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NEW JERSEY SUPREME COURT.

(Referred to Circuit Court.)

ERIE RAILROAD COMPANY, *Plaintiff,*	
vs.	*On Contract.*
WANAQUE LUMBER COMPANY, *Defdt.*	

APPEARANCES.

COLLINS & CORBIN, by MR. HOBART, for the plaintiff; W. CARRINGTON CABELL and WILLIAM HUGHES, for the defendant.

Transcript of testimony taken at the Passaic County Court House, Paterson, N. J., before Hon. Wilbur A. Heisley and a jury on February 4, 1907.

Mr. Hobart opened for the plaintiff.

Mr. Hobart:—Let the map be marked Exhibit P-1 subject to a stipulation as to the scale and the date when it was made.

CHARLES P. CURTIS, sworn in behalf of the plaintiff, testified as follows.

Mr. Hobart:—I will offer in evidence a stipulation in writing between the attorneys of the parties.

Marked Exhibit P-2.

[Page 51, Book of Pleadings and Exhibits.]

Mr. Hobart:—I will read this now (reads to the jury Exhibit P-2.)

Mr. Hobart:—I will offer a certified copy of the certificate of incorporation of the Wanaque Lumber Company, dated June 17, 1902.

Marked Exhibit P-3.

[Page 52, Book of Pleadings and Exhibits.]

Direct Examination by Mr. Hobart:

Q. What is your business? A. I am the assistant manager of the New York and New Jersey Car Service Association.

Q. Their offices are in New York? A. Yes, sir.

Q. How long have you been such Assistant Manager? A. I have been connected with the institution since 1891.

Q. Holding different positions? A. Yes, sir; well, substantially the same during the entire time, the same duties exactly.

Q. State generally what your duties were while in the employ of the association? A. Well, it was the supervision of the affairs of the various roads as applied to car service matters.

Q. Will you state when the New York and New Jersey Car Service Association was organized? A. Well, it was not organized—it was established as a department or bureau of various roads May 1st, 1891.

Q. It is not a corporation? A. No, sir; it is merely a department, the same as a ticket department, or freight department or auditing department.

Q. It includes a number of railroads in this vicinity? A. Yes, sir.

Q. Among others the Erie Railroad? A. The Erie and Greenwood Lake.

Q. Is the agreement among the different railroads comprising the association in writing? A. Yes, sir; it is a matter of record.

Q. And the rules are also in writing? A. Yes, sir.

Q. Have they been filed—that is, the agreement and the rules with the Interstate Commerce Commission? A. Yes, sir.

Mr. Cabell:—I object to that particular statement; I would like them to connect the Wanaque Lumber Company with the Car Service Association before they go into that.

The Court:—It will be admitted.

Mr. Hobart:—Does your Honor desire me to prove--

The Court:—I have admitted the question.

Mr. Hobart:—Does your Honor desire me to prove that the lumber company or its officers or agents had knowledge of these rules before I offer the rules in evidence?

Mr. Cabell:—The mere fact that the Car Service Association gave the Lumber Company notice of its rules would not have anything to do with the railroad company.

Mr. Hobart:—I will withdraw this witness for the present.

WALTER H. THRIFT, sworn in behalf of the plaintiff, testified as follows:

Direct Examination by Mr. Hobart:

Q. What position do you hold with the Wanaque Lumber Company? A. General manager.

Q. You have been such for how long a time? A. About three years and six months, since the 19th of May.

Q. That would take in the period in question in this suit? A. Yes, sir.

Q. When was your attention first called to the New York and New Jersey Car Service Association? A. I don't remember.

Q. You knew there was such an organization? A. Yes, sir.

Q. You knew that fact before the present trouble arose? A. Yes, sir.

Q. And as general manager you had charge, I suppose, of the shipments that were consigned to the lumber company from time to time? A. Yes, sir.

Mr. Cabell:—Objected to as leading. Objection overruled.

Q. And you are familiar with the rules, are you not, of the association? A. No, sir.

Q. Are you familiar with the rule as to the forty-eight hours' free time? A. I have heard about it.

Q. When did you first hear about it? A. I don't know.

Mr. Cabell:—I object—how is the railroad company and its affairs connected with the Car Service Association? I object to this line of questioning.

Mr. Hobart:—We prove that the Erie was a member and that it was adopted by the different railroads as their regulations.

The Court:—He must make certain proof; if he does not, he fails.

Mr. Hobart:—I am perfectly willing to examine two witnesses at once, but I am afraid it would embarrass the stenographer.

Q. When did you first hear about it? A. I don't remember. I don't know.

Q. You can state whether it was before or after

the trouble arose, as I will so designate it? A. Probably before.

Q. As a matter of fact have you ever seen a printed copy of the rules? A. I cannot answer that question.

Q. But during your service as manager of the lumber company, you had occasion from time to time to have this matter under consideration didn't you—your attention was called to it? A. Yes, sir.

Q. You knew that the railroad claimed that it was entitled to charge demurrage after forty-eight hours after arrival?

Mr. Cabell:—Objected to; objection overruled.

Q. You knew that claim was made—you knew that the railroad claimed that it was entitled to charge demurrage after forty-eight hours after arrival? A. Yes, sir.

Q. You knew that before the first point was raised as to car number 100824? A. Yes, sir.

Q. And did you report that fact to the officers of the lumber company? A. I did not.

Q. Are you able to state whether or not the officers or any of them knew of such claim? A. I don't know.

Q. Who were the officers of the lumber company in March, 1905? A. W. C. Cabell was president, and was the only one that I knew as an officer.

Q. Who ran the business of the company? A. I did.

Mr. Hobart:—I wish to call Mr. Cabell, the president of the company, now.

Mr. Cabell:—I would rather be excused.

The Court:—I think the fact that this wit-

ness says that he was the general manager and had the control of the business of the concern, notice to him would be better notice than to the president, simply because he was such—I think it makes a prima facie case of notice.

Mr. Hughes :—Notice of what?

The Court :—Notice that the goods were being shipped under a claim by the Erie Railroad Company that there would be a charge made for demurrage after forty-eight hours; that is what Mr. Thrift said.

Mr. Cabell :—There is just one question I would like to ask the witness by way of cross-examination, as I think the point is not clear.

Cross Examination by Mr. Cabell :

Q. A claim of forty-eight hours after what? A. After the cars were placed in a position, to unload.

Q. Where was the position, as you understood it, to unload? A. Why, at Wanaque; shall I point it out on the map?

Q. Yes.

(Witness steps down to the map.)

A. Anywhere along here from the upper part of the shed, along towards the paper mill.

Q. By shed you mean the lumber shed? A. Yes, sir.

Q. Before this controversy had you notice that they would charge demurrage for cars placed up at Midvale? A. No, sir.

Q. For cars placed in the neighborhood of the station known as Wanaque-Midvale? A. North of the station there was a mud hill some three years ago.

Re-Direct Examination by Mr. Hobart:

Q. You don't know of your own knowledge as to demurrage charges as to any one else, do you? A. No, sir.

Q. Now, it is a fact that you yourself have paid car service before this trouble arose with this first car? A. Yes, sir.

Q. How many times? A. What number?

Q. Several times? A. Yes, sir.

Q. And it was under a claim by the railroad that it was entitled to collect it? A. Yes, sir; and I sent some claims in that they agreed to send back, but they never took any notice of them.

Q. You did pay it? A. Yes, sir.

Q. And you knew what the claim was? A. Yes, sir.

Re-Cross Examination by Mr. Cabell:

Q. When you said you sent some claims in that they promised to send back, what did you mean?

Mr. Hobart:—Objected to.

Q. You mean they promised to send you money that they were paying the car service back? A. Yes, sir.

Q. (*By Mr. Hughes*) Why did you pay those car service charges to the railroad, Mr. Thrift—of your own free will or— A. I told them that it was not exactly the thing to pay those bills, but the agent told me it would probably be returned; they would send it in to the association and they would probably return it, or part of it; I sent it in and I never heard of it at all—no notice of it was taken whatever.

Q. Could you have gotten your stuff if you had not paid those charges in advance— A. We had the stuff; I believe.

MR. CHARLES P. CURTIS recalled.

Direct Examination continued by Mr. Hobart:

Q. You testified that the agreement and rules with respect to the New York and New Jersey Car Service Association was printed—have you a printed copy of the rules? A. Yes, sir.

Q. Please produce it. (Witness does so.) When were the rules and agreement that you have produced in force? A. Since May 1, 1891.

Q. And up to the present time? A. Yes, sir.

Q. 1891? A. Yes, sir.

Q. This copy which you have produced also is the memorandum of agreement between the roads? A. Yes, sir.

Q. And following that is the rules identically, that Mr. Cabell—the copy which Mr. Cabell has? A. Yes, sir; of which several copies, I think, have been delivered to Mr. Thrift—

Q. The Mr. Cabell that you refer to is the gentleman that has been mentioned as president of the lumber company? A. Yes, sir.

Mr. Cabell:—I object to his statement about a copy of the rules.

The Court:—You should object when the question is asked.

Mr. Cabell:—I have objected from the outset to any evidence about those rules, until he shows us they are competent.

The Court:—He is undertaking now to prove the existence of such books, and I suppose ultimately he will offer it in evidence; then your objection, I think, will have to be considered; I think the examination so far is proper.

Mr. Hobart:—I offer the rules.

Mr. Cabell:—You say the Erie Railroad Company adopted the car service rules?

Mr. Hobart:—Yes.

Mr. Cabell:—I object to the offer; I fail to see the foundation for introducing the rules.

The Court:—I don't see that the rules were ever brought to Mr. Thrift's attention; he said he was aware of the fact that the railroad company asserted the right to exact compensation in the way of demurrage after forty-eight hours—after the car had been forty-eight hours at its destination, but that was all he was asked; he was not asked as to the rate of demurrage, or as to any rules, but simply that they asserted it, and that he had paid such claims, but there is no proof at all that the rule itself, or any printed rule was ever brought to his attention.

Mr. Hobart:—Well, I insist on calling Mr. Cabell; he is under my subpoena.

(Witness withdrawn for the present.)

MR. WALTER C. CABELL, sworn in behalf of the plaintiff, testified as follows.

Direct Examination by Mr. Hobart:

Mr. Hobart:—If you will admit what is the fact, that either you or Mr. Thrift had a copy of those rules, that covers the whole thing, and you will save a lot of time.

Q. You are president of the Wanaque Lumber Company? A. Yes, sir.

Q. And have been since when? A. Since its organization, I think.

Q. Did you ever hear of "car service"? A. Yes, sir.

Q. You have heard of an association calling itself, "The New York and New Jersey Car Service Association"? A. Yes, sir.

Q. And you have heard of what purported to be rules of such association? A. I have heard of it; yes, sir.

Q. Have you ever seen the rules, or what purports to be the rules? A. I have seen what purport to be the rules. I don't know, of course, whether they are or not; I will say, however, that prior to this controversy I was not at all familiar with the rules of the Car Service Association.

Q. When did you first see them? A. I could not tell you.

Q. It was shortly after the controversy over the first car began? A. Yes, sir; sometime during the summer or fall of 1905, I became familiar with the Car Service rules—

Q. And, I think, as a matter of fact— A. With what purported to be Car Service storage.

Q. And, I think, as a matter of fact some one of the railroad officers or the association officers presented you with a copy—isn't that so? A. I think one of the Car Service Association presented me with what he said was a copy of the Car Service rules.

Q. Have you got that? A. No, sir; I have not; I don't know anything about it, but I presume—

Q. You have a copy now? A. Yes, sir; I have a copy now of what purport on their face, to be rules of the Car Service Association.

Q. Have you ever read that over to see if they were the same rules— A. No, sir; I never read them over until after this controversy—

Q. As a matter of fact, you knew, didn't you, that the railroad claim the right to collect car service after forty-eight hours, free time, so-

called? A. I learned that the Car Service Association claimed the right to collect certain charges after the expiration of time.

Q. But you knew it was the agent of the railroad company who said it was his duty to collect them? A. Not prior to that controversy—after the controversy, yes.

Q. And shortly after? A. Yes, sir; quite shortly after that.

Q. And you knew, didn't you, that the rate that the railroad claimed was one dollar per day? A. I did not know that the rate that the railroad claimed. I knew that the Car Service Association claimed one dollar a day under certain circumstances.

Q. Now, the fact is, Mr. Cabell, that after this controversy arose, and very soon after, you did make yourself familiar with the rules, isn't that so? A. With what I understood to be the rules—with what purport on the face to be the rules of the Car Service Association.

Q. And your attention was called to that, if I understand you correctly, as soon as the difficulty arose as to this first car—I think the number was 100824? A. No, sir; it was later than that; I don't remember how much later, but it was after the controversy was well under way.

Q. Do you know whether your manager had a copy of these rules? A. I do not.

Cross Examination by Mr. Hughes:

Q. Did you ever have any knowledge of any car service or Erie Railroad rules that allowed charges to be made taking delivery at any of these places as delivered— A. No, sir; but I will have to qualify that; I have never heard of such a rule, but after this controversy arose I heard that they did insist on such a payment—I learned that after

this controversy arose, and that is just what they were insisting on then.

Q. (*By the Court*) Did this controversy arise before or after the last car was received? A. The controversy arose—I am just trying to place it—but it is in May, I think, 1905—the controversy arose over the first car—now, that note, that did not relate to any right to charge demurrage as far as I know, up at the Midvale station, so I will say that I never heard they made such a claim until after the bulk of the cars were in, and there was a fight over them, or quarrel over them; then was the first intimation that I had that they were claiming—

Re-Direct Examination by Mr. Hobart:

Q. Isn't it a fact that prior to the controversy as to the first car, a claim had been made by the railroad or its agents on the lumber company for payment of car service? A. About how far prior?

Q. Any time prior—since the company's organization in 1902? A. About two years before this, when I first obtained any knowledge of the affairs of the Wanaque Lumber Company; I was a mere figurehead up to that time; there was a dispute with the Car Service Association, as to the propriety of certain charges. The merits of those charges were never gone into. They were simply taken up and abandoned.

Q. Your attention at that time was called to the fact, wasn't it, that the rate claimed was one dollar a day? A. Yes, sir.

Q. And wasn't your attention also called at that time to the fact that as to free time it was claimed by the Car Service Association, that free time expired forty-eight hours after the car arrived, and notice was sent? A. I won't say that exactly, because I did not go into the details there, but under certain circumstances that a dollar a day would be

charged for cars after they were placed down on the siding by the lumber shed; that is the only thing that was brought to my attention, and they abandoned that.

Q. And after the lapse of a certain time such a charge would be made? A. Yes, sir.

Q. And the time was forty-eight hours? A. Forty-eight, if my memory serves me as to what was gone over at that time, after they were placed for unloading at that point.

Q. And the lumber company refused to recognize the validity of such charges, isn't that so? A. The lumber company disputed the question in various ways.

Q. Well, they refused to pay? A. They refused to pay those particular charges.

Q. Afterwards they paid some other charges? A. Well, Mr. Thrift probably knows about that; at one time after that they did pay a bill that I know of myself, but what it covered I don't know.

Q. We need not go into that. And after that bill was paid there were some other charges which accrued, which the lumber company refused to pay? A. After the controversy arose I knew you were charging, but before then I had no knowledge of it.

Q. You don't know what they were paying? A. No, sir.

MR. THRIFT recalled.

Direct Examination by Mr. Hobart continued:

Q. Have you ever seen these printed copies of the rules? A. Last Saturday was the first.

Q. Wasn't a copy given to you some time ago? A. No, sir. I have no recollection of it whatever.

Q. About two and a half or three years ago? A. No, sir.

Q. Now, as to the rate that the railroad claim it was entitled to collect—you knew what that rate was? A. I understood it to be a dollar.

Mr. Hobart:—I will now offer the copy of the rules which has been produced by Mr. Curtis.

The Court:—How do you say that is competent in view of the fact that neither of the gentlemen admit the receipt of any personal knowledge of the contents? I say this before you argue the matter; my opinion is this: The railroad company has the right to impose and to adopt such reasonable regulations—such regulations as may be reasonable, but it may adopt all sorts of regulations, and if they are not reasonable they are not binding; that is the rule as I understand the law, but that no rule can be obligatory unless it is brought to his knowledge, and otherwise they have the right to adopt a course of conduct which is denied to every other business corporation—if this association or the directors of a railroad company is at liberty to adopt rules and lay them away in a desk, and the public never see the rules, and then after a length of time, to assert these rules, to try to bind a person by things which they had never seen or had never had brought to their knowledge, it seems to me would be unjust. Now, in this case, the gentlemen admit that at some time they knew there was a charge to be made for demurrage after forty-eight hours, and they understood it was to be a dollar a day; it seems to me if they received goods under such understanding, that that was a reasonable regulation of traffic, why, they would have to pay the demurrage, independent of the production of any printed rule; but I don't see

why they should be bound by the adoption of a printed rule ; why, a law of this state has to be published ; an act of parliament has to be published ; you cannot adopt these things in private, and the public have no way of knowing them ; and it seems to me these rules are not evidential ; they have not been brought home to the knowledge of the defendant ; if there is any other aspect of looking at the matter, I should be very glad to hear about it.

Mr. Hobart :—In the first place I take issue with your Honor on the point that there is any necessity of giving any such notice to the consignee, if the rules are reasonable, the consignee is bound by them ; every corporation is given the same power; it must have that power and it is not essential to bring home direct, personal knowledge to the consignee of what the particular rule may be, provided, and that is a question for the court, and possibly in some cases for the jury, provided such rule be reasonable. That is the first suggestion that I would like to have your Honor consider.

The Court :—I don't understand that the adoption of any written formula gives it any efficacy; I don't see how the publication adds any efficacy unless it is actually brought home to the knowledge of the consignee; I think you must be right in your assertion that they have the right to exercise any reasonable practice, but not to declare it in the shape of any printed language, unless they bring that printed language home to the consignee.

Mr. Hobart :—Further, the printed rule is substantially the same as the practice of which these gentlemen did admit they had knowledge.

Then the third answer I make is, that the law of this state says, that they can do this very thing—See laws of 1903, section 47 of general railroad act, which provides in substance (reading).

The Court:—Is the charge a full day for a fraction of a day?

Mr. Cabell:—There are a great many provisions in those rules; they are quite numerous.

The Court:—I sustain the objection; the offer is overruled.

Mr. Hobart:—I understand that the ruling is simply as to the effect that the printed rules are not to be admitted at this time?

The Court:—Not at this time, because they have not been brought home to the knowledge of the defendant; there is nothing in the case at all to show him when the precise hour of the beginning of the demurrage—

Mr. Hobart:—We ask for an exception.

Exception allowed. Let it be sealed, and it is sealed accordingly.

WILBUR A. HEISLEY.

J. [SEAL]

MR. CURTIS resumes the witness stand.

Direct Examination By Mr. Hobart:

Q. It is in evidence that there was a claim on the part of the railroad to the effect that it was entitled to collect a dollar a day after the expiration of forty-eight hours, either after arrival, or

after notice; I am not sure which, the evidence says on that point—

Mr. Cabell:—I object to the question.

Mr. Hobart:—I have not finished it yet.

Q. (Continued) And that the lumber company before this controversy arose had knowledge of that practice; I now want to ask you whether or not you have estimated the earning power of a freight car per day on an average, throughout the United States, and if you have, what is your estimate, and how was it arrived at?

Mr. Cabell:—Objected to; in the first place I object because it supposes a case different from that in evidence; the evidence speaks of charging demurrage forty-eight hours after a car was placed by the lumber yard shed—forty-eight hours after placing at the lumber shed.

Mr. Hobart:—I don't care anything about the time—it has reference to the earning capacity of freight cars.

