

INDEX.

	PAGE
Notice of Appeal and Grounds of Appeal....	a
Rule for Judgment	c
Opinion of Supreme Court	d
Recognizance on Appeal	h
Notice of Appeal	1
Specifications of Causes of Error	2
Transcript of Judgment	4
State of Demand	5
Stipulation	6
Clerk's Certificate	7
Order Extending Time	10
Transcript of Testimony	12
Certification by Stenographer	45
Certification by Judge	45

PLAINTIFF'S WITNESSES

Herman Golub:

Direct	17
Cross	19
Redirect	22

William A. Reilly:

Direct	22
Cross	26

Daniel A. McCarthy:

Direct	27
Cross	29
Redirect	30

DEFENDANT'S WITNESSES

	PAGE
Joseph E. Price:	
Direct	30
Cross	31
Direct (recalled)	40
John H. Stout:	
Direct	38
Cross	40

EXHIBITS

P-1. Bill of Lading	54
P-2. Letter	46
P-3. Letter	47
P-4. Letter	48
P-5. Freight Receipt	55
D-1. Ext. from Freight Tariff	49

PLAINTIFF'S WITNESSES

Herman Gold:	
Direct	17
Cross	19
Redirect	22
William A. Bell:	
Direct	23
Cross	25
Daniel A. McArthur:	
Direct	27
Cross	29
Redirect	30

Notice of Appeal and Grounds of Appeal.

(Filed July 12, 1918.)

NEW JERSEY SUPREME COURT

HYATT ROLLER BEARING COMPANY,
Plaintiff-Appellee,

—vs.—

THE PENNSYLVANIA RAILROAD
COMPANY,
Defendant-Appellant.

10

Action at Law

Notice of
Appeal

To Messrs. Day, Day, Smith & Slingerland,
Attorneys and of Counsel with Plaintiff-
Appellee: 20

TAKE NOTICE:

That the defendant-appellant appeals to the New Jersey Court of Errors and Appeals in the last resort in all causes, from the whole of the judgment entered in the New Jersey Supreme Court in this cause, upon the following grounds:

(1) That the said Supreme Court erred in affirming the judgment of the First District Court of Jersey City, and in holding that the letter of plaintiff-appellee to defendant-appellant, dated April 17, 1916 (Ex. p-2) was a claim and a sufficient compliance with the terms of the bill of lading which required a claim in writing to be made within four months. 30

(2) That the said Supreme Court erred in affirming the judgment of the First District Court of Jersey City and in holding that a written claim was filed by the plaintiff in compliance with the terms of the bill of lading, whereas the Supreme 40

Notice of Appeal and Grounds of Appeal

Court should have found that there was no compliance with the terms of the bill of lading, and should have ordered a reversal of the judgment or have ordered judgment to be entered in favor of defendant-appellant.

(3) That the said Supreme Court erred in affirming the judgment of the First District Court of Jersey City, and in holding that there was ample testimony furnished from which the trial Court could have concluded that the missing bundle was not placed upon the ferry car at Harrison, whereas said Supreme Court should have found that the evidence showed that five bundles were put into the ferry car at Harrison, that the car was sealed immediately after the loading, and that seals were intact when the ferry car was put on plaintiff's siding, that the Interstate Commerce Rules apply, and that if there was any loss from the ferry car, defendant-appellant was not responsible for the loss.

(4) That the said Supreme Court erred in affirming the judgment of the First District Court of Jersey City, because the judgment of the trial court is contrary to the evidence, and contrary to law, and also because there was no evidence to support the finding of the trial court.

VREDENBURGH, WALL & CAREY,
Attorneys for Defendant-Appellant.

Rule for Judgment.

(Filed June 28, 1918)

NEW JERSEY SUPREME COURT

HYATT ROLLER BEARING COMPANY,
Plaintiff-Appellee,

—vs.—

PENNSYLVANIA RAILROAD COMPANY
Defendant-Appellant.

On Appeal from District Court. 10

Rule of Affirmance.

This cause having been argued at the November term, nineteen hundred and seventeen of this Court on the specifications filed, and the Court having duly considered the same and being of opinion that there is no error in the judgment and proceedings of the Court below; 20

It is ordered that said judgment be in all things affirmed, with costs to the appellee to be taxed; and it is further ordered that execution issue out of this Court therefor.

Entered June 28, 1918,

On motion of

DAY, DAY, SMITH & SLINGERLAND,

Attorneys. 30

Opinion of Supreme Court.

(Filed June 21, 1918.)

NEW JERSEY SUPREME COURT

February Term, 1918.

10 HYATT ROLLER BEARING COMPANY,

—vs.—

THE PENNSYLVANIA RAILROAD
COMPANY.

Argued November Term 1917, Decided February Term 1918.

20 Appeal from First District Court of Jersey City.—
Day, Day, Smith & Slingerland, For Plaintiff;
Vredenburgh, Wall & Carey, For Defendant.
Argued before Justices Swayze, Trenchard and
Minturn.

The opinion of the Court was delivered by
Minturn, J.:

The case was tried before the court, without a jury, and the following facts were expressly or incidentally found as the basis for the judgment rendered in favor of the plaintiff. Five bundles of steel were consigned to plaintiff at its works in Harrison, in this state, on February 24th, 1916, by the Becker Steel Company of America, at Charleston, West Virginia. The car provided by defendant for the purpose of carriage to plaintiff's premises from the Harrison Station, was known as a "Ferry car" and was sealed at Harrison in accordance with the tariff filed with the Interstate Commerce Commission, the effect of which was that defendant was
40 relieved of responsibility for the losses incident

Opinion

to the intermediate carriage, from the Harrison station to plaintiff's premises at that place.

The ferry car was run into the premises of the plaintiff on March 11th, 1916, at one o'clock in the afternoon. When the car was unloaded one of the steel bundles was missing, and plaintiff brought suit to recover its value. Defendant contended that since the five bundles had been loaded in the car, and properly sealed, the plaintiff under the terms of the bill of lading, assumed all the liability for loss during transportation. 10

The trial court found that the defendant failed to deliver the goods at the Harrison station. The testimony was that when the shipment was received at the plaintiff's plant, it was checked up by three of its employees, and the fact of the absence of the fifth bundle was noted by another employee upon the original delivery receipt, and the receipt with that notation was forwarded to defendant. 20

There was in addition ample testimony furnished from which the trial court reasonably concluded that the fifth bundle was delivered to the plaintiff at Charleston, in West Virginia, but was not placed by defendant upon its ferry car at Harrison, to be run into the plaintiff's premises, upon the siding maintained for that purpose.

There was a diversity of testimony upon that question, but the trial court possessing the opportunity of viewing the witnesses pro and con, and with the advantage of considering the credibility of their testimony, found that the five bundles were not placed upon the ferry car at the Harrison station; and that finding upon well settled rules we cannot disturb. It eliminates from our consideration the legal effect of the consignment, under the terms of the bill of lading, as well as under the provisions of the Interstate Commerce Act, which 40

Opinion

under the conditions contended for by the defendant, it may be conceded, would relieve the defendant from responsibility, and impose the risk of transportation upon the plaintiff.

It is insisted finally, that the claim of loss, required by the bill of lading, to be furnished by the plaintiff, within four months, to the defendant,
10 after delivery, was never furnished.

The testimony evinces that in addition to the notation upon the receipt already referred to, there was a letter written by plaintiff to defendant on April 17, 1916, citing the facts, and informing defendant that the fifth bundle had not been delivered. The defendant after investigation notified plaintiff by letter, three days thereafter, that they had been unable to locate it. The stress of the reasoning upon this point is placed upon the word
20 "claim," contained in the bill of lading, as follows:

"Claims must be made in writing, to the carrier, at the point of delivery, or at the point of origin within four months after delivery," etc..

We think the information conveyed by the plaintiff to the defendant, was substantially a claim within the meaning of the language quoted. The liberality of interpretation placed upon that term by the Federal Supreme Court, and the courts of
30 sister states, where the question has arisen, evinces that the fundamental reason for the requirement, is to enable the carrier to trace the goods within a reasonable period after the delivery, or the failure to deliver, so as to protect itself from resulting loss, upon a subsequent claim for damage.

Manifestly the delivery of a notice of the loss, from which no other inference is reasonably derivable than that the loss has occurred, and giving the substantial particulars as in the case sub judice,
40 and which resulted in an investigation, by the car-

Opinion

rier, is substantially a claim or a notice of a claim within the reasonable construction of the bill of lading.

The most recent review of the subject is contained in *St. Louis & I Mt. Ry Co. v. Starbird*, 243 U. S. 592. There the court points out the rationale for a reasonable interpretation of the word, as follows: "Such notice puts in permanent form the evidence of an intention to claim damages, and will serve to call the attention of the carrier to the condition of the freight and enable it to make such investigation as the facts of the case require, while there is opportunity so to do." 10

In conforming with that general view, the rule is generally accepted to be, that a stipulation requiring the giving of notice of a claim for damages, must be given a reasonable construction, and a substantial compliance therewith on the part of the shipper is all that is required. 20

See annotations to *Hoye v. P. R. R.* 191 N. Y. 101, 14 Am. Cas 417; 4 R. C. L. 796 and cases cited; 10 C. J. 336 and cases cited.

The judgment will therefore be affirmed, with costs.

Recognizance on Appeal.

(Filed July 12, 1918)

NEW JERSEY SUPREME COURT.

10	<p>HYATT ROLLER BEARING COMPANY, <i>Plaintiff-Appellee,</i></p> <p style="text-align: center;"><i>vs.</i></p> <p>THE PENNSYLVANIA RAILROAD COMPANY, <i>Defendant-Appellant.</i></p>	<p>Action at Law</p> <p>RECOGNIZANCE</p>
----	---	--

State of New Jersey,)
 County of Hudson,) ss.

20 Be It Remembered, that on this eleventh day of July, A. D. nineteen hundred and eighteen, appeared before me, George W. Flaacke, one of the Supreme Court Commissioners of the State of New Jersey, at Jersey City in said State, The Pennsylvania Railroad Company, a corporation of the Commonwealth of Pennsylvania, by John A. Hartpence, its Attorney-in-fact on its behalf, as principal, and the American Surety Company of New York by Arthur Schneider, its resident Vice President, on its behalf, as surety, who jointly and severally did acknowledge said companies to be indebted to Hyatt Roller Bearing Company, a corporation, in the sum of One Thousand Dollars, to be made and levied of their respective goods and chattels, lands and tenements and real estate, if default be made in the following conditions:

The conditions of the above recognizance are such that,

Whereas, Hyatt Roller Bearing Company lately
 40 recovered judgment against the Pennsylvania

Recognizance on Appeal

Railroad Company, in an action at Law, in the First District Court of Jersey City, for the sum of two hundred and eighty dollars and twenty-five cents, damages and costs, as by the record thereof will appear and

Whereas, The Pennsylvania Railroad Company thereafter appealed from said judgment, to the New Jersey Supreme Court, and said New Jersey Supreme Court has rendered a judgment of affirm-¹⁰ance of the judgment of the First District Court of Jersey City, with costs amounting to the sum of thirty dollars and ten cents; and

Whereas, The Pennsylvania Railroad Company has taken an appeal from said judgment of the New Jersey Supreme Court to the New Jersey Court of Errors and Appeals, in the last resort in all causes;

Now, Therefore, if the said The Pennsylvania Railroad Company shall prosecute the said appeal²⁰ with effect, and also pay and satisfy, if the said judgment be affirmed, all the damages and costs in the former judgment, and all costs and damages to be awarded for delay of execution, then this recognizance to be void, else to be and remain in full force.

Taken and acknowledged this }
11th day of July A. D. 1918 }
GEORGE W. FLAACKE,

30

Supreme Court Commissioner of New Jersey.

THE PENNSYLVANIA RAILROAD
COMPANY,

by

John A. Hartpence,
Attorney in fact.

Recognizance on Appeal

(Seal) AMERICAN SURETY COMPANY
OF NEW YORK,

by Arthur Schneider,
Resident Vice President.

Attest:

H. M. LUNDY,
Resident Assistant Secretary.

10

Approved as to form and sufficiency of Surety.
GEORGE W. FLAACKE,
Supreme Court Commissioner of New Jersey.

20

30

40

Notice of Appeal.

(Filed Nov. 2, 1917.)

First District Court of Jersey City.

HYATT ROLLER BEARING COMPANY,
Plaintiff,

v.

THE PENNSYLVANIA RAILROAD
COMPANY,
Defendant.

10

Action at Law.
In Tort.

TO MESSRS. DAY, DAY, SMITH & SLINGERLAND,
Attorneys for Hyatt Roller Bearing Company,
Plaintiff.

20

SIRS:

TAKE NOTICE That the defendant THE PENNSYLVANIA RAILROAD COMPANY hereby appeals to the New Jersey Supreme Court from the judgment of the First District Court of Jersey City rendered in the above stated action on the 16th day of October, 1917.

30

VREDENBURGH, WALL & CAREY,
Defendant's Attorneys.

DATED, October 31st, 1917.

Service of a copy of within Notice of Appeal is hereby acknowledged this 1st day of November, 1917.

DAY, DAY, SMITH & SLINGERLAND,
Plaintiff's Attorneys. 40

Specifications of Causes of Error.

(Filed November 15th, 1917.)

NEW JERSEY SUPREME COURT.

10	<p>HYATT ROLLER BEARING COMPANY, <i>Plaintiff-Appellee,</i></p> <p style="text-align: center;">vs.</p> <p>PENNSYLVANIA RAILROAD COM- PANY, <i>Defendant-Appellant.</i></p>	<p>In Tort. On Appeal from First District Court of Jersey City.</p>
----	--	---

THE PENNSYLVANIA RAILROAD COMPANY, the above named appellant, specifies the following determinations or directions of the First District Court of Jersey City in the above entitled cause, with which it is dissatisfied in point of law.

20 (1) Because the trial judge refused to give judgment for defendant at the close of the case, although duly moved so to do by the defendant.

(2) Because the finding of the trial judge was contrary to the evidence.

(3) Because the judgment of the trial court was contrary to law.

30 (4) Because there was no evidence to support the finding of the trial court.

(5) Because the trial court erred in holding that the letter of plaintiff to the defendant dated April 17, 1916 (Ex. P-2) was a claim and a sufficient compliance with the terms of the bill of lading which required a claim in writing to be made within four months, which ruling of the trial court was erroneous, prejudicial to defendant and contrary to law, and to which findings defendant objected.

40

Specifications of Causes of Error

(6) Because the trial court found that a written claim was filed by the plaintiff in compliance with the terms of the bill of lading, whereas the court should have found that there was no compliance with the terms of the bill of lading, and should have given judgment for defendant, and that the trial court's ruling was erroneous, prejudicial to defendant, and contrary to law, and to which ruling defendant objected. 10

(7) Because the trial court found that five bundles being the entire shipment could not have been put into the ferry car at the Harrison Station of the defendants and that through some oversight or dishonesty of some stranger or employees or some unknown person, one bundle was missing at the Harrison Station and that only four bundles were actually placed in the ferry car at the Harrison Station instead of five, in view of the fact that the plaintiff's employee checked only four bundles at their plant, which finding was contrary to the evidence, prejudicial to the defendant and contrary to law. 20

(8) Because the trial court refused to give judgment for the defendant and find that the testimony showed that five bundles were put into the ferry car at the Harrison Station and that the car was sealed immediately after the loading, and that seals were intact when the ferry car was put on the plaintiff's siding; that the Interstate Commerce Rules apply and that if there was any loss from the ferry car after it was placed on the plaintiff's siding, that the defendant was not responsible for the loss, which refusal to give judgment and find for the defendant, was contrary to law, contrary to the evidence and prejudicial to the defendant, although the defendant requested the court so to find in its favor. 30 40

VREDENBURGH, WALL & CAREY,
Attorneys for Defendant-Appellant.

Transcript of Judgment.

(Filed November 15th, 1917.)

FIRST DISTRICT COURT SUMMONS.

10 THE STATE OF NEW JERSEY, TO THE SER-
GEANT-AT-ARMS OF THE FIRST DISTRICT
COURT OF THE CITY OF JERSEY CITY OR TO
ANY CONSTABLE OF SAID COUNTY:

STATE OF NEW JERSEY, }
COUNTY OF HUDSON, }ss.:
CITY OF JERSEY CITY, }

(L. S.)

SUMMON

PENNSYLVANIA RAILROAD COMPANY

to appear before the FIRST DISTRICT COURT of
Jersey City, to be held at the City Hall, corner
Grove and Montgomery Streets, in said City, on
20 the twenty-second day of May One Thousand Nine
Hundred and seventeen, at ten o'clock in the fore-
noon to answer unto

HYATT ROLLER BEARING COMPANY
in an action in Tort. Damage Five Hundred dol-
lars.

30 WITNESS, CHARLES L. CARRICK, Esq., Judge of
said FIRST DISTRICT COURT at Jersey City, afore-
said, the twelfth day of May, in the year One
Thousand Nine Hundred and seventeen.

JAMES N. BRADEN,

Clerk.

DAY, DAY, SMITH & SLINGERLAND,
Plaintiff's Attorney,
Newark, N. J.

State of Demand.

(Filed May 12, 1917.)

FIRST DISTRICT COURT OF THE CITY OF JERSEY CITY.

 HYATT ROLLER BEARING COMPANY,
Plaintiff,

VS.

 PENNSYLVANIA RAILROAD COM-
 PANY,
Defendant.

 Action at Law. 10
 In Tort.

The plaintiff above named demands of the defendant above named the sum of \$500. for that;—

1. On February 24, 1916, defendant was a common carrier of goods for hire from the City of Charleston, in the State of West Virginia, to the Town of Harrison in the County of Hudson and State of New Jersey. 20

2. On that day the Becker Steel Company of America delivered to defendant, as such carrier, goods of plaintiff, to wit; One bundle (7 pieces) $\frac{1}{2}$ " x 1" High Speed Steel Weighing 97 pounds, of the value of \$242.50, to be carried for reward from Charleston to Harrison, and there to be delivered by defendant to plaintiff. 30

3. Defendant neglected its duty and did not safely carry said goods from Charleston to Harrison, nor there deliver the same to plaintiff; but by default of defendant in the premises said goods were wholly lost to plaintiff.

Judgment in this action will be claimed for the sum of \$242.50, besides lawful interest and costs of suit.

DAY, DAY, SMITH & SLINGERLAND, 40
Attorneys of Plaintiff.

Stipulation.

FIRST DISTRICT COURT OF THE CITY OF JERSEY CITY.

10	HYATT ROLLER BEARING COMPANY, <i>Plff.</i>	vs.	PENNSYLVANIA RAILROAD COM- PANY, <i>Deft.</i>	} In Tort. Stipulation.
----	---	-----	---	----------------------------

The above case through a misunderstanding between the attorneys for the respective parties having been marked "Not moved";

20 It is hereby stipulated by and between the attorneys for the respective parties that the case be put on the list for trial on Tuesday, October 9th, 1917.

