No. 35168

# DURALITE COMPANY, INC. v. ERIE LACKAWANNA RAILWAY COMPANY, ET AL.

*Decided March 16, 1971*

Interstate Commerce Commission held to be without jurisdiction to grant relief sought for alleged unlawful abandonment of a portion of the branch line of the New York, Susquehanna and Western Railroad Company serving complainant's plant at Passaic, N. J., and for alleged violation of carriers' duty to provide service under section 1(4). Complaint dismissed.

*Robert B. Einhorn* for complainant.
*Francis X. Kennelly* and *J. T. Clark* for defendants.

REPORT AND ORDER OF THE COMMISSION

BY THE COMMISSION:

Exceptions to the examiner's report and recommended order were filed by the complainant. 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 October 1, 1969, the complainant, the Duralite Company, Inc., alleges that the defendants, the New York, Susquehanna and Western Railroad Company (Susquehanna) and the Erie Lackawanna Railway Company (Erie) have failed since on or about August 15, 1969, to render freight service requested to complainant's plant at Passaic, N. J., in violation of section 1(4) of the Interstate Commerce Act, and that the Susquehanna has abandoned the line of railroad serving said plant without obtaining authority therefor pursuant to section 1(18) of the act. Reparations for alleged damages due to the failure to provide service on shipments, including those moving *pendente lite,* are sought. The complainant seeks also an order requiring the defendants to cease and desist from the alleged violations, and to provide rail freight service to its plant.

The complainant is engaged in the business of manufacturing, distributing, and selling outdoor and casual furniture. Its principal manufacturing plant is at Passaic, N. J., at which point it receives inbound rail cars of raw materials and from which it ships rail carloads of finished products. The plant has a rail siding served by Susquehanna. Annual traffic averages 20 carloads inbound and 500 carloads outbound. The siding is located at the terminal end of the Passaic branch of the Susquehanna, and the complainant is one of three



HeinOnline -- 339 I.C.C. 312 1970-1971

customers served at this point. The area is also served by the Erie and the other two customers have track connections with that defendant as well. The Erie operates a team track in this area, located a short distance from the complainant's plant. To reach this track, however, requires trucking from the plant and extra handling.

The branch line of the Susquehanna leading to the complainant's plant passes over the Passaic River on a wooden bridge between the city of Garfield in Bergen County and the city of Passaic in Passaic County. This bridge is old and has been severely damaged by flood waters and debris, and it has become unsafe for the passage of trains. It was taken out of service for 5 months in 1968 in order to make repairs, and, in August 1969, it was again necessary to embargo all traffic to points beyond the bridge. Surveys by two independent engineers confirmed the unsafe condition of the bridge and repair of the existing structure is considered impracticable. The Susquehanna asserts that it has no funds to replace the bridge and that its permissible borrowing limit established by the Commission has already been reached.

If the bridge is not made usable, the relief sought is to require service by interchange of cars from the Susquehanna to the Erie and subsequent return of the cars to the Susquehanna at a point beyond the damaged bridge. Alternatively, the complainant seeks to require the Susquehanna to arrange to operate over a portion of the Erie tracks to accomplish the same result. It is conceded that the Susquehanna has physical connections with the Erie which make it possible to operate trains over a portion of the latter's tracks, bypassing the bridge and returning to the Susquehanna track at a point where cars can be delivered to and received from the complainant's siding. Such an operation was carried out at least once in 1968 but the Susquehanna contends that the expense of such service prohibits its use, assuming that appropriate arrangements could be made with the Erie. In an exhibit, for example, Susquehanna shows that in 1968 the total number of cars handled by it for complainant was 588 at an average return to Susquehanna per car of $33.60. Total annual revenues from this traffic was $19,756, which amounted to an average loss of $8,721 to the carrier. Susquehanna estimates that under the proposed alternative route desired by complainant its annual loss will increase to $57,509 with a loss per car of $97.80.

The examiner found that the Commission is without jurisdiction to grant the relief sought. On exceptions, the complainant argues that the Commission can entertain the complaint pursuant to section 1(18) of the act and that the examiner's finding disregards a line of cases where the Commission has recognized its jurisdiction over railroad embargoes under section 1(4) of the act.