Mr. Cabell:—The question of earning capacity is not in issue—earning capacity is a question—

The Court:—I think it is—I think if they can show the earning capacity of the cars it does enter into the reasonableness or unreasonableness of being kept out of the use of the car.

Mr. Cabell:—The earning capacity depends upon the employment of locomotives, of brakemen, of engineers and firemen, and all the men who are called upon to operate a railroad.

The Court:—The question should be remodeled.

Mr. Hobart:—That question is withdrawn and this question is substituted:

Q. Have you made an estimate of the earning capacity of the freight car on the average throughout the United States, as to its earning capacity per day? A. Yes, sir.

Cross Examination by Mr. Cabell:

Q. How did you make your estimate?—on the time the car was actually in service or the time the car is in existence? A. No, you could not get a just average of the earning of a car on a basis of that kind, for the reason—

Q. How did you estimate it—did you estimate it on the time the car was actually in service, or did you take into calculation the time the car was delayed for loading and unloading and to the railroads' own delays on the sidings? A. Covering the whole period—if I may be permitted I will tell you how I arrived at it.

The Court:—The charge is one dollar a day—now, suppose, Mr. Cabell, that you are liable for demurrage, do you seriously contend the car was not worth a dollar a day?

Mr. Cabell:—Yes, sir. I think it was worth just about twenty cents—the basis of damage when railroads delay goods in transit has time and again been adjudicated upon and has been settled to be six per cent. of the value of the goods unreasonably delayed—I mean at the rate of six per cent. per annum; now, if a car is unreasonably delayed, why, this six per cent. per annum would be a fair basis of compensation; it is exactly like the compensation awarded to the consumer; it is six per cent. of the actual value of the car at the time—I con-

tend that—though it is not essential for our case.

A. I took data for the year 1905, the time that this difficulty occurred, from the report of the United States Commission. I arrived at the total freight revenue of all the roads, covering 214,477 miles; I divided that by the total number of cars, multiplied by 365 days in the year; that gave the earnings per day, but that is not a fair estimate; it is not the value of the car, nor is it the worth of the car, for the reason that that contemplates all the wider cars, all the shop cars, and all cars that are being detained by shippers.

Mr. Cabell:—Objected to.

A. (Continued) It is too low under those trying conditions of detention, unreasonable.

Q. Your estimate is really too low? A. Very much too low.

Q. (*By Mr. Cabell*) Does your estimate take into consideration the cost of operating the railroads?

Mr. Cabell:—The distinction I make is this—a car on a siding is under no expense of operation—a car on the road is, and subject to wear and tear; now, a statement, your Honor, of the earning capacity of a car when men are employed upon it, and locomotives pulling it, and tracks being worn out, is quite a different thing from the value of a car when it is laid on a siding; we don't know that they have any use for it; nobody is put to any expense with reference to it (continuing argument).

Q. (*By the Court*) Would it be a fair way, in your estimation, in order to determine the earning capacity of a car to take the gross tonnage of all the cars in the United States, and divide that by the number of tons to find out what each ton was

worth, each ton's carrying capacity of the car was worth? A. No, sir; it would not; for this reason, that conditions, assuming conditions were the same, you might do it, but the conditions vary; you could show the cost per ton per mile, but you could not show the actual worth or value of a car.

Q. (*By the Court*) Isn't it a fact that some tonnage—the freight on some tonnage is much higher than freight on other tonnage? A. Yes, sir.

Q. Isn't it also a fact that a long haul tonnage is cheaper than a short haul, except perhaps in the case of coal? A. Sometimes.

Q. Doesn't it depend on the strength of the car, the size of the body and the uses to which it is adapted? A. And the conditions it encounters.

Q. Then it would depend on how many days it loses by being sidetracked or not unloaded or something of that kind? A. Yes, sir.

Q. Doesn't it depend on the general prosperity or the trade conditions, etc.? A. Indirectly, yes, sir; but to arrive at the actual value of the car under all conditions would be a very difficult thing.

Q. (*Further Direct*) Your estimate is really much lower than the actual earning power? A. My estimate shows just what the car was able to earn under very adverse circumstances which could be very clearly shown; under very favorable circumstances presumably fifty per cent. of the cars of the country would be all that would be necessary to transport the freight, but under the conditions that prevailed during that year, they were able to earn, show an earning per car, per day, 365 days a year, of so much money.

Cross Examination:

Q. (*By Mr. Hughes*) All you have done then is to take the Interstate Commerce book and make some calculations from the statistics they have

printed there? A. Any one can get them; that is compiled from the reports that are furnished the United States Commerce Commission of the various railroads.

Q. That is a mere matter of calculation? A. Yes, sir; anybody that can do simple addition and division and subtraction can arrive at that, and the data is free to most any one.

Q. You made no investigations or calculations with respect to this particular car, I presume—this particular car? A. No, sir; that car was one of the millions of cars of the country.

Q. No effort ever was made to trace it in its journeyings to and fro? A. No, sir; that is done by the railroads themselves.

Q. And it could be brought here, if necessary, couldn't it? A. I presume it could be.

Q. And it could be shown actually what that car did earn? A. I cannot say.

Q. The companies do have car tracers in their employ? A. Yes, sir; but they would be ignorant of the earning of the car.

Q. But there would not be any difficulty in taking any car owned by any railroad, and by referring to the records of the company, the car searcher's record, of demonstrating where it had gone, and where it had come from during the whole period of its existence? A. I presume that would be quite possible.

Q. And there is a great diversity as to the character of the cars—the specifications according to which they are built, the carrying capacity and size, etc? A. Yes, sir.

Q. A great diversity? A. Yes, sir.

Q. And one car might be fitted like a refrigerator car? A. Yes, sir.

Q. I presume you included all those cars, and they were all included in the statistics to which you refer? A. The total number of cars; yes, sir.

Mr. Hughes:—We insist on our objection.

Q. (*By the Court*) How long have you been observing the use of cars, the class of cars that were used in this case? A. I have been connected with cars for thirty years.

Q. Do you know the kind of cars that they used in this case? A. Yes, sir.

Q. You have been familiar with their use for thirty years? A. Yes, sir.

Q. And with the charges for the use of cars? A. Yes, sir.

Q. Freight rates, etc? A. Yes, sir.

Q. Do railroads ever hire cars to other roads? A. Certainly.

Q. By the day? A. Yes, sir.

Q. Are you familiar, were you familiar with the prices charged for such cars during the period in controversy? A. Yes, sir.

The Court:—I think he is competent to give an estimate of what these cars were worth a day.

Mr. Hughes:—I would like to examine him on the point as to this particular car to see if he knows what kind of a car it was.

Mr. Cabell:—He was asked, not as to his competency, but the question that Mr. Hobart desired to ask him, was, what was this estimate—what was the sum that he figured these cars are worth, based upon five or six impossible contingencies, almost impossible to figure, almost impossible for any court to consider.

The Court:—Some cases are not capable of mathematical demonstration. I think he is qualified to give an estimate of the value of these cars from the answers he gave to the questions of the Court.

Mr. Hobart:—In the courts of Illinois there is a leading case, Shoemaker vs. Chicago and Northwestern, in which for the purpose of showing whether or not the charge of $1 a day was reasonable, the testimony was offered as to the earning capacity of cars. (Continuing argument.)

The Court:—I have a very profound conviction as to whether a dollar a day is sufficient for a car; I think this man is competent to answer the question, and the evidential effect of his evidence must be considered by the jury, but I don't see the use in taking up all morning discussing this matter.

Mr. Cabell:—We ask for an exception: Exception allowed.

Further Direct:

Q. (*By Mr. Hobart*) What was, in the year 1905, the average earning capacity per day of freight cars? A. $2.34—365 days a year.

Q. Will you state whether or not there are other so-called car service associations in the United States, besides the one that has been referred to here as The New York and New Jersey Car Service Association?

Mr. Cabell:—Objected to. Objection overruled.

Exception allowed.

A. Yes, sir; there is.

Q. How do you know of that fact? A. Because of our intercourse with them and the published data on file with us, and through the country there are thirty-nine—all the tracks of the country are practically covered by car service associations.

New Jersey State Library

Q. Similar to the New York and New Jersey? A. Almost identical.

Q. What is the rate per day that is charged by the rules of these other car service associations through the country for the detention of freight cars?

Mr. Cabell:—Objected to as immaterial. Objection overruled. Exception allowed.

Mr. Cabell:—They pay each other at a fixed rate; they ought to develop that.

Before this witness answers any more questions as to the price, I wish to go into the question of whether or not the Erie Railroad company does not stand as much on the transportation of freight as it receives, or nearly as much—if it does have the expense of carrying freight and so great as to absorb the earning of the car in transit with goods—a car on the siding should surely not be awarded as much for its standing still without any expense upon it as a car that was actually upon the road; you must figure the expense of operation.

Mr. Hughes:—A charge made by other car service associations cannot by any possible stretch of imagination be a basis of the tonnage or a basis of what this particular Car Service Association ought to charge or go to the reasonableness of the charge in any way, because this Car Service Association, like any other, is a law unto itself; it does not bargain with the consignee; there is no competition between the consignees of the Car Service Association; in the case of a carpenter or any workman, he is bound to accept the prevailing rate of wages, but there is no chance for a consignee to make a bargain with the Car Service Association; the Car Service Association

says to him "forty-eight hours after we have put this here, your charges will be so much, and they must be paid before they are determined."

The Court:—If the charge is unreasonable they certainly cannot make you pay an unreasonable charge; their right to charge it depends upon the statutes, with the proviso that the charge must be a reasonable one; now, the railroad itself cannot be the judge of that absolutely, nor can the consignee; it is a fact to be determined, when disputed, by a jury.

Mr. Cabell:—I wish to advance this thought—the railroad company is by its own statement a member of an association to fix the prices; now, it is unlawful for railroads to combine to fix the prices of any service as a common carrier, and I think it is incompetent in this Court, against this defendant, to prove that that association with the assistance of these railroads is violating the law and ought to be in jail.

Mr. Hobart:—That question has been raised and passed upon repeatedly, and the ruling has always been the other way.

The Court:—Let him answer the question.

Q. (Question read.) A. It is never less than one dollar—nowhere in the country.

Q. In some cases is it more? A. Yes, sir; in one or two instances on the Pacific coast—under certain conditions.

Q. But through this section of the country, in the middle west and the south it is always a dollar a day? A. Yes, sir.

Q. Will you state generally what is the purpose of this charge of one dollar per day after the expiration of a certain amount of free time—

Mr. Cabell :—Objected to.

The Court :—I don't see how it is competent unless it bears upon the reasonableness of the charge.

Mr. Hobart :—That is the purpose of the question—a mere arbitrary charge would perhaps be held unreasonable.

The Court :—The question will be admitted.

Mr. Cabell :—We ask for an exception.

Exception allowed.

A. The object of the charge is to primarily prevent an unreasonable detention of the car and in the case of an unreasonable detention to impose a charge, a nominal charge that won't be too severe, upon the shipping public, but will act as a restrainer from a further detention after forty-eight hours, but you understand, when we say forty-eight hours, it is never forty-eight hours, the minimum time of any car must be—

Mr. Hobart :—Never mind that.

Recess till 2 o'clock.

MR. CHARLES P. CURTIS resumes the witness stand.

Mr. Hobart :—I offer the Car Service Association rules for identification.

Marked Exhibit A for identification.

Cross Examination by Mr. Cabell :

Q. This estimate of the earning capacity was made on gross earnings ? A. Yes, sir.

Q. There is a difference in the expense in connection with a car in service on the track in trans-

portation, and that of a car on a siding? A. That is possible, but it is all classed under the term "Transportation" you will recall.

Q. But there is such a difference in the actual expense of the railroads in connection? A. There would necessarily be the difference of hauling the car and keeping the car idle, but there would be no difference in the expense to the road as far as the cost to the owner of the car, providing it was a foreign car.

Q. Do they pay the owner of the foreign cars something? A. Certainly, and that, too, counts from the day the car is delivered until it is returned, including Sundays and holidays—absolutely no free time—but that is not pertinent to your question.

Q. How much is it that you pay the foreign roads for a car? A. Fifty cents a day.

Q. What was it in 1905? A. It was twenty cents a day for the first thirty days and eighty cents additional thereafter.

Q. Twenty cents a day for the first thirty days and eighty cents additional thereafter? A. Yes, sir; and you can count either eighty cents additional or $1 thereafter—that is the mere hire for the vehicle.

Q. You are under whom as assistant manager? A. F. E. Morse is the manager.

Q. These cars vary in size, don't they? A. Yes, sir.

Q. They vary in value, don't they? A. Necessarily.

Q. And they vary in earning capacity? A. Assuming that the same commodity, that the commodity was the same in both cars, a sixty ton car necessarily would earn more than a thirty ton car.

Q. And an open car is usually worth less than a closed car? A. It costs less to construct.

Q. Does it usually earn more or less? A. Ac-

cording to the freight that is carried on it; it depends very considerably on the freight that is carried.

Q. They deteriorate in value with use? A. Some.

Q. You have some cars that are in actual use that are not worth more than two hundred dollars now? A. I hardly think that; I hardly think so; you would get a very poor car for that.

Q. You have gondolas—open cars? A. The trucks alone would cost nearly that.

Q. Some of the wrecks that you run? Some of the cars with flat wheels? A. The flat wheels are only run until they are detected.

Q. Some of the cars in that condition that you have not yet detected, what are they worth—are not some of them worth as little as $200? A. That would depend on how flat the flat wheel was.

Q. Are you not operating some that are not worth over $200? A. I don't think they are, because I don't conceive how it could be kept in use.

Q. You are frequently called on to adjust car service differences, are you not? A. Constantly; that is my peculiar mission.

Q. Don't you frequently refund a car service charge already paid? A. If the circumstances permit—always.

Q. Sometimes you tell a man to pay it to you and you will give it back to him, don't you? A. No, sir.

Q. Oh, yes, you do—don't you sometimes tell a man in effect that you will see he gets it back after he has paid it to you? A. It is an invariable practice to decide no claims until we investigate them.

Q. Then you always insist on payment first and investigation afterwards? A. That is on the hypothesis that the charge is correct, and even then

we will make a refund under certains conditions—weather conditions for instance.

Q. Don't you frequently, after hearing a man's side of the story, tell him to pay it in and probably that he will get it back, but that he must pay it in first? A. We don't put it in that way; we will tell the man that he must pay the just bill.

Q. To pay the bill— A. We say "If you have any reasonable ground upon which you think you can file a claim for refund, we will gladly investigate impartially, and if the circumstances justify we will be very much pleased to make you a refund proportionate with the circumstances."

Q. Then you make a practice of giving back half of it? A. Not by any means.

Q. You give back less than half? A. Sometimes more than half of it, sometimes less.

Q. But you invariably insist upon payment first before the investigation? A. Before we make the refund—

Q. Are there some people who are not charged any car service at all? A. There are some people who will not pay car service.

Q. Are there not some to whom you don't even present bills? A. Not that I know of; no, sir.

Q. And are there not some from whom, after the bills are presented, they are withdrawn? A. What?

Q. Some to whom bills are presented are withdrawn by the car service? A. There have been instances—take the Wanaque Paper Company.

Q. Answer my question. A. It is altogether owing to the circumstances.

Q. (*By the Court*) Are there instances? A. There would be instances, yes—justified by the circumstances.

Q. (*Further Cross*) On the New York and Greenwood Lake Railroad you are paying a great deal more attention to the collection of car service

since this controversy than you were before, are you not? A. Not by reason of that controversy.

Q. You are making people now pay some car service charges who never had to pay them before? A. Because it is incumbent upon us by law to do so.

Q. Do you mean the new rate bill? A. That has a bearing; yes, sir.

Q. The new rate bill has stopped you from discriminating? A. No, sir; the new rate bill has tended to waken consignees more to a realization of their—

Q. Since the passage of the new rate bill has not your association been afraid of being called a discriminator and stopped its discrimination? A. We have not altered our procedure in the least.

Q. Has not your association frequently represented since the passage of the new rate bill that it is unlawful now to give any of the car service back, as it would be a rebate? A. No, sir; because we are doing it constantly.

Q. But has not your association made such representations? A. No, sir; it would be illegal to give car service back that is not justly due the man, but we are constantly making refunds, and we have not varied from the usual practice; we do it wherever the circumstances warrant.

Q. Do you know of Erie 100824? A. Not individually; I know that there presumably is such a car in their list of cars; they are all numbered numerically.

Q. You don't know what kind of a car it is? A. I would assume it would be a box car from the number.

Q. I ask you whether you know? A. Positively not; because I have never seen it.

Q. Do you know B. & O. car 70183? A. No, sir.

Q. Do you know what character of car it is? A.

I have only got to assume—I don't know positively.

Q. Do you know Michigan Central car 42865? A. The same applies to that.

Q. You don't know that? A. No, sir.

Q. Do you know car P. S. and N. number 1108? A. The same applies to that.

Q. Do you know L. S. & M. 44988? A. The same applies to that.

Q. Southern railroad 32537? A. The same applies to that.

Q. Track conditions vary in different parts of the country? A. I presume so.

Q. The conditions under which the Western Car Service Association operates, are they by those under which the New York and New Jersey Car Service Association operate? A. It may be possible, some roads make different rates.

Q. And the regulation as to imposing service charges after forty-eight hours vary don't they, in some places it is longer? A. On certain commodities in certain places under certain circumstances.

Q. It is as much as four days in some places? A. That is very true.

Q. In some places they have four days free time on all commodities, don't they? A. In one particular locality by statute law.

Q. The time required reasonably to unload a coal car is not as great as that to unload a lumber car, is it—a box car loaded with lumber? A. I don't see how you can reconcile that—you say it is not as great—

Q. The time reasonably required to unload a coal car is not as great as that required to unload a box car loaded with lumber, is it? A. Yes, sir; the lumberman claims his car is longer—

Q. Now, if a coal car is placed on a trestle, about how long does it require to unload it? A. If the coal is not frozen, and it is a free running coal, it

would take just long enough to run through the hoppers, and the hoppers vary in size.

Q. Would it take half a day? A. No, sir; an hour would do it.

Q. To unload a car loaded with a lot of small boards it would take longer than that? A. Undoubtedly, and it would take longer to unload a sixty ton coal car by shovelling out over the top as they do.

Q. A car, if it is placed close to the point of convenience of the consignee can be unloaded more readily than it can in a railroad yard half a mile away? A. Not necessarily.

Re-Direct Examination by Mr. Hobart:

Q. You said that under certain circumstances refunds might be made; give us an illustration of that? A. We will assume that a charge is perfectly just and proper payment has been made—we find that during the free time the consignee encountered rainy weather; we will refund that to him, not because we are responsible for it, but we give it to him because we think he is entitled to it, providing that the next day he has not also taken advantage of us in clear weather. For instance, bunching cars in transit; if it is beyond his capacity to take care of them, if the road accumulates the cars and bunches them in, he will pay the charge for the reason that at the time the charge is assessed it is not determined until evidence is produced that the cars were bunched; we would trace them through the different roads and find where they accumulated and make him a refund commensurate with the circumstances.

Q. That, of course, requires certain investigations? A. They all require investigation.

Q. You spoke of one place where there is an al-

lowance for four days, where is that? A. In Connecticut, that is because of the state law.

Q. Now, reference was made to the rate for foreign cars—do you know how that rate was arrived at—the reason for it? A. Yes, sir; it was somewhat of a compromise figure.

Mr. Cabell:—I object to this as irrelevant.

Mr. Hobart:—I am satisfied to have the whole thing struck out as to foreign cars. I want this witness as an expert to explain how they arrived at the rate.

