No. 929.

EUGENE S. PRESTON AND DAVID FLOYD DAVIS, Doing Business under the Firm Name of PRESTON & DAVIS,

v.

DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY.

Submitted March 23, 1907. Decided April 26, 1907.

Defendant's regulation put in effect October 15, 1906, discontinue the delivery at its Brooklyn terminal of petroleum oil in tank cars shipped to complainants, practically deprives complainants of opportunity to continue their business in competition with the Standard Oil Company and subjects complainants to unlawful prejudice and disadvantage. Defendant required to rescind the regulation and henceforth allow such delivery for complainants under reasonable rules and conditions as to the time and manner of unloading the cars.

H. A. Powell for complainant.
W. S. Jenny and *J. L. Segar* for defendant.

REPORT AND ORDER OF THE COMMISSION.

KNAPP, *Chairman:*

This case arises upon a regulation put in force by defendant on October 15, 1906, whereby it discontinued the delivery of petroleum oil in tank cars to complainants at its so-called Brooklyn terminal, [115] located at the foot of Clymer Street, in Brooklyn, N. Y.

About the year 1893 complainants engaged in the sale of petroleum oil, principally to the retail trade in the city of Brooklyn, buying at first in tank-wagon lots from the Standard Oil Company, which has

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large refining plants in that vicinity, where it receives crude oil by pipe line from the producing fields. Later complainants bought a few carloads of oil in barrels from an oil concern in Warren, Pa., which were shipped over defendant's line to its old South Ninth Street terminal in Brooklyn; but this method left empty barrels on their hands which, on account of a sudden decrease in price, could not be disposed of without loss. For this reason, apparently, they resumed the purchase of oil from the Standard.

In 1898 the price of oil to complainants was about doubled, but on account of the competition of other dealers in Brooklyn, including the Mellen Family Oil Company, a Standard concern, the retail price could not be materially increased, and during the following two years their business was not remunerative. They then endeavored to buy oil in the oil-producing regions and have it delivered by tank cars in Brooklyn, but for some reason could not arrange for such delivery, or did not take the steps necessary to secure it. In the course of the next two years the Standard appears to have reduced its price to complainants, and this operated to hold their trade with that company until 1902, when, during the coal strike of that year, the price was again raised nearly 100 per cent. Because of the coal strike oil was in great demand for heating as well as illuminating purposes, but complainants finally arranged during the latter part of 1902 to purchase tank-car lots of the Titusville Oil Works, at Titusville, Pa., and with the defendant railroad company for delivery of the oil in tank cars at its Brooklyn terminal aforesaid.

About November 1, 1900, defendant issued a circular which set forth, among other things, that petroleum and its products would not be accepted for delivery at the Brooklyn terminal. This appears to have been based upon some agreement or understanding between defendant and other lines reaching New York to prohibit the delivery of petroleum and its products at freight stations and piers generally in New York Harbor, as this particular circular of the defendant contains a reference, as follows: "(2,000—J. T. A. Cir. 407. T. L. A. Cir. 1580, 1587, 1589. Files 13997, 3868.)" "J. T. A." obviously refers to Joint Traffic Association and "T. L. A." to Trunk Line Association. It appears that this rule of the two railroad associations was never very well enforced, and at the time of the hearing it had become so nearly obsolete that defendant's vice-president was unable
[116] to furnish a copy from his own office or from the files of the Trunk Line Association, which he stated had been carefully searched. Even as far back as the beginning of 1903 the rule against delivering oil at New York Harbor freight piers or stations, including defendant's Brooklyn terminal, seems to have been ineffective, for on or about January 25 of that year defendant, by order of that date, excepted

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the Brooklyn terminal from its application, and this was apparently done on account of the traffic furnished by complainants.

This traffic was actively solicited by defendant's freight agents. In December, 1903, fully a year after complainants' tank-car shipments began, defendant's agent at East Buffalo, N. Y., wrote complainants calling attention to a lapse of three or four weeks since their last shipment and expressing the hope that they had "not lost sight of us through any neglect or any indifference on the part of any of my men." This was followed by a letter to Mr. Davis, a member of the complainant firm, from defendant's Brooklyn terminal freight agent on December 4, 1904, stating that the enlargement of track facilities at this terminal was under consideration, but that the company was uncertain whether it could be made to pay, in view of the heavy expense that would be incurred, and asking for an expression of Mr. Davis's views upon the subject. This is plainly such a letter as would be written to a shipper whose traffic was considered desirable to the carrier and entirely suitable for delivery through the terminal to which the letter referred.

In January, 1903, a representative of the Standard Oil Company talked with defendant's traffic manager concerning complainants' shipments, calling his attention to the trunk line agreement against oil delivery at New York harbor freight piers or terminals, and remarking upon the danger of fire resulting from such delivery; but it does not appear that any other rail carrier to Brooklyn made objection because of the nonobservance by defendant of the agreement in question.