DAY, DAY, SMITH & SLINGERLAND,
Attorneys for Plaintiff.

VREDENBURGH, WALL & CAREY,
Attorneys for Defendant.

30

40

Clerk's Certificate.

STATE OF NEW JERSEY, }
 HUDSON COUNTY, }
 CITY OF JERSEY CITY, }

FIRST DISTRICT COURT OF JERSEY CITY.

CHARLES L. CARRICK, Esquire, Judge.

No.—106711

HYATT ROLLER BEARING COMPANY, <i>Plaintiff,</i>	vs.	} Action at Law. In Tort, Day, Day, Smith & Slingerland, Piff. Attys. Vredenburgh, Wall & Carey, Deft. Attys.	10
PENNSYLVANIA RAILROAD COM- PANY, <i>Defendant</i>			20

Costs	City	AL
Summons,	1.50	
Service		.60
Trial Fee	1.50	
	3.00	.60
Appeal Bond	1.00	

A summons was tested May 12, A. D. 30
 1917, returnable May 22, A. D. 1917,
 at 10 o'clock in the Court Room of said
 Court in the City of Jersey City. The
 Constable returned the summons as
 follows, viz

I served the within summons May 14, A. D. 1917,
 on G. W. Glenn, Chief Clerk in charge of the de-
 fendant Company, by reading the same to him and

Clerk's Certificate

delivering to him a copy thereof. Robert J. Livingston, Constable.

Plaintiff's demand was filed May 12, A. D. 1917.

October 2, A. D. 1917, the plaintiff not appearing and the defendant not appearing the trial of the cause was proceeded with as follows: by Court marked "not moved".

10 October 9, 1917, Stipulation that cause be put on trial on Tuesday, October 9, 1917, filed.

October 9, 1917, By agreement of parties the trial was adjourned to October 16, 1917.

October 16, 1917, Both parties appearing the trial was proceeded with as follows:

Upon application of defendant—Arthur R. Bailey was appointed and sworn as stenographer.

20 On the part of the plaintiff—Henry Golub, William A. Reilly and Daniel A. McCarthy were sworn and testified.

One Bill of Lading, Three letters and one receipt were offered and received in evidence.

On the part of the defendant—Joseph E. Price and John H. Stout were sworn and testified. One Interstate Tariff Tax was offered and received in evidence.

30 WHEREUPON it is on this sixteenth day of October A. D., 1917, by this Court considered and adjudged that said Hyatt Roller Bearing Company, plaintiff, recover against said Pennsylvania Railroad Company, defendant, the sum of Two hundred and sixty-three dollars and fifty cents, debt, and sixteen dollars and seventy-five cents, cost of suit.

November 2. A. D. 1917, Notice of appeal and appeal Bond filed by defendant.

40 I, JAMES N. BRADEN, Clerk of the First District Court of Jersey City, Charles L. Carrick, Esquire, Judge, do hereby certify that the foregoing is a

Clerk's Certificate

true copy of the Summons, State of Demand,
Stipulation and Transcript of a Judgment of the
said Court.

IN WITNESS WHEREOF, I do hereby set my hand
as Clerk of the said Court and affix the seal of the
said Court this third day of November, nineteen
hundred and seventeen. 10

JAMES N. BRADEN,
Clerk.

First Dist. Court,
of
(L. S.)
Jersey City.
N. J.

20

30

40

Orders Extending Time.

(Filed Nov. 7, 1917.)

NEW JERSEY SUPREME COURT.

10	HYATT ROLLER BEARING COMPANY, <i>Plaintiff-Appellee,</i>	}	On Appeal
vs.	THE PENNSYLVANIA RAILROAD COMPANY, <i>Defendant-Appellant.</i>		From District Court. ORDER EXTENDING TIME

Application being made by Vredenburgh, Wall & Carey, the attorneys for the defendant-appellant, for an order extending the defendant's time to file with the Clerk of the Supreme Court a brief specification of the determinations or directions of the First District Court of Jersey City, with which it is dissatisfied in point of law in the matter of the appeal taken by the defendant in the above stated cause and for an order postponing the hearing of said appeal to the February Term, 1918, of the New Jersey Supreme Court; and it appearing to the Court that judgment was rendered in said cause in the First District Court of Jersey City on October 16th, 1917; that notice of appeal was served upon plaintiff's attorneys and duly acknowledged on November 1st, 1917, and that said notice of appeal and appeal bond approved by the Judge of the First District Court of Jersey City, were duly filed with the Clerk of said First District Court of Jersey City, and that the defendant has been unable to comply with rule 145 of the Supreme Court, which provides that a brief specification of the determinations or direc-

Orders Extending Time

tions of the District Court, with which the defendant is dissatisfied in point of law, shall be filed with the Clerk of the Supreme Court at least 10 days before the opening day of the next term of the Supreme Court following the taking of said appeal, and that the defendant cannot bring the case on for hearing at the November Term of the Supreme Court, 1917, being unable to comply with Rule No. 150 of the Supreme Court; 10

IT IS ON THIS 7th day of November, 1917, ORDERED that the defendant's time to file a brief specification of the determinations or directions of the First District Court of Jersey City, with which it is dissatisfied in point of law, be extended to December 1st, 1917, and it is further ordered that the hearing of the appeal in the above stated matter be postponed to the February, 1918, Term of the Supreme Court. 20

By the Court,
F. J. SWAYZE.

Entered Nov. 7, 1917,

On motion of

VREDENBURGH, WALL & CAREY,
Attys. for Appellant.

We consent to the entry of the above order.

DAY, DAY, SMITH & SLINGERLAND,
Attys. of Plaintiff. 30

A true copy,

WM. C. GEBHARDT,
Clerk.

Transcript of Testimony.

(Filed Nov. 3, 1917)

STATE OF NEW JERSEY,

HUDSON COUNTY—IN THE FIRST DISTRICT COURT.

10	<p style="text-align: center;">HYATT ROLLER BEARING Co. <i>Plaintiff,</i></p> <p style="text-align: center;"><i>vs.</i></p> <p style="text-align: center;">PENNSYLVANIA RAILROAD Co., <i>Defendant.</i></p>
----	---

20 Transcript of the testimony and proceedings taken in the above entitled matter, in the First District Court of Jersey City, on Tuesday, October 16, 1917, at 10 o'clock in the forenoon, before His Honor
CHARLES L. CARRICK,
Judge.

APPEARANCES:

30	<p style="text-align: center;">Messrs. DAY, DAY, SMITH & SINGERLAND, by FREDERIC W. SMITH, Esq., <i>For the Plaintiff,</i></p>
30	<p style="text-align: center;">Messrs. VREDENBURGH, WALL & CAREY, by JOHN H. PATTERSON, Esq., <i>For the Defendant.</i></p>

40 Mr. Smith: Your Honor will remember, some weeks ago, there was a similar case to this against the Pennsylvania Railroad Company, because of a shortage in a certain shipment of steel alleged to have been sent by the Becker Steel Company in West Virginia, directed to the Hyatt Roller Bear-

Argument

ing Company in Harrison, and the facts in that case were very similar to what they are in this case.

The Court: It has all gone from my mind at this time. I do not carry these cases in mind very long after they are disposed of. I remember there was a suit several months ago of a similar title.

Mr. Smith: Mr. Patterson has very kindly agreed respecting certain elements of proof which is necessary in the case of the plaintiff, and I think we can put those matters before the Court. First, is the admission with respect to the receipt of the shipment at Harrison. I have the original bill of lading, and that might as well go in.

(The same is marked Exhibit P-1)

Mr. Patterson: And then we admit, also, that the goods came to the Harrison station.

The Court: Where did your company receive the shipment?

Mr. Patterson: Somewhere along the connecting line; I don't know. At any rate, to save time, there is no question but what the goods were at the Harrison station.

The Court. That is, the five bundles?

Mr. Patterson: The five bundles; and to save everybody's time, we are simply starting from the Harrison station; we had the goods there and we endeavored to show delivery. I also want to have it noted that we raise the question that there was no claim filed.

The Court: You mean, no claim filed in accordance with the bill of lading?

Mr. Patterson: Yes, Your Honor.

The Court: Within what time does the bill of lading require that claim shall be filed?

Mr. Patterson: Four months, I think.

Argument

(Mr. Smith reads the provision referred to from the bill of lading.)

The Court: Is it conceded in this case, on behalf of the plaintiff, that no written claim was made?

Mr. Smith: Oh no.

Mr. Patterson: There was a letter written which will be introduced in evidence.

10 Mr. Smith: You might as well put that right in now.

Mr. Patterson: The plaintiff contends this letter is a claim and the defendant contends it is not a claim, and we want the Court to decide whether or not it is a claim.

Mr. Smith: We agree, then, that these letters should go in as the letters having been sent by the parties who purport to sign them.

20 The Court: Suppose you give me the dates and read the letters.

Mr. Smith: The first letter is dated April 17, 1916, and is directed to the Pennsylvania Railroad Company, Newark, N. J. and is as follows:

Gentlemen:

30 On a shipment from the Becker Steel Company of Charleston, W. Va., freight bill No. 41,161, dated March 7th, the quantity specified is five bundles of steel, weighing 477 lbs. with freight charges amounting to \$1.05. On March 17 we received four bundles weighing 380 lbs. Can you at this time advise if you have information of the one bundle containing seven pieces and weighing 97 lbs. which you failed to deliver with the rest of material.

Yours very truly,

HYATT ROLLER BEARING CO.,
F. A. Weiss, Purchasing Agent.

40 Mr. Patterson: Then follow memorandums in pencil which are not a part.

Argument

(The letter is marked Exhibit P-2)

Mr. Smith: The other letter is dated December 13th, 1916, written by the firm of Edward A. & William T. Day, addressed to T. S. Hood, freight agent, Pennsylvania Railroad, Newark, N. J., and is as follows:

Dear Sir:

The Hyatt Roller Bearing Company has placed in our hands for collection two claims against your company, one for \$256 and the other for \$242.50. These claims arise through a shortage in the delivery of certain shipments of steel. We believe that you are familiar with the matter. Will you kindly advise us whether there is any hope of settling these claims without resorting to litigation.

Yours very truly,

EDWARD A. & WILLIAM T. DAY.

10

20

(The same is marked Exhibit P-3.)

Mr. Smith: Then, I have another letter from T. S. Hood, Agent of the Pennsylvania Railroad Company, addressed to F. A. Weiss, Purchasing Agent Hyatt Roller Bearing Company, Harrison, N. J. The letter is dated Harrison, N. J., April 20th, 1916, and is as follows:

Dear Sir:

Replying to your favor of the 17th, relative to alleged shortage of one bundle of steel in shipment of five bundles from the Becker Steel Co., of Charleston, W. Va., we have made a thorough search of our warehouse and can find no trace of this bundle. Our records clearly indicate that the entire shipment was received at this station on March 9th, checking from car 511362, and was reloaded on March 10th into L. V. 63339, together with a number of other shipments, and forwarded to

30

40

Argument

your siding. We are unable to advise further.
 Yours truly,
 T. S. HOOD, Agent.

Then there is a memornadum at the bottom of the letter.

Mr. Smith: We admit that these are the only
 10 letters.

Mr. Smith: Don't you think we had better put this receipt in at the same time?

Mr. Patterson: I don't think that bears on this question of the claim that the Court wants to hear now. I will admit that receipt.

Mr. Smith: I want the Court to know all the facts.

Mr. Patterson: Will you admit, Mr. Smith, that
 20 these letters that you have introduced,—one from the attorneys and one from the plaintiff—are the only claims, or purported claims, which were filed?

Mr. Smith: Except as this may have operated as a claim. This is a receipt made out when the goods were received by the Hyatt Roller Bearing Company. The date of it is March 7, 1916; and when we go into the proofs it will be shown that a memorandum was made upon it, showing the difference between the quantity of goods specified in
 30 the delivery receipt was entered upon the receipt itself.

The Court: And then handed back to the railroad company?

Mr. Smith: Yes. (Counsel here reads the clause in the receipt relating to claims for loss).

Mr. Patterson: Our contention is that that letter is a request for information to which we replied. A claim is a technical thing. I have a few cases on that point.

40 The Court: I will hold that that is a claim.

Herman Golub, for Plaintiff—Direct

Mr. Patterson: I object and ask—well, I will ask subsequently in the case. I want the finding so that I can have my objection to it.

Mr. Smith: It is also to be admitted, as I understand it, as agreed between Mr. Patterson and myself, that the value of the shipment is as stated by the plaintiff.

Mr. Patterson: It is admitted that \$242.50 is the invoice price. 10

Mr. Smith: In other words, there is no contest on the question of the amount of damages?

Mr. Patterson: No.

HERMAN GOLUB, sworn on behalf of the plaintiff, testified as follows:

20

Direct Examination by Mr. Smith:

Q. By whom were you employed in March, 1916? A. The Hyatt Roller Bearing Co.

Q. Where? A. In Harrison.

Q. What was your position, What were your duties? A. Checker.

Q. What do you mean by that? A. Checked material out of freight cars.

Q. Do you remember the shipment of rods of steel respecting which this contest arises; do you remember that shipment? A. I remember the shipment of bars. 30

Q. What is your custom with respect to the manner of checking? Just tell the Court what you do. A. Go inside the car—

Mr. Patterson: I object to the custom. I think he ought to be confined to what he did in this case.

The Court: It will be excluded. He ought to tell us what he did in this particular case. 40

Herman Golub, for Plaintiff—Direct

Q. I show you a book; do you recognize that?

A. Yes, sir.

Q. What is that? A. My own handwriting.

Q. What is written in the book? A. Well, we open a car and go inside of the car and check the material as it is loaded on the truck.

10 Q. When was the record upon the page to which the book is opened made? A. March 13th.

Q. Now, will you refer there to that record and see if there is a record of shipment of steel rods.

A. It is marked here "Shipper unknown; 4 bundles steel"; no tags or anything on the bundles. When we get something like that we put tags on.

Q. What is your record? A. "Shipper unknown; four bundles of steel".

Q. How did you come to make that record? A. Well, I only found four bundles of steel.

20 Q. (By the Court): Who was with you when you checked it? A. Myself.

Q. Alone? A. Yes, sir.

Q. (Direct ex. resumed) Is that in your own handwriting? A. Yes, sir.

Q. Did you weigh it? A. No, sir.

Q. What did you do with the four bundles? A. Checked it out of the car, loaded it on the truck and brought it inside on the receiving floor.

30 Q. And you left it there? A. Yes, sir.

Q. Who was present at the place where you left it? A. Why, I notified Mr. Reilly to have it checked up.

Q. What about that car; was it closed or open? A. The seals were O. K.

Q. And who opened it? A. I did.

Q. What else was there in the car? A. Other material.

40 Q. What kind of a car was it? A. Box car for merchandise.

Herman Golub, for Plaintiff—Cross

Q. How was this steel packed? How were the bundles fastened together? A. With wire.

Cross-Examination by Mr. Patterson:

Q. Mr. Golub, did you mention something about the seals being O. K.? A. Yes, sir.

Q. What do you mean by that? A. They were on it the way they should be—fastened together. 10

Q. What do you mean by that? A. Sealed properly.

Q. Well, what do you mean by that? How were they sealed?

The Court: You want to know whether it was intact?

Mr. Patterson: I want him to describe just what he saw; that was my point.

A. (continuing) The seals were on properly as they should be. 20

Q. When were they on properly? A. When the car came in—when I came over to the car to open it up.

Q. Did you see the car come in? A. I can't say that.

Q. What time of the day was this when you looked at the seal? A. Well, we started to unload the car at 10:45 A. M.

Q. When did you finish? A. 5 P. M. 30

Q. It took you most of the day, then, didn't it? A. Yes, sir.

Q. What did you take out of the car first? A. Winsor Broom Co., 144 brooms, 12 bundles.

Q. That was the first you took out of the car? A. In this first shipment.

Q. Did you unload it alone? A. Not alone; the laborers unloaded it and I checked it up.

Q. Did you use a truck or anything of that sort? 40
A. Yes sir, to load the material on.

Herman Golub, for Plaintiff—Cross

Q. And then where did you take the material to? A. Receiving-room floor.

Q. And did you truck it yourself? A. Well, the laborers—I watched them go in with it; I went along with it.

Q. And you put it on the receiving-room floor? A. Yes, sir.

10 Q. And where was that with reference to the car door? A. Right around the driveway there.

Q. How far away? A. It ain't a very big distance; the distance of this room.

Q. From the front to the back of this room? A. From the car into the receiving-room, yes.

Q. What did you mean when you said it went around? A. Right inside, around the driveway.

Q. Oh, then it was a curved driveway? A. Yes, sir.

20 Q. How long did it take you to go around the curve from the car to where you put it? A. I couldn't say; I never timed that.

Q. And did you do that with each commodity you took out of the car? A. Each truckload that went in I followed up and saw that they put the bundles down properly.

Q. Now, how long was it after you took these brooms out before you opened up the car? A. After the car was opened we started to work.

30 Q. After the car was opened you went out and picked this place where you put the stuff; is that it? A. No, sir.

Q. Where did you go? A. Inside of the car and started unloading it.

Q. Did you do that as soon as you opened it? A. Yes, sir.

Q. Did you go to lunch that day? A. Yes, we closed the car up when we went to lunch.

40 Q. How long did you take for lunch? A. We only get a half hour.

Herman Golub, for Plaintiff—Cross

Q. Where did you go? A. Inside of the receiving-room.

Q. Did you seal the car up while you were at lunch? A. No sir, we locked it up but we didn't seal it up.

Q. (By the Court) How was it locked, with padlock? A. No, they have some kind of a—I don't know what you call it—a latch. 10

Q. You mean they have something that you put through a staple? A. That's the way they close them up.

Q. As a matter of fact, anybody could lift the catch and open the door? A. Not anybody; one man couldn't open the door.

Q. What I mean by that is, when you say you locked it you don't mean it was sealed or that you put a padlock on it? A. Oh, we didn't put a padlock on it, no. 20

Q. What time was it that you took this steel out of the car? A. What? That personal shipment?

Q. Yes. A. I can't say what time it was.

Q. You worked up to five o'clock in the afternoon; would you have it out of there, say, about four o'clock? A. No sir, I had it out before lunch hour. 30

Q. How do you figure that out? A. Because the next shipment was from the Cleveland Automatic Machine Company, three machines crated, and that must have taken all the rest of the time.

