Michigan Law Review

Volume 32 | Issue 1

1933

CARRIERS - DAMAGES FROM PREFERENTIAL RATES

CARRIERS — DAMAGES FROM PREFERENTIAL RATES — The Interstate Commerce Commission held that defendant railroad was discriminating against complainants in forcing them to pay the blanket rate for lumber dealers plus a short-line charge, and made an order to "cease and desist," but further held that the record would not support an award of damages. The Supreme Court of the District of Columbia refused a mandamus to compel the Commission to award damages, but on appeal the Court of Appeals held that the writ should issue. On certiorari from the United States Supreme Court, *held*, judgment of Court of Appeals reversed and petition for mandamus denied since a finding by the Commission of undue prejudice was not inconsistent with a denial of reparation inasmuch as damages resulting from discrimination must be definitely proved and do not automatically flow from a finding of undue prejudice. *Interstate Commerce Commission v. United States ex rel. Campbell*, (U. S. 1933) 53 Sup. Ct. 607.

Since the cases of *Pennsylvania Railroad v. International Coal Co.*[1] and *Southern Pacific Co. v. Darnell-Taenzer Lumber Co.*[2] it has been settled that where the action is based on "unreasonable" or "excessive" rates,[3] damages consist of the excess paid,[4] being assimilated to the common law doctrines of extortion or overcharge;[5] but where the action is based on discrimination,[6] damages must be definitely and causally shown.[7] As a result proof of damages is comparatively simple in the one and exceedingly difficult in the other type of case. In discrimination cases complainant must not only be prepared to prove a definite loss, for example of profits from diversion of business by competitors or of being forced to sell at lower prices,[8] but also must be able to prove that such

[1] 230 U. S. 184, 33 Sup. Ct. 893, Ann. Cas. 1915A 314 (1913).
[2] 245 U. S. 531, 38 Sup Ct. 186 (1918).
[3] Under 24 Stat. 379 (1887), U. S. C. tit. 49, sec. 1(5) (1926).
[4] 1 ROBERTS, FEDERAL LIABILITY OF CARRIERS, 2d ed., sec. 325 (1929).
[5] I. C. C. ANNUAL REPORT 1919, p. 19.
[6] Under 24 Stat. 379-380 (1887), 41 Stat. 479-80 (1920), U. S. C. tit. 49, sec's 2, 3, 4 (1926).
[7] VANDERBLUE AND BURGESS, RAILROADS, RATES, SERVICE, MANAGEMENT 53-55 (1924); 1 ROBERTS, FEDERAL LIABILITY OF CARRIERS, 2d ed., sec. 186 (1929); SHARFMAN, INTERSTATE COMMERCE COMMISSION (Part Two) 388n. (1931).
[8] Interstate Commerce Commission v. United States ex rel. Campbell, (U. S. 1933) 53 Sup. Ct. 607 at 610; Pennsylvania Railroad v. International Coal Co., 230 U. S. 184 at 203, 33 Sup. Ct. 893, Ann. Cas. 1915A 315 (1913).

losses were proximately caused by the undue preference or prejudice alleged.[9] Hence he must show the conditions of competition surrounding his business, a "capacity of preferred producers to fix the prices for the market," and that in fact prices were fixed to his disadvantage solely because of the discrimination, and not because of some other marketing advantage.[10] It seems obvious that such a burden would discourage bad faith (uncertain or vexatious claims), while on the other hand claims based on alleged "unreasonable" rates might be expected to be numerous and burdensome.[11] Facing this, the Commission has attempted to expose the fallacy of the extortion analogy to excessive rates, and has recommended the adoption of a rule requiring that damages be proven with equal certainty in both types of cases.[12] Meanwhile it has within limits been possible for the Commission to rid itself of unwanted claims through its wide discretion in determining whether a given rate was reasonable.[13] To the argument of public convenience made by the Commission may be added arguments of policy, for there would seem to be no good reason for distinguishing the methods of proof in the two cases. In either the question is purely one of private compensation, for whatever public injury is involved may be taken care of by means of the punitive provisions of the statute.[14] If anything, cases of discrimination involve greater wilfulness and should more readily yield private damages, since the *reasonableness* of a rate is frequently determined years after the fact and by no predictable formula.[15] In providing for "damages" in either case there is nothing in the statute requiring or approving a difference in application.[16] Perhaps the best solution would be to require in each case definite proof of damage, as suggested by the Commission, but to take the difference in rates to be pre-

[9] Interstate Commerce Commission v. United States ex rel. Campbell, (U. S. 1933) 53 Sup. Ct. 607 at 610, syllabi no's 8, 9.