The complaint is predicated upon alleged violations of sections 1(18) and 1(4) of the act, specifically that Susquehanna has abandoned a portion of its line without authorization of the Commission pursuant to section 1(18), and that in failing to render service requested by complainant, both defendants have violated their duty pursuant to section 1(4). The applicable portion of section 1(18) reads,"*** no carrier by railroad subject to this part shall abandon all or any portion of a line of railroad, or the operation thereof, unless



HeinOnline -- 339 I.C.C. 313 1970-1971

and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment." While it is apparent that Susquehanna did not seek such a certificate from the Commission, it is well settled that under section 1(20)[1] remedies for violation of section 1(18) must be sought by court action.[2] Thus, we have no jurisdiction to grant the relief sought by complainant for the alleged unlawful abandonment.

The complainant also contends that the defendant is legally bound to provide the service in issue pursuant to section 1(4) until authorized by the Commission to abandon service. The pertinent part of section 1(4) reads:

> It shall be the duty of every common carrier subject to this part to provide and furnish transportation upon reasonable request therefor, ***.

Based upon the views expressed by the Supreme Court in *United States* v. *Pennsylvania R. Co.*, 242 U.S. 208 (1916), the Commission has taken the position that enforcement of the railroads' section 1(4) duties, except as entrusted to us by other provisions of the statute, rests with the Courts and not with us. See, for example, *Oliver Mfg. Supply Co.* v. *Reading Co.*, 297 I.C.C. 654 (1956), and cases cited therein.

In the circumstances, therefore, we find that the Interstate Commerce Commission is without jurisdiction to grant the relief sought for alleged unlawful abandonment of a portion of the branch line of the New York, Susquehanna and Western Railroad Company serving complainant's plant at Passaic, N. J., and for alleged violation of carriers' duty to provide service under section 1(4). Accordingly, the complaint will be dismissed.

COMMISSIONER BUSH, dissenting in part:

The complaint against the defendants, the Erie Lackawanna Railway Company (Erie) and the New York, Susquehanna and Western Railroad Company (Susquehanna) for alleged unlawful abandonment of a portion of the branch line of the Susquehanna should not, under the particular facts of record, be dismissed for lack of jurisdiction, and complainant's remedy, at this time, should also not be found to exist solely before the judiciary. I do agree, however, that the complaint should be dismissed, but for the reason that complainant has not proven that either defendant failed to fulfill its common carrier duty to provide service upon *reasonable*[3] request in violation of section 1 of the Interstate Commerce Act (49 U.S.C. § 1).

Although the Erie has a team track in the area of the complainant's plant, it has no line leading to the plant, nor trackage rights over the Susquehanna

---

[1]The pertinent language provides, "Any construction, operation, or abandonment contrary to the provisions of this paragraph or of paragraph (18) or (19) of this section may be enjoined by any court of competent jurisdiction at the suit of the United States, the Commission, any commission or regulating body of the State or States affected, or any party in interest;***."

[2]See *Powell* v. *United States*, 300 U. S. 276 (1937); *Long Island R. Co.* v. *New York Central R. Co.*, 281 F. 2d 379 (1960); *Meyers* v. *Famous Realty, Inc.*, 271 F. 2d 811, 816 (1959).

[3]All emphasis added except for the cited cases.



HeinOnline -- 339 I.C.C. 314 1970-1971

branch line whereby it might afford direct service to this complainant. In order to acquire the latter, it is necessary for *carriers* by railroad to apply for approval and authorization therefor from us pursuant to the provisions of section 5 of the act (49 U.S.C. § 5), which neither defendant has sought. Such action being solely permissive, as is the case of an extension of a line of railroad, we lack jurisdiction to grant such approval in the absence of an application for authority in either or both instances. Accordingly, the alternative relief, to the extent that trackage rights are sought by the complainant *shipper*, should be denied.

Admittedly, the Susquehanna can provide service for the complainant by interchange of cars with the Erie pursuant to the provisions of section 3(4) of the act (U.S.C. § 3(4)), which is not in issue herein. It is conceded that this carrier has physical connections with the Erie, enabling the former to operate over a portion of the latter's tracks, bypassing the destroyed Susquehanna bridge. Because of destruction of this bridge, an old, wooden structure requiring almost constant repairs due to damage by ravages of fire, flood waters, and debris, it became unsafe for the movement of trains thereover. While the defendant, Susquehanna, has attempted to keep the bridge in repair, its age and the constant battle with the aforesaid elements, constituting acts of God, render the carrier's efforts an exercise of futility. In 1968, the bridge was taken out of service for approximately 5 months to repair damage from such causes. In August of 1969, it was necessary to embargo all traffic to points beyond the bridge for similar reasons.