Q. You are assuming that, then? A. No, I know it; I am positively sure about it.

Q. (By the Court) After you got the brooms out what did you take out next? A. Next, four crates and two boxes, shipped from Hardings Brothers; must have been bolts and nuts. 40

Herman Golub, for Plaintiff—Redirect
William A. Reilly, for Plaintiff—Direct

Q. What after that? A. Mitchell, one box.

Q. (By the Court, continued) Then what?

A. Two boxes.

Q. Then what? A. Six boxes.

10 Q. Then what? A. Then a box, and one barrel of oil. And then "shipper unknown, 4 bundles of steel".

Redirect Examination by Mr. Smith:

Q. Mr. Golub, just one question: Did you read all of the record on that item? A. What it says here?

Q. Yes. A. That isn't my writing; that is done by the office.

20 Q. Do you know whose writing that is? A. Mr. Reilly's and somebody's else; I don't know.

Q. You have given us what is in your handwriting? A. Yes.

Q. But there is some other writing there? A. Yes. We ain't supposed to know what comes in; only to check up what comes in.

Q. You mean, your knowledge was only to the extent of what you actually took out of the car?

A. I know nothing about what it should be; I only know what we take out of the car.

30

WILLIAM A. REILLY, sworn on behalf of the plaintiff, testified as follows:

Direct Examination by Mr. Smith:

Q. Mr. Reilly, by whom were you employed in March, 1916? A. Hyatt Roller Bearing Company.

40 Q. And what was your position? A. Checker—inside checker.

William A. Reilly, for Plaintiff—Direct

Q. Inside where? A. Receiving-room floor.

Q. Is that the receiving-room floor that has been referred to by Mr. Golub? A. Yes.

Q. The same building? A. Yes, sir.

Q. Do you remember the shipment of steel which is in dispute here? A. Yes, sir.

Q. What did you do with respect to that shipment? Tell the Court what you know about it. 10

A. We have a file that is alphabetical. We have a list of what they sent to us, the same date that they sent the shipment. You see, they send us a shipping memorandum. We put that alphabetically in this file and when we receive the steel on the floor we look through the file until we come across the Becker Steel Company and get out their package—

Q. You are referring to this particular shipment, are you? A. Yes—and go to check it up. 20
So I found out the size was all right, and when we came to weigh it and counted the number of bundles and pieces I found out it didn't tally with this package slip.

Q. (By the Court) Didn't tally in what respect? A. With neither bundles, nor pieces, nor weight.

Q. Now, where did you get that sheet that you have in your hand? A. This was under the B's in our file. 30

Q. What did you say that was? A. This is a packing memorandum, or shipping memorandum, whatever you might call it.

Mr. Smith: Before I go any further I would like to offer the page of this book from which the witness is testifying.

Mr. Patterson: I object to it.

The Court: It is not an instrument of evi- 40

William A. Reilly, for Plaintiff—Direct

dence; it is a memorandum that he made at the time to refresh his recollection. It is taken in connection with testimony which has been given by the witness. It has been referred to and may be used in that way. You may have it marked for identification.

(The same is marked P-6 for identification.)

10

Q. When did you first see this shipment, Mr. Reilly? A. What do you mean by "when"?

Q. Where was it when you first saw it? A. On the receiving-room floor.

Q. And tell the Court, please, what you found as the result of your checking. A. As the result of my checking I found four bundles which contained 26 bars, 204 and 1 inch in length.

20 Q. (By the Court) You say 26 bars? A. Yes, 204 and 1 inch the length of it, and 380 lbs. net weight.

Q. What is called for upon the invoice which you hold? A. It calls for 5 bundles containing 33 bars, 477 lbs.

Q. What did you do then? A. When I found out that it didn't check up with this memorandum I went to the Purchasing Department to see if there had been any changes made on the invoice.

30 Q. What is the invoice? A. The bill that they send.

Q. Who do you mean by "they"? A. Becker Steel Company.

40 Q. Well, did you find the invoice? A. Yes sir, I found out that it was marked exactly what it was on here in the beginning before I made the search, and so I came down and told Mr. McCarthy, which is our foreman, the difference in the shipment, and he went over with me and found it the same as I had checked it. It tallied up.

William A. Reilly, for Plaintiff—Direct

Q. How did you find that out? You say, you and he went over and found it the same as you had checked it. A. We found the pieces and reweighed them all over again.

Q. Did you do anything with respect to this memorandum? A. I marked it just as you find it.

Q. Then the marks upon it are yours? A. Yes, sir. 10

Q. And you did that when you did the checking? A. Yes.

Mr. Smith: I offer the memorandum in evidence.

Mr. Patterson: I object to it. It is not his memorandum.

The Court: It may be marked for identification.

(The same is marked P-7 for identification.) 20

Q. I show you a paper, marked in this cause Exhibit P-5; do you recognize any of the handwriting upon that? A. Yes, sir.

Q. Whose handwriting is it? A. I recognize some of it as mine.

Q. What is your handwriting on that? A. "Received 4 bundles, 382 lbs" and Mr. McCarthy's name with my initials, and the date underneath Hyatt Roller Bearing Co. 30

Q. When did you put that memorandum on there? A. Three, seventeen, sixteen.

Q. (By Mr. Patterson) That is, March 17, 1916? A. Yes, sir.

Q. Do you know what was done with that paper after that? A. That was forwarded to the Pennsylvania Railroad Co.

Q. Now, I show you a page in a book, marked for Identification P-6; do you recognize any of the handwriting on that page? A. Yes, sir. 40

William A. Reilly, for Plaintiff—Cross

Q. Whose handwriting do you recognize? A. I recognize some of it as mine.

Q. What on the memorandum is in your handwriting? A. "Becker Steel Company, 5 bundles"; and then I marked it "4 bundles received".

Q. When was that? A. On the 13th.

10 Q. Where is that memorandum located upon the book, with respect to the testimony of Mr. Golub? A. It is right here, on the memorandum here (indicating).

Cross Examination by Mr. Patterson:

Q. Where were you in the receiving-room? A. I was right on the floor there; I can't tell you any particular place.

20 Q. You didn't go to the car? A. No, sir, I did not.

Q. And you only examined such things as you found there on the floor? A. Yes, sir.

Q. And how soon after they were put there did you examine them or did you see them after that? A. How soon did I see them after they were put there?

Q. Yes. A. Well, I didn't get at them right away. It was in the afternoon sometime when I checked them up.

30 Q. You don't know what time they were put there? A. Well, I couldn't tell you that.

Q. And you say the bundles had no marks on them? A. No, sir.

Q. Nothing to identify them at all? A. No, sir.

Q. I suppose you had to hunt around to find out where they came from? A. We had to look through our alphabetical file.

40 Q. How big is that receiving-room? A. Why, I don't know; maybe 80 or 90 feet long, and about 40 feet front, I guess.

Daniel A. McCarthy, for Plaintiff—Direct

Q. And how far was the spot where the goods were from the car? A. Well, I don't know just how far; about, I should imagine, 50 feet. It isn't direct, you know, coming from the car; you go in the alleyway.

Q. You had other things piled in there? A. Where?

Q. In the receiving-room? A. No, only stock. 10

Q. You spoke of an alleyway; was that a straight passageway from the car to the receiving-room? A. No, you have got to come out of the car and turn.

Q. Turn at right angles? A. Yes; that is, before you come to the receiving-room. That is just in the alley.

Q. What track was this car on, do you know? A. No. 20

DANIEL A. MCCARTHY, sworn on behalf of the plaintiff, testified as follows:

Direct Examination by Mr. Smith:

Q. Mr. McCarthy, by whom were you employed in March, 1917? A. Hyatt Roller Bearing Company.

Q. What was your position at that time? A. 30
Supervisor of the Receiving Department.

Q. Are you in the same room with Mr. Reilly? A. He is in my office.

Q. You are his boss, are you? A. Yes, sir.

Q. And do you remember the shipment of steel from the Becker Steel Company which is in dispute in this case? A. I know of the case, and I know we re-checked it at the time.

Q. When was that re-checking done, if you re- 40

Daniel A. McCarthy, for Plaintiff—Direct

member? A. Why, the afternoon that the shipment arrived and we re-checked it the same day.

Q. What was your first knowledge of the shipment? Just tell the Court what you know about it and what you did with it. A. Mr. Reilly called my attention to the shortage and notified me that he had checked it with the Purchasing Department, and I went out and verified this and re-checked it as to the number of bars and the weight.

Q. What do you mean by verifying it as to the number of bars; what did you do? A. I took the checks made by Mr. Reilly.

Q. You refer to Exhibit P-7 for identification?

A. Yes, sir.

Q. Now you had that before you (P-7 for identification shown to witness)? A. I had them count the number of bars and weigh the entire shipment.

Q. How many bars were there? A. 26 bars.

Q. How many bundles were there? A. I don't know how many bundles there were at that time; the bundles had been opened by the checkers at the beginning of the checking.

Q. What was the weight? A. 380 lbs.

Q. And where was that checking done? A. On the floor of the receiving-room.

Q. Did you check it with anything else besides this memorandum? A. No, sir.

Q. I show you a paper marked P-5; do you recognize any handwriting upon that? A. Yes, sir.

Q. And whose handwriting do you recognize? A. Mr. Reilly's.

Q. Do you know that he wrote that? A. Yes, sir.

Q. Did you see him write it? A. No, sir.

Q. Is your handwriting upon there? A. No, sir.

Q. It is not? A. No, sir.

Daniel A. McCarthy, for Plaintiff—Cross

Q. Isn't that your handwriting (showing witness P-5)? A. No, that is by Mr. Reilly. That is a part of his duties in his work of my department.

Q. Did you do anything with that exhibit P-5 after it was checked? A. No, sir, I did not.

Q. Do you know what became of it? A. Sent to the Harrison Station of the Pennsylvania Railroad. 10

Q. When, do you know? A. No, I couldn't tell you that.

Cross Examination by Mr. Patterson:

Q. All that you checked, Mr. McCarthy, was what Mr. Reilly presented to you on that floor there? A. Just verified his checking, and I made a search in the Department to see if there might have been any more of the steel around that they hadn't checked, and also in the car. 20

Q. Did you see the car that this came in? A. Yes, sir.

Q. What track did it come on? A. Track 1; that is the line right opposite our plant there.

Q. How does your plant run, east and west? A. Nearer southeast and northwest.

Q. How did this track run, east and west? A. Yes, I think so. 30

Q. How far was it away from the plant? A. The distance from the front of the building out to the track, I should judge, was about 30 feet.

Q. You put other cars in there? A. Yes, sir.

Q. Was that enclosed in any way? A. No, sir, it was not.

Q. Right out on the street? A. Right out on the street.

Q. Right out in the street where anybody could come along and walk on the track? A. Anybody could, yes. 40

Daniel A. McCarthy, for Plaintiff—Redirect
Joseph E. Price, for Defendant—Direct

Redirect Examination by Mr. Smith:

Q. The shipment to which you refer is the same covered by this bill of lading marked P-5? A. Yes, sir.

Mr. Smith: That is all. Plaintiff rests.

10

THE DEFENSE.

JOSEPH E. PRICE, sworn on behalf of the defendant, testified as follows:

Direct Examination by Mr. Patterson:

Q. What is your business, Mr. Price? A. Checker.

20 Q. Where? A. P. R. R., Harrison freight station.

Q. And were you so employed in the month of March, 1916? A. Yes, sir.

Q. You know about these five bundles of steel involved in this case, don't you? A. Yes, sir.

Q. What is this book here? A. This is the check book.

30 Q. In whose handwriting is it? A. My handwriting.

Q. And made when? A. On March 9th, 1916.

Q. Is that the time you checked the goods? A. Yes, sir.

Q. On March 9th what did you check, with regard to these five bundles of steel? What did you do? A. I checked five bundles of steel and unloaded them into the freight station.

40 Q. I show you Exhibit P-5, which is a delivery receipt, and ask you if you can tell what you did further with those five bundles of steel? A. On

Joseph E. Price, for Defendant—Cross

March the 10th I had these loaded into the Hyatt ferry car L. V. 63,339.

Q. And were there other things in that car, Mr. Price? A. In this 63,339? Yes, sir.

Q. What was the purpose of that car? A. This was a Hyatt ferry car because there was a heavy shipment in it, consisting of 3 crates of machinery and other goods. 10

Q. And where did this shipment come from? A. From various points.

Q. And you loaded them into this ferry car to go over to Hyatt's? A. Yes.

Q. And how often had you sent those ferry cars over to Hyatt's? A. At that time two or three a week, or one or two.

Q. You say you loaded the goods on the 10th in the ferry car? A. Yes, sir. 20

Q. And you checked it? A. Yes, sir.

Q. Where did you check it? In the car? A. In the car, yes sir.

Q. And after you had loaded this car what was done? A. Why, I looked over the car to see that the goods was properly loaded, and then the men closed the car, and the sealer William Doyle sealed the car.

Q. Were you present? A. Yes, sir.

Q. And about how long was that after the car had been loaded and closed? A. About three minutes. 30

Q. Were you there all the time? A. Yes, sir.

Q. Right at the car door all the time? A. Yes, sir.

Cross Examination by Mr. Smith:

Q. Mr. Price, how long have you been employed there at that station by the Pennsylvania? A. Twelve years. 40

Joseph E. Price, for Defendant—Cross

Q. This record that you refer to is your record of the checking which you did when the car was unloaded and the goods were put upon your platform, isn't it? A. This record here? Yes.

The Court: You mean the book?

Mr. Smith: Yes, the book.

10 Q. And where were these goods placed upon the platform, if you remember,—these five bundles of steel? A. Nearly opposite this car, about 26 feet away.

Q. Are you very sure about this particular shipment, respecting which this suit has arisen, when you are testifying now? A. Yes, sir.

20 Q. You remember there was another shipment of rods from the same party, consigned to the Hyatt Roller Bearing Co., where it was alleged a suit was brought for loss just like this, don't you? A. Yes, sir.

Q. Well now, are you sure in your own mind that you are referring to this particular case as the one which you are now testifying about? A. Yes, sir.

Q. What is there that distinguishes this particular loss and makes you so certain about it? A. My records.

30 Q. Which records? A. Of the checking and the loading in the car.

Q. But the only record of the checking that you have is the checking out of the car? A. I have the two records, one of checking out of the car on the 9th and this one here of loading it into the car on the 10th.

Q. The record which you mention as being the one of loading it into the car is Exhibit P-5, isn't it? A. Yes.

40 Q. Who made that? A. I made the record.

Joseph E. Price, for Defendant—Cross

Q. Did you write it on the typewriter? A. Oh no, that is my stamp there on the 10th.

Q. Which is your stamp? A. This one here (witness pointing out on the book).

Q. The one dated "Harrison, N. J., March 10th"? A. Yes, sir.

Q. And where did you have to go to use that stamp? A. In the office. 10

Q. How many men are there there working, transferring shipments across the platform? A. Six men now.

Q. You don't actually carry the stuff, yourself, do you? A. No sir, only check it.

Q. How far from the ferry car that you mentioned was this particular shipment of steel lying? A. About 26 or 27 feet.

Q. And did it lie in that one place more than 24 hours? A. No, sir. 20

Q. It was taken out of a car one day? A. Yes, sir.

Q. And remained where it was placed until it was put in the other car? A. Yes, sir.

Q. That is an open freight-house, isn't it? A. There are doors on the freight-house.

Q. Where these goods were placed, I mean. A. Where they are placed it has a closed door.

Q. It is open during the day, isn't it? A. No, 30 we always keep this especially for the purpose of storing long goods like that.

Q. What do you mean by "long goods"? A. Goods that would interfere with another door.

Q. But you use that freight-house a good deal every day, don't you? A. Yes, sir.

Q. And you didn't handle these particular goods yourself? A. No, sir.

Q. And you weren't present, as a matter of fact, when they were carried in, were you? A. I was. 40

Q. But you wont be absolutely sure that there

Joseph E. Price, for Defendant—Cross

were five bundles carried into the car, will you?

A. I am very particular about those shipments. It is my duty to look after them.

Q. Yes, that is your duty, but very often shipments go wrong in your freight-house, don't they?

A. No, sir.

10 Q. Occasionally they do, don't they? A. No, not occasionally.

Q. Well, they have gone wrong before? A. No, sir.

Q. They haven't? A. They haven't gone wrong, no.

Q. Do you remember the other case where a shipment of steel went wrong and there was a bundle short that should go to Hyatt? A. I don't admit that there was a bundle short.

20 The Court: He thinks the Court went wrong.

Q. Do you remember a machine some months ago which was to go to the Hyatt Roller Bearing Company—or, rather, a scale which was to go to the Hyatt Roller Bearing Co., and which wasn't delivered, and word was sent back to your freight-house that the scale wasn't delivered, and then four or five days afterwards you found it in your freight-house; do you remember that case? A.

30 Yes, sir, and I would like to explain about that.

Mr. Patterson: I object as irrelevant. All right, let him go ahead and explain.

Q. Go ahead. A. There was a bill handed to me by the delivery clerk that had the car number indicating that it had been unloaded, which got on there in some way, and it was handed to me when I went down to the freight-house to load the Hyatt car—

40 Q. You are referring now to the scale, aren't you? A. To the scale, yes.

Joseph E. Price, for Defendant—Cross

Q. Go ahead. A. I went back and told the delivery clerk this machine wasn't in the house, as I was looking at the car number he gave me which was one that was unloaded.

Q. That was a mistake of the clerk, then, wasn't it? A. Yes. I would like to explain, too, that I told Mr. Barryton that the machine wasn't there, and he advised me to send the bill down to investigate it, in case it might have gone in a car before that, and he said he would call Mr. McCarthy up; and under those conditions I sent the bill down. 10

Q. Don't you also remember, Mr. Price, that the Hyatt Roller Bearing Company have received from you advices on a number of occasions of goods which did not belong to them and they sent them back to you in this ferry car? A. I don't remember of a particular case of that kind. 20

Q. Well, you know that that has happened, don't you? A. I really can't say so.

Q. You wouldn't say that it has not happened? A. How can I say when I don't know?

Q. Now, what position in this freight-car were these rods shipped to the Hyatt Roller Bearing Company, located, if you remember? A. In the car that was sent to Hyatt?

Q. Yes, in the ferry car? A. They're always loaded on the side of the car. 30

Q. Well, where were these particular rods placed? A. I don't remember just where they were put in the car.

Q. Did you see them put in the car? A. Yes, sir.

Q. How do you know that you saw them put in the car? A. Because I was standing there right beside the men that loaded them.

Q. Where did they put them? A. In the car.

Q. In what position in the car? A. Alongside in the car. 40

Joseph E. Price, for Defendant—Cross

Q. On which side? A. I saw them going into the car. It is so long ago I couldn't remember just on which side.

Q. All you saw was that they just passed through the door; how many men carried them?

A. Two men.

Q. Could two men carry a bundle? A. Yes, sir.

10 Q. And you remember seeing those men go past you five times, do you? A. Yes, sir.

Q. Did they carry the bundles one after another, or did they carry something in between? A. No, carried them separately one after the other.

Q. You remember that particularly, do you? A. Yes.

Q. Those men might have gone past you four times and not five? A. No, sir.

Q. Did you count them? A. Yes.

20 Q. Did you make any record of the count? A. Yes, sir, when I stamped this bill.

Q. You stamped that bill and that is all you did? A. Yes, sir.

Q. After the thing was completed? A. Yes, sir.

Q. How long was that after the rods were taken in the car? A. Well, about five minutes. After the rods were taken into the car?