A. I would necessarily have to explain the conditions that existed briefly before the introduction of the per diem rule. For years immemorial the roads had interchanged cars on a mileage basis, charging two-thirds of a cent a mile, while the car was running. After the car stopped at its destination and was detained by a consignee or held by our own, the charge ceased; that became so burdensome that the roads finally got together and abandoned that mileage system and inaugurated the per diem. The rate fixed—the first proposition was very much in excess of the rate that they charged, but as an experiment tentatively for a certain period they tried twenty cents to see if that would remedy in any manner the evil. That was based on charging if a car of the Erie Railroad was delivered, we will say at Chicago, destined for New York on the first of the month, and it was not returned until the thirtieth of the month, they would simply say one from thirty leaves twenty-nine, and you owe us hire for twenty-nine days. The charge now has been increased to fifty cents and a higher rate advocated.

The Court:—Strike that last part out.

Q. Had you finished with your explanation of

how they arrived at that rate of twenty cents? A. Yes, sir.

Mr. Hobart :—There is one witness present from the general offices of the company. In the natural order of proof I should offer the various way-bills and bills of lading, but the witness who will testify to that will be quite lengthy, and I am anxious to let this witness finish today as he has an important meeting to attend tomorrow.

MR. DAVID L. GREY, sworn in behalf of the plaintiff, testified as follows.

Direct Examination by Mr. Hobart :

Q. Mr. Grey, what position do you hold with the Erie Railroad Company? A. Assistant general freight agent.

Q. You have been such for how long a time? A. About two years.

Q. What experience have you had in the railroad business? A. I have been connected with the Erie Railroad for more than twenty years.

Q. In the freight department? A. Fifteen of which was in the freight department—about that.

Q. I refer you to a bill of lading and way-bill which purports to cover car P., S. and N. number 1108, and I call your attention to the fact that that car purports to be consigned from Alton, Pennsylvania, to Alcott and Company, Paper Mill and Lumber Yard Switch, Wanaque, New Jersey. The bill of lading purports to have been shipped by the P., S. & N. Railroad Company, and the date is August 7, 1905. I now ask you what instructions were issued to connecting agents with regard to shipments over the P., S. and N. to this station of the Erie Railroad Company—that is, first, were

any instructions at all given, and if so, in what form?

The Court:—From the Erie Railroad to connecting carriers?

Mr. Hobart:—Yes; the purpose is to show that certain instructions in the form of what are sometimes called billing instructions or sometimes called joint tariffs are issued by the Erie Railroad to its several connecting carriers, and that, according to those instructions, there was no authority on the part of the agent of the connecting carrier to make a shipment to a connecting siding at Wanaque or Wanaque-Midvale. I don't claim any actual notice on the part of the lumber company, but as to this car (and the same applies to two other cars, only over different connections) the question, of course, arises at once, whether under a bill of lading which calls for a delivery on its face to what is called the "paper mill siding" or "lumber siding" whether the railroad company was justified in tendering delivery at the public siding at that station. I propose to show afterwards that delivery was tendered at the public siding at this station, instead of on the private siding; we refused to deliver on the private siding, and I purpose to show by this witness that according to the tariff that was in force at that time and instructions to agents of connecting carriers, that no agent had any authority to issue way-bills or bills of lading to any place except at certain designated stations—given in the tariff—which was required to be filed with the Interstate Commerce Commission, and which was required to be posted for the information of the public. I am anticipating to some extent the defence that will no doubt be made on

that. I want to raise this squarely so I will put the question.

Q. (*By Mr. Hobart*) In the year 1905 was there in effect between the Erie Railroad Company and its connection, the P., S. & N. Railroad, any joint tariff for cars consigned on the P., S. & N. to the Erie and its stations? A. Yes, sir.

Q. Was that joint tariff in writing? A. It was a printed tariff.

Q. Was it filed with the Interstate Commission? A. Yes, sir.

Q. Was it required to be posted for the inspection of the public? A. Yes, sir.

Q. And were orders sent to post it? A. By a notation on the tariff to that effect.

Q. Do you know whether the rules of the railroad require the posting of such notice? A. I do.

Q. You don't know whether this particular notice was put up? A. I cannot say to that, but that is the general question; in fact it is a part of the law.

Q. Now, I refer you to the joint tariff, joint freight tariff—between the Erie Railroad and P., S. & N. which is number 415 on the file of the Interstate Commerce Commission, according to the face of the paper, and I ask you whether this tariff was the one that was in force during the year 1905? A. Yes, sir.

Mr. Hughes:—I don't see the relevancy of this?

Mr. Hobart:—I now offer this joint freight tariff number 415 for the purpose of proving that according to this tariff, and also according to the rules and customs of the Erie Railroad and P., S. & N., station agents were limited in making shipments to the stations specifically named in the tariff.

The Court :—From the inspection that the Court has had of the paper, it does not appear that there is anything prohibiting an agent from shipping to another point ; that seems to me the question simply involves the opinion of the witness as to the construction to be placed on the—there is nothing which says in so many words that an agent may not receive or ship freight to any other point, excepting the point named on that tariff.

Mr. Hobart :—The law has that effect ; we are obliged to ship according to the rates to the places named in the tariff, in the public tariff ; if we don't we violate the State Commission law ; we have got to go by these tariffs or not at all.

The Court :—But what is there in that law to prohibit a consignee who desires to ship something from Newark to Paterson, to make the railroad company agree as to what particular siding in Paterson they will land the car? That is the difficulty I have. As to the same municipality, but to a different siding, one man wants it on one siding, another man at another siding, but all at one station.

Mr. Hobart :—That would be in effect a discrimination.

The Court :—I shall sustain the objection.

To which ruling of the Court the plaintiff's counsel prays an exception. Exception allowed. Let it be sealed, and it is sealed accordingly.

WILBUR A. HEISLEY,

J. [SEAL]

Q. Had any agent of the connecting carrier, the

P., S. & N., any authority, so far as the Erie Railroad Company is concerned, to issue bills of lading or way-bills to any place or station other than the stations named in the joint freight tariff already referred to?

Mr. Hughes :—Objected to.

The Court :—I think the question is objectionable on the ground that it asks for a conclusion of law as to what the agent's authority was.

Q. What was the authority to agents of the P., S. & N. Railroad with respect to goods consigned to stations of the Erie Railroad ; were instructions in fact—

Mr. Cabell :—Objected to—it is what they did ; it is not a question of what authority the agent thought he had before.

The Court :—It is what the law says under all the circumstances of the case, the agent's authority was ; in other words there is a legal proposition whether or not in accepting the consignment of a bill to a siding not marked upon the tariff, whether the agent acted within the scope of his authority; whether he was acting within the scope of his authority. I will admit it.

Exception allowed to defendant.

A. The tariff covering the rate from the point of shipment to the destination was the authority—

Q. What were their instructions with regard to that tariff? A. No other instructions than those noted in the tariff.

Q. Now, will you look at the tariff and state whether you can tell us from that whether there were any instructions of any kind by which an agent of the P., S. & N. might be allowed to make a

consignment to a private siding at Wanaque-Midvale?

Mr. Cabell:—Objected to.

The Court:—It is silent as to whether he shall or shall not ship to any other place.

Mr. Hobart:—That is true, sir; but what I want to show by this witness is, that according to the rules and customs of the business, no agent had any authority in fact, to ship to any place, except the particular stations designated in this tariff.

The Court:—I think you have a right to show that as between the agent and the company, that he had no right to do that; he had received instructions, perhaps to the contrary; I shall certainly tell the jury that notwithstanding that it might have been within the scope of his authority if they find certain facts—

I think you have the right to show what your instructions were.

Q. Look at the tariff sheet and state whether according to this tariff sheet taken in connection with the rules and customs of the business there was any authority on the part of a connecting agent to ship goods to a private siding to Wanaque or Wanaque-Midvale?

Mr. Cabell:—Objected to as calling for a conclusion.

Objection sustained.

The Court:—It is too ambiguous as I look at it.

Q. Can you state by an inspection of the sheet whether this would apply to a shipment from Alton, Pennsylvania to Wanaque-Midvale.

Mr. Cabell:—Objected to as calling for a conclusion.

The Court:—Objection sustained.

Q. Do you happen to know whether Alton is on the line of the P., S. & N.? A. I believe it is.

Mr. Hobart:—Now I will offer this joint tariff?

Mr. Cabell:—Objected to.

The Court:—That is the paper we have been discussing?

Mr. Hobart:—Yes, sir.

Objection sustained. Exception allowed to plaintiff. Let it be sealed, and it is sealed accordingly.

WILBUR A. HEISLEY,

J. [SEAL]

Mr. Hobart:—I will ask this question to get that clear.

Q. In the case of a tariff such as we have referred to, what was the custom of the business with respect to a foreign agent shipping to any place other than that designated on the tariff?

Mr. Cabell:—Objected to.

Objection sustained. Exception allowed to plaintiff. Let it be sealed, and it is sealed accordingly.

WILBUR A HEISLEY

J. [SEAL]

Mr. Hobart:—Joint tariff 415 will be marked Exhibit A for identification.

Perhaps I should call your Honor's attention to the fact—I don't know that it has been men-

tioned before, that the bill of lading shows a consignment to Alcott & Company; (I speak of that in order to be fair with the Court) as bearing on the point that the posting of the notice would operate as legal notice to the consignor, (who happens to be the same as the consignee) of the extent of the authority of the agent of the connecting carrier.

Q. (*By Mr. Hobart*) Had any agent of the P., S. and N., so far as the Erie Railroad is concerned, any authority to in any way vary from the instructions given in the joint freight tariff, Exhibit A for identification?

Mr. Hughes:—Objected to.

The Court:—He has said the only instructions that they got were these tariff bills. Objection sustained.

To which ruling of the Court the plaintiff's counsel prays an exception. Exception allowed. Let it be sealed, and it is sealed accordingly.

WILBUR A. HEISLEY,
J. [SEAL]

Q. Had any agent of the P., S. & N. Railroad any authority to issue from Alton, Pennsylvania a bill of lading consigned to what purports to be a private siding at Wanaque-Midvale.

Mr. Hughes:—Objected to.

Objection sustained. To which ruling of the Court the plaintiff's counsel prays an exception. Exception allowed. Let it be sealed, and it is sealed accordingly.

WILBUR A. HEISLEY,
J. [SEAL]

The Court :—Of course, I do not mean to say that you are prohibited or precluded from showing that you had instructed them not to do it ; I don't mean to say that is not competent, but you are asking this man as to the legal authority—the competency of the act of an agent to represent the principal. That is a question of law. I think you have a perfect right to show what your instructions were to the agents, but even in that case I should hold that there must be something bringing it home to the attention of the shipper, and that the agent's power was limited because he was the representative of the company for the purpose of receiving the freight for shipping purposes, and I think the effect of the shipper there must be something brought home to his knowledge, which would make him think that an act, which would generally be within the supposed scope of an agent's authority, was not within his authority, by reason of a limitation placed upon it by the principal, and brought home to the knowledge of the shipper.

Mr. Hobart :—The paper is excluded ?

The Court :—Yes.

To which ruling of the Court the plaintiff's counsel prays an exception. Exception allowed. Let it be sealed, and it is sealed accordingly.

WILBUR A. HEISLEY,
J. [SEAL.]

Q. Now I refer you to the way bill and bill of lading for car L. S. & M. S. 44988, or rather to the waybill only. (The defendant produces a bill of lading.) I refer you to the bill of lading and waybill, both, and call your attention to the fact

that the car is consigned to the Wanaque Paper Mill and lumber yard siding; now I will ask you what billing instructions were in force as to connecting agents so far as related to this car, which seems to have come to the Erie from Chicago?

Mr. Hughes:—Is there any reason why the instructions should be different for that car?

Q. Well, let us see—do you happen to know whether there is anything said in the billing instructions as to the station to which cars might be consigned?

The Witness:—I don't understand the question.

Q. Is there anything printed in the billing instructions, or in the tariff sheet, which give any instructions to agents, connecting agents, as to where they shall make shipment—to what points?

Mr. Hughes:—Objected to.

The Court:—Let him answer yes or no.

Q. (Question read) A. Yes, sir.

Mr. Hughes:—Objected to.

Objection overruled. Exception allowed to defendant.

Q. Can you turn to this? A. This is what is called the east bound billing instructions, that shows the points on the various eastern lines to which certain roads are applied.

Mr. Hughes:—We object to this.

Q. What are the instructions to agents, that is the point with regard to shipments?

Mr. Hughes:—I don't see how you can show that is a copy of it.

The Court:—Is this a copy of it or not?

A. I should say yes.

Q. Now state what the instructions to agents are with regard to shipments. Do you happen to know if there is anything in the book which, in so many words— A. This book has Wanaque-Midvale as a station to which through rates are applied.

Q. The book does not say anything then about private sidings at Wanaque-Midvale? A. No, sir.

The Court:—It is silent on that subject.

A. Yes, sir.

The Court:—That is what I have understood.

Q. (*By Mr. Hobart*) Are these the instructions and the tariff that were in force in 1905—the ones that you have just referred to? A. Yes, sir.

Mr. Hobart:—Now as to this one, if your Honor please, I will either offer it in evidence or simply call your Honor's attention to the instructions that will appear on page 180, if your Honor considers that it is competent evidence, the instructions in question being under the head of eastbound billing instructions; then follows a number of stations—among them Wanaque-Midvale; this is a case exactly like the other one, in that the consignor is also the consignee, and I will offer the billing instructions, together with the joint tariff for the purpose of showing that agents of connecting carriers were instructed to make waybills read to Wanaque-Midvale. Exhibit B for identification.

[Page 59, Book of Pleadings and Exhibits.]

Mr. Cabell:—We object to that.

The Court:—Objection sustained.

To which ruling of the court the plaintiff's counsel prays an exception. Exception allowed. Let it be sealed, and it is sealed accordingly.

WILBUR A. HEISLEY,

J. [SEAL]

Q. Is it the custom, as well as the rule of the company, for these instructions to be posted as required by law? Now let us take car 32537; I will call your attention to the bill of lading and waybill of that car in which the consignee appears as Alcott & Company, Paper Mill and Lumber Yard Switch, Wanaque, New Jersey; that purports to have come from Boydton, Virginia, August 24, 1905, and I show you what purports to be the joint freight tariff of the Atlantic Coast Dispatch, Interstate Commerce number M 847, is that the tariff and instructions to agents that was in force from Boydton, Virginia, in 1905, so far as the Erie Railroad is concerned?

Exhibit C for identification.

[Page 64, Book of Pleadings and Exhibits.]

Mr. Cabell:—Objected to.

Objection overruled.

Q. Is that also required to be posted?

Mr. Cabell:—Objected to as calling for a conclusion.

Objection overruled.

A. Yes, sir.

Q. And are instructions, sent to agents, posted?

Mr. Cabell:—Objected to.

Q. The one that you have in your hand is an office copy, I presume? A. Yes, sir; we have a notation on the face that it is to be posted.

Q. And instructions are sent to agents to post these tariffs, are they?

Mr. Cabell:—Objected to.

Objection overruled.

A. This tariff, would be posted with the Interstate Commerce Commission by the originating carrier.

Q. But I mean where the point where the shipment originated? A. It should be.

The Court:—Who would send it to that agent down at Boydton?

A. The originating carrier would send it.

Q. Is it the custom to post these tariffs as required by law?

Mr. Cabell:—Objected to.

Objection sustained. Exception allowed to plaintiff. Let it be sealed, and it is sealed accordingly.

WILBUR A. HEISLEY.

J. [SEAL]

Q. Can you state from your knowledge of railroad practice of several years whether it is customary to post at all stations the tariffs showing the freight rate and instructions to agents? A. Those are the instructions. That is the general custom and it is required by the Interstate Commerce law to do it—not only the Erie Railroad but all railroads on Interstate traffic.

Q. Now, in this tariff that has been referred to, I observe on page 64 a reference to Wanaque, New Jersey; was any agent of any connecting carrier of the Erie Railroad Company authorized to ship goods to a private siding at Wanaque, or at Wanaque-Midvale?

Mr. Cabell:—Objected to.

Objection sustained. To which ruling of the Court the plaintiff's counsel prays an exception. Exception allowed. Let it be sealed, and it is sealed accordingly.

WILBUR A. HEISLEY,

J. [SEAL]

The Court:—You can show your instructions, if you wish.

Q. I will call your attention to what are called general instructions on the fly leaf of the tariff, which read "Agents are cautioned not to sign bills of lading calling for delivery at destination via any line or at any particular station unless tariff information provides that such deliveries can be made."

Mr. Hughes:—Objected to.

Objection sustained. To which ruling of the Court the plaintiff's counsel prays an exception. Exception allowed. Let it be sealed, and it is sealed accordingly.

WILBUR A. HEISLEY,

J. [SEAL]

Q. I also call your attention to the fact that in this same tariff there are foot notes which purport to refer to so-called individual sidings at certain points, and I ask you whether in this tariff there is anything to indicate that there is any individual siding at Wanaque or Wanaque-Midvale?

Mr. Hughes:—Objected to.

Objection sustained. To which ruling of the Court the plaintiff's counsel prays an excep-

tion. Exception allowed. Let it be sealed, and it is sealed accordingly.

WILBUR A. HEISLEY,

J. [SEAL]

Mr. Hobart:—I will offer this tariff Exhibit C for identification.

The Court:—The offer is overruled.

To which ruling of the Court the plaintiff's counsel prays an exception. Exception allowed. Let it be sealed, and it is sealed accordingly.

WILBUR A. HEISLEY,

J. [SEAL]

No Cross Examination.

MR. ROBERT D. CARTER, sworn in behalf of the plaintiff, testified as follows:

Direct Examination by Mr. Hobart:

Q. You are an officer of the Wanaque River Paper Company? A. Yes, sir.

Q. And have been for some time past? A. Yes, sir; since the organization.

Q. Are you the president of the company? A. Yes, sir; I am the president.

Q. Are you familiar with its affairs? A. With the paper company's business—yes, sir.

Q. And has the paper company a siding at Wanaque-Midvale? A. Yes, sir.

Q. How far is that siding from the present station? A. The beginning of it do you mean?

Q. Yes. A. 200 yards, I should think.

Q. Is there a public siding almost opposite the

present station, on the opposite side of the track—that is the easterly side? A. There is a siding up above the station—a public siding.

Q. You have seen freight come there and be delivered there? A. Yes, sir.

Q. Your company has an arrangement whereby deliveries are mady on your private siding? A. On the siding leading into our works.

Q. Is that the siding of the paper company? A. Well, it is on our land—part of it.

Q. Which part? A. The part on the west of the public road.

Q. There is a public road, which I think is marked on the map a little to the—marked highway? A. Yes, sir.

Q. Now, from that point to your paper mill, the siding is on your property? A. Yes, sir.

Q. Going in the other direction from the highway to the railroad tracks, the one marked main tracks, if you happen to know whose land that is on? A. To a point in the centre of the road out to the railroad, it belongs to the railroad—about half a plot that we purchased from Vreeland to get the switch through, we deeded back half to the railroad to put the station there; the station was afterwards moved up, combined.

Q. Which part of the siding does that take in? A. The part that belongs to the railroad—I should judge—I don't know how far the railroad runs out this way; we have a strip in here, but this part of it is on the railroad property out to the centre of the road.

Q. Your agreement with the railroad company was made a number of years ago? A. Yes, sir.

Q. When? A. The same year we built; I think it was in 1890.

Q. Have you been able to find that original agreement? A. No, sir; I found something relating to it—simply a letter relating to it.