[10] Interstate Commerce Commission v. United States ex rel. Campbell, (U. S. 1933) 53 Sup. Ct. 607 at 611; Mitchell Coal and Coke Co. v. Pennsylvania Railroad, (C.C. E. D. Pa. 1910) 181 Fed. 403; South River Lumber Co. v. N. & W. Ry., 109 I. C. C. 173 (1926); National Hay and Milling Co. v. G. B. & Q. R. R., 89 I. C. C. 1 (1924); Clay County Coal Operators Ass'n v. C. & M. R. R., 81 I. C. C. 414 (1923); Quaker City Quality Cracker Co. v. B. & O. R. R., 183 I. C. C. 183 (1932); Arcade Mfg. Co. v. A. T. & S. F. Ry., 168 I. C. C. 120 (1930).

[11] A glance at the digests of the Interstate Commerce Commission reports reveals this to be the case. See I. C. C. ANNUAL REPORT 1930, Pp. 92-3.

[12] I. C. C. ANNUAL REPORT 1919, pp. 19-21; *ibid.*, 1921, p. 58.

[13] See Iola Cement Mills Traffic Ass'n v. A. T. & S. F. Ry., 169 I. C. C. 367 (1930), where some rates were found not unreasonable, others not unreasonable in the *past*, etc.; Scharff-Koken Mfg. Co. v. A. T. & S. F. Ry., 151 I. C. C. 270 (1929); Louisiana Oil Refining Corp. v. St. L. S. W. Ry., 122 I. C. C. 503 at 504 (1927); Sloss-Sheffield Steel and Iron Co. v. L. & N. R. R., 51 I C. C. 635 (1918); and particularly California Growers' and Shippers' Protective League v. Southern Pacific Co., 129 I. C. C. 25 (1927), as illustrative of the complexity of the question of reasonableness.

[14] 24 Stat. 382 (1887), U. S. C. tit. 49, sec. 10 (1926).

[15] I. C. C. ANNUAL REPORT 1919, p. 19.

[16] In Pennsylvania Railroad v. International Coal Co., 230 U. S. 184 at 204, 206, 33 Sup. Ct. 893, Ann. Cas. 1915A 315 (1913), the court stresses that the statute gives a right of action for "damages" only. But the same provision covers violations both of the discrimination and unreasonable rate clauses of the Act.

sumptively the measure of loss,[17] or to permit the Commission (or court) to take judicial notice of certain difficult elements of proof, such as the conditions of competition in the market. Otherwise, not only undesirable but many worthy claims might be discouraged, and the fears of nullification of the statute, as expressed by Justice Pitney, dissenting in the *International Coal* case,[18] be realized.

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[17] In the principal case Cardozo, J., suggests that it is "an evidentiary circumstance" only. Interstate Commerce Commission v. United States ex rel. Campbell, (U. S. 1933) 53 Sup. Ct. 607 at 609. In England under The Railways Clauses Consolidation Act, 8 & 9 Vict., c. 20, sec. 90 (1845), and The Railway and Canal Traffic Act, 51 & 52 Vict., c. 25, sec. 27 (1888), damages consist *prima facie* of the difference in rates paid. See Manchester, Sheffield and Lincolnshire Ry. v. The Denaby Main Colliery Co., 14 Q. B. D. 209 (1884), and Chance and Hunt v. Great Western Ry., (Ry. and Can. Comm.) 29 T. L. R. 483 (1913).

[18] Pennsylvania Railroad v. International Coal Co., 230 U. S. 184 at 211, 212, 33 Sup. Ct. 893, Ann. Cas. 1915A 315 (1913).