Q. Yes. A. After the car was closed then I stamped them up.

30 Q. How long was that after the rods were taken in? A. Well, I don't know just how many minutes.

Q. Was it an hour or two? A. No, it wasn't an hour; it was about a quarter of an hour.

Q. Do you mean to say it only took 15 minutes to fill up that car after those rods were put in?

A. Fifteen minutes?

Q. Yes. A. That is according to what time they took in those rods.

40 Q. I want you to tell me, Mr. Price, how long

Joseph E. Price, for Defendant—Cross

after you put those rods in the car you made that stamp on this bill. You don't remember, do you?

A. It was after the car was full.

Q. It may have been two or three hours? A. No, it was not.

Q. How do you know it wasn't two or three hours? A. Because we would then be there after working hours. 10

Q. How do you know what hour of the day you put the rods in? A. I know it was in the afternoon.

Q. How do you know that? A. Because the Hyatt car went out in the afternoon, and, as a rule, when a car goes out in the afternoon we finish the rest of the car.

Q. You are testifying to what you usually do, not what you did in this specific case, aren't you? 20
A. As a rule, yes.

Q. As a rule you do those things, and you are testifying to what you ordinarily do, but you don't remember this specific instance, do you, now honest? A. I know that we unloaded that car and this was left in in the morning, and then in the afternoon we loaded this stuff in, and after the car was loaded I put that on the bill.

Q. Did you have that bill in your hand when you stood by the side of the door and saw these 30
men go in with five bundles of steel? A. Yes.

Q. Did you make any memorandum on it at all as to the amount or weight? A. No, I counted them.

Q. And you made no memorandum on this at all, as to whether or not it checked up with your records in the office? A. No, I held the bill until the bundles were shipped.

Q. You put nothing on it until after you got in the office, to tell whether the car was complete? 40

John H. Stout, for Defendant—Direct

A. The ones that were complete I did; I made a check on the bill and rubber stamped it.

Q. What else was there in this car that went to the Hyatt Roller Bearing Company? A. There were a number of things—three machines, 5 barrels, half barrel, box, two boxes.

10 Q. I just want to ask you, Mr. Price, whether you remember within the last month or two a shipment which should have gone to the National Hoisting Engine Company out of your freight-house, and which went over to the Hyatt Roller Bearing Company, and which was drawn to your attention and sent back? Do you remember that?

A. I really don't remember it; didn't hear of it.

20 Q. Do you remember a shipment of socks which should have gone to Bamberger's, and which went over to the Hyatt Roller Bearing Company? A. From Bamberger's?

30 Q. That went from your freight-house over to the Hyatt Roller Bearing Company in a ferry car, and which should have gone to Bamberger's? A. I do not remember it; I do not know of it. I know I went in when Mr. Reilly came there to check a car that went temporarily out in the yard until Mr. Reilly arrived there, and we found down in the yard one of the Hyatt machines, and Mr. Reilly and I seen it about the same time and we took it in.

JOHN H. STOUT, sworn on behalf of the defendant, testified as follows:

Direct Examination by Mr. Patterson:

Q. What is your business? A. Conductor.

Q. For the Pennsylvania Railroad Company?

40 A. Yes, sir.

John H. Stout, for Defendant—Direct

Q. Where do you live? A. 9 Nevins street, Kearny.

Q. And were you employed in that capacity by the Pennsylvania Railroad in March, 1916? A. Yes, sir.

Q. I show you two slips and ask you to tell us what they are? A. This is the car-loading ticket to make up the ferry car, and this is the put ticket made out for our conductors. 10

Q. Is there any handwriting on that ticket that is yours? A. Yes, sir.

Q. What does that show? A. The seal record and time of placement.

Q. And what car was it? A. Lehigh Valley, No. 63,339.

Q. Tell us what you did with that car. A. From the time it left the house, you mean? 20

Q. From the time it left the Harrison station. A. Well, in the afternoon of the 10th—

Q. 10th of what? A. The 10th of March, 1916, I pulled the car and left it in the yard over night. The next day we took it up back of the N-tower.

Q. And where was that? A. That is about a quarter of a mile from the Hyatt plant.

Q. And where did you take it from there? A. We assembled them from there and then took them up to Hyatt's place. 30

Q. Did you place the car on the Hyatt siding? A. Placed it on No. 1 track, opposite the Hyatt building. They use that track as an unloading track.

Q. That is a track that is out in the street, isn't it? A. Yes, sir.

Q. Have you got your seal record here? A. Yes, sir.

Q. And is that in your handwriting? A. Yes, sir. 40

John H. Stout, for Defendant—Cross
Joseph E. Price, for Defendant—(recalled)

Q. What does that show as to the condition of the seal? A. Car sealed intact both sides.

Q. What is the record? A. P. R. 161. That is the stamp on the seal.

Q. And what time of the day did you place that car on the Hyatt siding? A. March 11, 1916,
 10 1 P. M.

Q. (By the Court) What day of the week was that? A. I don't know.

Cross Examination by Mr. Smith:

Q. These cards had nothing to do with the contents of the car, had they? A. No, that is just for the movement.

20

JOSEPH E. PRICE, recalled on behalf of the defendant, testified as follows:

Direct Examination by Mr. Patterson:

Q. You know the seals that are put on at the Harrison station, don't you? A. Yes, sir.

Q. Now, you testified before that Mr. Doyle put the seals on in your presence? A. Yes, sir.
 30

Q. What were those seals? A. 161.

Q. 161 what? A. Harrison.

Q. And you saw him fasten the seals on the car at the Harrison station? A. Yes, sir.

No Cross Examination.

Mr. Patterson: That is all of the witnesses, and I at this time, if the Court please, offer in evidence a certified copy of the Interstate tariffs; I offer specifically page 9 of the tariff
 40

Argument

covering the rules governing ferry cars, and particularly section B at the bottom of that page.

(The same is admitted in evidence.)

Now, I would ask for judgment for the defendant, on the ground, first, that the testimony shows that the five bundles were put into this ferry car; that the car was sealed at the Harrison station, and that the seals were intact when it was put on the Harrison siding; that the Interstate rules apply, and that if there was any loss from that ferry car after it was placed on the siding the railroad company is not responsible for that loss. 10

Furthermore, in conjunction with that, it appears from the testimony of the plaintiff's witnesses that in unloading this car after they broke the seal there was not a continuous watch kept on the car. The witness Golub testified that he left the car and went along to another part of the warehouse, and this missing bundle of steel might very readily have been removed from the car during that time. I didn't ask him specifically the number of trips he made, but either Mr. Reilly or Mr. McCarthy—Mr. Reilly I think—said he had to go some 50 feet from the car and turn at right-angles, and the car was out in the street; that is, that he had to truck the stuff from the street something like 50 feet from the warehouse, leaving the car open in the street, and it seems to me that their testimony is conclusive that these bundles were not in the car at the time that they say they were. To make out a clear case here it seems to me they have got to show that that car was watched all the time after it was opened. It might have been in the car 20 30 40

Argument

10 when Golub first broke the seal and have been removed or lost in some way, because the car was open from ten o'clock in the morning until five o'clock in the afternoon, with the exception of the lunch hour when he says he just shut the door. I do not think in this case that the plaintiff has made out a clear case which will enable the Court to say that the goods were not taken out of that car through the negligence of the plaintiff or by the plaintiff itself. They may very likely have been and I think they were.

20 And then I will go back to my concluding remarks to ask the Court to find specifically in this case that the letter of April 17th is not a claim. I understand the Court has ruled, for the initial purposes of the case, that it is a claim. Mr. Smith and I had some agreement regarding that, and we were going to ask the Court that we might submit memorandums.

Mr. Smith: Yes, I suggested if there was any doubt in the Court's mind I would do so, but if there is no doubt in the Court's mind I don't want to go into it.

30 The Court: I find that the letter of April 17th, addressed to the Pennsylvania Railroad Co. was a sufficient compliance with the terms of the bill of lading, which required a claim to be made within four months; and the only question that remains to be determined is whether the bundle of steel rod, which undoubtedly was missing at some time shortly after the car was opened at the plant of the Hyatt Roller Bearing Company, had been put in the car when it was sealed up at the station at Harrison—the ferry car, as it has
40 been called. There is no doubt that the car

Argument

was received at the plant of the plaintiff in the same condition as it left the Harrison station a day or two earlier. It was sealed at the Harrison station and it arrived with the seal intact.

But the question is, does the record which was shown here and is marked Exhibit P-5, actually state the contents of the ferry car 10 as representing what was received in the Harrison station. They apparently checked out 5 bundles of steel at the Harrison station, and it was there for the period of a day—24 hours—. It was received on the 9th and put into the ferry car, or some portion of it put into the ferry car, upon the 10th, and the question for me to solve is, whether the entire five bundles were put in and shipped over 20 to the plaintiff, or, through some oversight or some dishonesty of some stranger or employee or some unknown person, the 5th bundle was not purloined and four bundles actually placed into the car instead of five.

I think my judgment is, from this evidence, that the mistake was much more likely to occur at the Harrison station than at the plaintiff's plant. It would seem as if care had been exercised by the employes when 30 they opened this car and checked it up, and as soon as the discrepancy was apparent the attention of the man, or immediate boss, was called to it and he looked it up, and he called in the supervisor and they went over the matter again, and they discovered, I think very shortly after the car was opened and the unloading took place, that there was a shortage. To my mind, it seems very much more probable that the loss of this bundle occurred in the Harrison station rather than 40

Argument

at the plant of the plaintiff, and I shall award judgment in this case for \$242.50 for the plaintiff.

Mr. Smith: I would like to ask that interest be included upon that judgment, from the date of that letter of April 17th.

The Court: What do you say about that, Mr. Patterson?

10

Mr. Patterson: I hadn't heard anything about interest. We agreed on \$242.50.

Mr. Smith: The agreement was that that was the invoice value.

20

The Court: Well, I suppose there ought to be some reasonable chance to look it up on the part of the defendant before chargeable with interest; but certainly that wouldn't take very long. I think there ought to be interest on the claim, if it is asked for by the plaintiff, from the 1st of May. If you can compute what that is it can be included in the judgment.

Mr. Patterson: I would like to have my objection noted at this time to the Court's ruling that the letter of April 17th, 1916, and sent by the plaintiff to the defendant, was a claim.

30

The Court: Just give me the amount and I will include it.

Mr. Smith: We figure the interest for one year and six months, which makes it up to the first of October, \$21.

The Court: Then \$263.50 will be the judgment in favor of the plaintiff against the defendant.

40

Argument

To HIS HONOR, CHARLES L. CARRICK,
 Judge of the First District Court
 of the City of Jersey City:

I, ARTHUR R. BAILEY, the stenographer sworn in
 the foregoing cause, do certify that the foregoing
 is a true transcript of the shorthand notes of the
 testimony taken by me on the trial of the cause
 wherein The Hyatt Roller Bearing Company is **10**
 plaintiff, and The Pennsylvania Railroad Com-
 pany is defendant.

ARTHUR R. BAILEY,
Stenographer.

To HIS HONOR, WILLIAM S. GUMMERE,
 Chief Justice, and to the Associate Justices
 of the Supreme Court of New Jersey: **20**

I, CHARLES L. CARRICK, Judge of the First Dis-
 trict Court of the City of Jersey City, do certify
 that the foregoing stenographer's transcript of
 testimony, made by Arthur R. Bailey, a stenogra-
 pher designated by me, in my state of the case be-
 tween The Hyatt Roller Bearing Company, plain-
 tiff, and The Pennsylvania Railroad Company,
 defendant, as the same was tried before me on
 October 16, 1917.

CHARLES L. CARRICK, **30**
Judge.

Exhibit P-2.

Chicago, Ill.

Detroit, Mich.

HYATT ROLLER BEARING CO.

Newark, New Jersey

P. R. R., Apr. 18, 1916, Newark, N. J.

Hy. Flex. Rol.

Reg. U. S. Pat. Off.

10

April 17th, 1916.

Pennsylvania Railroad Co.,
Newark, New Jersey.

Gentlemen:

On a shipment from the Becker Steel Company of Charleston, W. Va. freight bill #41161 dated March 7th, the quantity specified is 5 bundles of Steel weighing 477 lbs. with freight charges amounting to \$1.05. On March 17th we received 4 bundles weighing 380 lbs. Can you, at this time, advise if you have information of the 1 bundle containing 7 pieces and weighing 97 lbs. which you failed to deliver with the rest of material?

20

Yours very truly,
HYATT ROLLER BEARING CO.
F. A. WEISS,
Purchasing Agent.

WPW/W

30**40**

Exhibit P-3.

December 13, 1916.

T. S. Hood, Esq.,
Freight Agent, Pennsylvania Railroad,
Newark, N. J.

Dear Sir:—

The Hyatt Roller Bearing Co. has placed in our hands for collection two claims against your Com- 10
pany, one for \$256. and the other for \$242.50.
These claims arise through a shortage in the de-
livery of certain shipments of steel. We believe
that you are familiar with the matter.

Will you kindly advise us whether there is any
hope of settling these cases without resorting to
litigation.

Yours very truly,
EDWD. A. & WM. T. DAY. 20

30

40

Exhibit P-4.

PENNSYLVANIA RAILROAD COMPANY

File E-9

Harrison, N. J.
April 20th, 1916.

Mr. F. A. Weiss, Purchasing Agent.
Hyatt Roller Bearing Co,
10 Harrison, N. J.

Dear Sir:—

Replying to your favor of 17th, relative to alleged shortage of one bundle of steel in shipment of 5 bundles from the Becker Steel Co of Charleston, W. Va.

20 We have made a thorough search of our warehouse and can find no trace of this bundle, our records clearly indicate that entire shipment was received at this station on March 9th checking from car #511362 & was reloaded on March 10th into L. V. 63339 together with a number of other shipments and forwarded to your siding. We are unable to advise further.

Yours truly,

T. S. HOOD,
Agent.
Estill

30

40

Exhibit D-1.

INTERSTATE COMMERCE COMMISSION

Washington

I, GEORGE B. MCGINTY, Secretary of the Interstate Commerce Commission, do hereby certify that the schedule hereto attached is a true copy of Pennsylvania Railroad Company Local and Joint Freight Tariff G.O.-I.C.C. No. 7108, said schedule having been filed with the said Interstate Commerce Commission on January 12, 1916. 10

And I do further certify that said G.O.-I.C.C. No. 7108 was in force throughout the period February 15, 1916, to April 30, 1916, both dates inclusive.

IN WITNESS WHEREOF I have hereunto set my hand and affixed the Seal of [SEAL] said Commission this 30th. day of July, A. D. 1917. 20

GEORGE B. MCGINTY,
*Secretary of the Interstate
Commerce Commission.*

Only two supplements to this tariff will be in effect at any time.

G. O.—P. S. C.—2 N. Y.—No. 850
Superseding G. O.—P. S. C.—2 N. Y.—No. 712 30
G. O.—P. S. C.—Md.—No. 376
Superseding G. O.—P. S. C.—Md.—No. 297
G. O.—I. C. C. No. 7108
Superseding G. O.—I. C. C. No. 5762
G. O.—P. S. C.—Pa.—No. 1348
Superseding G. O.—P. S. C.—Pa.—No. 833

Exhibit D-1

PENNSYLVANIA RAILROAD COMPANY
 Philadelphia, Baltimore & Washington Railroad
 Company
 West Jersey & Seashore Railroad Company

Local and Joint Freight Tariff.

—OF—

- 10** Rates and Regulations
 Governing Miscellaneous Services
 F. D. No. 335
 Corrected to February 15, 1916.
 Superseding F. D. No. 335, issued February 1,
 1915.

Issued January 6, 1916 by
 GEO. D. OGDEN,
20 General Freight Agent,
 Philadelphia, Pa.
 Effective February 15, 1916
 Except as noted in individual items
 WALTER THAYER,
 General Freight Agent.

- CHAS. E. KINGSTON,
 Assistant General Freight Agent.
 J. L. EYSMANS,
 Assistant General Freight Agent.
30 ROBT. C. WRIGHT,
 Freight Traffic Manager.
 E. P. BATES,
 Assistant Freight Traffic Manager.
 (R. G. O. 6338) (2700)
 Agent's Index No. 16

“C”

Item No. 14. Page 9.

(A) RULES GOVERNING THE HANDLING
 OF FERRY CARS.

- 40** The term “Ferry Car” applies to a car con-

Exhibit D-1

taining freight in less than carloads moved to or from a warehouse, industry or commercial plant having track connection with this Company, when such freight has been received or is to be forwarded by this Company in road haul.

Ferry car service will be furnished at stations named in List of Stations and Agencies G. O.—I. C. C. No. 7000, G. O.—P. S. C.—Pa.—No. 1280, G. O.—P. S. C.—2 N. Y.—No. 830, G. O.—P. S. C.—Md.—No. 370, supplements thereto and reissues thereof, subject to the following rules and conditions, except at the following stations:

BuffaloN. Y. See Item No. 15.

EtnaPa.
 GuyasutaPa.
 Herrs Island.....Pa.
 MillvalePa.
 Pittsburgh Stations.....Pa.
 Pittsburgh Union Stock Yards..Pa.
 SharpsburgPa.
 SummerPa.

See Pennsylvania
 Lines I. C. C.—
 F No. 667, P. S. C.
 —Pa.—F No. 178,
 and reissues
 thereof.

10

20

Rule 1.—When car contains 6000 pounds or more, or when the full loading capacity of car is used, no charge will be assessed. (See Note below.)

Rule 2.—On heavy or bulky freight which shipper or consignee is required to load or unload in accordance with Rule 8 (B), Section 2, of Official Classification (Note 1) no charge will be assessed.

Rule 3.—When car contains less than 6000 pounds of freight, except as provided in Rules 1 and 2, the charge will be \$2.00 per car, to be paid by the shipper on outbound freight and by the consignee on inbound freight. (See Note below.)

30

40

Exhibit D-1

Rule 4.—Only one placement of a car will be made.

Note.—In instances where a shipper, at the request of these Companies, loads freight into or on more than one car, for purpose of geographical distribution, the aggregate weight of shipments forwarded in any one day shall be treated the same as if forwarded in or on one car.

10 Conditions.

(a) Cars must contain only such freight as may, under current rules and regulations, be accepted for transportation.

(b) In consideration of carrier's gratuitous service or nominal charge as provided in this tariff, the shipper or consignee assumes all responsibility for loss or damage to contents of open cars or where a clear seal record is established for box cars.

20 (c) This tariff will apply exclusively on freight moving under station to station freight charges, and not on any local switching movement from one siding to another siding (company or private) within the jurisdiction of any one agency, nor upon freight received from or delivered to connecting lines under switching, except as provided in G. O.—I. C. C. No. 7114, G. O.—P. S. C.—2 N. Y.—No. 851, G. O.—P. S. C.—Pa.—No. 1352, G. O.—P. S. **30** C.—Md.—No. 377, supplements thereto and re-issues thereof.