Q. But no copy of the agreement itself? A. No, sir.

Q. Are you able to recollect what the substance of it was with respect to the use of the siding? A. That the paper company do the grading and lay down the ties and the railroad company furnish the rails, that is, we pay for them but the railroad company refund the amount on a basis of 10 per cent. as earnings of the Greenwood Lake Railroad —that has been returned to us.

Q. The parties to that agreement were the paper company and the railroad company? A. Yes, sir.

Q. Did the lumber company ever become a party to it? A. How do you mean?

Q. Did they ever join in the argreement? A. No, sir.

Q. Are you also an officer of the lumber company? A. I was at the beginning, when the company was incorporated, but soon after I resigned.

Q. Well now, the map there shows what is called lumber shed, is that the shed of the defendant in this case—the Wanaque Lumber Company? A. Yes, sir.

Q. Does that stand on property belonging to the paper company? A. Yes, sir.

Q. What is the argeement between the paper company and the lumber company as to the use of the siding? A. I don't remember exactly—but they are to pay us so much a month for the use of the building; they leased the buildings to the paper company—they simply rented from our company.

Q. And does that carry with it the right, so far as your company is concerned, to use the sidings? A. I think that was in it.

Mr. Hobart:—Do you happen to have that, Mr. Cabell?

Mr. Cabell :—Yes.

Mr. Hobart :—Will you waive formal proof of that?

Mr. Cabell :—Yes.

Q. Do you recall the occasion when the railroad station was moved to the north, and as I understand it the station was put near the place where your siding leaves the main line? A. Yes, sir.

Q. Now, the station was moved north some time ago? A. Yes, sir.

Q When? A. About three years ago, I think.

Q. Do you remember what the arrangement, or what the custom, was with regard to the use of the paper company siding before the station was moved? A. I understand people used it right along.

Q. Was that with the consent of your company? A. The question never came up—we never objected—the question did not come up at all.

Q. And after that station was moved, the lumber company made this arrangement you have spoken of for the use of part of the property, and the switch with it, is that right? A. I don't know whether the arrangement was made before or after the station—perhaps about that time.

Q. Now, what is the public delivery track at Wanaque-Midvale, or what was it in 1905? A. I don't know of anything except that switch.

Q. At Wanaque-Midvale do you say? A. Yes. I suppose they called the one above the station there—we have had nothing to do with it.

Q. I thought that you might have observed that deliveries are made on the track above the station? A. Yes, sir.

Q. Has the Wanaque Paper Company ever paid any car service charges?

Mr. Cabell :—Objected to.

The Court:—I don't see how it is competent. Objection sustained.

To which ruling of the Court the plaintiff's counsel prays an exception. Exception allowed. Let it be sealed, and it is sealed accordingly.

WILBUR A. HEISLEY,

J. [SEAL]

Mr. Hobart:—I propose to show that before this controversy arose, charges were made by the paper company for detention, and the paper company paid the same.

The Court:—Take your exception.

Cross Examination by Mr. Cabell:

Q. When the station existed at Wanaque, where was the point of delivery known as Wanaque? A. At the one leading into the paper company.

Q. Since the station has been done away, and the station established down at Wanaque-Midvale to the north, has the railroad company made deliveries to persons other than you on the switch at Wanaque, spoken of as the paper company's switch? A. Yes, sir.

Q. Where, what part of the switch? A. Well, I have noticed them all along there—I could not say exactly. (Indicates on the map.)

Q. Sometimes it was delivered upon land belonging to the railroad company? A. Yes, sir.

Q. And sometimes upon land belonging to you? A. I think so; I am not quite sure of that, but I think they have.

Q. Is that continued; did that continue during 1905? A. I think so, I noticed the cars on there and people working at cars; I paid very little at-

tention to what was being done ; it did not concern us.

Q. Did you see any delivery there is 1906? A. Drew's stuff.

Q. Did you see any cars of manure there for Gabriel Decker? A. I think so.

Q. Did you see any cars of ore there for John Sager? A. I cannot say positively ; I think so, but I paid very little attention to that.

Q. You never heard of anybody being refused delivery there, except the Wanaque Lumber Company? A. No, sir.

Q. How are your goods usually billed? A. Billed to Wanaque.

Q. And they always place them for you on the switch? A. Yes, sir.

Re-Direct Examination by Mr. Hobart :

Q. These cars for other consignees than your company—these cars for other consignees than your company, isn't it the fact that they are generally placed along the sidings or were placed along the siding between the main line and what is marked highway? A. I should think that would be more usual than the other ; I have noticed the cars there that had stuff that did not belong to us, but I paid very little attention.

Q. They may have belonged to the lumber company as far as you know? A. Yes, sir.

Recess till 10 o'clock, February 5, 1907.

February 5, 1907.

ROBERT P. MADILL, sworn in behalf of the plaintiff, testified as follows :

Direct Examination by Mr. Hobart :

Q. You are a civil engineer and surveyor in

the employ as the Erie Railroad Company? A. I am.

Q. Did you make this blue print which is on the board? A. I did.

Q. And state when it was made? A. January 11th.

Q. What is the scale? A. 50 feet to the inch.

Q. That should be fifty feet on the map instead of twenty feet? A. Yes, sir.

Q. Now, will you state how many sidings there are at the present Wanaque-Midvale station? A. There are five.

Q. Are you including in that the siding leading to the paper mill? A. No, sir.

Q. Aside from that then there are five? A. Four sidings besides that.

Q. Which is the public delivery siding at that station at this time?

Mr. Cabell:—Does he know that?

The Court:—What difference does that make at this time?

Q. Do you happen to know anything about the situation there before you made the map? A. No, sir.

Q. Now, you have shown here a siding, several sidings, on the easterly side of the track, state the length of the most easterly of those sidings, where it is possible for people to get their freight? A. I shall have to scale that. (Does so.)

Mr. Cabell:—Objected to, because it has actually been changed.

Mr. Hobart:—If there has been any substantial change, of course, I have no right to ask the question, but it is a mere matter of scaling to get the length of those sidings.

Cross Examination by Mr. Cabell:

Q. I notice on the map you have some driveways marked? A. Yes, sir.

Q. What are they? A. A portion of it is a beaten driveway.

Q. It indicates that they drove all over the field to the east of the track? A. They can.

Q. The dark marks are all around the fields? A. Yes, sir.

Q. But on the west of the track are laid roads? A. Yes, sir.

Q. And these laid roads lead to a highway, macadamized highway, a short distance to the west, don't they? A. Yes, sir.

Q. When did you make that map? A. January 11, 1907.

Q. (*By Mr. Hobart*) There are several driveways leading up to the siding where people can drive up so as to get close to the tracks? A. Yes, sir.

Mr. Cabell:—That is now; we don't want that.

MR. HERMAN L. DAVIS, sworn in behalf of the plaintiff, testified as follows:

Direct Examination by Mr. Hobart:

Q. I believe you are an inspector in the employ of the New York and New Jersey Car Service Association? A. I am.

Q. And were such in 1903, and from that time on until the present? A. I was.

Q. In the course of your duties did you have occasion to call at the Wanaque-Midvale station and have interviews there with the agent, and also with officers of the lumber company? A. I did.

Q. Did you in 1903 have any interview with Mr.

Cabell, the president of the lumber company? A. I did.

Q. Did you keep any record of that interview? A. I did.

Q. Did you keep any record of what was said or done? A. I did.

Q. Was it customary for you to keep such records for future reference? A. It is customary.

Q. Can you by referring to your records or report in 1903, state whether or not the attention of Mr. Cabell was called to the rules of the car service association? A. I can.

Q. You may refer to your record for the purpose of refreshing your memory.

The Court :—Does his memory need refreshing?

Q. Have you any recollection of it besides from your record? A. I have.

Q. Now state whether or not you called the attention of Mr. Cabell to the rules of the association? A. I did.

Q. At what time? A. On July 28, 1903.

Q. In what way did you call his attention to the rules? A. By presenting him with a copy of the book of rules.

Q. Did you give it to him personally? A. I did.

Q. Where? A. My recollection is in his office.

Q. At Wanaque-Midvale? A. Yes, sir.

Q. Will you state whether or not the copy of the rules that you presented to Mr. Cabell is the same or different from the one that was referred to by Mr. Curtis, and which has been marked for identification (showing paper to the witness)? A. It is substantially the same.

Q. In what respect is it different? A. The one I delivered to Mr. Curtis is what we call a terra cotta or brown cover, and did not contain the agreement, if my recollection is right.

Q. That is the agreement between the different railroads? A. Yes, sir.

Q. Did it contain the rules which are printed in this Exhibit A, beginning on page 12? A. Yes, sir; it did.

Q. Were those rules in the book that was presented to Mr. Curtis the same or different from those printed in this book? A. The same.

Q. Were they both what is called the reprint of November, 1901? A. It must have been.

Q. How do you know that they were the same —how do you know they were the same? A. Because in 1901 when these were reprinted our stock of book of rules had run out, and that is why that is called the reprint—therefore, in 1903, it seems to me to be impossible for me to have delivered to him any other book of rules than the reprint.

Q. Was the reprint of 1901 the edition that was in use in 1903? A. It was.

Mr. Hobart:—I now offer these rules.

Cross Examination by Mr. Hughes:

Q. Is the original of these rules in existence—the original rules of the Car Service Association? A. I believe they are.

Q. Have you ever seen them? A. Not of late.

Q. Have you ever compared this with them? A. That is carrying me back sixteen years, and I cannot answer it.

Q. The particular copy that you gave to Mr. Curtis, did you ever compare that copy with the original rules? A. No, sir.

Q. You don't know whether it was an exact copy of the rules or not, do you? A. It must have been.

Q. Why do you say that—suppose the printer made a mistake and the proofreader did not find

it, and the officials of the Erie Railroad Company overlooked it, then it would not necessarily be a true copy, would it? A. We always assume—

Q. Yes; but you never compared this or the book you gave Mr. Curtis with the original book? A. No, sir.

Q. Or the one that you gave Mr. Cabell? A. No, sir.

Further Direct.

Q. (*By Mr. Hobart*) Was the copy you presented to Mr. Curtis the one that was recognized by your association as the rules that were in force at that time? A. Yes, sir.

Q. How do you know that—did you ever compare the particular copy that you gave Mr. Cabell with any other copy of rules recognized originally, or any other kind? A. I did not; no, sir.

Mr. Cabell :—I object. I wish to call the Court's attention to the predicament they are in; they are contradicting their own witness; they are impeaching their own witness—not under circumstances where they are taken by surprise.

The Court :—Do you object to the introduction of this book?

Mr. Cabell :—Yes.

The Court:—Admit the book. Exception allowed to defendant.

Mr. Hobart :—We offer the reprint of rules of 1901, in evidence.

Marked Exhibit P-4.

[Page 66, Book of Pleadings and Exhibits.]

MR. JOHN G. DREW, sworn in behalf of the plaintiff, testified as follows :

Direct Examination by Mr. Hobart :

Q. Mr. Drew, you are a resident of Wanaque-Midvale ? A. Yes, sir.

Q. And have been for some years past ? A. Yes, sir.

Q. There are, I believe, two separate towns or townships, are there not ? A. Towns.

Q. One called Wanaque, and the other called Midvale ? A. Yes, sir.

Q. Do you recall the time when there were two separate stations ? A. Yes, sir.

Q. One called Wanaque and one called Midvale ? A. Yes, sir.

Q. Do you remember the occasion when the two stations were combined into one ? A. Yes, sir.

Q. Do you recall when that was ? A. Why, I think it was, as near as I can remember now, about 1904.

Q. As late as that ? I thought it was earlier than that ? A. It might have been 1903 ; it was somewheres in that neighborhood ; I am not sure of the date.

Q. You recall the fact ? A. Yes, sir ; I know all about it.

Q. Do you remember anything about any new sidings that were put in at or about the time the two stations were combined into one ? A. Yes, sir.

Q. Were new sidings put in ? A. Well, when the depot was first made and consolidated in one called Wanaque-Midvale, there were storage switches, but no switches to receive freight, not until about two years after, something like that.

Q. Along in 1905 ? A. Yes, sir.

Q. Now, do you recall whether during the year

1905 there was a siding on the easterly side of the tracks which was used for public delivery? A. Not to my recollection.

Q. You know there is a siding there? A. I know there is a siding now.

Q. How long has it been there to your recollection? A. Well, under oath I could not say, because I never used it.

Q. You have a private siding of your own, I believe? A. Yes, sir.

Q. Where is your siding located? A. It branches right off of the Wanaque River Paper Company's switch to my mill.

Q. By the way, how is that switch leading into the paper mill generally known around there, what is it called? A. It is called the Wanaque River Paper Company's switch and the Wanaque switch.

Q. Do you use part of that switch in order to get to your own private siding? A. Yes, sir.

Q. And have you any understanding or agreement with the paper company as to the use of the siding? A. Have I?

Q. Yes? A. Not for my siding.

Q. Well, for what? A. Well, for the land that the paper company still owns.

Q. That is to say, in order to get the cars on your switch they have to pass over land owned by the paper company? A. Well, really, that I cannot tell, whether it belongs to the paper company or not.

Q. Did you have any agreement with the paper company as to the use of the so-called paper company siding? A. No, sir; not for the siding; my agreement is for some land with the railroad company—what the paper company deeded back to the railroad company, and there is a little point there that joins my land that the Wanaque River Paper Company owns, and I leased that so that no nuisance could get there.

Q. What is your business? A. Flour and grain.
Q. Have you ever paid car service prior to 1905?

Mr. Cabell:—Objected to.

The Court:—How is it material?

Mr. Hobart:—It is only to meet the possible claim that we made any discrimination.

The Court:—There is no evidence of discrimination. I sustain the objection.

Mr. Hobart:—I don't insist on it.

Mr. Cabell:—If he prefers to ask it I am perfectly willing.

Cross Examination by Mr. Cabell:

Q. You speak of two towns, are there two post offices? A. Yes, sir.
Q. In 1905 can you show me where the Wanaque post office was? A. Yes, sir.
Q. Just step to the map, and as near as you can identify it, here is your mill? A. Right here—right opposite my mill.
Q. And about how far from the lumber shed? A. Not over 250.
Q. North or south? A. North.
Q. And where is the Midvale post office—north of the station? A. North of the present station.
Q. And in what direction was it from the old Midvale station—the first Midvale station—the Midvale post office at that time? A. Northwest.
Q. What part of the land upon which this switch lies is the property of the Erie Railroad Company? A. It joins Conrad Vreeland's land on the south, and comes to the public highway leading from Pompton to Ringwood.
Q. Then it goes north along the highway? A. Yes, sir; north along the highway.

Q. About how far from Vreeland's line? A. About seventy to seventy-five feet.

Q. Then what direction does it take? A. East.

Q. To what point? A. To the railroad.

Mr. Hobart:—I have the deed or an abstract of it, if you want it.

Mr. Cabell:—You have put Mr. Carter on the stand for that and he has testified to it.

Q. Does part of that land include the beginning of the switch leading into your mill? A. Yes, sir.

Q. Is the point of the switch leading into your mill on paper company land or Erie Railroad Company land? A. Erie Railroad.

Q. And it then passes along Erie Railroad Company land? A. Yes, sir.

Q. Then across a little strip of paper land? A. About four to five feet.

Q. And then to your own land? A. Yes, sir.

Q. You speak of Wanaque-Midvale—when goods are billed to Wanaque, what is the understanding in the neighborhood and by you as to where it means? A. It means—

Mr. Hobart:—Objected to as immaterial. Objection sustained.

The Court:—You ask him what the understanding is when goods are billed to Wanaque, New Jersey?

Mr. Cabell:—Yes.

The Court:—I do not think that is competent.

Q. If you know, where does the railroad company, or where did it habitually, in 1905, deliver freight consigned to Wanaque, New Jersey? A. On the switch, here, (indicating) from the public highway to the main line.

Q. (*By the Court*) Which switch is that? A. Part of the paper mill switch at Wanaque—the part that the Wanaque River Paper Company deeded back to the railroad.

Q. (*By Mr. Cabell*) During the year 1905 did you notice any deliveries made on the Wanaque switch between the highway and the railroad company's right of way? A. Oh, yes.

The Court:—You say "Wanaque switch"; do you mean the paper switch?

Mr. Cabell:—He has already described it as known as the Wanaque switch and the paper mill switch—but the distinction I make is that they most commonly speak of this part of it as the Wanaque switch, and the rest of it as the paper company switch.

Q. (*By Mr. Cabell*) Through 1905 where was the public switch at Wanaque, New Jersey? A. At the same place east of the public highway.

Q. (*By the Court*) You mean that is a switch, a part of which is known as the paper mill switch? A. Yes, sir.

Q. (*By Mr. Cabell*) Did you see people receiving goods there in car loads? A. Oh, yes.

Q. Did you receive any there? A. Several cars.

Q. Not on your own siding? A. No, sir.

Q. Did you load any cars there? A. I do all my loading there, only what I do at my mill—if there is a car at my mill I load that, otherwise I load on the hill.

Q. Have you seen other people load there? A. Yes, sir.

Q. Do you ever remember seeing John Segar or John Segar's teams loading iron ore there? A. Several cars.

Q. In what year? A. In several years.

Q. Have you seen Gabriel Decker receive manure there? A. Yes, sir.

Q. In what year did you see Gabriel Decker receive manure there? A. Back to 1896—1904 and 1905.

Q. And since that time? A. He received a car this year, 1906.

Q. Have they stopped delivering there now? A. Not that I know of.

Q. Did you see any goods received there in December, 1906? A. Yes, sir.

Q. How are your goods usually billed? A. To Wanaque.

Q. And where placed? A. At my switch.

Q. Did they ever place them there without any orders? A. I don't ever give them any orders.

Q. And when they are billed to Wanaque, then they habitually place them on the switch? A. Yes, sir.

Q. The switch you have described as the Wanaque switch? A. Yes, sir.

Q. Or at what other place—they either place them here or where? A. All my grain and flour I have placed on my own switch, and if I have hay or such things, I have it on the switch there and load it in my building from the paper mill switch.

Re-Direct Examination by Mr. Hobart:

Q. This switch that you have described as the paper mill switch, and which has also been spoken of as the Wanaque switch, extends only as far as this highway, isn't that the fact? A. I often go clear down to the office.

Q. You have often spoken of having seen cars of other people unload on this same siding? A. Yes, sir.

Q. And those cars are usually placed to the east of the highway, are they not? A. Yes, sir.

Q. And I don't suppose you can recall any car outside of your own that has ever been placed west of the highway, can you?

Mr. Cabell :—Objected to.

Q Did you ever see a car except your own placed on the siding to the west of the highway, that is, except your own, and the paper company's and the lumber company's? A. Well, yes ; I have.

Q. How often? A. Only one time that comes to my mind, and then they had an accident and they ran one of my cars down there, and I unloaded it.

Q. That was one of your own cars? A. Yes, sir.

Q. My question has reference to a car of any one else outside of your own? A. West of that—I don't know of any.

Mr. Cabell :—I will refresh your memory.

Q. (*By Mr. Cabell*) Did you ever see a car of household goods of Chester Slowson delivered in front of the lumber shed? A. Yes, sir.

Q. When was that, was it before or after this controversy? A. After—that I had forgotten for the moment, and also another car of furniture for our minister up there—I remember that.

Q. Did you ever see Ed Ricker receive coal on the west of the highway ; did you ever see Ed Ricker receive coal on that highway ? A. Oh, yes ; he had a coal shed there—excuse me, I had forgotten that.

Q. (*By Mr. Hobart*) Mr. Ricker has a siding of his own? A. He has at the present time. And right here he had a coal bin and he received all his coal down there.