Surveys by two independent engineers confirmed the unsafe condition of this structure, and repair thereof is considered impracticable and unfeasible *at this time*. The unrebutted statement by the Susquehanna that it has no funds to replace the bridge and that its permissible borrowing limit established by the Commission has already been reached is entitled to substantial weight. These facts are of particular significance when consideration is given to the net railway operating losses incurred by this carrier as reflected in its annual reports on file with this Commission, of which I take official notice.

The complaint is predicated upon alleged violations of sections 1(18) and 1(4) of the act, specifically, that Susquehanna has abandoned a portion of its line without authorization of the Commission pursuant to section 1(18). In failing to render service requested by complainant, both defendants allegedly have violated their duty to provide service upon "*reasonable*" request pursuant to section 1(4). The applicable portion of section 1(18) is stated to be the provision that "***no carrier by railroad subject to this part shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall *first* have been obtained from the Commission a certificate that the present and future public convenience and necessity permit of such abandonment." While it is apparent that Susquehanna did not seek such a certificate from the Commission, not every change in ownership or mode of operation constitutes an abandonment and no Commission approval is necessary where the cessation of operations results, not from the volition of the railroad, but as a result of conditions over which the railroad has no con-



HeinOnline -- 339 I.C.C. 315 1970-1971

trol. *City of Alexandria, Va.* v. *Chicago, Rock Island & Pacific R. Co.*, 311 F. 2d 7, 10 (5 Cir. 1962). Such are the circumstances in this case. The railroad was, therefore, precluded from "first" obtaining a certificate of public convenience and necessity pursuant to the provisions of section 1(18) so as to render that section applicable or those of section 1(20), conferring exclusive jurisdiction upon the judiciary to provide remedies from violations of the aforesaid subsection.

The evidence of record here further shows that the complainant and Susquehanna representatives were jointly attempting to resolve the issue involved early in 1970, so that service could be provided on a reasonable basis. This fact is incompatible with any intention by Susquehanna to abandon, which intention must necessarily exist before the provisions of section 1(18)-(20) may be applied. See *Williams* v. *Atlantic Coast Line R. Co.*, 17 F. 2d 17, 22 (4 Cir. 1927); *Wheeling & Lake Erie Ry. Co.* v. *Pittsburgh & West Virginia Ry. Co.*, 33 F. 2d 390, 392; *City of Flint* v. *Grand Trunk Western R.R. Co.*, 69 F. 2d 604, 606; *Myers* v. *Arkansas & Ozarks Ry. Co.*, 185 F. Supp. 36, 41; *City of Alexandria, Va.* v. *Chicago, Rock Island & Pacific R. Co., supra.*

As heretofore indicated, the plaintiff also contends that the defendant is legally bound to provide the service in issue pursuant to the provisions of section 1(4) until authorized by the Commission to abandon service. The relevant portion of section 1(4) is as follows:

> It shall be the duty of every common carrier subject to this part to provide and furnish transportation upon reasonable request therefor, ***.

Whether the shipper's request was "reasonable," on balance, with the Susquehanna's common carrier duty in this case, the following significant facts must be considered and, in my view, lead to but one conclusion. The estimated cost of replacement of the bridge amounting to approximately $627,117, the inability of the Susquehanna to finance or obtain the necessary financial assistance for reconstruction, the estimated average yearly loss of $8,721.13 for handling traffic for the complainant in 1968, the precarious financial position of Susquehanna, the availability of team-track delivery and/or origination by the Erie to the complainant, and the existence of other competitive modes of transportation clearly indicate that the complainant's request that the Susquehanna provide and furnish transportation is unreasonable. Accordingly, I would find that the Susquehanna is not legally bound to provide the service in issue, and dismiss the complaint.