(d) This tariff does not grant the use of private sidings or facilities to other than the owners, or those to whom the privilege of use is granted by the owners without cost to the carrier.

(e) Inbound shipments may be held in freight houses at delivery station, when for ferry car service, subject to storage rules as per tariffs lawfully published and on file with the Interstate

Exhibit D-1

Commerce Commission, Public Service Commission of the Commonwealth of Pennsylvania, Public Service Commission, Second District, State of New York, and Public Service Commission of Maryland.

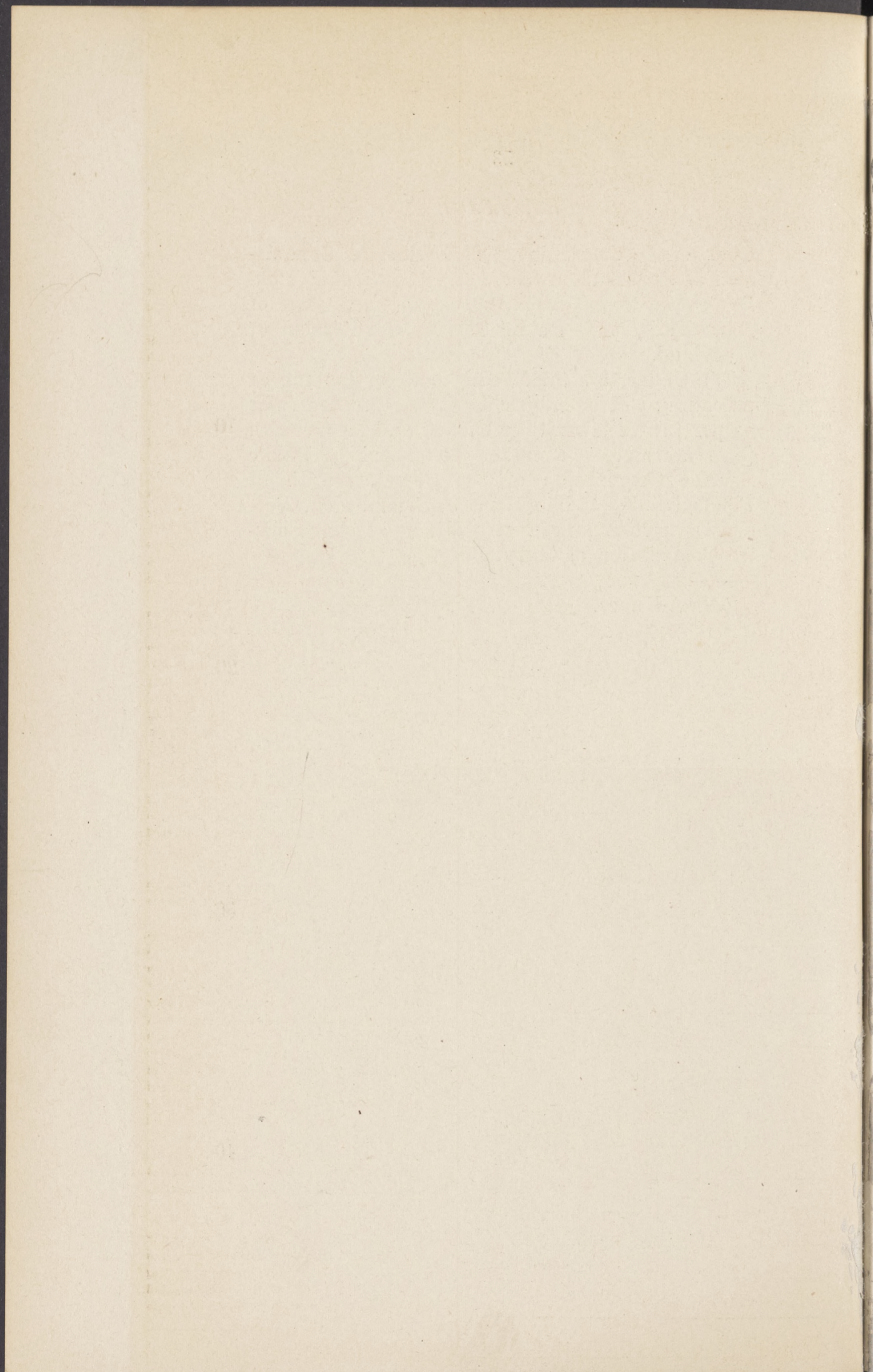
(f) Under this tariff, cars held for loading or unloading will be subject to car demurrage rules as per tariffs lawfully published and on file with the Interstate Commerce Commission, Public Service Commission of the Commonwealth of Pennsylvania, Public Service Commission, Second District, State of New York, and Public Service Commission of Maryland. **10**

(A) Advance.

20

30

40



CONDITIONS

Sec. 1. The carrier or party in possession of any of the property herein described shall be liable for any loss thereof or damage thereto, except as hereinafter provided.

No carrier or party in possession of any of the property herein described shall be liable for any loss thereof or damage thereto or delay caused by the act of God, the public enemy, quarantine, the authority of law, or the act or default of the shipper or owner, or for differences in the weights of grain, seed, or other commodities caused by natural shrinkage or discrepancies in elevator weights. For loss, damage, or delay caused by fire occurring after forty-eight hours (exclusive of legal holidays) after notice of the arrival of the property at destination or at port of export (if intended for export) has been duly sent or given, the carrier's liability shall be that of warehouseman only. Except in case of negligence of the carrier or party in possession (and the burden to prove freedom from such negligence shall be on the carrier or party in possession), the carrier or party in possession shall not be liable for loss, damage, or delay occurring while the property is stopped and held in transit upon request of the shipper, owner, or party entitled to make such request; or resulting from a defect or vice in the property or from riots or strikes. When in accordance with general custom, on account of the nature of the property, or when at the request of the shipper the property is transported in open cars, the carrier or party in possession (except in case of loss or damage by fire, in which case the liability shall be the same as though the property had been carried in closed cars) shall be liable only for negligence, and the burden to prove freedom from such negligence shall be on the carrier or party in possession.

Sec. 2. In issuing this bill of lading this company agrees to transport only over its own line, and except as otherwise provided by law acts only as agent with respect to the portion of the route beyond its own line.

No carrier shall be liable for loss, damage, or injury not occurring on its own road or its portion of the through route, nor after said property has been delivered to the next carrier, except as such liability is or may be imposed by law, but nothing contained in this bill of lading shall be deemed to exempt the initial carrier from any such liability so imposed.

Sec. 3. No carrier is bound to transport said property by any particular train or vessel, or in time for any particular market, or otherwise than with reasonable dispatch, unless by specific agreement endorsed hereon. Every carrier shall have the right in case of physical necessity to forward said property by any railroad or route between the point of shipment and the point of destination; but if such diversion shall be from a rail to a water route the liability of the carrier shall be the same as though the entire carriage were by rail.

The amount of any loss or damage for which any carrier is liable shall be computed on the basis of the value of the property at the place and time of shipment under this bill of lading.

Except in cases where the loss, damage, or injury complained of is due to delay or damage while being loaded or unloaded, or damaged in transit by carelessness or negligence, claims must be made in writing to the carrier at the point of delivery or at the point of origin within four months after delivery of the property, or, in case of failure to make delivery, then within four months after a reasonable time for delivery has elapsed. Suits for recovery of claims for loss or damage, notice of which is not required, and which are not made in writing to the carrier within four months as above specified, shall be instituted only within two years after delivery of the property, or, in case of failure to make delivery, then within two years after a reasonable time for delivery has elapsed. No claims not in suit will be paid after the lapse of two years as above, unless made in writing to the carrier within four months as above specified.

Any carrier or party liable on account of loss of or damage to any of said property shall have the full benefit of any insurance that may have been effected upon or on account of said property, so far as this shall not avoid the policies or contracts of insurance.

Sec. 4. All property shall be subject to necessary cooperage and bailing at owner's cost. Each carrier over whose route cotton is to be transported hereunder shall have the privilege, at its own cost and risk, of compressing the same for greater convenience in handling or forwarding, and shall not be held responsible for deviation or unavoidable delays in procuring such compression. Grain in bulk consigned to a point where there is a railroad, pub-

lic, or licensed elevator, may (unless otherwise expressly noted herein, and then if it is not promptly unloaded) be there delivered and placed with other grain of the same kind and grade without respect to ownership, and if so delivered shall be subject to a lien for elevator charges in addition to all other charges hereunder.

Sec. 5. Property not removed by the party entitled to receive it within forty-eight hours (exclusive of legal holidays) after notice of its arrival has been duly sent or given, may be kept in car, depot, or place of delivery of the carrier, or warehouse, subject to a reasonable charge for storage and to carrier's responsibility as warehouseman only, or may be, at the option of the carrier, removed to and stored in a public or licensed warehouse at the cost of the owner and there held at the owner's risk and without liability on the part of the carrier, and subject to a lien for all freight and other lawful charges, including a reasonable charge for storage.

The carrier may make a reasonable charge for the detention of any vessel or car, or for the use of tracks after the car has been held forty-eight hours (exclusive of legal holidays), for loading or unloading, and may add such charge to all other charges hereunder and hold such property subject to a lien therefor. Nothing in this section shall be construed as lessening the time allowed by law or as setting aside any local rule affecting car service or storage.

Property destined to or taken from a station, wharf, or landing at which there is no regularly appointed agent shall be entirely at risk of owner after unloaded from cars or vessels or until loaded into cars or vessels, and when received from or delivered on private or other sidings, wharves, or landings shall be at owner's risk until the cars are attached to and after they are detached from trains.

Sec. 6. No carrier will carry or be liable in any way for any documents, specie, or for any articles of extraordinary value not specifically rated in the published classification or tariffs, unless a special agreement to do so and a stipulated value of the articles are indorsed hereon.

Sec. 7. Every party, whether principal or agent, shipping explosive or dangerous goods, without previous full written disclosure to the carrier of their nature, shall be liable for all loss or damage caused thereby, and such goods may be warehoused at owner's risk and expense or destroyed without compensation.

Sec. 8. The owner or consignee shall pay the freight and all other lawful charges accruing on said property, and, if required, shall pay the same before delivery. If upon inspection it is ascertained that the articles shipped are not those described in this bill of lading, the freight charges must be paid upon the articles actually shipped.

Sec. 9. Except in case of diversion from rail to water route, which is provided for in section 3 hereof, if all or any part of said property is carried by water over any part of said route, such water carriage shall be performed subject to the liabilities, limitations, and exemptions provided by statute and to the conditions contained in this bill of lading not inconsistent with such statutes or this section, and subject also to the condition that no carrier or party in possession shall be liable for any loss or damage resulting from the perils of the lakes, sea, or other waters; or from explosion, bursting of boilers, breakage of shafts or any latent defect in hull, machinery, or appurtenances; or from collision, stranding, or other accidents of navigation, or from prolongation of the voyage. And any vessel carrying any or all of the property herein described shall have the liberty to call at intermediate ports, to tow and be towed, and assist vessels in distress, and to deviate for the purpose of saving life or property.

The term "water carriage" in this section shall not be construed as including lighterage across rivers or in lake or other harbors, and the liability for such lighterage shall be governed by the other sections of this instrument.

If the property is being carried under a tariff which provides that any carrier or carriers party thereto shall be liable for loss from perils of the sea, then as to such carrier or carriers the provisions of this section shall be modified in accordance with the provisions of the tariff, which shall be treated as incorporated into the conditions of this bill of lading.

Sec. 10. Any alteration, addition or erasure in this bill of lading which shall be made without an indorsement thereof hereon, signed by the agent of the carrier issuing this bill of lading, shall be without effect, and this bill of lading shall be enforceable according to its original tenor.

Exhibit P-5
A. D. 8939

317 H 8 1/2 x 11 12 1 15

DELIVERY RECEIPT

RECEIVED FROM PENNSYLVANIA RAILROAD COMPANY
IN GOOD CONDITION THE ARTICLES DESCRIBED BELOW

1309
41161
Freight Bill No.
3/7 1916W
Freight Bill Date

Length of Car Feet Inches. Marked Capacity of Car Lbs. C. L. Minimum Lbs.

ROUTE No. COMMODITY No. L. or F.

Point of Origin CH ARLESTON W VA 2/26 16 Connecting Line Reference

Original Car

Waybilled From

Waybill No.

Date

191

POT TFR VA

2594

3/3

Shipper

BECKER STEEL CO

to 162 - Newark, N. J.

Via

Consigned to

HYATT ROLLER B CO HAR

Destination

State of

County of

Route

Car Initial and No.

ACL 29127

No. PACKAGES	DESCRIPTION OF ARTICLES AND SPECIAL MARKS	WEIGHT (Subject to Correction)	Rate and Authority	FREIGHT CHARGES	ADVANCES	Balance
	5BDL STEEL RF&P 511362-378 Picked 11/13 4 Bdl 380 1/2 G 2 3/19	477	22 5.9	28	77	05
				4/19/14		

SIGNATURE

DATE OF DELIVERY

TIME

1840

1840

1840

1840

1840

1840

1840

1840

1840

1840

1840

1840

1840

1840

1840

1840

1840

1840

1840

1840

1840

1840

1840

1840

1840

1840

1840

1840

1840

1840

1840

1840

1840

1840

1840

1840

1840

1840

1840

1840

1840

1840

1840

1840

1840

1840

1840

1840

1840

1840

1840

1840

1840

1840

1840

1840

1840

1840

1840

1840

1840

1840

1840

1840

1840

1840

1840

1840

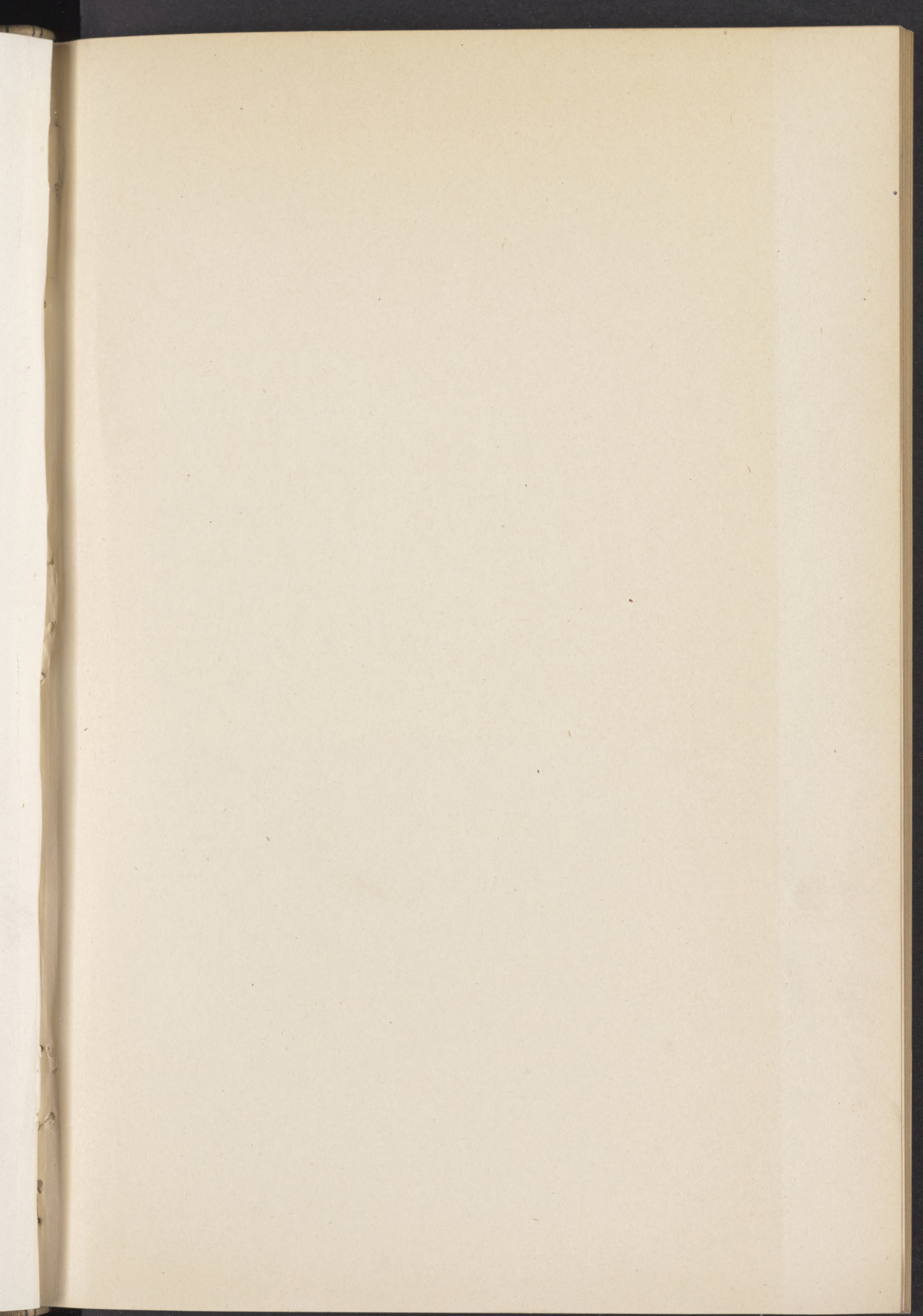
1840

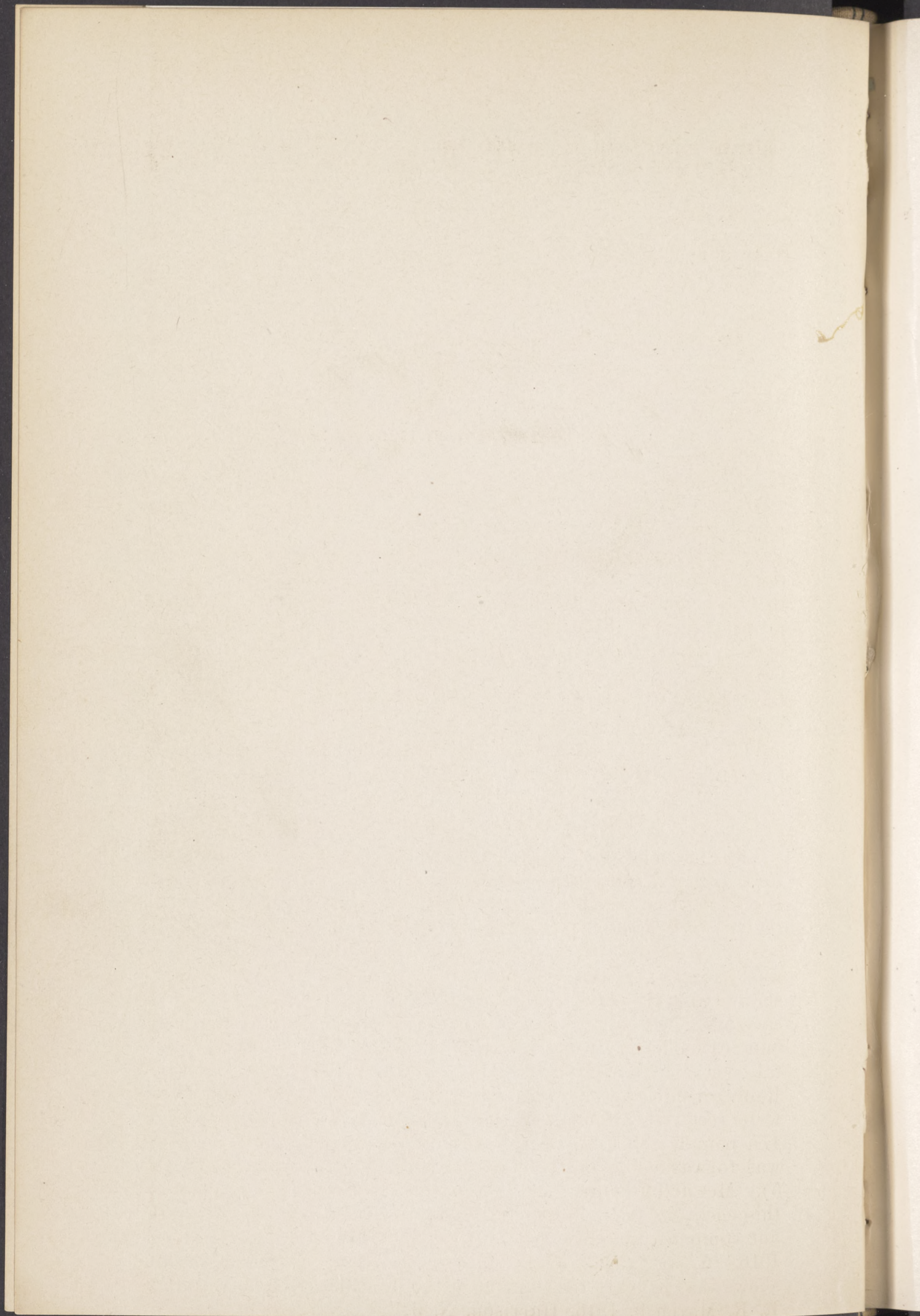
1840

1840

1840

1840





New Jersey Court of Errors and Appeals

HYATT ROLLER BEARING COMPANY, a corporation,
Plaintiff-Respondent,

vs.