Re-Cross Examination by Mr. Cabell :

Q. Ed Ricker since had a coal switch put in over here? A. Yes, sir.

Q. Since this controversy? A. Yes, sir.

Q. Is there any difference in deliveries at Wanaque now from what there were before this station

was established at Wanaque-Midvale? A. Well, not that I know of, until you people—

Q. What do they generally call this? A. The Midvale switch.

Q. What do they call the other? A. The Wanaque.

Q. Now, this switch that you speak of at the Midvale station, how do you get to it? A. You cross over the main line and four other tracks to get in there.

Q. And in what direction is that from the present Wanaque-Midvale station? A. North.

Q. About how far? A. It must be 2,000 feet about.

Q. What goes on on those tracks—the main track and the two first sidings? A. Storage.

Q. Do they ever drill there? A. Yes, sir.

Q. Do they drill often? A. Very often.

Q. Do trains pass up and down the main track? A. Yes, sir.

Q. Is not there a yard of the railroad company immediately to the north—a yard where passenger cars are stored? A. Yes, sir.

Q. That entails a great deal of drilling in that neighborhood, doesn't it? A. Yes, sir.

Q. Is there any protection at this crossing? A. None whatever.

Q. Would you think that crossing was really a safe crossing? A. No, sir; I always instruct my men when they go there to be careful, for I came near getting killed there.

Q. If a man at this switch to the north of the crossing is loading goods, to get out into the village, what does he have to do? A. He has to cross those storage tracks and the main line.

Q. Now, on those storage tracks, does he have to pass between cars before he comes out on the main track? A. Yes, sir.

Q. Is there any warning if the cars are being

drilled on these storage tracks, closing the cars together? A. No, sir; that is what causes the danger.

Q. You cannot tell what is on the main track until you get past the switch track? A. That is right.

Q. What is the condition of the field immediately to the east of the storage tracks? A. It is very bad.

Q. They have not built any roads, have they? A. No, sir.

Q. But late in 1905 didn't they put some ashes immediately against the switch so you could get up to the cars? A. To raise the wagon so we could get the stuff from the wagon in the car door—it was a gutter there.

Q. Is there any part of the village to the east of the track—here is the main road and this is east of the track; is there any part of the village in that direction? A. No, sir.

Q. In 1905 was there one house off here towards the mountain? A. There was one.

Q. And there were no worn driveways leading in that direction? A. No, sir.

Q. What is to the east of this track after you passed the fields? A. Nothing but low farming ground.

Q. And that is a mountain? A. Yes, sir; wood.

Q. Where does the village lie? A. To the west.

Q. Is there not a highway leading from here to the west of the track? A. Yes, sir.

Q. 150 or 250 feet to the west, is it? A. About that.

Q. And all the houses are along that highway or to the west of it? A. Yes, sir.

Q. So that all persons— A. That is along by the depot and this switch.

Q. Have they made any changes in these tracks since 1905? A. Yes, sir.

Q. Can you tell what they are? A. They have made this delivery switch—in 1905 I don't think there was any delivery switch there.

Q. There is a gravel pit to the east of your feed mill, isn't there? A. Yes, sir.

Q. The other side of the main track? A. Yes, sir.

Q. They had in 1905 some rough tracks leading into the gravel pit, didn't they? A. Yes, sir; they used that for that purpose.

Re-Direct Examination by Mr. Hobart:

Q. The main highway is on the west of the tracks, I think you said? A. Yes, sir.

Q. Then there is a roadway leading to the freight house? A. Yes, sir.

Q. And the roadway leading across the tracks? A. Yes, sir.

Q. Plank? A. Yes, sir.

Q. To a driveway which adjoins the siding on the east? A. Not all of them—part of them are plank and others are not. That is what makes it so dangerous—when you go with a load you cross those tracks, your horses are pulling down in that and they switch these cars down, and there is no warning there when the engine is on the other end, and that is the risk I have always cautioned my men to look out for.

Q. Why do your men go there? A. I have to go there sometimes.

Q. For what? A. For shipping freight. Oftentimes there is a scarcity of cars and when I cannot get a car at Wanaque, I take it to the freight house, and they have us go across here and put it in the car.

Q. It is safe enough if your men look out? A. I don't know about that.

MR. JOHN CARR, sworn in behalf of the plaintiff, testified as follows.

Direct Examination by Mr. Hobart:

Q. Mr. Carr, you are in the employ of the Erie Railroad Company and have been for some years past? A. Yes, sir.

Q. Were you at one time employed on what is known as the Greenwood Lake Division? A. Yes, sir.

Q. What was your special duty? A. To look after the tracks.

Q. Supervisor? A. Yes, sir.

Q. And do you remember the occasion when the two stations known as Wanaque and Midvale were combined? A. Yes, sir.

Q. Before the stations were combined into one how far apart were they? A. I could not tell you exactly—they must have been about 1,500 feet apart—probably a little more.

Q. When were the two combined into one station?

Mr. Hughes:—I think he ought to tell us what was done; he is assuming the two stations were combined.

Mr. Hobart:—I want to fix the date.

A. There were two stations, but the work was all done in Wanaque, I believe, for the two—when I was there.

Q. There were always two stations there? A. Yes, sir.

Q. When were they put into one station? A. In the fall of 1901.

Q. (*By the Court*) When the new station was built? A. In the fall of 1901.

Q. What was done? A. The new station was built there.

Q. What was done with the old station? A. The Wanaque station was moved down to Pequannock and the other was sold to some farmer.

Q. Both the old stations were taken away? A. Yes, sir.

Q. And a new one was built? A. Yes, sir.

Q. Was the new one put on the place where the present Wanaque-Midvale station is? A. Yes, sir.

Q. And what was the station called after this change was made? A. Wanaque-Midvale.

Q. And has been called such ever since? A. Yes, sir.

Q. Does it so appear on the time tables? A. Yes, sir.

Q. What were the other two stations called? A. One was Wanaque and the other was Midvale.

Q. Do you happen to know anything about the sidings? A. At Wanaque there was a paper mill track and Mr. Drew's switch when I was there; I left in the spring of 1902, to the main line.

Q. Do you know anything about the construction of the new sidings? A. No, sir; that was all done after I left.

FRANK PARRY, sworn in behalf of the plaintiff, testified as follows:

Direct Examination by Mr. Hobart:

Q. Where do you live? A. Wanaque.

Q. What is your business there? A. Merchant.

Q. Were you at one time in the employ of the Erie Railroad? A. I was.

Q. On the Greenwood Lake Division? A. Yes, sir.

Q. What position did you hold? A. Agent at the Wanaque station.

Q. When were you there as agent? A. From 1899 until 1902.

Q. During the time that you were there there were two stations, were there not? A. One station at Wanaque.

Q. What was there at Midvale? A. A station at Midvale.

Q. Do you remember the time when the change was made in the stations? A. Yes, sir.

Q. When was that? A. In December, 1901.

Q. Now, what change was made as to the stations? A. Both stations were combined into one.

Q. And the location was changed? A. Yes, sir; the location was changed between the two.

Q. That is, a new station was placed about half way between the two? A. Yes, sir.

Q. Now, come to the sidings—before the change was made was there a siding at Wanaque? A. Yes, sir.

Q. Was there one at Midvale? A. I don't know that there was any public siding at Midvale, but there were sidings there?

Q. What was used as the public siding at Wanaque? A. The switch leading to the paper mill.

Q. The one that is generally known as the paper mill switch? A. Yes, sir; it was known as the paper mill switch.

Q. And deliveries were made not only to the paper company but to others at that time? A. Yes, sir.

Q. Now, were you still at the station at the time the new sidings were put in? A. At what place?

Q. At the station now called Wanaque-Midvale? A. Yes, sir.

Q. Do you remember when they were put in?

A. Well, they were put in, I suppose, about 1901, at the time the station was built.

Q. About the same time? A. Yes, sir.

Q. How many sidings were put in, do you remember? A. They put in and then they have taken them out again—I think there were about four at that time.

Q. You have been living at Wanaque ever since then? A. Yes, sir.

Q. You are familiar with the general situation there? A. Yes, sir.

Q. In 1905 do you know how many sidings there were at the station called Wanaque-Midvale? A. Three.

Q. And what were those sidings used for? A. One was used for passenger trains, a passenger siding; one was used for storage switch, and one for general delivery.

Q. Were deliveries made there at the time you were station agent? A. Yes, sir.

Q. And since that time have you noticed whether general deliveries have been made on that siding? A. Yes, sir.

Q. What method is there of getting to the siding—where the general deliveries are made—how did you get there? A. You have to cross the track between the station and the freight house, which has been very poor until lately.

Q. But it was so that you could drive across? A. Yes, sir.

Cross Examination by Mr. Cabell:

Q. After the two stations were consolidated to one known as Wanaque-Midvale, did the railroad continue to make general deliveries at this Wanaque switch between the main tracks and the highway? A. They made deliveries there also.

Q. (*By the Court*) You refer now to the paper mill switch? A. Yes, sir.

Mr. Cabell :—I think that the testimony here shows that this switch is designated as the Wanaque switch or the Paper Mill switch, it is known as both, and the other is the Midvale-switch.

Mr. Hobart :—No ; the other is the Wanaque-Midvale switch.

Q. (*By Mr. Cabell*) You never knew anyone to be refused deliveries on the Wanaque switch, except the Wanaque Lumber Company? A. No, sir.

Q. You never heard of anyone being refused before this controversy? A. No, sir.

Q. You have seen people receiving there since this controversy? A. Yes, sir.

Q. Is there any difference in the character of the Wanaque switch now, and before the stations were consolidated? A. No, sir.

Q. (*By Mr. Hughes*) You usually know this delivery switch to the north of the present station, and opposite the freight house, as the Midvale switch, don't you? A. It is in Midvale ; yes.

Cross Examination by Mr. Hughes :

Q. What is it known as generally? A. It is known as the switch used for the Wanaque-Midvale station.

Q. Have they one station where they have a passenger gate for their station? A. Yes, sir.

Q. The stations are placed for the agent to do his work in, are they not? A. Yes, sir.

Q. There is a freight house at Midvale, isn't there? A. Yes, sir.

Q. Just a little north of this crossing? A. Yes, sir.

Q. Some goods they unload in the freight house, don't they? A. Yes, sir ; they have a switch

now, lately, within the last two months, I believe they are running south of this, which would bring it in Wanaque.

Q. But they did not in 1905? A. No, sir; there was a switch there but it was not so that you could drive to it.

Re-Direct Examination by Mr. Hobart:

Q. Something was asked you whether there was any difference in the character of the paper mill siding now as compared with what it used to be; I don't quite understand what is meant by the character of the siding—what do you mean by that—you said it was the same? A. It was in the same place and it looks the same now that it did at that time—same size rail—wooden ties and runs in the same direction.

Q. (*By Mr. Cabell*) Used the same? A. Yes, sir.

Q. (*Further Re-Direct by Mr. Hobart*) In what way is it used the same? A. To convey freight to the paper mill.

Q. That is what you mean? A. Yes, sir.

Q. Where did you get your freight? A. At Midvale.

Q. At Midvale? A. From the Midvale switch and the Wanaque switch, both.

Q. You got some then from the siding that we have been calling the siding at Wanaque-Midvale? A. Yes, sir.

Re-Cross Examination by Mr. Cabell:

Q. Your store is right on the road? A. Right on the line of Wanaque-Midvale.

Q. Goods for your store are most conveniently received at this Midvale switch? A. Yes, sir.

Q. The general public receives goods at Wanaque switch known as the paper mill switch? A. Yes, sir.

Re-Direct Examination by Mr. Hobart:

Q. Whom did you ever see, of the general public, get goods at the Wanaque switch, so-called? A. I have seen a man named Risnet receive goods there, and I have seen Mr. Writenour received goods there and I have seen cars loaded there—iron ore—I cannot recall any others just now.

Q. Those are all you remember? A. Yes, sir.

Q. Where were those cars placed, that you remember about? A. Those cars were placed, as I remember, between the crossings above the Wanaque Lumber Company's sheds, aud the main track.

Q. That is, to the east of the crossing, or the road? A. Yes, sir.

Re-Cross Examination by Mr. Cabell:

Q. You have seen Ed Ricker receive coal to the west of the highway? A. Yes, sir.

Q. Down below the lumber company's sheds? A. Yes, sir.

HENRY S. WRITENOUR, sworn in behalf of the plaintiff, testified as follows.

Direct Examination by Mr. Hobart:

Q. I believe you live near Wanaque-Midvale? A. Yes, sir.

Q. And have for some years past? A. Yes, sir.

Q. Do you recall the occasion when there was a change made in the station there? A. Yes, sir; I remember about the change, about the two stations being combined.

Q. You have, at times, received freight? A. Yes, sir.

Q. Before the station was moved where did you

receive it? A. I received it on what I understand was the Wanaque switch.

Q. After the station was moved did you sometimes receive freight on the same switch? A. Yes, sir.

Q. And under what circumstances? A. Well, be more specific.

Q. After the station was moved you had some freight delivered on the Wanaque switch? A. Yes, sir; let me say I have had freight delivered on Mr. Drew's switch, by permission of Mr. Drew.

Q. Now, did you get any permission from the paper company in regard to this? A. No, sir; I never knew it was necessary.

Q. Have you also had freight delivered at any other siding? A. Yes, sir.

Q. Where? A. At the Midvale siding.

Q. Which siding do you mean as the Midvale siding? A. I mean the siding to the north of the present Wanaque-Midvale station.

Cross Examination by Mr. Cabell:

Q. You have, since the consolidation of the stations, received goods on the Wanaque switch? A. Yes, sir.

Q. The switch that is sometimes spoken of as the paper mill switch? A. Yes, sir.

Q. There was no question about it, was there? A. No, sir.

Q. You could have them placed either up at Midvale or Wanaque just as you wanted them to? A. They have never refused to place only one car there.

Q. When was that? A. The first of November, 1906.

Q. Never before this controversy with the Wanaque Lumber Company? A. No, sir.

Q. Did you unload a car of coal there in Decem-

ber, charcoal, on the Wanaque switch? A. Yes, sir.

Mr. Hobart:—We have some depositions which I think we had better read at this time, as there are two other witnesses that have not arrived; one of them is the station agent who will prove the records.

The following depositions were read by Mr. Hobart.

NEW JERSEY SUPREME COURT.

ERIE RAILROAD COMPANY
vs.
WANAQUE LUMBER COMPANY.

Stipulation for taking of Depositions.

It is hereby stipulated that the testimony of Mr. De Forrest C. Wilsey and of Mr. I. P. Alcott, witnesses on behalf of the plaintiff, who reside out of this state, may be taken de bene esse without order of the court before Theodore Rurode, Esquire, Master in Chancery of New Jersey. Said witnesses reside in the city and state of New York and their testimony is to be taken stenographically by said Theodore Rurode and signatures of witnesses waived.

The testimony of said Wilsey is to be taken on Friday, January twenty-fifth, nineteen hundred and seven, at ten-thirty a. m. at the office of said Wilsey, No. 17 State street, New York City.

The testimony of the said Alcott is to be taken on Friday, January twenty-fifth, nineteen hundred and seven, at eleven-thirty a. m. at the office of said Alcott, No. 29 Broadway, New York City.

COLLINS & CORBIN,
Attorneys of Plaintiff,
W. CARRINGTON CABELL,
Attorney of Defendant.

Dated January 22, 1907.

NEW JERSEY SUPREME COURT.

ERIE RAILROAD COMPANY

vs.

WANAQUE LUMBER COMPANY.

Depositions of De Forrest C. Wilsey and I. P. Alcott, witnesses on behalf of the plaintiff, taken pursuant to the annexed stipulation at the time and places named therein, in the presence of George S. Hobart, Esq., of the firm of Collins & Corbin, attorneys for the plaintiff; and W. Carrington Cabell, attorney for the defendant.

DE FORREST C. WILSEY, being duly sworn on his oath says:

Direct Examination by Mr. Hobart:

Q. Are you an officer of the Frank E. Morse Company? A. I am secretary and treasurer of that corporation.

Q. Were you such during the year 1905? A. I was.

Q. And you still occupy that position with the company? A. Yes, sir.

Q. I refer you to a way-bill dated June 17, 1905, for car marked "B. & O. 70183," for a consignment of lime to the Wanaque Lumber Company, at Wanaque, N. J., and ask if that car of lime was sent by your company to the lumber company? A. The lime so described was shipped consigned to the Wanaque Lumber Company, Wanaque, N. J.

Q. Have you any records which will enable you to identify the car by number? A. Yes, we can

identify it by car number and by the description of it.

Mr. Cabell :—The company doesn't deny that that car was theirs and they paid for it.

Q. You can identify this car No. 70183 as being the number of the car in which lime was consigned to the Wanaque Lumber Company at that time? A. I so identify it; yes, sir.

Q. I also call your attention to what purports to be an order or direction from the Frank E. Morse Company to the freight agent of the Erie Railroad Company referring to this car, under date of June 8th, 1905. A. That is all right; that is the same thing; I have got a copy of it; I identify that as correct.

Q. And the signature of it here is? A. E. B. Morse, our bookkeeper.

Q. And he has authority to give such instructions for delivery? A. Yes, sir.

Mr. Hobart :—I offer this order, dated June 8th, 1905, in evidence.

Marked Exhibit P-1.

Q. I observe a pencil memorandum—do you know anything about that? A. No; that has nothing to do with us. It may have been some memorandum of the agent's—probably it is.

Q. What was this car loaded with? A. Lime.

Q. Have you anything which will show the invoice value of it?

Mr. Cabell :—I have the invoices and I will bring them to the court, and if the court thinks they are evidence I will produce them right there.

Q. Have you a copy of the invoice here at the office? A. Yes, sir.

Q. Can you refer to it?

Mr. Cabell:—I object to it as incompetent and on the ground that the original is in the possession of the defendant and will be produced on demand, and the best evidence of the price is the invoice itself.

Mr. Hobart:—I don't know that I care to insist upon it; the only thought I had in mind in regard to it was that it might have some bearing upon the question of the reasonableness of the charge; for example, it might be argued that if a car—if the goods in the car were worth only ten dollars it would be unreasonable to charge a dollar a day; if they were worth a thousand dollars it would be entirely reasonable.

The other thought that I had in connection with it is, that it leads up to the offering of the invoice or a copy of it in evidence, which shows on its face the agreement as to who shall pay the freight.

The Court:—Is there any dispute about who is to pay the freight if you accepted the goods?

Mr. Cabell:—The stipulations cover it.

Mr. Hobart:—That being understood, I won't press the question. Then that will cut out the following question.

Mr. Cabell:—Then I guess about all the rest of it is out.

Q. Will you state whether or not you have either the original or a copy of the bill of lading for this car? A. Which bill of lading do you refer to?

Q. The bill of lading from Jersey City, where, I understand, the car was transferred, according to

this Exhibit P-1, to Wanaque? A. No, we have not.

Q. Do you know where it is? A. I presume it is in the possession of the Wanaque Lumber Company.

Q. Was it sent to that company? A. They would get a copy of the way-bill and the freight bill. What the method of the railroad company in that case is I can't say.

Q. I want to know whether or not you have any means of determining where the original is? A. The original should be in the possession of the railroad company; they issue an original and duplicate, and they retain the original in that case.

Q. Well, you haven't got it? A. We haven't got it.

Q. And haven't seen it? A. No.

Q. Can you state, by reference to any of your papers where this carload of lime came from? A. The original point of loading?

Q. Yes. A. Engels, West Virginia.

Q. And on arrival at New York Harbor you gave the order which has been offered in Exhibit P-1? A. We did.

Q. Now, the bill of lading from Engels to New York, have you the original in duplicate of that? A. No, we have not. It was sent to the Wanaque Lumber Company, July 14, 1905, at their request.

