating did not remove the application of the class 40 classification rating because the released-value provision made instant coffee moving under released valuation, in legal effect, a separate and distinct commodity.

The class 35 exceptions rating providing a rate of $2.18 was established on August 1, 1952, and the tariff naming this rate contained a provision to the effect that, if a combination of rates to and from intermediate points resulted in lower charges, the latter would apply. On July 1, 1954, a commodity rate of 83 cents, minimum 30,000 pounds, was established on instant coffee from Morris Plains to Cairo, and this rate plus the applicable class rate of $1.16, minimum 30,000 pounds, from Cairo to Houston produced a through rate of $1.99. The defendants concede that the combination of intermediates was applicable where it produced lower charges than the rate of $2.18. On January 20, 1955, the class 35 exceptions rating on instant coffee was canceled, and a reduced classification rating of class 32.5, minimum 30,000 pounds, was established, which resulted in a rate of $1.56 on the commodity, without limitation as to value, from Morris Plains to Houston.

The defendants contend that the exceptions rating on instant coffee superseded both the unreleased- and released-value classification ratings. They maintain that the language of the exceptions item is specific; that there is no expressed intent that the exceptions rating should supersede only unreleased-value ratings; and that there are no differences in the commercial or transportation characteristics of the commodity described in the several items naming rates on instant coffee, whether released or not released in value. The identical contention was urged in *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, division 2 found that an exceptions rating on aniline oil requiring no value release was applicable even though it resulted in higher charges than those under the classification ratings on shipments of the commodity when released as to value. In the *Upjohn* case, division 2 held that a commodity rate which was not contingent upon a released value took precedence over rates based on classification ratings whether or not contingent upon released value. There, as here, a separate released-value rating was published in the classification, and the description in the commodity tariff made

no distinction between these articles whether released or not released. Although a petition for reconsideration in the latter proceeding was denied by us on May 21, 1956, we are persuaded here that the exceptions rating on instant coffee, not subject to released value, did not supersede the applicable classification rating published subject to released value.

Under section 20 (11) of the Interstate Commerce Act, carriers may establish and maintain rates dependent upon the released value of a commodity declared in writing by the shipper or agreed upon in writing as the released value of the property shipped when expressly authorized to do so by order of this Commission. The released-value rating on instant coffee was authorized by our orders No. 1104 of May 1, 1952, and No. 1113 of December 10, 1953. The purpose of maintaining released-value rates is that a shipper may have the choice of two rates, under the higher of which unlimited carrier's liability attaches and under the lower of which the shipper, in consideration of the reduced rate, by fair and reasonable agreement declares or agrees that for the purpose of claim in case of loss or damage the value of his shipment is a certain amount, or not in excess of a certain amount specifically published as authorized. When such an agreement is made at the time of shipment, the shipper is bound by his declaration and is estopped from claiming or recovering more than the value stated in case of loss or damage. *Adams Exp. Co.* v. *Croninger*, 226 U. S. 491; *Crown Overall Mfg. Co.* v. *Director General*, 100 I. C. C. 471. Each of the considered shipments was tendered to the originating carrier with a notation on the bills of lading that the agreed or declared value of the property is hereby specifically stated by the shipper to be not exceeding 50 cents a pound, and the defendants do not deny that they accepted the shipments subject to that notation.

As stated, the defendants contend that there are no differences in the commercial or transportation characteristics of the commodity described in the several items naming rates on instant coffee, whether released or not released in value. It seems apparent that from a commercial standpoint there was no difference in the coffee (assuming it was of the same grade) whether its value was released or not released, but it is equally apparent that there was a distinct difference from a transportation standpoint by reason of the shipper's declaration as to value. If the exceptions rating had been subject to a released value of 50 cents a pound, it obviously would have had no application in the absence of a declaration of value by the shipper and the higher unreleased classification rating would have applied. Stated differently, an exceptions rating subject to a released value of 50 cents a pound would not have removed the unreleased rating from the classification, and conversely we conclude that the unreleased exceptions rating did not remove the released rating from the classification.

In view of our findings herein, it is unnecessary to discuss the complainant's contention that the tariff provisions respecting the released-value rating in the classification were indefinite and ambiguous prior to April 10, 1954, when there was published in connection with the released rating a provision to the effect that rates based on that rating would take precedence over all other rates not subject to released value when the released-value rates resulted in lower charges. The latter provision, however, supports the view that the released and unreleased ratings should be considered as separate and distinct items from a transportation viewpoint. Neither is it necessary to consider the allegation of the unjustness or unreasonableness.

Upon reconsideration, we find and conclude that the assailed rate charged on the considered shipments was inapplicable; that the applicable rate was $1.92, plus the general increases authorized in Ex Parte No. 175; that the complainant made the shipments as described, and paid or bore the charges thereon; and that it was damaged thereby and is entitled to reparation, with interest, in the amount of the difference between the charges paid and those which would have accrued at the rate herein found applicable.

The findings in the prior report, 300 I. C. C. 23, with respect to applicability are reversed. The complainant should comply with rule 1.100 of the General Rules of Practice.

CHAIRMAN FREAS and COMMISSIONER MINOR dissent.

MURPHY, *Commissioner*, dissenting:

I cannot agree with the majority report that the classification description of instant coffee pertains to two separately defined commodities simply because, when released in value, a lower rating is provided. On the contrary the commodity description remains unchanged irrespective of the number of ratings provided and this, I believe, is the true test.

If the rationale of the majority were carried to its logical conclusion, we would be committed to the proposition that there are two or more commodities created whenever transportation characteristics warrant different ratings. Are we prepared to say, however, that instant coffee is a different commodity when shipped in one instance on a carload rating and in another on a less-than-carload rating? I think not. By the same token, would it be reasonable to conclude that there are two commodities created when provision is made for a lower rating on an article shipped knocked down than for the same article set up, or when a lower rating is provided on materials in bulk than on the same materials in packages, or when a higher rating is applied by rule 34 of the Uniform Freight Classification?

With these analogies in mind, it becomes apparent that a classification exceptions rating on instant coffee which does not distinguish between released and unreleased values takes precedence over all the classification ratings on the identical commodity and has the effect of making inapplicable the classification ratings whether or not contingent upon released values. It is the description which is controlling, and the different ratings dependent upon value are no more determinative of rate precedence than ratings dependent upon alternative minimum weights, packaging requirements, length of car, et cetera. The logic of this position was upheld in *Dow Chemical Co.* v. *Chesapeake & O. Ry. Co.*, 296 I. C. C. 544, decided on August 30, 1955, and in *Upjohn Co.* v. *Pennsylvania R. Co.*, 297 I. C. C. 699, decided on December 22, 1955. I would adhere to this precedent as sound.

COMMISSIONER WINCHELL joins in COMMISSIONER MURPHY'S dissenting expression.

COMMISSIONER MITCHELL did not participate in the disposition of this proceeding.