THE PENNSYLVANIA RAILROAD COMPANY,
Defendant-Appellant.

Action at Law.

*On Appeal from
Supreme Court.*

Brief of Plaintiff-Respondent.

APPELLANT'S THIRD AND FOURTH GROUNDS OF APPEAL AND THIRD AND FOURTH POINTS OF LAW are not proper bases for an appeal to this Court.

They assume that this Court will reverse the conclusion of the Court below on the ground that the finding of fact is not supported by the evidence. Even if there should be any question respecting the propriety of the conclusion of fact, this Court could not concern itself with such a question. This principle has been recognized in this Court in numerous cases, and is repeated in *Steinmeyer v. Phenix Cheese Co.*, 102 Atl. Rep. 150 (1917); *Smarak v. Segusse*, 102 Atl. 354 (1917).

The finding of fact of the District Court is conclusive. *District Court Act*, Section 205, Comp. Stat. 2012.

The Facts Found by the Trial Court.

The District Court Judge expressly found that the bundle of steel for which the plaintiff sued was lost at the defendant's station at Harrison; that the bundle was not lost at the plant of the plaintiff; *that the defendant failed to make delivery of one bundle of steel received by it from the consignor* (case, page 43). This finding of fact was based upon the testimony of the plaintiff's witnesses, which showed that when the shipment was received by the plaintiff it was carefully checked by three of its employees. Golub checked the four bundles out of the ferry car when it was opened (case, page 18); notation was thereafter made on the original delivery receipt by W. A. Reilly, inside checker, that only four bundles, weighing 382 pounds, were received, although the receipt called for five bundles, weighing 477 pounds; this receipt, containing such memoranda of shortage, was forwarded to the defendant company (case, page 25, Exhibit P. 5). McCarthy, supervisor of the receiving department, corroborated this checking (case, page 28). The receipt forwarded to the defendant company was received by it at the Harrison station March 9th, 1916. A careful inspection of the copy of the receipt (Exhibit P. 5) shows that it bears the imprint of the defendant's rubber stamp: "P. R. R. March 9, 1916, Harrison, N. J."

The finding of the Trial Court was proper under the evidence. The Court possessed, as it always does, the opportunity of gathering from the appearance of the witnesses and the manner in which they testified, that added element which a reading of the testimony never contains, and which is so essential in a proper determination of the facts of any case. The Court below was convinced of the uncertainty of defendant's witnesses, and that in spite of their statements to the contrary, the bundle was lost at the Harrison station. It was also convinced of the accuracy and care shown by the plaintiff's witnesses, and that it was certain that the bundle was not in the ferry car when the car reached the plaintiff's plant.

The third and fourth grounds of appeal and points of law are, therefore, not only without legal merit in this Court, but entirely without force under the evidence in the case.

APPELLANT'S SECOND GROUND OF APPEAL AND SECOND POINT OF LAW are also without force in view of the determination upon the facts.

If there can be no reversal of the finding of fact, argument upon this second point is futile. That is to say, if the bundle sued for was not in fact placed in the ferry car (as the Trial Court found), why argue about the proof of a "clear seal record." It is not disputed that the car was sealed at the defendant's station at Harrison and that the seal was broken by plaintiff's employees at its plant when the work of unloading the car began, but *if the bundle in question was never loaded into the car we are not concerned with the provisions of the ferry car tariff*. If, upon this point, this Court should find the defendant not liable to the plaintiff, such conclusion must be predicated upon a finding that the goods in question were in fact loaded into the ferry car and lost after the car was sealed. In a different garb this is the same contention as made in appellant's third and fourth points, and it should not be considered by this Court.

Appellant's Point One.

No Claim Filed.

The only question in this case is this: Did the plaintiff comply with section 3, paragraph 3, of the bill of lading? This provision is as follows:

"Except in cases where the loss, damage or injury complained of is due to delay or damage while being loaded or unloaded, or damaged in transit by carelessness or negligence, claims must be made in writing to the carrier at the point of delivery or at the point of origin within four months after delivery of the property, or in case of failure to make delivery, then within four months after a reasonable time for delivery has elapsed." (Exhibit P. 1 on back.)

In the first place, defendant received on March 9, 1916, delivery receipt (Exhibit P. 5), with notation made upon it that four bundles of steel, weighing 380 pounds, had been received. The receipt called for
 six bundles weighing 477 pounds

On April 17, 1916, plaintiff notified defendant of the loss by letter bearing that date, specifying all necessary particulars and informing defendant *that it had failed to deliver the bundle in question* (case, page 14, Exhibit P. 2). Three days thereafter defendant informed plaintiff by letter that it had thoroughly investigated the matter, that a thorough search of the warehouse revealed no trace of the bundle and that they were unable to give further information about it (case, page 15, Exhibit P. 4).

On December 13, 1916, plaintiff's attorneys informed defendant by letter, bearing that date, that the claim (with another) had been placed in their hands for attention (case, page 15, Exhibit P. 3).

The Trial Court found that the letter of April 17, 1916 (Exhibit P. 2) was a sufficient compliance with the terms of the bill of lading (case, pages 16 and 42). By holding that the letter was a notice, it was unnecessary therefore to decide whether the notation upon the freight receipt or the letter of plaintiff's attorneys were claims as required by the stipulation in the bill of lading.

We now contend that the delivery receipt containing the notation of the shortage (Ex. P. 5), the letter dated April 17 (P. 2), and the letter dated December 12 (P. 3), were claims within the stipulation above recited.

While such provisions are inserted in shipping contracts under statutory authority, and while they are not strictly in derogation of the common law liability, they are nevertheless inserted for the protection of the carrier, and in their construction the courts have kept in mind the real purpose of such provisions. Appellant's contention would make such construction narrow, technical and precise, shading the phraseology to meet the exact definition of the words; all of which is contrary to the decisions upon the subject.

The purpose of such a stipulation is to give the carrier reasonable notice and information respecting the loss or damage so that prompt investigation may be made. A substantial compliance only is necessary.

"As regards the sufficiency of the notice of a claim for loss of or injury to goods shipped, it is very generally held that no particular form of notice is necessary, and that a substantial compliance with the stipulation providing for notice is all that is required. It 'is addressed to a practical exigency and it is to be construed in a practical way.' * * *

"It is no defence to an action for loss or injury that the claim filed with notice of damages to a shipment was for less than the amount sued for. The parties seeking to recover are not confined to any special amount by the contract, *but are merely required to give notice in order that the carrier may investigate before the witnesses or the evidence is beyond its reach.*" 10 *Corpus Juris* 336, par. 489, and cases cited.

“The construction upon these stipulations must be reasonable and adapted to the circumstances of each case. *Am. & Eng. Ency. of Law* (1st Ed.) Vol. 3, p. 15.

“The object of such a condition is to prevent frauds on the company.” *Ib.* (note).

“The facilities of the carrier for tracing a loss and recovering the goods or for finding out the true cause of the loss or injury are of little use after the lapse of a considerable time and its ability to defend itself or to recover the goods is greatly lessened where the shipper waits for some time before making his complaint; and for these reasons it is held that a carrier may properly contract with a shipper that he must present his claim within a fixed time or forfeit his right to insist upon it.”

Am. & Eng. Ency. of Law (2d Ed.) p. 321.

* * * * *

“The requirement, as to making claim for damages within the time and in the manner specified (in the bill of lading) may be waived by failing to object to the form of a defective notice, or by entertaining and proceeding to consider and negotiate with reference to the claim, or by misleading the owner as to the necessity of giving notice. *And a substantial compliance with the stipulation is all that is required.*” 6 Cyc. 509.

* * * * *

“the evidence in this case * * * tended to show a substantial compliance with the spirit of the agreement upon which alone the validity of such agreements are upheld and sustained at all.” *Rich v. Kansas Pac. Ry.*, 63 Mo. 314, 322 (1876).

* * * * *

“The object of words of this character, it is said, is to enable the carrier, while the occurrence is recent, to promptly inform himself of what the actual facts occasioning the loss or injury were, and thus protect himself against claims which might be made upon him after such a lapse of time as to frequently make it difficult, if not impossible, to ascertain the truth.”

St. Louis & S. F. R. Co. v. Keller, 119 S. W. 254-255 (Ark. Supr. Ct. 1909), quoting *Hutchinson on Carriers* (3rd Ed.) Sect. 442.

In this case the Court says further:

“its (the stipulation’s) effect, is to require the one who has the peculiar knowledge to inform the one who has not that knowledge to seek the facts while they exist, so that the facts may be obtained and presented by both sides. Its effect is, therefore, to uphold and enforce its rights if they are founded on truth, and not to limit or defeat those rights.”

* * * * *

“The purpose of such notice is that the company may have a fair and reasonable opportunity of examination and inspection of the live stock transported under its management before it

shall be placed beyond its reach and beyond the possibility of identification. * * *

“While the carrier may stipulate by contract that notice of a claim for damages shall be given within a specified time in order to be valid, still, the construction upon such stipulation must be reasonable and adapted to the circumstances of each case.”

Atchison T. & S. F. R. Co. v. Temple, 27 Pac. Rep. 98 (Kan. Supr. Ct. 1901).

* * * * *
See also *Atchison T. & S. F. R. Co. v. Collins*, 27 Pac. Rep. 99 (Kan. Supr. Ct. 1891).

Also *Kansas A. & V. R. Co. v. Ayers*, 38 S. W. Rep. 515 (Ark. Supr. Ct. 1897).

* * * * *
“All such contracts of limitation, being in derogation of common law, are strictly construed and never enforced unless shown to be reasonable. Any doubt or ambiguity therein is to be resolved in favor of the shipper * * *. Stipulations in a bill of lading are similar in words to a policy of insurance. It is well settled by the best authorities that if a policy is so drawn as to require interpretation and to be fairly susceptible of two different constructions, the one will be adopted that is most favorable to the insured and against the construction which would limit the liability of the insurer. * * *

“The object of such a stipulation is not to relieve the carrier from its just liability for such a purpose would be clearly unlawful, but simply to give it such notice as will enable it, by proper investigation, to protect itself against unjust claims. It is not denied that the plaintiffs signed the receipt for the cattle ‘under protest.’ These words written upon the receipt would be ample notice to the defendant that the plaintiffs intended to enforce their rights. The meaning of those words is too well known in the business world to be capable of misconstruction. If defendant’s agent had desired any more specific notice or information he might have asked for it after having been put upon notice, but this he did not see fit to do.”

Hinkle v. So. Ry. Co., 36 S. E. Rep. 348, pp. 350-351 (N. C. Supr. Ct. 1900).

* * * * *
“It is not difficult for the consignee to comply with a requirement of this kind and give notice in writing to the agent of the delivering carrier. Such notice puts in permanent form the evidence of an intention to claim damages and will serve to call the attention of the carrier to the condition of the freight and enable it to make such investigation as the facts of the case require while there is opportunity so to do.

“In this case no attempt was made to give such notice in writing to the agent of the delivering carrier. * * *

St. Louis I. Mt. & So. Ry. Co. v. Starbird, 243 U. S. 592, p. 605 (1916).

* * * * *

All of the decided cases upon this subject, without an exception, so far as we have discovered (and this includes the cases cited by appellant in its brief) repeat the rule that a substantial compliance with the terms of such a stipulation in a bill of lading is all that is necessary.

We contend that the letters P. 2 and P. 3, as well as the delivery receipt, with its penciled memoranda (Exhibit P. 5) each contains all the information necessary under this rule.

Appellant's argument would be fully met if the words "we claim" were appropriately inserted in the last paragraph of plaintiff's letter (P. 2), so that it read as follows:

“Can you at this time advise if you have information of the 1 bundle (we claim) containing 7 pieces and weighing 97 pounds which you failed to deliver with the rest of the material.”

Or if the delivery receipt (Exhibit P. 5) had endorsed upon it the words "shortage claimed" or "1 bundle claimed," or "we claim missing bundle" or words of like import, appellant would admit it to have been sufficient.

The letter of the plaintiff, as written, advising the railroad company that it had "failed to deliver" the bundle of steel, could mean nothing else than that the bundle was claimed. The notation of the shortage upon the delivery receipt, and the fact that it was so returned to the defendant company, could mean nothing but that the missing bundle was claimed. Both of these communications were a substantial and complete compliance with the stipulation.

Appellant contends that "there is a plain distinction between a stipulation in the bill of lading requiring a claim to be filed and one simply requiring a notice of the claim to be given or filed." And it cites various cases in which this is indicated.

There is no case which draws the distinction as fine as indicated by appellant.

Citation of authorities in which the word "claim" has been given a meaning in law is not helpful to us in this case. In addition to the cases cited by appellant in which this word is defined:

See *Gordon Brothers v. Wageman*, 77 Neb. (Supreme Court) 185 (1906):

“It implies that the right is in dispute and is suggestive of contention, litigation or something left for future determination.”

Appeal of Beach, 76 Conn. 118 (Ct. of Errors 1903):

“Claim in its primary meaning is used to indicate the assertion of an existing right. In its secondary meaning it may be used to indicate the right itself.”

Collins v. Farley, 80 Vt. 144 (Supr. Court 1902):

“One meaning of the verb ‘claim’ is to assert, to hold or maintain as a fact or as true.”

Prigg v. Pennsylvania, 41 U. S. 536 (1842), quoting Lord Dwyer:

“A claim is a challenge by a man of the propriety or ownership of a thing which he has not in possession, but which is wrongfully detained from him.”

See also *Words and Phrases* (second series), pp. 723-4.

Orvis v. Jennings, 6 Daly 434 (1876).

The determination of the question here to be decided is not limited to the meaning of a single word.

The Court must determine whether or not there was in this case a reasonable and substantial compliance with this condition of the contract.

A careful reading of the cases cited by appellant to support its contention will show that they are authorities for the contention now made by the appellee. A few of them will be reviewed:

In *Georgia F. & A. R. Co. v. Blish Milling Co.*, 241 U. S. 190 (1916), there had been one or two telegrams between claimant and carrier respecting the loss, and then consignor wired the railroad company: “We will make claim against railroad for entire contents of car at invoice price. Must refuse shipment as we cannot handle.” It was held that this telegram satisfied the requirement of the bill of lading. Regarding the stipulation the Court said:

“The purpose of the stipulation is not to escape liability but to facilitate prompt investigation, and to this end it is a precaution of obvious wisdom. * * * In the preceding telegram which passed between the parties * * * the shipment had been adequately identified so that this final telegram taken with the others established beyond question the particular shipment to which the claim referred, and was in substance the making of a claim within the meaning of the stipulation—the object of which was to secure reasonable notice. We think that it sufficiently apprised the carrier of the character of the claim, for while it stated that the claim was for the entire contents of the car ‘at invoice price’ this does not constitute such a variance from the claim for the value of the flour as to be misleading. And it is plain that no prejudice resulted; granted that the stipulation is applicable and valid, *it does not require documents in a particular form. It is addressed to a practical exigency and is to be construed in a practical way.* The stipulation required that the claim should be made in writing, but a

telegram which in itself, or taken with other telegrams containing an adequate statement, must be deemed to satisfy this requirement."

* * * * *

In *Western Union Telegraph Co. v. Moxley*, 98 S. W. Rep. 112 (Ark. Supr. Ct. 1906), the reasoning had reference especially to claims for damages for non-delivery of telegrams and not for loss of goods. The Court at first found that the plaintiff could have damages for mental anxiety, even though his letter notifying the company had only mentioned as damages the cost of the message and the telephone charges. *On a re-hearing it was held that the damages should be limited to the items mentioned in plaintiff's letter, and to that extent the letter was held sufficient to sustain the action.* Referring to the letter and the claim contained therein the Court said:

"The language quoted contains the only claim for damages made in the letter, and so far as it goes complies with the stipulation in the contract that the claim must be presented in writing. But it does not go far enough to include a claim for mental suffering, for the claim is expressly limited to the cost of the message and the amount expended for long-distance conversation." * * *

"The only claim presented by plaintiff to defendant within sixty days was expressly limited to the items above referred to, and the defendant company under its contract is not liable for damages beyond those items."

In *St. Louis I. Mt. & So. Ry. Co. v. Starbird* (*supra*) the Court held that there had been no attempt made to give any notice in writing to the agent of the delivering carrier. The notice in that case was verbal and was given to a dock master.

In *Kidwell v. Oregon State Line*, 208 Fed. 1, the Court merely held that to inform an agent that there would be a claim for damages does not give the carrier a statement of fact upon which an investigation might be made.