Q. And has never been returned to you? A. Not returned; no.

Q. Have you any memorandum, or anything to indicate, the number or date of the bill of lading? A. I have a pen and ink copy that I made of it, just simply a memorandum, filed away for reference for ourselves.

Q. Do you know the date? Just give a description of the bill of lading as taken from the memorandum. A. Dated June 6, 1905, at Engles, West Virginia, shipped by the Washington Building

Land Company, containing lime, weight 30,000 lbs. consigned to F. E. Morse Company, Jersey City, N. J., care of Erie Railroad; routed via St. George, B. & O. No. 70183, sixth class freight, rate $2.40, signed by the agent C. W. Brantner.

Cross Examination by Mr. Cabell:

Q. Did the Erie Railroad Company ever make any effort to get you to take this car from Wanaque after its arrival and send it elsewhere? A. My recollection is that the Erie Railroad Company communicated with us regarding the car being there and we advised them that it was not property of ours, that it had already been sold to the Wanaque Lumber Company, and we had nothing further to do with it.

Q. Can you tell us the date of that communication—about when it was? A. No, I can't. As a matter of fact I couldn't say whether it was written or whether a messenger came in here in relation to the car.

Q. Well, could you remember whether it was in July, or August or September, by referring to your invoice there—a copy of your invoice—can you tell when it was? A. Well, if you will tell me, did you people finally unload that lime?

Q. Oh, no; it was never unloaded. A. Then I couldn't locate the date with any degree of definiteness at all. I might say that perhaps some time between—well, I should say that this happened some time between the 17th of June and the middle of July.

Q. Now, what was the nature of that communication from the railroad some time between June 17th and the middle of July? They communicated with you on the subject of this car. Now, what did they want you to do, if anything? A. They simply advised us to this effect, that there

was a car of lime there which we had shipped, consigned to your company, the Wanaque Lumber Company, and there seemed to be some dispute as to where the lime should be placed, the railroad company claiming that Wanaque was the proper delivery of it, and the lumber company, as we understand it, insisting on delivery at the paper mill switch.

Re-Direct Examination by Mr. Hobart:

Q. Was the communication to which you refer in the form of a letter, to which you replied under date of September 8th, 1905? A. That covers the whole thing—that is the communication.

Mr. Cabell:—I ask that it be marked D-1 for identification.

By Mr. Cabell:

Q. You haven't the letter from the Erie Railroad Company, if there was a letter at that time? You referred to a letter of September 7th—have you that letter? A. I presume we have.

Mr. Hobart:—I have what purports to be a carbon copy of the letter which may be used by the defendant if so desired.

Same is marked D-2 for identification.

Taken and sworn to before me January 25, 1907.

THEO. RURODE,
Master in Chancery of New Jersey.

IRVING P. ALCOTT, a witness on behalf of the plaintiff, being duly sworn on his oath, says:

Direct Examination by Mr. Hobart:

Q. Are you a member of the firm of Alcott & Company? A. Yes, sir.

Q. Is it a partnership? A. Yes, I am the firm at the present time.

Q. Alcott & Company is simply a trade name? A. The trade name.

Q. And during the year 1905 were you the firm at that time? A. Yes, sir.

Q. And of course had charge of the business? A. Yes, sir.

Q. I desire to refer you to a certain carload of lumber which, according to the way-bill that I have, was marked "M. C. No. 42,865," the date of the way-bill being July 28, 1905. What record have you of that? A. I have no record of that special number. That was transferred as far as I can find, as far as my records show me. The original number was "S. A. L. 38147," and was transferred to 42,865. That is what my records show.

Q. Do your records show where this car came from in the first instance? A. On that car I cannot give you the shipping point. I can give you the shipper's address that shipped me the car—Burton, Virginia.

Q. Now, this car, when it came from Burton, Virginia, was consigned to Alcott & Company, I presume? A. Yes, sir.

Q. And you in turn gave an order to transfer it? A. I gave an order to the agent at Wanaque and also a copy of the order to the Wanaque Lumber Company.

Q. The car was not consigned to Wanaque from the original point of shipment? A. Yes, it was consigned to us at Wanaque.

Q. That is,it was consigned to Alcott & Company at Wanaque? A. Yes, sir.

Q. And you in turn gave an order to the agent for delivery to the Wanaque Lumber Company—is that correct? A. That is correct—which is always the custom.

Q. I show you a typewritten order, dated August

5th, 1905, addressed to the freight agent, Erie R. R., Wanaque, and signed in typewriting "Alcott & Company". Can you identify that as being the order for delivery? A. Yes, I do. I identify it this way, that it is on my bill head.

Q. And that was the customary method of giving your orders for delivery? A. That was the customary method.

Q. You identify that order? A. Yes.

Offered in evidence and marked P-3.

Q. Now I show you what purports to be an original bill of lading, issued by the Seabord Air Line Railroad company, car No. 42,865, on the back of which there is in writing the following: "Please deliver this car to the order of the Wanaque Lbr. Co. on payment of freight, and oblige Alcott & Co." Do you identify that writing? A. I do; that is Mr. Charles E. Page's writing, a young man in my office at that time, who is now in business for himself.

Q. And he was authorized to give such an order? A. Always; he had charge of it.

Q. That is the original bill of lading? A. As far as I can tell.

Q. This is evidently the one that came to you and was in turn sent to the agent at Wanaque? A. Yes, sir.

Offered in evidence and marked P-4.

Q. Will you please state what the agreement was between Alcott & Company and the Wanaque Lumber Company with respect to the freight charges on this car? A. Well, it is understood in the lumber business that all the freight is cash which is due when the cars arrive.

Q. And who is to pay it? A. The customer.

Q. And that was the understanding in this case,

was it? A. Yes; that is the understanding in all cases.

Q. Is that true as to the other three cars, Nos. 1108, 44988 and 32537? A. Yes. It is the custom in the lumber business for all freight charges to be paid by the customer.

Q. And all four of these cars were shipped to the Wanaque Lumber Company upon that understanding, is that correct? A. Yes, sir.

By Mr. Cabell:

Q. When is this freight to be paid by the customer? A. As soon as he receives the car. I understand that that is the rule of the railroad company, unless you can run an account with them.

Q. When do you give the customer credit for the amount of the freight? A. Well, we don't give him credit until he sends us a settlement and then he deducts the freight from the face of the invoice and sends us the proceeds, after the freight is deducted.

By Mr. Hobart:

Q. With regard to these same four cars, has settlement been made as between your company and the Wanaque Lumber Company? A. Yes, sir.

Q. And in that settlement did the Wanaque Lumber Company receive credit for the freight charges? A. Certainly; they deducted the freight charges when they sent their settlement for the face of the invoices.

Q. And that applies as to all of these four cars? A. Yes. If a bill is $200 and the freight is $25.00 the customer sends a check for $175, with the receipted freight bill, so that we know the exact amount of freight that he has paid out.

Q. Do you happen to know, as to these four particular cars, how settlement was made between

you and the Wanaque Lumber Company? A. By note.

Q. What I mean in particular is with regard to the freight—did they assume the freight charges? A. They assumed the freight charges.

Mr. Cabell:—We deducted the freight charges.

A. (Continued) Yes; I had nothing to do with the freight; they sent me their notes for the face value of the invoices, less the amount of freight.

Q. Let us go back to the first car, which has been referred to as car No. 42,865; can you state from your records the invoice value of the lumber that was consigned in that car?

Mr. Cabell:—To that I interpose an objection, first, that it is a matter between the seller and the buyer with which the railroad company has nothing to do in this suit, and second, that the best evidence of that is the invoice itself, and that invoice the Wanaque Lumber Company has in its possession and will produce at the trial upon the Judge passing upon its admissibility. I insist upon that objection. I feel that the dealer should protect his customer in matters of prices.

Objection sustained. To which ruling of the court the plaintiff's counsel prays an exception. Exception allowed. Let it be sealed, and it is sealed accordingly.

WILBUR A. HEISLEY,

J. [SEAL]

Q. Now if you will refer to your record, Mr. Alcott, and give us the invoice value of the lumber of the car in question? A. I prefer not to answer because I don't want the Wanaque Lumber Company to know what I pay for the lumber.

Q. I want to know what the invoice value of the lumber was as it was sold to the Wanaque Lumber Company.

Mr. Cabell :—I object to it.

A. I would rather not do that. The Wanaque Lumber Company have the receipted invoices from me.

Q. I want this gentleman to testify what his own books show, or any records he may have, with regard to it. All I want to know is simply what this was billed to the Wanaque Lumber Company at? A. You mean the total amount of the invoices?

Q. Yes. All I want is simply a statement—I won't even look at your books—but I want simply a statement of the quantity of lumber and what it was worth as it was sold to the lumber company.

Witness :—How will it be harmful to you for me to state the value?

Mr. Cabell :—Because I don't want the Erie Railroad Company to know the value. My technical objection is as to its competency. Well, give it.

A. The amount of that invoice was $260.22. I received that amount, less the freight. I don't remember what the freight was.

Q. While we are on the subject of invoice values, refer if you please to the others,—the next one is 1108. A. $326.75. That is the total of the invoice.

Mr. Hobart :—Now, as to that car the stipulation states that it is agreed that the amount of freight is so much but the defendant denies any liability upon these two cars, 1108 and 44988, insisting that some other person would be liable to the plaintiff for the freight charges upon proper delivery. Now, the way the invoice value, or perhaps I had better

say the invoice itself—the way that that comes in is by reason of the fact that the invoice itself shows on its face that the agreement was that the lumber company should pay the freight. Here is the detailed statement of the amount and then at the bottom "Less freight." I submit that that issome evidence to indicate that the lumber company is liable for the freight on this car.

The Court :—Why would that be evidence?

Mr. Hobart :—It shows the agreement between the parties as to who should be liable for the freight. It shows the terms between those two companies, in other words.

The Court :—And that invoice is given to the railroad company?

Mr. Hobart :—No, sir.

The Court :—How is it then that you have it in your possession?

Mr. Hobart :—Mr. Alcott has furnished me with a copy of it.

The Court :—Of course, Alcott's books of account would be evidence; there is no question about that.

Mr. Cabell :—(Argues.)

The Court :—What is this thing you call an invoice?

Mr. Cabell :—It is a bill that the shipper sends to his customer before the goods arrive.

The Court :—What we are dealing with is whether this is admissible in evidence.

Mr. Hobart :—On the point that Mr. Cabell has suggested, my argument is, that

under the agreement between the parties the lumber company became the owner of the goods and was liable for the freight just as soon as they were shipped, and, moreover, that the agreement, as indicated by the bill itself, indicates that there was an understanding between them that the lumber company should pay the freight.

The Court:—I sustain the objection.

To which ruling of the Court the plaintiff's counsel prays an exception. Exception allowed. Let it be sealed, and it is sealed accordingly.

WILBUR A. HEISLEY,

J. [SEAL]

Mr. Hobart:—Before we proceed further I would like to demand the production from the defendant of the receipted bills or invoices to which this witness refers and copies of which I have, as to cars 1108 and 44988, for the purpose of offering them in evidence, in order to show who was the owner of the goods, and to show that the agreement between the Alcott and the lumber company was that the lumber company should pay the freight.

Mr. Cabell:—I object; I refuse to produce them at this time.

Mr. Hobart:—You admit that you have them?

Mr. Cabell:—Yes.

The Court:—They are bills made out by Alcott & Company to the defendant?

Mr. Hobart:—Yes, sir; with the legend "less freight."

The Court:—I sustain the objection.

To which ruling of the court the plaintiff's counsel prays an exception. Exception allowed. Let it be sealed, and it is sealed accordingly.

WILBUR A. HEISLEY,

J. [SEAL]

Q. Let us refer again to car No. 1108, and I show you what purports to be the original way-bill, dated August 7, 1905, and I call your attention to this way-bill and ask whether you can state where the bill of lading for that car is? Is it in your possession? A. Not to my knowledge.

Q. In the ordinary course of business to whom would it be sent? A. It all depends. This concerns here, the Halden people, which is a concern that I have been doing business with several years, and I handle all their lumber at this end, and there wouldn't be one car out of a hundred that they would send me the bill of lading. They simply ship it to my customers in my name.

Q. It is quite possible that no bill of lading was ever issued on that? A. The chances are that I never received it. Bills of lading generally come when there are sight drafts and the lumber is in the shipper's name, but this stuff is all shipped in my name. I practically represent them in this territory.

Q. I also call your attention to what purports to be a printed form or order of your company, with regard to car 1108. Was that order given to the agent of the railroad company at Wanaque? A. I don't know whether this one went to the railroad company or to the Wanaque Company—we send out a duplicate. As soon as we get our invoice, we send two out, so there will be no delay and demurrage charges.

Order, dated August 9, 1905, offered in evidence and marked P-5.

Q. Now I call your attention on this way-bill, which has already been referred to, for car 1108, to the fact that the car in question purports to have been sent to you at the following address: "Paper mill Lbr. Yd. switch, Wanaque, N. J." Will you state whether that direction was given of your own motion or of the agent's motion, or of somebody else? A. The majority of country yards have their own switches, and it is customary for us shippers to sign our cars to their switch, of our own free will. Sometimes we are requested to do so. I can't swear whether I was requested by the Wanaque Lumber Company to do so or not, or whether I did it of my own free will.

Q. I notice that the first car which is marked of the way-bill as 42865, does not have that special direction; it seems to be simply Wanaque. That is dated July 28, '05. Whereas the way-bill for car 1108, of August 7, has a special direction. And my inquiry is whether between those dates any request was made, verbal or written, for the special direction? A. I couldn't say; I can state this, that previous to selling to the Wanaque Lumber Company, I shipped in lumber to the paper mill, before I sold to these people, and I always ship to the paper mill switch.

Q. That is, any shipments to the paper mill, you always gave special directions as to their siding? A. Yes, sir.

Q. To whom was that direction given? A. I can't remember. That was long before the Wanaque Lumber Company started. I won't say they hadn't started. But it was when I was selling to the paper mill.

Q. Who gave you the information that the lumber company had its yard on or near the paper

mill siding? A. Nobody. I used to go up there, and I saw it.

Q. Can you give us any information as to why car 1108 is directed to Wanaque whereas car 42865, according to the way-bill, is directed to Wanaque-Midvale. A. I couldn't give you that information.

By Mr. Cabell:

Q. Isn't it highly probable that if there was any trouble at that time, that the Wanaque Lumber Company would give a special direction? A. I can't remember whether I got any instruction from the Wanaque Lumber Company to make it special.

By Mr. Hobart:

Q. How do you account for the change of the direction as between the two way-bills? A. I can't account for it.

Q. Have you any letters or other written communications from the lumber company with regard to the place of delivery for lumber that might be consigned to the lumber company by you? A. Not to my knowledge; I don't recall any just now.

Q. Has any search been made for any letters bearing on that subject? A. No. I haven't searched for any. As a rule letters that have no importance to me I destroy. When a car's transaction is closed I destroy my files.

Q. And if there were any letters they have been destroyed since in all probability? A. Yes, in all probability. When I receive my settlement for a car I am done with that transaction and there is no use keeping those things.

Q. Now allow me to refer to car L. S. and M. S. 44988, and I show you what purports to be an order, dated August 12, 1905, for delivery; you identify that as an order given in duplicate to the lumber

company and to the agent of the railroad company? A. Yes, sir.

Offered in evidence and marked P-6.

Q. By reference to the way-bill I observe that this car has also been consigned to the paper mill and lumber yard siding. Have you any recollection as to that car with regard to the reason why that special direction was given? A. No, except that I was in the habit of doing it as I did other cars.

Q. This car, according to the bill of lading, was consigned to yourself. Have you any recollection as to what was done with the bill of lading of that car? A. No, sir.

Q. Let me call your attention to the fact that I have in my possession, received from the Erie Railroad Company, what purports to be a copy of the bill of lading, which I show you, and ask, whether by reference to the bill of lading and way bill you can state whether you ever had the original bill of lading? A. I can't swear to it.

Q. If you have had the original bill of lading, where would it be sent in the ordinary course of business? A. It would stay in my office, if I didn't destroy them after a year.

Q. Would it be sent to the agent at Wanaque? A. It isn't necessary, where the goods are consigned to me.

Q. Your course of business then was simply to send an order for delivery, and not send the bill of lading? A. Yes, sir.

Q. You would keep the bill of lading and destroy it after a few months? A. Yes, sir; sometimes I didn't receive any.

Q. So far as you are able to determine at this time, if you ever had that original bill of lading, it has been destroyed? A. No. I don't say that.

Q. Would there be any way of determining whether you had the original bill of lading? A. No, not by my records.

It is admitted that the copy of the bill of lading which is produced by the plaintiff may be offered in evidence instead of the original.

Same is marked Exhibit P-7.

Q. Now let us take up car Sou. 32537, and I show you what purports to be an order for delivery of that car, dated August 28, 1905? A. I recognize that.

Q. This was sent in duplicate the same as the other orders that you have referred to? A. Yes, sir.

Offered in evidence and marked P-8.

Q. I call your attention, as to this car 32537, that according to the way-bill this also was consigned to paper mill and lumber company yard switch. Have you any recollection as to that car—the reason for the special directions? A. No, sir.

Q. Nothing other than what you have stated as to the other cars? A. That is all.

Q. Now as to the bill of lading of that car. I show you what purports to be a copy which has been handed to me by the freight agent of the railroad. Are you able to state what has become of the original? A. No.

By consent the copy is received in evidence and is marked P-9, the defendant reserving his objection as to its competency, relevancy, etc.

Cross Examination by Mr. Cabell:

Q. In your dealings with the Wanaque Lumber Company when were they to become the owners of the stuff, the freight that you turned over to them by order? A. It is customary as soon as they pay the freight. As soon as the stock is delivered to them they pay the freight.

Q. Here is a car billed "Alcott & Company, paper and lumber mill yard switch, Wanaque," and you have given an order for delivery to the Wanaque Lumber Company. When will that become, as between you and the company, the property of the Wanaque Lumber Company? A. As soon as delivered at their switch as the way-bill calls for, and when they pay the freight on it.

Q. Has the lumber company since agreed to take these cars from you, wherever they might be delivered? Have they agreed to settle with you for those cars, wherever they might be? A. They have settled with me.

Re-Direct Examination by Mr. Hobart:

Q. What was the agreement of sale between you and the lumber company—cash or by note? A. By note. It is no agreement; they offered their notes and I accepted them.

Q. When were the notes offered and accepted as compared with the time of delivery of the cars? A. I guess two of those cars were the regular time, and the other two about six months, I imagine, after the cars arrived at Wanaque.

By Mr. Cabell:

Q. And why were those two cars settled for a long time afterwards? A. Because they were never delivered there.

Q. Did the lumber company insist, for any length of time, on your producing them on the switch? A. They certainly did.

Q. How long afterwards, or rather about six months afterwards, did they waive their claim with respect to you, to deliver it on that switch, and pay for the cars and take the property? A. They did.

By Mr. Hobart:

Q. Were notes given by the lumber company for all four of these cars? A. Yes, sir.

Q. When were they given as compared with the

time of the order for delivery? A. I can't state that.

Q. Before or after the orders for delivery were given? A. Afterwards. You mean after the cars arrive or before? Remember the orders for delivery of those cars always go before a car arrives; so naturally I wouldn't get my payment until after the car arrived.

Q. Did you give any order for delivery as to any or all of those cars, before or after the lumber company gave you a note or notes in payment for them? A. I gave the orders long before I received my paper.

Q. Was the order for delivery given before the cars actually arrived? A. Certainly.

Q. And was the order given on the understanding between you and the lumber company, that the lumber company would give a note in payment? A. Well, I had been doing business for a number of years with them and it was always customary for them to give me paper; so there was no special agreement made in those special cases.

