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Miscellaneous—Construction of Tariff Rates

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many months prior to the accident. A tenant also testified that the "landlady" visited the place frequently and either she or her sons collected the rent.

From this evidence, the Court felt, it would not be unreasonable for a jury to infer that the defendant knew, or should have known, that its employee was in the habit of seeking aid from young boys to assist him in his work for the defendant. Thus a jury could have concluded that the defendant acquiesced in the practise or that because of the nature of the work, the defendant made it necessary for the janitor to enlist the aid of these boys, by failing to provide assistance to the janitor.

There was further evidence that the can which fell was faulty and that the janitor may have been negligent in failing to warn the plaintiff of the danger in the work. Other evidence tended to show negligence in hoisting the can and in failing to supervise the fastening of the rope by which the can was hoisted. This evidence, the Court reasoned, raised questions of fact for the jury and did not show the plaintiff was guilty of contributory negligence as a matter of law.

On this evidence and set of facts, it is apparent that the Court was correct in reversing the lower courts and granting the plaintiff a new trial; the plaintiff had raised sufficient questions of fact to escape dismissal.

Construction of Tariff Rates

In *Bianchi v. Sears Roebuck and Co.*,[45] the Court held that interior loading did not include removal of goods from a platform which, although it was one continuous floor, extended into a warehouse. The plaintiff, a common carrier of goods for hire by truck, performed pick-up and delivery services for the defendant. According to a tariff schedule[46] on file with the Public Service Commission, goods accepted at the platform or entrance to the shipping room were chargeable at the regular rates, whereas those which had to be removed by the carrier from the interior of a building, basement or above the ground floor were subject to an additional charge.

45. 1 N. Y. 2d 63, 133 N. E. 2d 699 (1956).

46. Pick-Up and Delivery Service (a) . . . the rates published in tariffs governed hereby, include one pick-up . . . . (b) Shipments will be accepted at . . . platform or entrance to shipping or receiving room of consignor . . . when directly accessible to carrier's motor vehicle at the street level. (d) Pick-up . . . does not include removal from . . . the interior of a building nor basements or floors not directly accessible to carrier's motor vehicle . . . . (e) When carrier upon request, is obliged to perform pick-up or delivery service to or from the interior of a building, basement or above the ground floor . . . an additional charge will be made . . . .

The policy[47] of the statute which authorizes the setting of the tariff rates is to provide reasonable rates without unjust discrimination against any shippers, and therefore no variance from the traiff schedules is allowed.[48] The Appellate Division,[49] in holding the additional charges applicable, used an "imaginary line" test, saying that once the carrier passed through any door he was removing goods from the interior of the building. However here the provisions of the tariff were ambiguous[50] so that evidence that the customary practice of carriers who dealt with the plaintiff did not make this charge, was helpful in resolving the ambiguity[51] and was not a changing of the legal rates set out in the tariff. "Where the meaning is doubtful, such provisions are to be construed in favor of the shipper."[52] Moreover, the reason for the distinction in the tariff was to compensate a carrier for extra work involved in extra handling, and since here the loading of the carrier could be done in one operation, the justification for the extra charge did not exist.

The Court's use of a reasonableness test in its interpretation of the tariff brings about a more equitable result, although the imaginary line test of the Appellate Division would be much simpler in its practical application in future dealings between carriers and shippers. In any event, the entire problem can be resolved by more explicit language in future tariffs.

Unfair Competition—Similarity of Names

In *Playland Holding Corp. v. Playland Center, Inc.*,[53] plaintiff moved for a summary proceeding pursuant to Section 964 of the N. Y. Penal Law to enjoin

47. N. Y. PUB. SERV. LAW §63(i) 1. It is hereby declared to be the policy of this state to regulate transportation by motor carriers in such manner as to recognize and preserve the inherent advantages of, and foster sound economic conditions in such transportation and among such carriers in the public interest; promote adequate, economical, and efficient service by motor carriers, and reasonable charges therefor, without unjust discriminations, undue preferences or advantages, and unfair or destructive competitive practices . . . .

48. N. Y. PUB. SERV. LAW §63(t) 2. No common carrier by motor vehicle shall charge or demand or collect or receive a greater or less or different compensation for transportation or for any service in connection therewith between the points enumerated in such tariff than the rates, tolls and charges specified in the tariffs in effect at the time. . . .

49. 284 App. Div. 709, 134 N. Y. S. 2d 495 (4th Dep't 1954).

50. See note 46 *supra*. Paragraph (b) seems to uphold the interpretation of the carrier, whereas paragraph (e) seems to agree with the shipper's interpretation.

51. *New York Cent. & Hudson River R. R. v. General Electric Co.*, 219 N. Y. 227, 114 N. E. 115 (1916); MCKINNEY'S STATUTES, book 1 §128, Practical Construction. . . . General Usage, long continued and therefore unquestioned, has much the weight of judicial decision and should not be lightly disregarded. . . . Thus in a doubtful case a construction placed upon a statute by the parties affected, and acquiesed in for a long period, will be followed by the court. . . . When a freight tariff is properly filed and published it has the force and effect of a statute and is often so treated for purposes of construction. *Updike Grain Co. v. Chicago & N. W. Ry.*, 35 F. 2d 486 (8th Cir. 1929).

52. 9 AM. JUR., *Carriers* §144 (1937); *United States v. Gulf Refining Co.*, 268 U. S. 542 (1924).

53. 1 N. Y. 2d 300, 135 N. E. 2d 202 (1956).