In *Atlantic Coast Line v. Bryan*, 65 S. E. 30 (Va. Supreme Court 1909), no claim was made by the plaintiff within the stipulated period, and nothing was done by him except to inquire as to a lost bundle of clothing.

In *A. C. Cheney Piano Co. v. New York Central R. R.*, 148 New York Supp. 108 (Supr. Ct. 1914), there was no written communication between the parties within the required period.

In *Olsen v. C. B. & Q. R. Co.*, 250 Fed. 272 (1918), it was held that a telegram to an officer of the railroad company, notifying him that a shipment of cattle would suffer injuries if precautions were not taken (sent and received before the loss and damage were inflicted), was not equivalent to notice by the shipper of his claim for damages, the extent of the damage not then being known, and it not being known what the shipper would claim. It was also held that oral notice was not sufficient.

We therefore claim that if the purpose of such a stipulation in a bill of lading and the rules for its interpretation are as laid down in the authorities herein referred to, it follows that plaintiff fully met all of the requirements by sending to the defendant the notice contained upon the delivery receipt and the two letters. The facts noted upon the delivery receipt were enough to cause defendant to make its investigation. The letter of April 17th was of itself complete and sufficient notice. It supplemented the information given upon the delivery receipt. The letter of December 13, 1916, written by plaintiff's attorneys, brought the matter again to the attention of the defendant. The reply made by defendant (Exhibit P. 4) to plaintiff's first letter (Exhibit P. 2) showed that there was in the notice sufficient to enable defendant to make a "thorough search." Defendant stated in this letter that no trace of the bundle could be found; that the records had been examined and that no further information could be given. It would have been meaningless for plaintiff to again write defendant, in view of this reply, repeating the statements in its first letter, and adding to it the word "claim."

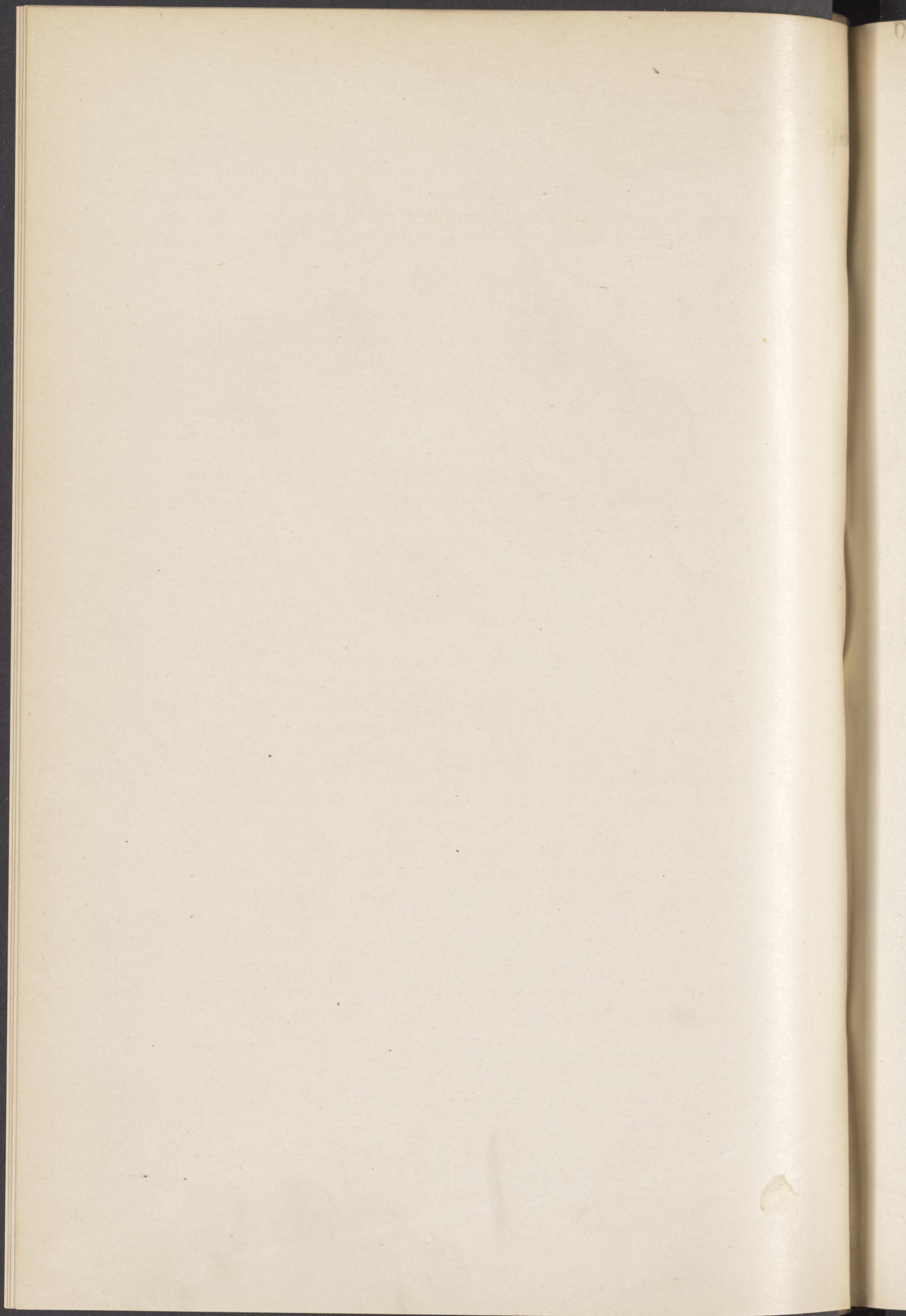
Respecting the letter written by plaintiff's attorneys (Exhibit P. 3), it is insisted that notwithstanding the previous notice this letter of itself, or taken in connection with the other communications, was a sufficient basis for plaintiff's suit.

In case of failure to make delivery, claim was to be made within four months after a reasonable time to make delivery had elapsed. What is such reasonable time and when does it expire? If under any circumstances it could be said that it was not unreasonable to give a railroad company five months to trace and find a bundle of steel which had been shipped from Charleston, West Virginia, to Newark (when it took seventeen days to make an ordinary shipment), then the letter of December 13th was proper notice and plaintiff's suit could rest upon that alone.

To hold, under the circumstances of this case, that the defendant company would not be held liable unless the notice given by plaintiff were followed by a specific demand, would be to hold that a valid claim must be technical and formal, notwithstanding the fact that the purpose of the stipulation contained upon the bill of lading had been reasonably met. Such a decision would be contrary to all law on the subject.

It is therefore respectfully insisted that proper notice was given to defendant; that the decision of the Trial Court that a proper claim had been made was correct, and that the judgment of the court below should be affirmed.

DAY, DAY, SMITH & SLINGERLAND,
Attorneys for and of Counsel with Plaintiff-Respondent.



New Jersey Court of Errors and Appeals

HYATT ROLLER BEARING COMPANY,
Plaintiff-Respondent,

vs.

THE PENNSYLVANIA RAILROAD
COMPANY,
Defendant-Appellant.

Action at Law. 10
On Appeal
from Supreme
Court.

BRIEF OF DEFENDANT-APPELLANT.

20

I.

Statement of Facts.

This case was tried before the Judge of the First District Court of Jersey City, without a jury. It was brought to recover damages for the alleged loss of a bundle of steel from a "Ferry Car," the alleged missing bundle being a part of a shipment of five bundles of steel consigned to plaintiff at Harrison, New Jersey, by Becker Steel Company of America, from Charleston, West Virginia, February 24th, 1916. 30

The "Ferry Car" was provided pursuant to a tariff (Exhibit D-1, Case, pp. 49-53) filed with the Interstate Commerce Commission, and relieved the plaintiff of the necessity of trucking merchandise by providing a car into which shipments accumulating at the Harrison Station from various points could be loaded and transported to plain- 40

tiff's siding. The service was gratuitous where the aggregate weight of the shipments was more than 6,000 pounds, and plaintiff assumed all responsibility for loss or damage to the contents of the car where a clear seal record was established (Exhibit D-1, Sub. Div. (b), Case, p. 52).

Plaintiff contended that they received but four of the five bundles of steel in the shipment.

10 Defendant introduced evidence that the five bundles had been loaded into the Ferry Car, a box car; that the car had been sealed within three minutes of the time of loading, the checker remaining at the car until it was sealed; that the car was transported under seals and placed on plaintiff's siding with seals intact on March 11th, 1916, at 1 o'clock P. M. Defendant contended, therefore, that, as the five bundles had been loaded into the Ferry Car, and a clear seal record established, as found by the Trial Court (Case, p. 42, l. 40 to p. 20 43, l. 5), the Ferry Car Tariff governed and that any loss from the car was assumed by the plaintiff.

Defendant also contended that no claim had been filed by plaintiff pursuant to the provisions of the bill of lading.

The Trial Court found that a claim had been filed, and that defendant was responsible for the loss, and gave judgment for the plaintiff for \$263.50 and costs.

30 From this judgment defendant appealed to the Supreme Court, where it was affirmed. The present appeal is from the judgment of the Supreme Court.

II.

Points of Law involved.

1. No claim filed as required by the bill of lading.

2. Under the filed Tariff plaintiff assumed the risk of loss from the "Ferry Car" containing the shipment, where a clear seal record was established. 10

3. There is no evidence to support the finding of the Trial Court that through some oversight or dishonesty of some stranger or employees or unknown person one bundle was missing at the Harrison station and was not put into the Ferry Car.

4. There was no evidence to support the judgment of the Trial Court and judgment should have been given for defendant when requested. 20

III.

Character of Shipment.

The shipment was interstate in character and governed by the provisions of the Interstate Commerce Act, and was also subject to the conditions of the bill of lading and tariff as filed with the Interstate Commerce Commission pursuant to said act, the material portions of which are here quoted: 30

Section 6, provides, in part, as follows:

"That every common carrier subject to the provisions of this Act shall file with the Commission created by this Act and print and keep open to public inspection schedules showing all the rates, fares and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier 40

by railroad, by pipe line or by water when a through route and joint rate have been established. * * * 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 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 privilege or facilities in the transportation of passengers or property except such as are specified in such tariffs." (U. S. Comp. Stat. Sec. 8569.)

20 Section 20, provides, in part, as follows:

30 "That any common carrier, railroad or transportation company subject to the provisions of this Act receiving property for transportation from a point in one State or Territory or the District of Columbia to a point in another State, Territory, District of Columbia, or from any point in the United States to a point in an adjacent foreign country shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage or injury to such property caused by it or by any common carrier, railroad or transportation company to which such property may be delivered or over whose line or lines such property may pass within the United States or within an adjacent foreign country when transported on a through bill of lading, and no contract, receipt, rule, regulation or other limitation of any character whatsoever shall

40

exempt such common carrier, railroad or transportation company from the liability hereby imposed; and any such common carrier, * * * shall be liable to the lawful holder of said receipt or bill of lading or to any person entitled to recover thereon, whether such receipt or bill of lading has been issued or not, * * *: Provided further, That it shall be unlawful for any such common carrier to provide by rule, contract, regulation, or otherwise a shorter period for giving notice of claims than ninety days and for the filing of claims for a shorter period than four months, and for the institution of suits than two years: Provided, however, That if the loss, damage or injury complained of was due to delay or damage while being loaded or unloaded or damaged in transit by carelessness or negligence, then no notice of claim nor filing of claim shall be required as a condition precedent to recovery." (U. S. Comp. Stat. Sec. 8604-a.)

Tariffs filed and bills of lading issued pursuant to said Act are binding on shipper and consignee, and the provisions of such tariffs and bills of lading cannot be waived, changed or ignored.

Spada v. P. R. R., 86 N. J. L., 187.

Olivit v. P. R. R., 88 N. J. L., 241.

Georgia F. & A. R. Co. v. Blish Milling Co., 241 U. S., 190; 36 Sup. Ct. Rep., 541; 60 L. Ed., 948.

Missouri K. & T. R. Co. v. Ward, 244 U. S., 383; 37 Sup. Ct. Rep., 617; 61 L. Ed., 1213.

St. Louis I. M. & S. Ry. v. Starbird, 243 U. S., 592; 37 Sup. Ct. Rep., 462; 61 L. Ed., 917.

10

20

40

IV.

ARGUMENT.

POINT I.

No Claim Filed.

10 The bill of lading (Ex. P-1, Sec. 3; Case, p. 54), provided, in part, that before plaintiff could recover, "*Claim must be made in writing to the carrier at point of delivery or at the point of origin within four months after delivery of the property or in case of failure to make delivery, then within four months after a reasonable time for delivery has elapsed.*"

20 The shipment was made at Charleston, West Virginia, February 24th, 1916; arrived at the Harrison station March 9, 1916; was loaded into the Ferry Car March 10, 1916; and was placed on plaintiff's siding March 11, 1916; the plaintiff unloading the car on March 13th, 1916.

On April 17, 1916, plaintiff wrote defendant as follows (Ex. P-2, Case, p. 46):

April 17, 1916.

Pennsylvania Railroad Co.,
Newark, New Jersey.

Gentlemen:

30 On a shipment from the Becker Steel Company of Charleston, W. Va. freight bill No. 41161 dated March 7th, the quantity specified is 5 bundles of Steel weighing 477 lbs. with freight charges amounting to \$1.05. On March 17th we received 4 bundles weighing 380 lbs. Can you, at this time, advise if you have information of the 1 bundle containing 7 pieces and weighing 97 lbs. which you failed to deliver with the rest of material?

Yours very truly,

HYATT ROLLER BEARING CO.,

F. A. Weiss,
Purchasing Agent.

40

WPW/W

On April 20, 1916, defendant replied to plaintiff's letter as follows (Ex. P-4, Case, p. 48):

Harrison, N. J., April 20th, 1916.

Mr. F. A. Weiss, Purchasing Agent,
Hyatt Roller Bearing Co.
Harrison, N. J.

Dear Sir:—

Replying to your favor of 17th, relative to alleged shortage of one bundle of steel in shipment of 5 bundles from the Becker Steel Co. of Charleston, W. Va. 10

We have made a thorough search of our warehouse and can find no trace of this bundle, our records clearly indicate that entire shipment was received at this station on March 9th checking from car No. 511362 & was reloaded on March 10th into L. V. 63339 together with a number of other shipments and forwarded to your siding. We are unable to advise further.

Yours truly,

T. S. HOOD,

Agent,

Estill. 20

Nothing further was done in the matter until nearly nine months later, December 13th, 1916, when plaintiff's attorneys wrote defendant's agent as follows (Ex. P-3, Case, p. 47):

December 13, 1916.

T. S. Hood, Esq.,
Freight Agent, Pennsylvania Railroad,
Newark, N. J. 30

Dear Sir:

The Hyatt Roller Bearing Co. has placed in our hands for collection two claims against your company, one for \$256 and the other for \$242.50. These claims arise through a shortage in the delivery of certain shipments of steel. We believe that you are familiar with the matter. 40

Will you kindly advise us whether there is any hope of settling these cases without resorting to litigation.

Yours very truly,

Edwd. A. & Wm. T. Day.

10 This letter was properly disregarded by the Court, as well as a notation on the freight receipt (Ex. P-5, Case, p. 55) "Received 4 bundles 382 lbs.," signed in plaintiff's name. The letter was sent too late if it could be construed to be a claim, and the notation on the freight receipt could not under any view be regarded as a claim.

The question then was as to the letter of April 17th, 1916, (Ex. P-2). It was filed within time, but if it was not a claim then no claim was filed in accordance with the provision in the bill of lading.

20 The trial court erred, we think, in holding, (Case, p. 42, l. 28-33):

"I find that the letter of April 17th addressed to the Pennsylvania Railroad Co. was a sufficient compliance with the terms of the bill of lading which required a claim to be made within four months."

30 There is a plain distinction between a stipulation in the Bill of Lading requiring *a claim to be filed*, and one simply requiring *a notice of claim to be given or filed*; and this is clearly indicated in the cases in which the question here involved is discussed, and forms the basis of distinguishing decisions.

40 In *Georgia F. & A. R. Co. v. Blish Milling Co.*, 241 U. S., 190; 36 Sup. Ct. Rep., 541; 60 L. Ed., 948, the United States Supreme Court declared that a provision in a bill of lading substantially the same as the one here involved, requiring the filing of a claim within four months, was valid, and that its terms could not be waived or ignored, and

said that a telegram: "We will make claim against railroad for entire contents of car at invoice price. Must refuse shipment as we cannot handle,"—was a claim in writing within the meaning of the stipulation. And, further, "In the preceding telegrams which passed between the parties and are detailed by the state court in stating the facts, the shipment had been adequately identified so that this final telegram taken with the others established beyond question the particular shipment to which the claim referred, and was in substance the making of a claim within the meaning of the stipulation,—the object of which was to secure reasonable notice. We think that it sufficiently apprised the carrier of the character of the claim, for while it stated that the claim was for the entire contents of the car "at invoice price," this did not constitute such a variance from the claim for the value of the flour as to be misleading. * * * The stipulation required that the claim should be made in writing, *but a telegram which, in itself, or taken with other telegrams, contained an adequate statement, must be deemed to satisfy this requirement.*"

The United States Supreme Court, in *St. Louis, I. M. & Ry. Co. v. Starbird*, 243 U. S., 592; 37 Sup. Ct. Rep., 462; 61 L. Ed., 917, reversed a judgment for plaintiff on the ground that the Supreme Court of Arkansas erred in holding that verbal notice to the dockmaster of the condition of a shipment of peaches was a compliance with the terms of the bill of lading which required written notice.

In *Kidwell v. Oregon Short Line*, 208 Fed., 1, at page 3, the Circuit Court of Appeals said, regarding the filing of a claim pursuant to a provision in a bill of lading requiring claims for loss, damage or detention to be filed.

"It is no compliance with such a provision to remark to a freight agent of the carrier

10 along the line of the route that the shipper is going to put in a claim for damages. Nor is it a compliance to inform the agent at the place of destination that there will be a claim against the company for damages. To impart the information that a claim will be presented is not to present 'A claim for loss, damage or detention.' It does not inform the carrier of the nature, extent, amount or cause of damage. It gives no definite statement of facts upon which an investigation may be had, or which shows that an investigation is required."

The judgment of non-suit was affirmed.

20 In view of these Federal decisions, therefore, a claim must be in writing and must contain an adequate statement to satisfy the provision in the bill of lading. *Georgia &c. Ry. Co. v. Blish Milling Co., supra.* And, as said in *Kidwell v. Oregon Short Line, supra*, a claim must be a claim for loss &c. and contain information of the nature, extent, amount and cause of damage; it must contain a definite statement of facts upon which an investigation may be had or which shows that an investigation is required. Plaintiff's letter of April 17, 1916, (Ex. P-2) satisfies none of the requirements except that it is in writing. It made no demand that could be acted upon by defend-
30 ant. *To hold the letter a claim is to make a different contract between the parties*, and this both the United States Supreme Court and our Court of Errors and Appeals declare cannot be accomplished.