Whatever may be the fact in this regard, it seems that the delivery of oil in tank cars to complainants at the Brooklyn terminal continued without interruption or friction until after September 23, 1905, when a fire occurred in the terminal yard. This fire appears to have been started by a few small boys, with some loose charcoal and shavings found in the yard, close by or directly under one of complainants' tank cars. The testimony shows that quite a blaze resulted, lasting fifteen or twenty minutes, during which time this particular car and two other tank cars, with two cars loaded with other freight, but coupled together, were hauled away from the danger point by an engine, no part of the contents of the cars being ignited or injured in any way. Defendant had also been greatly damaged by fires at other terminals, including the Hoboken, N. J., terminal, [117] but none of these fires resulted from the storage or delivery of petroleum at such terminals.

After this fire at the Brooklyn terminal defendant's agents took more careful notice of the methods employed by complainants in transferring oil from tank cars to their tank wagons, and apparently

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came to the conclusion that those methods were subjecting defendant to rather serious risk, mainly, as it seems, because of the fact that in the unloading process considerable oil was spilled upon the ground under the car and over the space about the tank wagon. There is sharp conflict in the testimony both as to the amount of spillage during the unloading and as to the inflammability of the oil which soaked into the ground and ties between the rails and spread over the granite-block pavement between the tracks. There is no question that defendant has the right to make and enforce suitable regulations to insure the safety of its terminal and the freight passing through the same for shipment or delivery; but as to this oil traffic defendant's agents did nothing more at the time than criticise the unloading methods, while, on the other hand, complainants took no steps to improve their methods.

Subsequently, on November 27, 1905, some two months after the fire in the Brooklyn terminal, complainants' consignor, the Titusville Oil Works, was notified by letter from one of defendant's traveling freight agents that the defendant had decided to discontinue the handling of oil in tank cars consigned for Brooklyn terminal delivery. This embargo, however, was almost immediately withdrawn. Conferences were afterwards held between complainants and the defendant's officers from March 1906, to August, 1906, and on the 29th of that month order was again issued by defendant that on and after October 15, 1906, this delivery at the Brooklyn terminal would be discontinued.

So far as appears, complainants are the only receivers of oil from defendant at this terminal in Brooklyn, which is about one-half mile from complainants' place of business. With the use of this terminal they have built up and enlarged their business to substantial proportions. They have storage capacity at their warehouse equal to or somewhat exceeding the contents of a tank car, which run from 6,000 to 9,000 gallons, and they are able to turn over in sales 4,000 or 5,000 gallons a day. The two tank wagons used by complainants in taking oil from a car hold from 700 to 800 gallons each. The bottom of the wagon tank is something over a foot below the bottom of the car tank, while the top of the car tank is considerably higher than the top of the wagon tank. It results that in unloading by
[118] gravity the wagon tank can be completely filled by pipe from the bottom of the tank car to the tank wagon until the surface of the oil in the car falls below the level of the surface of the oil in the tank wagon. After that lighter and lighter loads must be put in the tank wagon, as the tank car oil level becomes lower, the last tank wagon-load being about equal in depth to the difference between the levels of the bottom of the car and the bottom of the wagon tanks.

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Under this method of unloading by gravity complainants must make somewhere from 10 to 13 trips between the terminal and their plant in transferring the contents of a tank car. Their method of removing the oil from the tank car to the tank wagon is to attach a metal pipe to the opening at the bottom of the car, to which is joined a hose which leads to and is coupled on with the tank wagon. These couplings and joints are liable to leak, and the cap unscrewed from the bottom of the car to permit the coupling contains some oil. Pails are set under the couplings and joints to catch the dripping. More particular description of the methods is unnecessary. With extreme care very little oil need be spilled or allowed to drip, but in actual practice it appears that perhaps a gallon or more may reach the ground, ties, or pavement during the unloading of a car. This oil is 140 to 150 degrees fire test and will not burn until that amount of heat is applied. In the course of successive unloadings at an assigned place in the terminal yard this dripping or spillage spreads over a space about 15 or 20 feet square. Complainants claim that this soakage will not burn. Defendant's witnesses assert that it will and that it did when a bonfire was started in the yard on September 23, 1905. This soakage or waste oil in defendant's yard constitutes in our opinion a condition which may fairly be termed dangerous.

The terminal consists of a freight house and large yard containing tracks having capacity for about 90 cars, which are brought there on floats or lighters from defendant's track terminals in New Jersey, the Brooklyn terminal being on what is called Wallabout Bay. Complainants' cars were assigned an unloading space near the bridge over which the cars are run from the floats to the yard. Various kinds of combustible freight have been and are freely brought to this yard for delivery. Petroleum oil of the fire test mentioned is not of itself more dangerous than furniture or other inflammable commodities. Defendant has another terminal in Brooklyn, at the other end of the city, 5 or 6 miles from complainant's plant. This could not be used by complainants without loss.