Q. After you had given the order for delivery, did you consider yourself the owner of the lumber in any of those cars? A. I do as a rule until the freight is paid and the railroad company turns the goods over to the customer.

Q. And in these cases the lumber company has made settlement with you? A. Yes, sir.

Q. You don't happen to know whether, as a matter of fact, the freight has been paid on any or all of those cars, do you? A. I don't know.

Q. Something was said as to two of those cars, about settlement being made six months after delivery. What did that refer to? A. That the cars were never delivered to the Wanaque Lumber Company, on their switch, and they had the matter up with the railroad company at the time to try to get them to deliver them there, and the

thing was dragging along, and it was no trouble of mine, and the Wanaque Lumber Company thought they would take the matter up themselves, and so they settled with me.

Q. They did settle with you? A. Yes.

Q. So you don't know whether any of the freight has been paid on any of them? A. No.

Q. Do you happen to know to which two cars your last answer applies, or your preceding answers apply? Mention has been made of two cars. Did you happen to know which ones they were? A. Yes.

Q. Which were they? A. One is 1108 and the other 44988.

Q. Now, as to those two cars, did the lumber company give notes in payment? A. Yes, sir.

Q. When were those notes given as compared with the date of the order of delivery? A. Months afterwards.

Q. Who called your attention to the fact that the lumber company claimed that those two cars had not been properly delivered? A. I think it was their man there, Mr. Thrift.

Q. Someone on behalf of the lumber company? A. Yes, sir.

Q. And did the lumber company, by reason of that claim, decline at that time to give notes? A. For a while.

Q. And afterwards they did agree to give notes and did give them? A. Yes, sir.

Q. The only reason then, as I understand, why notes were not given, as soon as the order for delivery was received, was because the lumber company claimed that the cars had not been properly delivered? A. No, sir. My account is not due until thirty days from the date of invoice, and then I can make a demand for payment either in notes or checks.

Q. The notes then are not given until thirty

days? A. Thirty days from the date of invoice, but the customer has the privilege of paying cash less two per cent., or of giving a ninety day note.

Q. Now, let us take those two cars—an order for delivery was given as to each of them. When did you first know that there was any claim made that proper delivery had not been made? A. Now, that question I don't know whether I can answer. I can't recall whether the Wanaque Lumber Company notified me that the cars were not delivered, or whether the freight agent at Wanaque notified me that there was a car there consigned to me, on demurrage.

Q. Did you, in accordance with your usual custom, thirty days after the date of the invoice, call upon the lumber company to pay for the cars or give notes? A. I made a demand, yes.

Q. In writing? A. No.

Q. To whom? A. To Mr. Thrift.

Q. What was the response to the demand? A. Simply that the cars hadn't been delivered to them and that they didn't owe me for the lumber.

Q. The only ground that was stated for failure to give a note at that time was the claim that proper delivery had not been made? A. They hadn't received the cars and they hadn't been unloaded.

Q. But the claim that was made was that proper delivery had not been made? A. I suppose they based it on that.

Q. Is that the only reason that was given for not giving you the note? A. They had no reason to give the notes if they weren't in possession of the goods.

Q. That was the only claim they made? A. Yes, that the lumber hadn't been delivered to them.

Q. They didn't object to the price of the lumber or the quality? A. No.

Q. It all turned on the question of delivery? A. Yes.

Q. You, of course, don't consider that you are liable for the freight on those two cars, if it hadn't been paid ?

Objected to as immaterial. Objection overruled. Exception allowed to defendant.

A. No.

Re-Cross Examination by Mr. Cabell:

Q. Did the Erie Railroad Company ever make a request of you after the cars arrived at Wanaque, to ship them somewhere else—cars 1108 and 44988? A. I will have to put it this way. When the Wanaque Lumber Company were having trouble with the Erie Railroad Company on those two cars, there was a representative of the Erie came into my office—I don't know what his name is, and I don't know whether he came from Jersey City or New York—but he asked me some questions with regard to those two cars; I don't remember the question either, it is so long ago; but he did ask me whether I couldn't sell those cars somewhere else, and have them transferred; and I told him no. I have forgotton what else he spoke to me about, but I remember that one thing.

Q. Was that the only time? A. That is the only time to my knowledge.

Q. Have you any idea of the date of that? A. No ; I couldn't recall that.

Re-Direct Examination by Mr. Hobart:

Q. This representative informed you, did he not, that the cars were at Wanaque, and that the lumber company had refused to accept them, or words to that effect? A. No, sir.

Q. He informed you that the lumber had not been unloaded? A. No, sir.

Q. Did he give you any information? A. He simply came in to find out if I could dispose of that lumber.

Q. Without giving any reason? A. He said he was from the Erie railroad and gave no reason.

Taken and sworn to before me this 25th day of January, 1907.

THEO. RURODE,

Master in Chancery of N. J.

(Invoice referred to in Alcott's testimony.)

Order No. 1919.

New York, Aug. 5th, 1905.

The Wanaque Lumber Co.,
Wanaque, N. J.

Bought of Alcott & Co.,
Wholesale Lumber and Timber,
29 Broadway.

Car	Pieces	Feet	Description	Price	Am't.
			No. 1 Hemlock Rough.		
	100	800	2x4"-12'		
	100	1,200	2x6"-12'		
	50	800	2x8"-12'		
	10	240	4x6"-12'		
	100	933	2x4"-14'		
	200	2,800	2x6"-14'		
		6,773		@ 17.50	$118.53
	100	1,067	2x4"-16'		
	100	1,600	2x6"-16'		
	75	1,600	2x8"-16'		
		4,267		@ 18.50	78.94
	20	480	2x6"-24'	@ 21.00	10.08
	100	2,667	2x8"-20'		
	15	540	4x6"-16'		
	10	400	4x6"-20'		
	200	2,667	2x4"-20'		
		6,274		@ 19.00	119.20
					$326.75

Less freight

E&OE.

Car :—P. S. & N. No. 1108
Via. Erie Railroad.

(Invoice referred to in Alcott's testimony.)

Order No. 2030.

New York, Aug. 7th, 1905.

The Wanaque Lumber Co.,
Wanaque, N. J.
Bought of Alcott & Co.,
Wholesale Lumber and Timber
29 Broadway.

Car	Pieces	Feet	Description	Price	Amount
			Red Cedar Siding.		
	68	204	½x6"- 6' No. 1		
	380	1,330	½x6"- 7' No. 1		
	220	880	½x6"- 8' No. 1		
	220	990	½x6"- 9' No. 1		
		3,404		@ 21.60	73.53
	840	5,040	½x6"-12' No. 1		
	512	4,608	½x6"-18' No. 1		
	504	4,032	½x6"-16' No. 1		
		13,680		@ 24.60	336.53
	280	840	½x6"- 6' No. 2		
	250	875	½x6"- 7' No. 2		
	210	840	½x6"- 8' No. 2		
	190	855	½x6"- 9' No. 2		
		3,410		@ 20.00	68.20
	800	4,000	½x6"-10' No. 2		
	668	4,008	½x6"-12' No. 2		
	152	1,064	½x6"-14' No. 2		
	576	4,608	½x6"-16' No. 2		
		13,680		@ 23.00	314.64
		87,000	18" Perfection Shingl	3.90	339.30
					$1,132.20

Less freight
Via Erie R. R.
Car :—L. S. &. M. S., No. 44988.

MR. E. J. RICKER, sworn in behalf of the plaintiff, testified as follows :

Direct Examination by Mr. Hobart :

Q. You live at Wanaque? A. I do.

Q. How long have you lived there? A. Always.

Q. For a number of years? A. Yes, sir.

Q. All your life? A. Yes, sir.

Q. I believe you are the postmaster there, are you not? A. Yes, sir.

Q. Now, you recall the occasion of the change of the station, when the two stations were combined into one known as the Wanaque-Midvale station? A. I do.

Q. Now before that change was made will you state where cars were delivered—that is, on what siding? A. They were delivered on the paper mill switch, I believe.

Q. What is that switch known as? A. As the paper company's switch.

Q. Was it ever known to your knowledge as the lumber yard switch? A. Not to my knowledge.

Q. Was it ever known as the paper mill and lumber yard switch? A. Not to my knowledge.

Q. Now, after the change was made, do you know whether or not the siding known as the paper mill siding was used for deliveries to the general public? A. Well, I know in some intances where deliveries were made but not in general I would not say.

Q. Where were deliveries made to the general public as a rule after this change was made? A. Well, I had some deliveries to myself—and I think—

Mr. Cabell :—I will object—the answer is not responsive.

A. General deliveries were made at the sidings of the new station, the Wanaque-Midvale station—general deliveries.

Q. How long has that been the practice there to make deliveries at the Wanaque-Midvale station? A. I would say since the establishment of the new station.

Q. Have you got freight there yourself at this siding opposite the new station? A. Yes, sir.

Q. Frequently? A. Very frequently.

Q. Have you seen others get their freight at the same place? A. Yes, sir.

Cross Examination by Mr. Cabell:

Q. What is your business? A. Real estate and coal.

Q. You are the Erie Railroad coal agent at Wanaque? A. Yes, sir.

Q. And you are now using this siding shown on this map, to the south of Wanaque siding, known as the paper mill siding? A. Yes, sir.

Q. Before you received your coal on your new siding, where did you receive it sometimes? A. Just prior to the erection of my new pockets, I received it at the new station—before that I received it on the paper mill siding.

Q. You have a practical monopoly of the Erie Railroad coal business, haven't you? A. Yes, sir.

Q. They won't let any one else in the Erie coal business, will they? A. Nobody else; no other recognized agent.

Q. You have, since the stations were consolidated, frequently seen freight delivered to various persons on the Wanaque siding, where you used to get your freight? A. I have in a number of cases.

Q. You have seen them as late as 1906—as late as in the year 1906? A. I believe I have.

Q. You know you have? A. Yes, sir; I would say I have; I think I saw a car of manure delivered there.

Q. Haven't you seen them deliver iron ore there? A. Yes, sir; I saw them loading it.

Q. You have seen many people load and unload there? A. I saw iron ore loaded there, and manure delivered there, at that point.

Q. Did you ever hear of any one besides the Wanaque Lumber Company being refused delivery there, prior to November, 1906? A. No, sir.

Re-Direct Examination by Mr. Hobart:

Q. How many deliveries have you observed made on the Wanaque switch, since the station was moved?

Mr. Cabell:—Objected to.

Objection overruled. Exception allowed to defendant.

Q. (*By the Court*) How many deliveries, he says, have you seen made on the Wanaque switch, since the station was moved? A. I could not answer that accurately, but I remember seeing a couple of cars of manure.

Mr. Cabell:—I object to his answer, now, as not responsive to the question—he said he could not tell—

The Witness:—And I think myself I had three or four cars of lumber—I do not recall anything else.

Q. (*By Mr. Hobart*) Where were your coal pockets before this station was changed?

Mr. Cabell:—Objected to.

A. On the Wanaque siding.

Q. And did you have a lease from the paper company for the lease of that? A. Yes, sir.

Mr. Hobart:—I should now like to offer the lease from the paper company, that was referred to by the witness, Mr. Carter.

MR. M. B. ROOME, sworn in behalf of the plaintiff, testified as follows.

Direct Examination by Mr. Hobart:

Q. You have lived at Wanaque for some years past? A. Yes, sir.

Q. What is your business? A. Hotel.

Q. Do you remember about the stations being changed there, back in 1901? A. Yes, sir.

Q. Before the station was changed where were the public deliveries made? A. Why, for Wanaque it was made where it is now, on the switch that runs in just above the station; it goes now into the paper mill.

Q. What is that switch known as? A. The Wanaque switch we always call it.

Q. Sometimes called the paper company's switch? A. Well, from the main road into the paper mill—west of the wagon road we always call the paper mill switch.

Q. After the station was moved do you recall anything about sidings that were constructed about that time? A. No, sir.

Q. You know there are sidings there now? A. Yes, sir; I go across them; but I could not swear whether there is two, three or more.

Q. Do you recall the time when they were built? A. I know there was one or two in there before the station.

Q. After the station was moved state whether or not public deliveries of freight were made on the new sidings, the ones opposite the present Wanaque-Midvale station? A. Yes; there have been deliveries made there.

No Cross Examination.

CLYDE L. SMITH, sworn in behalf of the plaintiff, testified as follows :

Direct Examination by Mr. Hobart:

Q. You live at Midvale ? A. Yes, sir.

Q. And are employed by the railroad company ? A. At Great Notch at this time.

Q. Were you at one time employed at the Wanaque-Midvale station as agent? A. I was.

Q. During what time? A. 1903 and 1904.

Q. While you were so employed, where was the public delivery track ?

Mr. Cabell :—Objected to.

Objection overruled. Exception allowed to defendant.

A. The outside track opposite the freight house at Wanaque-Midvale.

Q. Will you indicate it on the map—just point to it for the benefit of the jury ? A. It is about—

Q. Find the freight station. A. Opposite here (indicating). It is opposite the freight house.

Q. Was freight delivered on that siding, while you were there, to people in general ? A. Yes, sir.

Cross Examination by Mr. Cabell :

Q. Mr. Smith, was freight delivered to people in general anywhere else in that neighborhood ? A. Not as a practice.

Q. Was freight delivered down here on the Wanaque siding ? A. In one instance ; yes, sir.

Q. Wasn't it delivered in 1903-1904 ? A. No, sir.

Q. How long were you agent there ? A. Six and one-half months.

Q. Was anybody refused delivery there at that time ? A. Yes, sir.

Q. Who was the person ? A. Mr. Henry Writenour.

Q. When was that? A. It was in the fall of 1903.

Q. You are sure of that? A. Positive.

Q. You refused him delivery there? A. Yes, sir; but it was afterwards delivered though.

Re-Direct Examination by Mr. Hobart:

Q. Why did you refuse delivery? A. Because I consider it a private siding of the Wanaque Paper Company.

Q. What led you to that consideration?

Mr. Cabell:—Objected to.

Objection sustained.

Q. Had you received any instructions in regard to it?

Mr. Cabell:—Objected to.

Objection sustained. To which ruling of the Court the plaintiff's counsel prays an exception. Exception allowed. Let it be sealed and it is sealed accordingly.

WILBUR A. HEISLEY,

J. [SEAL]

The Court:—I don't see how the private instructions from a principal to the agent could affect the shipper.

Mr. Hobart:—And I will make an offer to save time; we propose to show that the witness had received instructions from his superior officers not to make deliveries at such sidings.

The Court:—Perhaps that may be relevant in view of this fact, that he afterwards did deliver there and might have done it contrary to the wishes of the company; in that aspect it would be competent; if that is what you

claim—if he delivered it there on his own volition, but not with the knowledge or consent of the company—I think in that aspect it is competent.

Q. What is the fact about it, how was it you came to refuse? A. Because I considered it a private siding of the Wanaque Paper Company.

Q. How did you come to deliver it afterwards? A. Mr. Writenour told me that he had the privilege of Mr. Carter to have the car placed there.

Q. Do you refer to Mr. Carter who has some connection with the paper company? A. Yes, sir.

Re-Cross Examination by Mr Cabell:

Q. Can you tell us exactly when you went to Wanaque-Midvale as the agent? A. It was September 24th.

Q. What time in 1904 did you go away? A. About the twenty-eighth of March.

Q. Was the car of Mr. Writenour a car of potatoes? A. It was.

Re-Direct Examination by Mr. Hobart:

Q. Did you have instructions from the railroad company with regard to deliveries on the private siding?

Mr. Cabell:—Objected to; I think he should confine the record to this siding.

Q. The siding called the Wanaque siding? A. I was made to understand—

Mr. Cabell:—Objected to.

Q. I understand you had some written instructions in regard to it?

Mr. Cabell:—Objected to as leading.

A. As far as written instructions go, I never received any written instructions regarding it.

Q. Did you receive any other kind from the company? A. No instructions; no, sir.

Mr. Hobart:—That answers it then, and I cannot very well press the question.

MR. C. C. CAMPBELL, sworn in behalf of the plaintiff, testified as follows.

Direct Examination by Mr. Hobart:

Mr. Hobart:—This lease has been referred to and called for—

Mr. Cabell:—I produced it at your request.

Mr. Hobart:—It is offered in evidence.

Admitted. Marked Exhibit P-5.

[Page 74, Book of Pleadings and Exhibits.]

Mr. Hobart:—I will now offer the map; I do not think it has been formally offered yet.

Marked Exhibit P-1.

[Facing page 50, Book of Pleadings and Exhibits.]

Mr. Cabell:—Under the limitations, of course, agreed upon.

Q. (*By Mr. Hobart*) Are you agent of the railroad company at Wanaque-Midvale station? A. Yes, sir.

Q. Now, you were agent there on two separate occasions, if I understand it correctly? A. Yes, sir.

Q. Gives us the dates? A. July 19, 1904, until January 11, 1905, and from April 5, 1905, until the present time.

Q. Will you state what the system was of keep-

ing the records of car service at that station? A. Well, at the time I went there—do you mean?

Q. Yes; state generally what the system was. A. It was not complete I must admit.

Q. There is a book called the car service book? A. Yes, sir.

Q. Was that kept under your direction while you were there? A. Well, it was left principally to my assistant, although I had charge of it, of course, the same as other books and records of the office.

Q. You were the man in charge of the office? A. Yes, sir.

Q. And you had several men to help you? A. I had one man to help me.

Q. Now, have you the original car service record books here today? A. Yes, sir.

Q. Where are they? A. They are right there in that package.

Q. The book that you have before you, is that the earlier of two books? A. Yes, sir; this is the one at the time I was there first.

Q. Does that book show the record as to car number 100824? A. Yes, sir; I believe it does.

Q. (*By Mr. Cabell*) What date?

Mr. Hobart:—March 27, 1905.

Q. (*By Mr. Hobart*) Do you find in that book a record as to that car? A. Yes, sir; there it is.

Cross Examination by Mr. Cabell:

Q. I notice here in the arrival column an erasure, what does that mean? A. That means that—

Q. You have 3 | 27 and then you have 4 | 4? A. Sometimes we get a car on what we call advance billing—the way-bill was received in the office on the 27th day of March, the car did not arrive until the 4th day of April, under this way-bill

here—the 23rd—that was when we received the revenue billing for the car.

Q. Then this arrival column does not show—you don't always put down the time of arrival? A. Yes, sir.

Q. What is that 3 | 27? A. That was put in in error.

Q. When did you strike out that pencil mark and put the other there? A. The date that the car arrived on a car billing—what we call running card—when we noticed our mistake in putting in there the 3 | 27, the date the revenue billing was received at the office and found that the car had not arrived, but came on running card, on the 4th day of April, merely a clerical error.

Q. I notice a great many of those clerical errors in the column here? A. There is only one more there—there are two or three others there.

Q. They are all clerical errors, too? A. Yes, sir.

Q. There are more clerical errors marked in that column than there are accurate markings, are there not? A. I don't know that there are.

Q. Yes; there are three or four there that are right—half the page is right and the other half is wrong? A. Yes, sir.

Mr. Hughes:—I don't think it ought to go in.

Q. (*By Mr. Cabell*) I notice a column marked, "Date, notice of arrival sent to consignee." A. Yes, sir.

Q. You know that this card to the Wanaque Lumber Company is marked in pencil in that column, and all the others in ink—how do you explain that? A. An indelible pencil.

Q. Date, notice of arrival sent to consignee is here marked 4 | 4? A. Yes, sir; that means April 4th, postal notice was sent April 4th. I was not

agent at that time; that was prior to my being agent; I went there on the 5th of April.