In *Prigg v. Pennsylvania*, 41 U. S., 539, at page 615, 10 L. Ed. 1060, the United States Supreme Court said with reference to a claim for the delivery of a slave: "What is a claim? It is in a just juridical sense a demand of some matter as
40 of right made by one person upon another, to do

or to forbear to do some act or thing as a matter of duty.”

In *Hill v. Henry*, 66 N. J. Eq., 150, at p. 161, Vice-Chancellor Stevens said that the words “to claim,” speaking with reference to a claim of property, meant “to challenge as a right,” “to demand as due.”

In *Marsh v. Benton*, 39 N. W., 713, 75 Iowa, 469, a claim is defined as “a demand made of a right or supposed right, a calling on another for something due, or supposed to be due, as a claim for wages or services. It must state the amount claimed.” 10

Plaintiff’s letter (Ex. P-2) is not a claim of anything at all according to these definitions.

The Court’s reasoning in the case of *Western Union Telegraph Co. v. Moxley*, 98 S. W. Rep. 112, can very properly be applied to the case at bar. In that case the telegraph company failed to deliver a telegram sent to the plaintiff, Moxley, regarding the illness of his wife’s father. The telegram contained the following condition: “The company will not be liable for damages or statutory penalties in any case where the claim is not presented in writing within sixty days after the message is filed with the company for transmission.” Plaintiff, contended that he complied with the foregoing condition by mailing the following letter to defendant: 20

“Little Rock, Ark., July 7, 1903. Manager Western Union Telegraph Company, Little Rock, Ark.—Sir: I beg to hand you herewith papers concerning nondelivery of a message addressed to me, June 13, 1903. To state this case briefly I will say that my wife’s father was lying at the point of death, at Cairo, Ill. On June 12th I communicated with Cairo by means of the long-distance phone and my brother-in-law, A. F. Staehle, advised me that 30 40

10 he would wire me early in the morning of the 13th as to the condition of my wife's father. Knowing that the wire would be here for me I made every effort possible to get it, as you will note from the reference attached to the copy of telegram. I called twice, personally, twice by phone and sent a note by one of your messenger boys at 1:20 p. m., but all without result. Not having heard anything at 6:30 p. m. I was forced to use the long distance telephone, at a cost of \$1.05, after having had a day of suspense and one of extreme worry of my life. The nondelivery of this message caused much annoyance and I would thank you to look into the matter and ascertain and advise me who is at fault. The whole trouble appears to be at this end of the line. In addition to locating the trouble will say that I shall also expect to have the cost of the message refunded, as well as the amount expended for long distance conversation. Will you kindly give this your careful consideration and advise at the earliest date practical. Very respectfully, J. N. Moxley."

20

From a judgment in favor of plaintiff for \$300 defendant appealed.

The Supreme Court of Arkansas said:

30 "The language of the stipulation, is not that notice of negligence shall be given, nor even that notice of the claim shall be given, but that the company will not be liable in any case 'where the claim is not presented within sixty days.' It will be observed that not notice but the presentment of the claim is required. It seems clear that the meaning of this is that the plaintiff shall present his claim for damages within the time named or

40 the company will not be liable therefor, and the

courts so hold. *Manier v. Western Union Tel. Co.*, 94 Tenn. 442, 29 S. W., 732; *Western Union Tel. Co. v. Murray* (Tex. Civ. App.) 68 S. W. 349; *Western Union Tel. Co. v. Beck*, 58 Ill. App. 564. As to the reasons on which such stipulations are based see *Express Co. v. Caldwell*, 21 Wall, (U.S.) 264, 22 L. Ed. 566. There is clear distinction between a notice of negligence and a claim for damages. It is no doubt often the case that notice is given to this company concerning the negligence of its employes in transmitting and delivering telegrams, and complaint made thereof without any thought of making a claim for damages. A mere notice to the company that its employees have been negligent, with the circumstances thereof, is a very different thing from a presentment of a claim for damages based on such negligence, and, to hold that a stipulation which requires a presentment of the claim for damages in writing is satisfied by a notice of the negligence on which the claim is based, would do violence to the language used, and be, in effect, making a different contract between these parties. *It may be that notice of the negligence would be as beneficial to the company as a presentment of the claim, but the parties have contracted for the one and not the other, and we have no right to say that the company must be satisfied with something other than a presentment of the plaintiff's claim, because we think the other could subserve the same purpose.*

The company has the right to stand on its contract. The contract stipulates that the defendant shall not be liable for damages unless a claim therefor was presented in writing within 60 days after the message was filed, and plaintiff's case fails unless he shows such presentment.

Now, a reference to the letter addressed by plaintiff to the manager of the defendant company will show that, after calling attention to the non-

delivery of the telegram with the circumstances thereof and the suspense and worry it caused him, he requests that the manager investigate and ascertain and advise plaintiff who is at fault. He then proceeds as follows: "In addition to locating the trouble will say that I shall also expect to have the cost of the message refunded, as well as the amount expended for long-distance conversation." The language quoted contains the only claim for damages made in the letter, and, so far as it goes, complies with the stipulation in the contract that the claim must be presented in writing. But it does not go far enough to include a claim for mental suffering, for the claim is expressly limited to the cost of the message and "the amount expended for long-distance conversation."

The majority of us are of the opinion that the only claim presented by plaintiff to defendant within the 60 days was expressly limited to the items above referred to, and that the defendant company, under its contract, is not liable for damages beyond those items. We, therefore, conclude that the evidence does not sustain the judgment. As this disposes of the case, we need not notice the other points made.

Judgment reversed, and cause remanded for a new trial."

See also:

30 *Atlantic Coast Line v. Bryan*, 65 S. E. 30.

A. C. Cheney Piano Co. v. New York Central R. R., 148 N. Y. Supp. 108; 85 Misc.

Rep. 157.

Olson v. R. B. & L. R. Co., 250 Fed. Rep. 372, 375 (1918).

We think, therefore, the plaintiff's letter (Ex. P-2) was only a request for information or a trace, something that might never ripen into a claim against defendant. Defendant's reply, (Ex. P-4) closed the matter, and plaintiff's duty was to file a claim or make some move if further action was

required of defendant. If plaintiff located the bundle, of course no claim would have been necessary. The provision in the bill of lading made it necessary for plaintiff to make a claim or demand on defendant as a condition precedent to a recovery, in order that defendant might investigate and adjust the matter. The letter (Ex. P-2) made no demand that required adjustment, and, as we understand the law, there was no duty on defendant to inquire further about the bundle or ask plaintiff if it would present a claim. The first intimation defendant had of any demand was the receipt of a letter from plaintiff's attorneys, (Ex. P-3), in December, 1916, and at that late date defendant could not waive the stipulation and discriminate in favor of plaintiff by any adjustment, even if the facts warranted it. 10

The Trial Court erred, therefore, in holding that plaintiff's letter (Ex. P-2) was a claim and a sufficient compliance with the terms of the bill of lading, whereas he should have found that no claim in writing was filed by plaintiff within time. This is, in substance, defendant's objection to the Trial Court's ruling, as stated in its 1st and 2nd Causes of Error. (Case, pp. a-b.) 20

A tracer is not a claim.

Old Dom. S. S. Co. v. Flanary (Va. App.)
69 So. Rep. 1107.

A. C. L. v. Bryan (Va. App.), 65 S. E.
Rep. 30. 30

To hold otherwise would be to permit the carrier to waive the provision of the Bill of Lading.

Spada v. P. R. R. Co., 86 N. J. L. 187.

Olivit v. P. R. R. Co., 88 N. J. L. 241.

Int. Watch Co. v. D. L. & W. R. R. Co.,
80 N. J. L. 553; aff. 82 N. J. L. 528.

*Standard Combed Thread Co. v. P. R. R.
Co.*, 88 N. J. L. 257.

Erie R. R. Co. v. Wanaque Lumber Co., 40
75 N. J. L. 878.

And it was a matter of law for the Trial Court to pass upon.

In *Missouri K. & T. Ry. v. U. S.*, 178 Fed. 15, at p. 17, the Court passed upon written request to confine cattle for 36 hours in conformity to the Act of Congress known as the "Twenty-eight Hour law," and said:

10 "The question whether or not the requests conformed to the statute was a pure question of law, it presented no dispute about any fact, and its decision depended entirely upon the construction of the Act of Congress and of the written requests. It is the exclusive province, as well as the duty, of the court to construe statutes and written instruments, and where the validity of the latter is conditioned by a compliance with the provisions of the former, to decide their legality."

20 See also:

Higgins v. McCrea, 116 U. S. 671; 6 Sup. Ct. Rep. 557; 29 L. Ed. 764;

Georgia F. & A. R. Co. v. Blish Milling Co., 241 U. S. 190, *supra*.

St. Louis I. M. & S. R. Co. v. Starbird, 243 U. S. 592, *supra*.

Chesapeake & Ohio Ry. v. McLaughlin, 242 U. S. 142; 37 Sup. Ct. Rep. 40; 61 L. Ed. 207.

30 *Blivin v. N. E. Screw Co.*, 23 How. 420; 16 L. Ed. 510.

Smith v. Lunger, 64 N. J. L. 539.

Grueher v. Waldron, 71 N. J. L. 597.

40 As it was admitted by plaintiff (Case, p. 16, l. 18 to 30) that nothing was done to satisfy the provision in the bill of lading except the letters and notation on the freight receipt introduced in evidence, we think that the judgment should have been in favor of defendant.

POINT II.

No evidence to support the finding of the trial Court that loss was chargeable to defendant, and under the tariff plaintiff assumed the risk of loss from the ferry car.

The Ferry Car tariff filed with the Interstate Commerce Commission, governing the transaction, was introduced in evidence (Ex. D-1, pp. 49-53). 10

Sub. Div. (b) of Conditions, Case, p. 52, is as follows:

In consideration of the carrier's gratuitous service or nominal charge as provided in this tariff, the shipper or consignee assumes all responsibility for loss or damage to contents of open cars or where a clear seal record is established for box cars.

The purpose of this service is to collect various shipments and load them into a Ferry Car to be transported to and from defendant's station relieving the shipper or consignee of the necessity of trucking the commodities to and from defendant's station. Plaintiffs had two or three cars a week. (Case p. 31). 20

Plaintiff had the burden of proving a loss. This case was not, however, the usual one where goods in transit were in the carrier's possession until delivered to the consignee; where plaintiff's case consisted in showing delivery to the carrier and failure of the carrier to deliver. In this case the goods were delivered to the consignee when placed in the Ferry Car, a box car (Case, p. 18, l. 39) and a clear seal record was established, because the binding provision in the tariff was that consignee assumed the risk of loss from such car when he accepted the service. Plaintiff in this case attempts to avoid the tariff provision and render it a nullity through the medium of testimony showing a checking at plaintiff's plant of 30 40

goods from the Ferry Car, when the same testimony shows that there was opportunity for a loss from the car while on plaintiff's siding. The plaintiff's contention and the Trial Court's finding disregard the tariff provision that the risk of loss was assumed by plaintiff, and made defendant liable as a common carrier for the merchandise until it was unloaded into plaintiff's warehouse, which result the tariff was intended to prevent. Plaintiff cannot reap the benefit of the tariff and avoid its liabilities.

The ruling of the Trial Court was error, because (a) the tariff provision could not be waived, changed or ignored.

Georgia F. & A. R. Co. v. Blish Milling Co., supra.

(b) There was a gap in the evidence, because of testimony of plaintiff's witnesses that the car was left unguarded in the street several times during any of which times the bundle might have been stolen or removed from the car.

Kelly v. Central R. R. Co. of N. J., 70 N. J. L. 190.

Neither of plaintiff's witnesses Reilly or McCarthy saw the goods in the car—they merely checked what they saw in the Receiving Room floor of plaintiff's plant. They testified this was in the afternoon. (Case, p. 26, l. 27-29; p. 28, l. 1-2).

Plaintiff's only other witness Golub, unloaded the car, going into the Receiving Room with each load, and in so doing he went inside the plant to the room around a corner, some fifty feet away, leaving the car open and unguarded. Even during lunch time the car was left unguarded. While he says he took four bundles of steel out before lunch time the other bundle might have been stolen from the car when left unguarded out in the street.

He did not testify anywhere that the bundle in question was not in the car when he first opened it. Furthermore, the car lay for two days in the public street on plaintiff's siding before being unloaded, where there was opportunity for loss. Plaintiff assumed the risk of loss and defendant was not under any duty to place a watchman on the car to see that no goods were removed from it. The very purpose of the tariff was to relieve defendant of the duty to watch where they rendered this service. 10

Defendant's witness Price, testified without contradiction that he checked the five bundles into the station warehouse on March 9, 1916, and that on March 10th, 1916, he checked the five bundles into Ferry Car L. V. 63339 with other merchandise for the plaintiff. That the car was closed and sealed in his presence and that the seals were affixed by Doyle within three minutes from the time the car was loaded. That he did not leave the car until it was sealed. 20

Defendant's freight conductor, Stout, testified that he took the Ferry Car from the Harrison Station on March 10th, 1916 and placed it on plaintiff's siding March 11th, 1916 at 1 o'clock P. M., when seals were intact.

The Trial Court found (Case, pp. 42, l. 40, to 43, l. 5) that the car was sealed at the defendant's station and arrived on plaintiff's siding with seals intact. 30

In view of Price's uncontradicted testimony, and the Trial Court's finding that there was a clear seal record, the tariff applied and plaintiff assumed the loss from the car, and judgment should have been rendered for defendant.

POINT III.

No evidence to support trial court's finding that bundle was missing at defendant's station and was not put into the car.

10 There was no evidence in the case to warrant the Trial Court's finding that through some oversight or dishonesty of some stranger or employees or unknown person one bundle was missing at the Harrison Station and was not put into the Ferry Car. Whereas, as the Trial Court should have found as requested by defendant (Case, p. 41, l. 7-16) that the testimony showed that the five bundles in the shipment were put into the Ferry Car at the Harrison Station; that the car was sealed at the Harrison Station and that seals were intact when the car was placed upon plaintiff's siding; that the Ferry Car Tariff applied and that if 20 there was any loss from the car that defendant was not responsible for such loss. (Third Cause of Error, Case p. b).

The Trial Court erred, therefore, and the judgment under review affirming it should be reversed.

V.

30 The Trial Court erred in refusing to give judgment for defendant as requested by defendant, for the reasons given in parts II and III and IV of this brief, and the judgment under review, affirming the Trial Court, should be reversed.

VI.

It is respectfully submitted, therefore, that the judgment under review should be reversed, set aside and for nothing holden, and judgment final should be directed to be entered in the Court below in favor of the defendant, with costs.

VREDENBURGH, WALL & CAREY, **10**
Attorneys for and of Counsel with
Defendant-Appellant.

ADDITION TO ARGUMENT OF DEFENDANT-APPELLANT.

(1) The statute moved in February, 1871, which would be called the Act for the Amendment of the Act of the 20th of March, 1869, relating to the giving of notice of claims, and for the filing of claims for a shorter period than four months, and for the institution of suits thereon within two years. It thus appears that this portion of the act specifically refers to three things, namely the giving of notice of claims, the filing of claims, and the institution of suits, and it is important to note that a different but necessarily large period of time is accorded each transaction. Thus, in our minds, especially the latter very much, and when the two are taken together, that a specific distinction is made in the giving of notice or the filing of claims or the institution of suits, and second, that a different time is specified for each transaction. It brings out very clearly the different steps and the difference in the steps which Congress had in mind with respect to the collection of a claim.

20
30
40

60 NOV. 1, 1918

New Jersey Court of Errors and Appeals

(No. NOVEMBER TERM, 1918.)

HYATT ROLLER BEARING COMPANY,
Plaintiff-Respondent,

vs.

THE PENNSYLVANIA RAILROAD
COMPANY,
Defendant-Appellant.

Action at Law.
On Appeal
from Supreme
Court.

10

ADDITION TO ARGUMENT OF DEFENDANT-APPELLANT.

(1) The shipment moved in February, 1916, which would be under the first Cummins Amendment. The Amendment prohibits "a shorter period for giving notice of claims than ninety days and for the filing of claims for a shorter period than four months, and for the institution of suits than two years." It thus appears that this portion of the act specifically refers to three things, namely the giving of notice of claim, the filing of claims, and the institution of suits, and it is important to note that a different but increasingly large period of time is accorded each transaction. This, to our minds, emphasizes the matter very much, and when the two are taken together, first, that a specific distinction is made in the giving of notice or the filing of claim or the institution of suit; and second, that a different time is specified for each transaction, it brings out very clearly the different steps and the difference in the steps, which Congress had in mind with respect to the collection of a claim.

20

30

40

(2) In interpreting what is meant by the provision in the bill of lading relative to making of claims, the Interstate Commerce Commission, in *Conference Ruling No. 510*, a copy of which is appended below, has specifically stated two things which may accomplish this result, and has not stated any others. The first is the making of the claim itself, and the second is a written notice of
10 the intended claim. Unless one or the other of these provisions is complied with, it does not appear that the claim is properly made. It would not seem from the letter which the plaintiff sent to our agent at Newark that compliance is made with the provision for written notice of intended claim. (Exhibit P-2.)

(3) Since the Interstate Commerce Commission by its Conference Ruling, has specified what
20 will meet the requirements of the bill of lading provision in question, it does not seem that anything other than specified in that ruling would be sufficient to meet the requirements of the provision in question. This is so because of the rule announced in the Federal Courts and generally followed that "a construction made by the body charged with the enforcement of a statute, which construction has long obtained in practical execu-
30 tion and has been impliedly sanctioned by the reenactment of the statute without alteration in the particulars construed, when not plainly erroneous, must be treated as read into the statute." Two of the particular cases on this point are *New Haven R. R. v. Interstate Commerce Commission*, 200 U. S. at pages 401-2; and *Logan v. Davis*, 233 U. S. at page 627.

CONFERENCE RULING 510.

June 21, 1918.

510. WRITTEN NOTICE TO CARRIER CONSTITUTES PRESENTATION OF CLAIM.—Modifying Conference Ruling 456. It is the view of the Commission that the provision in the uniform bill of lading requiring that claims for loss, damage, or delay must be made in writing within a specified period is legally complied with when the shipper, consignee, or the lawful holder of the bill of lading, within the period specified, files with the agent of the carrier, either at the point of origin or the point of delivery of the shipment, or with the general claims department of the carrier, a claim or a written notice of intended claim describing the shipment with reasonable definiteness. (See *G. F. & A. Ry. v. Blish Milling Co.*, 241 U. S. 190.)

Respectfully submitted,

VREDENBURGH, WALL & CAREY,
Of Counsel with Defendant-Appellant.

INDEX

Volume 2

Volume 2

New York, N.Y.

run Bond

South