On November 17, 1906, about a month after the order excluding complainants' shipments from the Brooklyn terminal became effective, the defendant's vice-president wrote complainants that the Brooklyn Eastern District Terminal, formerly Palmer's dock, which is about a mile from complainant's place of business, would receive their shipments for delivery at that terminal, but no guaranty of continued delivery was given and after complainants had made one [119] or two shipments for such delivery at Palmer's dock the management of that terminal company, which is a separate corporation serving various roads engaged in Brooklyn traffic, discontinued such delivery for complainants. The result of this was that complainants

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could no longer pursue their business of shipping oil in tank cars to Brooklyn. If complainants were able to use defendant's more distant terminal in Brooklyn, that use would be subject to the same exclusion orders which were issued by it as to the terminal in question.

During the produce season the Brooklyn terminal is more or less congested, but it does not appear that complainants' oil traffic has in any way contaminated, damaged, or interfered with other traffic at that terminal, or that it is not profitable traffic to the defendant. It does appear that complainants have kept cars in the terminal for unloading much longer than was necessary. Defendant's records indicate an average of nine days for a considerable period, though, on the other hand, complainants show that they have been called upon to pay only an insignificant amount of demurrage. Defendant's counsel calls attention in his brief to section 765 of the charter of the city of New York, relating to petroleum and coal oils and the sale thereof, and authority therein given to the fire commissioner of that city; but careful reading of the section specified does not indicate any prohibition upon the transportation here in question.

It is fairly demonstrated by the evidence that continued exclusion of complainants from this terminal will prevent them from bringing oil in tanks to Brooklyn and consequently put them out of business altogether in that city or compel them to again purchase their supplies from the Standard Oil Company. Either of these results would inure to the benefit of that company by eliminating the competition of complainants.

It is due to the defendant to say that its unwillingness to continue the delivery of tank cars at this Brooklyn terminal is based upon actual apprehension of the danger of fire resulting from the transfer of oil from tank cars to tank wagons. The serious risk appears to be connected with the unloading of tank cars at such a place as this terminal, since neither the transportation of the cars to and from the terminal nor their presence there, whether loaded or empty, would seem to be attended with any extraordinary hazard.

It is unquestionably the defendant's right and duty to take all needful precautions against a conflagration or other liability to accident, but we are not convinced that it was necessary in this case to take such extreme measures as to prohibit further delivery of tank cars at the terminal in question. The prosperous business of com-
[120] plainants ought not to be destroyed or made subservient to a monopoly unless its continuance involves the defendant in a disproportionate risk which is practically unavoidable. Under the circumstances of this situation we think the defendant should have established suitable regulations or requirements respecting the methods and time of unloading these tank cars and allowed further test

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under proper safeguards before excluding complainants altogether from the use of this terminal for the delivery of their tank-car shipments. It seems to us that the process of unloading could be protected against any great degree of danger by feasible devices which the defendant could reasonably require to be used under the supervision of its agents. Having in mind certain devices suggested at the hearing, we are of the opinion that methods of transfer could be adopted which would avoid undue risk of fire or other casualty.

Taking everything into account, we are led to the conclusion that defendant's order of October 15, 1906, discontinuing the delivery of petroleum oil in tank cars at its Brooklyn terminal, subjected complainants to undue and unreasonable prejudice and disadvantage in violation of the statute. An order will accordingly be entered requiring the defendant, on or before June 15, 1907, to rescind the prohibitive regulation in question and to thereafter allow and provide for the delivery of oil in tank cars at this Brooklyn terminal under reasonable rules and conditions respecting the time and manner of unloading.

ORDER.

Upon the foregoing report:

It is ordered, That defendant, the Delaware, Lackawanna & Western Railroad Company, be, and it is hereby, notified and required, on or before the 15th day of June, 1907, to cease and desist, and during a period of at least two years thereafter to abstain, from maintaining and enforcing its regulation of October 15, 1906, whereby and whereunder it, the said defendant, discontinued the delivery of petroleum oil in tank cars to complainants at its so-called Brooklyn terminal at the foot of Clymer Street, in the Borough of Brooklyn, City of New York, and to establish on or before said 15th day of June, 1907, and during a period of at least two years thereafter to maintain, a regulation rescinding the said regulation of October 15, 1906, and restoring its former practice of allowing and providing for the delivery of petroleum oil in tank cars at said Brooklyn terminal under reasonable rules and conditions respecting the time and manner of unloading oil consigned to said terminal in tank cars.

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