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INTERSTATE COMMERCE - DISCRIMINATION BETWEEN SHIPPERS BY PROVIDING NON-TRANSPORTATION SERVICES AT LESS THAN COST

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INTERSTATE COMMERCE — DISCRIMINATION BETWEEN SHIPPERS BY PROVIDING NON-TRANSPORTATION SERVICES AT LESS THAN COST — In order to increase the use of rail transportation, seven railroads with terminals at the Port of New York expended a total of $35,000,000 in construction of warehouse and docking facilities. Charges for leases, storage (both in and out of the transit privilege), handling and insurance were found by the Interstate Commerce Commission to be non-compensatory. The commission further found that the below-cost warehouse rates were not available to all shippers alike. Upon an appeal by the carriers from a three-judge court's dismissal of their petition to enjoin enforcement of a cease and desist order issued by the commission, it was *held*, that sections 2, 3(1) and 6(7) of the Interstate Commerce Act[1] had been violated, in that the carriers had discriminated unlaw-

[1] 49 U. S. C. (1935), § 2: "If any common carrier subject to the provisions of chapter shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered or to be rendered, in the transportation of passengers or property, subject to the provisions of this chapter, than it charges, demands, collects, or receives from any other person or persons for doing him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is prohibited and declared to be unlawful."

Ibid., § 3(1): "It shall be unlawful for any common carrier . . . to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

Ibid., § 6(7): "nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such

fully, had given unreasonable preferences, and had received less compensation than the rates filed. *Baltimore & Ohio Railroad v. United States*, (U. S. 1939) 59 S. Ct. 284.

As pointed out by the commission,[2] the activities engaged in by the defendant carriers are further examples of economic waste resulting from the competition of railroads with each other.[3] But until the policy problem of railway consolidation is resolved, the carriers must hew closely to the tenets of free competition as prescribed and made mandatory by such provisions of the act as were involved in the principal case. The importance that section 6(7) has played in recent years in proscribing unfair competitive practices is attested by the increasing number of cases falling under its ban.[4] The Court here found that by furnishing commercial [5] warehousing services at less than cost, the carriers were not receiving revenues sufficient to pay the cost of such storage without a concession from the published freight rates.[6] There can be little doubt but that in interpreting the warehousing services to be of a nontransportation nature, the Court correctly found section 6(7) violated. Where payments are made directly by the carriers to certain shippers for the latters' performance of non-transportation services, the courts have found that such action constitutes a violation of sections 2 and 3(1).[7] Likewise where the carriers in-

tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs."

[2] Propriety of Operating Practices—New York Warehousing, 198 I. C. C. 134 at 201 et seq. (1933).

[3] For other examples of similar waste, see Duplication of Produce Terminals, 188 I. C. C. 323 (1932). An alleviation of this particular railway problem is still possible through consolidation of railroads into a limited number of systems. Emergency Railroad Transportation Act, 48 Stat. L. 211 at 217, § 201 (1933), 49 U. S. C. (1935), § 5.

[4] United States v. American Sheet & Tin Plate Co., 301 U. S. 402, 57 S. Ct. 804 (1936); United States v. Pan American Petroleum Corp., 304 U. S. 156, 58 S. Ct. 771 (1938), noted in 37 MICH. L. REV. 644 (1939); New York, N. H. & H. Ry. v. Interstate Commerce Commission, 200 U. S. 361, 26 S. Ct. 272 (1906); Chicago & Alton Ry. v. Kirby, 225 U. S. 155, 32 S. Ct. 648 (1912); and see extensive citation and annotation of cases under this section in 49 U. S. C. A. (1929), p. 283 et seq.

[5] "While storage of property is clearly within the transportation service which carriers are obligated to furnish, their duty under these provisions extends only to that storage which is necessarily incidental to transporting such property." 198 I. C. C. 134 at 195 (1933).

[6] The Court cited for comparison on this rule, Wight v. United States, 167 U. S. 512, 17 S. Ct. 822 (1897); Seaboard Air Line Ry. v. United States, 254 U. S. 57, 41 S. Ct. 24 (1920).

[7] Terminal Warehouse Co. v. United States, (D. C. Md. 1929) 31 F. (2d) 951; Merchants Warehouse Co. v. United States, 283 U. S. 501, 51 S. Ct. 505 (1931); United States v. Union Stock Yard & Transit Co., 226 U. S. 286, 33 S. Ct. 83 (1912); United States v. American Sheet & Tin Plate Co., 301 U. S. 402, 57 S. Ct. 804 (1936).

directly make payments to particular shippers by absorbing certain losses, the courts hold the same sections to be violated.[8] Though sufficient ground for upholding the cease and desist order against these seven defendants may be found in their undoubted violation of section 6(7), it is pertinent to inquire whether sections 2 and 3(1) are actually involved here. Transportation is a decreasing cost industry; therefore it is sound economic policy for the carriers to take on every additional unit of traffic up to their capacity which affords a return at least above the out-of-pocket expense of moving it.[9] The courts, recognizing the economics of transportation, permit carriers to carry products which would not otherwise move, at rates below a mathematical proportion of the burden of operating the entire enterprise.[10] However, the courts insist that the low rates applicable to these slow-moving products yield a return at least equal to out-of-pocket costs. An application of these rules to the facts of the immediate case suggests the possibility that the Court wrongly found a violation of sections 2 and 3(1). If, as a result of the decision in this case, the carriers lose those additional shippers originally acquired by the offering of non-transportation services, which is not at all improbable, and if the revenues derived solely from this class was any amount over the total out-of-pocket costs, a consideration not mentioned in the opinion, the result will be an increase in the joint costs account applicable to the other shippers. Before a court finds sections 2 and 3(1) to have been violated, it is submitted that the economic item of the situation be given a thoroughly adequate consideration.

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[8] Seaboard Air Line Ry. v. United States, 245 U. S. 57, 41 S. Ct. 24 (1920); Central of Georgia Ry. v. Blount, (C. C. A. 5th, 1917) 238 F. 292; Cleveland, C. C. & St. L. Ry. v. Hirsch, (C. C. A. 6th, 1913) 204 F. 849.

[9] See discussion in 28 HARV. L. REV. 683 (1915).

[10] The permitted concession in favor of the traffic which will not otherwise move does not increase the burden on the other classes of service, but lightens the burden of joint costs which they would have to pay without the assistance were the favored traffic not obtained. See RIPLEY, RAILROADS, RATES AND REGULATION 71 et seq. (1922). Cf. Interstate Commerce Commission v. Chicago Great Western Ry., 209 U. S. 108, 28 S. Ct. 493 (1908).