COMMISSIONER GRESHAM, whom COMMISSIONER BREWER joins, dissenting in part:

I agree with the majority that remedies for violation of section 1(18) of the Interstate Commerce Act must be sought by court action and that, accordingly, we have no jurisdiction to grant the relief sought by complainant insofar as the alleged unlawful abandonment is concerned. However, the facts in this proceeding indicate to me that an abandonment within the purview of section 1(18) probably has occurred here. Therefore, I would refer this mat-



HeinOnline -- 339 I.C.C. 316 1970-1971

ter to the Bureau of Enforcement of this Commission to bring a court action under section 1(20) seeking both (1) determination that an unlawful abandonment has occurred, and (2) an injunction against the continuing violation. Cf. *I.C.C.* v. *Memphis Union Station Company,* 230 F. Supp. 456 (W. D. Tenn. 1964), affirmed 360 F. 2d 44 (C.A. 6th Cir. 1966), cert. den. 385 U.S. 830 (1966). This is not to say that, if the defendants filed an application to abandon the line involved, the merits might or might not justify a finding that the present or future public convenience and necessity permit of such abandonment. But it is to say that the strong purpose of the Interstate Commerce Act prohibiting abandonment of railway service without approval of this Commission outweighs the present posture of the defendants regarding this matter. Cf. *Meyers* v. *Jay Street Connecting Railroad,* 259 F. 2d 532, 536 (C.A. 2d Cir. 1958).

I do not agree, however, with the indication by the majority that this Commission has no power to enforce the railroad's section 1(4) duties. The *Pennsylvania* case, upon which the majority heavily relies, principally dealt with the provision of additional cars by a rail carrier. And, in my opinion, it is by no means dispositive of the issue whether this Commission can make a determination here that the shipper is or is not making "reasonable request" for service and, if so, require the carrier to perform its duty. Indeed, 41 years after the *Pennsylvania* case this Commission in *Galveston Truck Line Corp.* v. *Ada Motor Lines, Inc.,* 73 M.C.C. 617 (1957), unanimously found that certain motor carriers were not meeting their statutory duty under section 216(b) of the act (similar to a counterpart of section 1(4)) to provide adequate service and that they must cease and desist from such unlawful conduct. And the Supreme Court noted the *Galveston* case with approval in *Carpenters' Union* v. *Labor Board,* 357 U.S. 93 (1958). At page 109 thereof the Court indicated that this Commission is concerned with the *enforcement* of duties pursuant to the Interstate Commerce Act. The Court continued:

> It is the Commission that in the *first* [emphasis mine] instance must determine whether, because of certain compelling considerations, a carrier is relieved of its usual statutory duty, and necessarily it makes this determination in the context of the particular situation presented by the case before it.

I recognize that section 1(4) does not specifically charge this Commission with the responsibility of enforcing its provisions. But section 12(1) of the act provides that this Commission is "authorized and required to execute and enforce the provisions of this part." And even though such express authority is not present in section 1(4), it seems to me that one of the basic reasons for the creation of the Interstate Commerce Commission was to enforce the provisions of the act unless such power is expressly delegated to other bodies. Compare the language of the Supreme Court in *American Trucking Assns.* v. *U.S.,* 344 U.S. 298 (1953), at pages 309-310.

In *American Trucking* v. *A., T. & S.F.R. Co.,* 387 U.S. 397 (1967), at pages 412-413, the Supreme Court concluded that, in light of the mandate of the



HeinOnline -- 339 I.C.C. 317 1970-1971

national transportation policy, this Commission had authority derived from the common carrier obligations of the railroads as reflected in section 1(4) and certain other sections of the act to promulgate a requirement that any railroad offering trailer-on-flatcar service through its open-tariff publications must make that service available to any person on nondiscriminatory terms. I would infer from this further support for the tenet that the duties of carriers under section 1(4) alone can be enforced by this Commission. And I conclude with a quotation of language by the Supreme Court from page 416 of the same opinion, which I believe is apposite here.

***[T]he Commission, faced with new developments or in light of reconsideration of the relevant facts and its mandate, may alter its past interpretation and overturn past administrative rulings and practice. ***[T]his kind of flexibility and adaptability to changing needs and patterns of transportation is an essential part of the office of a regulatory agency. Regulatory agencies do not establish rules of conduct to last forever; they are supposed, within the limits of the law and of fair and prudent administration, to adapt their rules and practices to the Nation's needs in a volatile, changing economy. They are neither required nor supposed to regulate the present and the future within the inflexible limits of yesterday.

COMMISSIONER BROWN, dissenting:

In line with my dissenting expression in *Adequacies—Passenger Service—Southern Pac. Co.*, 335 I.C.C. 415, 437, I disagree with the majority that, under section 1(4) of the act, the Commission lacks jurisdiction to enforce a rail carrier's duty to render transportation service upon reasonable request therefor.

*It is ordered,* That the complaint herein be, and it is hereby, dismissed.



HeinOnline -- 339 I.C.C. 318 1970-1971