Q. Oh, I beg pardon; did you make a pencil memorandum? A. No, sir.

Q. Who did? A. That I could not say; I was not agent at the time.

Q. Who made this correction in ink of a car 100824, where it is changed from 3 | 27 to 4 | 4? A. I did.

Q. You were not agent at the time—you put that down the next day? A. Yes, sir; because our card billing comes in, and we give them the stamp date of the station, Wanaque-Midvale station—all card bills that come in are stamped on the date of arrival, regardless of—

Q. We are not talking about that; we are talking about this entry here. A. It was taken from the card billing—that insertion was taken from the card billing instead of from the—

Q. Then your only evidence of the date of arrival is your card billing that you saw, and you went back and marked it as 4 | 4? A. Because the revenue billing showed the date of March 27th—stamped date on it.

Q. Your record is not made up from the actual arrival of the car then? A. It is at the present time; yes, sir.

Q. But that is not? A. No, sir.

Q. This one was not made according to the system? A. All these dates have been changed on these because they were taken—this agent entered the date of the arrival of revenue billing at the office, which was in advance of the car, and when the car did arrive we had to make that change, and make the correct change of when the car did arrive; on this date this man shot himself; the way freight was in there at about the time that he shot himself, at the time he committed the deed; the way freight was at the station at that time;

therefore, of course, there was a slight mix-up, I suppose, in the business.

Re-Direct Examination by Mr. Hobart :

Q. Did the car arrive on the date shown on the record? A. As to the stamp date on the card, way-bill or running card.

Q. You were there the next day? A. And the car was in the yard.

Q. (*By Mr. Cabell*) Did you go out and inspect the cars in the yard personally? A. No, sir; I have my assistant for that.

Q. You then don't know that the car was in the yard? A. No, sir.

Q. (*By Mr. Hobart*) You can tell by reference to your yard book? A. Yes, sir.

Q. Is it the system to have a record kept in the yard book each day of the cars in the yard? A. Yes, sir.

Q. And was that the system adopted or followed by you when you went there on the 5th of April? A. It was there ever since I worked there.

Q. What is the car service record book to do with the yard book, if anything? A. The yard book is drawn each day for cars.

Mr. Cabell :—Objected to; the answer is not responsive.

The Witness :—The cars in the yard book are checked against the billing, the card billing, the running card—each day, and they are entered in the car service book, which gives us the date of arrival of the cars.

Q. When the car is taken away what record is made of it? A. If the car belongs to us, why, each day, if the car belongs to us, each day we follow it up, and when the car is released the book shows whether that car is loaded or empty; if empty it

is released, and then the car service book is made up to that effect that the car is released on that date. Each morning this yard book is taken.

Q. You, personally, of course, did not make up the record of the yard book? A. I never have, with very few exceptions.

Q. Always made by your assistant? A. Yes, sir.

Mr. Hughes:—I should like to ask one question.

Cross Examination by Mr. Hughes:

Q. Just one question as to whether you make that record up from the cars or the cards? A. The yard is taken each morning and the cards are checked with this yard book or revenue billing, some cards come in with revenue billing, the revenue billing accompanies the card; that is checked with the car service book; that is the way we have of keeping the record.

Q. I mean you would not enter a car in the car service book simply because you had the billing; of it? A. No, sir; if the card billing checks with the yard book—occasionally a car will come ahead of even the card billing, or we get a card billing ahead of the car.

Q. On very rare occasions? A. On these occasions when the entry was corrected afterwards.

Q. Did the first entry correspond with the cards billing? A. The first entry in pencil there gives the date of the revenue billing, arrival at the stations, that is stations like Buffalo or any large station; they follow the cars on what they call—on the regular billing—and these billings are sent by train mailed to the destination; then, when the yardmaster, or whoever has charge of the cars, he makes up a running card, and those cards go forward with the conductor who handles that car,

and in all cases he should not handle a car without a running card.

Q. Then he should not handle running cars without a card? A. No, sir.

Q. Haven't you entered up some running cards there— A. The revenue billing comes by train mail.

Q. You entered up the revenue billing there as the time of arrival of the car? A. No, sir; that was done by my predecessor, by entering the date of the revenue billing.

Q. After you arrived it appears to have been done some more? A. Yes, sir; these numbers here were figured by my assistant who did not understand how to keep the books, and the correction was made after I called his attention to the fact that he had made wrong entries.

Q. Then you are able to say there are gross inaccuracies in that record? A. Inasmuch as the entering of the first item.

Mr. Hobart:—We do not claim any car service from the date that is crossed out there, the 27th of March.

Q. When does this record show, if at all, when notice was given to the consignee? A. These here.

Q. What does that say? A. 4 | 4.

Mr. Hobart:—I will offer the record of that car; I desire now to offer the record of the car for what it may be worth, stating, as I stated in the first place, that we only claim from the corrected date.

The Court:—I think it is competent; of course, the weight the jury will attach to it is for them to determine. Your objections simply go to its value as evidence. It is admitted.

Exception granted to defendant.

Marked Exhibit P-6.

[Facing page 76, Book of Pleadings and Exhibits.]

Re-Direct Examination :

Q. (*By Mr. Hobart*) When you went there as agent, was in July 1904, you said? A. Yes, sir.

Q. Where was the public delivery track? A. It was just north of the freight house on the opposite side of the track.

Q. When you went there the second time in April, 1905, where was the public delivery track? A. In the same place.

Q. The freight house is on the other side of the track? A. On the west side of the track.

Q. And was at that time? A. Yes, sir.

Q. Was there a crossing across the track? A. Just south of the freight house.

Q. Now, on or before the difficulty arose to this car 100824, where was it customary to place the cars that came consigned to the lumber company? A. Together with all other cars on what is called track number one, which is the first track used of the passing siding.

Q. Now, as to the lumber cars, what was the custom with respect to the length of time that they would stay on that siding? A. Until they were ordered placed on the paper mill switch.

Q. Then it was customary to place them on the paper mill switch? A. Yes, sir.

Q. And that continued up to the time of this particular car? A. Until I received notice not to place any more.

Mr. Hughes :—I ask to have that struck out.

The Court :—I decline to strike it out; let it stand.

Q. When you were there as agent in the year

1904, did any car service accrue as against the lumber company? A. Yes, sir.

Q. Were bills presented? A. They were mailed.

Q. Were they paid? A. Never.

Q. Do you know why any change was made with regard to the lumber company as to the place of delivery? A. I don't understand the question.

Mr. Cabell:—I object to this—

Q. Do you know why any change was made with regard to the lumber company as to the place of delivery?

The Court:—Anything which prompted the railroad company to make the change?

Mr. Hobart:—Yes, sir; the point is: he says that instructions were sent, and I propose to show the reason for it was that the fact that the lumber company had refused to pay car service charges, and in line with certain decisions which I shall later call to your Honor's attention, when the time for argument comes, to the effect—the point that I desire to mention now, so that your Honor may have it in mind, is that we shall claim that if the lumber company refused to pay car service charges, the railroad company was justified in refusing to continue the custom of delivery on this siding.

The Court:—You mean to say that if the defendant refused to pay car service because it did not unload the cars promptly, freight delivered on the paper mill siding, that that was one reason why the railroad company would be justified in telling their agent not to deliver other cars to them until the prior bill was paid?

Mr. Hobart:—Not necessarily that, not as

a means of collecting the prior bill, but it was a legal justification, as the cases hold, for the company to refuse to continue the practice of delivering on a private siding, and it is so decided in a number of cases.

The Court:—I suppose the law would simply require them to deliver on their regular siding —the usual siding, unless they had made some contract.

Mr. Hobart:—The defendant will claim that by custom, or by some other right, we were bound to continue making deliveries on this so-called paper mill siding; now, we want to show that the reason why we refused to continue making such deliveries was the failure to pay former charges and that was a reasonable justification for our action in retaining the car in our possession until such charges were paid. There is no claim made of any general lien.

The Court:—As I understand it, you are seeking to justify these present charges—justify the refusal to deliver by the plaintiff until these present charges were paid—because the defendant had failed to pay other charges on other cars.

Mr. Hobart:—That is not quite it; it is not for the purpose of enforcing a collection of the prior charges, not at all, but for the purpose of enforcing the collection of charges that might accrue on this particular car, by retaining it in our possession.

The Court:—But how would the fact that they had not paid on the other car have anything to do with the fact that they had not paid on this car; suppose they had offered to

pay the reasonable car demurrage on this car, would not you have been obliged to have delivered them their car regardless of that fact that they still owed on another car?

Mr. Hobart :—I think that may be so as to that car. This question has got to be passed on sometime during the case, and I would like to call your Honor's attention now to the decisions.

The Court :—I mean to say that my inclination is that the mere fact they had not paid car service on other cars would be no excuse for the company not delivering the present cars, if the defendant did pay, or offered to pay, the reasonable demurrage charges on these present cars.

Mr. Hobart :—I agree with your Honor to a certain extent.

The Court:—Then what is the object of your question ?

Mr. Hobart :—The point is this, that the lumber company refused to pay charges on prior cars; now, this lumber company claims to have the right of delivery on a special siding and we refused to deliver this car on that siding—the reason that we refused, at least that is what I hope to show, is because they had refused to recognize charges on prior cars, consequently we insisted upon retaining this particular car in our own possession for the purpose of enforcing the lien, which, of course, ran on from day to day, and our justification for so doing was the attitude of the company as made known to us in connection with prior cars.

The Court :—You mean to say you refused

to deliver it on the private siding, because if it was delivered there, you had every reason to believe the defendant would not pay any demurrage?

Mr. Hobart:—That is the point exactly; that expresses it precisely.

The Court:—I think it is competent to show that the company did act reasonably.

Mr. Hobart:—Does your Honor desire me at this time to refer to the cases that bear on this?

The Court:—Not at all; the question is admitted.

Q. (Question read.)

A. Yes, sir; because Mr. Thrift, the manager, told me that they did not recognize car service.

Q. (*By Mr. Hobart*) Now going back again to car 100824?

Mr. Cabell:—I wish to ask if this testimony applies to car 100824; it was not stated definitely when this regulation was put in force, and I want to know—can the witness tell me when the company refused to place cars—

The Court:—Bring that out on cross examination.

Q. (*By Mr. Hobart*) Going back to car 100824 I will offer the way-bill for that car.

Mr. Cabell:—I refuse to be bound by that.

Marked Exhibit P-7.

[Facing page 76, Book of Pleadings and Exhibits.]

Mr. Hobart:—I will also offer the transfer slip for the purpose of showing it is Interstate Commerce; goes with the way-bill.

Marked Exhibit P-8.

[Page 77, Book of Pleadings and Exhibits.]

Mr. Hobart:—I ask the defendant if he has the bill of lading?

Mr. Cabell:—No ; I haven't it.

Q. (*By Mr. Hobart*) Will you state what the custom was with regard to sending the consignees notice of the arrival of cars? A. On this particular car or at that time?

Q. At that time. A. At that time, as I stated before, that our records were not kept up in the present state of efficiency.

Q. Was there any notice sent for that car? A. Yes, sir.

Q. In what form was it sent? A. It was sent on a postal notice.

Mr. Hobart: —Have you the postal card?

Mr. Cabell:—I have.

Mr. Hobart:—I offer it in evidence.

Mr. Cabell:—I have it here.

Mr. Hobart:—I ask the defendant to produce a postal card dated the fourth of April, 1905?

Mr. Cabell: —I haven't got it.

Mr. Hobart: —I ask the witness to refer to his letter press copy book of postal card notices sent and state whether or not he finds a record of the postal card?

Mr. Cabell:—I object to his record of the postal card.

The Court:—You don't object to the postal card?

Mr. Cabell:—I produce one.

Mr. Hobart:—That is not the one I want.

The Court:—He has called for a postal card which you do not produce; now, he wants to prove by the record the sending of a postal card.

Mr. Cabell:—Suppose he tells us he sent it first?

The Witness:—There was one mailed the day that I went there, on April 5th.

Q. (*By Mr. Hobart*) Did you keep carbon copies? A. There is a press copy, a letter press copy of that card.

Q. Have you the book? A. I have it somewhere in the office, but I have searched for it and did not find it; the agent who had charge of it at this time, he copied in—

Q. Never mind; you have looked for it and cannot find it? A. Yes, sir.

Q. Have you ever seen it? A. Yes, sir.

Q. When? A. About the time I went there.

Q. Was your attention called to the matter, or how did you happen to find it? A. I found a book that was not used for that purpose, and I have searched for it since and could not find it.

Q. Did you, at my request, make another copy based on the letter press copy—I refer now to the first one that you did not find? A. One was made from that copy.

Q. Did you make it yourself? A. Yes, sir.

Q. The postal card is in the printed form, isn't it? A. The body of the card is in the printed form; we had to fill in certain parts, dates, etc.

Q. Car number? A. Car number, and all other parts, excepting a rule in regards to calling attention to the car service rules.

Q. That is printed on the card? A. Yes, sir.

Q. Well, did you make a copy on the printed

form that was in use, of the postal card on the day you went there as agent in April, 1905, did you make a copy of it on one of the printed forms? A. No, sir; the copy was made before I went there —laid there in the office, and was copied—that is, it had been copied, and the card was ready to mail, and it was mailed.

Q. And a copy was kept? A. Yes, sir.

Q. Did you mail it? A. Not personally.

Q. Who did? A. My assistant.

Q. (*By Mr. Cabell*) How do you know? A. It was mailed just the same as others.

Mr. Cabell:—Objected to.

The Court:—I think that is competent; if you prove that a letter was written in your office and was treated the same as all other correspondence was—put in the box—that is relevant.

Mr. Cabell:—We think he ought to show that he did, as a matter of practice, mail the cards.

Q. (*By Mr. Hobart*) What was the custom about mailing postal card notices? A. Postal card notices for Wanaque were mailed at Wanaque post office by the assistant when he took the yard.

Q. (*By the Court*) How often was that? A. Every morning.

Q. (*By Mr. Hobart*) When you went there on the 5th of April you found a postal card which had not yet been mailed directed to the Wanaque Lumber Company? A. Yes, sir.

Q. And was it turned over to the assistant for mailing? A. Yes, sir; it was.

Q. Did you at that time or not, notice any letter press copy of the card? A. I found one about that time when I was copying other papers.

Q. That is the one you have not been able to find

at this time, in connection with this trial? A. Yes, sir.

Q. Did you at any time thereafter, and before this trial came on, make a copy of that card on the printed form, a letter press copy? A. There was one made—a copy of the copy.

Mr. Hobart:—That particular book has unfortunately been lost, or at least cannot be found.

Q. (*By Mr. Hobart*) Can you identify this card which I have in my hand, which purports to be a copy? A. Yes, sir; that is my writing.

Q. That is in your handwriting? A. Yes, sir.

Q. Copied from what? A. From the original.

Q. (*By Mr. Cabell*) The original or the carbon copy? A. The press copy.

Q. (*By Mr. Hobart*) Do you remember when that was made? A. I could not say.

Q. It was sometime before this trial came on? A. Yes, sir.

Q. (*By Mr. Cabell*) After the suit began? A. No, sir.

Q. (*By Mr. Hobart*) Is that or not a correct copy of the letter press copy? A. Yes, sir; as near as I remember.

Q. This purports to have been sent by one Fisher? A. He was the agent who shot himself.

Q. You came there the day after he died? A. Yes, sir.

Mr. Hobart:—I would like to offer this.

Mr. Cabell:—I object.

The Court:—Now, as I understand it, this is a copy that he made from the press copy, and the press copy is destroyed, and you cannot find it?

Mr. Hobart:—Yes; those are the facts.

The Witness:—That is correct.

The Court:—I will admit it.

Marked Exhibit P-9.

[Page 78, Book of Pleadings and Exhibits.]

Q. (*By Mr. Hobart*) Now, was there any postal card notice sent with regard to this same car? A. I believe there was.

Q. I show you a postal card which the defendant produced, dated April 27, 1905; is that the one that you refer to? A. Yes, sir; that is made by my assistant.

Q. You recognize his writing? A. Yes, sir.

Q. Mailed in the usual course? A. Yes, sir.

Marked Exhibit P-10.

[Page 79, Book of Pleadings and Exhibits.]

Q. Now, the car service record book has been referred to, and the record of this car offered, I ask you to refer to that and state when that car was released? A. July 6th, 1 P. M.

Q. 1905? A. Yes, sir.

Q. Up to that time what was the amount of car service that had accrued, according to your records? A. $75.

Q. State how you arrived at the figures of $75; you need not give us all the figures of the computation, but simply between what dates? A. From the date of the mailing of the postal notice—April 4, 1905.

Mr. Cabell:—I think your statement shows April 5th.

The Witness:—The date of the postal notice was April 4, 1905, computing from that time to July 6th at 1 P. M., amounts to $76, or $75 and some 23 hours, and the car was ordered

April 4th at 3 P. M. ; that was when the lumber company came to the office and ordered the car placed on the paper mill switch. The car was placed April 5th, at 3 P. M.; that was when it was taken from the storage yard on number one switch to the paper mill switch for unloading ; that was deducted one day, deducted from the time the car was ordered until it was placed.

Q. (*By Mr. Cabell*) When did you say it was ordered? A. On the 4th of May—I made a mistake—on May 4th it was—it was placed May 5th.

Q. (*By Mr. Hobart*) Placed the next day on the paper mill siding? A. Yes, sir.

Q. Now, was it Mr. Thrift that ordered the car placed on the private siding ? A. Yes, sir.

Q. Now, before the order for placing was given, was there any car service accrued as you figure it? A. Yes, sir.

Q. What was said as to the payment of the charges up to that time ? A. I told him the car service would have to be paid.

Q. Was the car locked ? A. I put locks on the car before removing it from number 1 switch.

Q. And were the locks on when it was put on the private siding? A. Yes, sir.

Q. Now, after the car had been placed on this siding, what was said or done as to car service? A. Well they requested me to have the locks off so they could unload the car.

Q. What did you say to that? A. I told him I could not do it until the car service was paid.

Q Did they or did they not offer to pay the car service? A. No, sir.

Q. Whom were these communications with for the most part? A. Mr. Thrift, the manager of the lumber company.

Q. Did you tell him the amount of the car service that had accrued up to that time? A. I did.

Q. Do you remember whether he went over the figures with you? A. No, sir; he did not.

Q. What did he say as to the charge? A. He said that he did not recognize car service.

Q. Did he offer to pay any part of it? A. Not the car service—he offered to pay the freight.

The Court:—All of this is as to the first car?

Mr. Hobart:—Yes.

The Witness:—I think it was about $17, if I remember right, about $17, the first time he called in regard to the car.

Q. Did he make any objection as to the amount of the charge? A. No, sir; he did not make any objection to the amount but he objected to paying any part of the car service.

Q. Now, did you send any letters to the lumber company with regard to this car? A. Yes, sir.

Q. I ask you to produce the original or the letter dated April 27th. I will offer this letter.

Marked Exhibit P-11.

[Page 80, Book of Pleadings and Exhibits.]

Q. Do you know when this letter was sent—was it or not sent the day it was written? A. Yes, sir; it was.

Mr. Hobart:—I will read this letter. (Reading Exhibit P-11.)

Q. (*By Mr. Hobart*) Now, I am not sure whether you gave us the date as to this first car when Mr. Thrift asked you to put it on the private siding? A. That was May 4th.

Q. Some days after this letter was written? A. Well, I don't know just the date of that letter.

Q. The letter is April 27th? A. Yes, sir; April 27th.

Q. Now, after Mr. Thrift requested you to place the car did you have it put on the private siding? A. Yes, sir; on the following day.

Q. Why did you wait until the next day? A. Because our way freight had gone west.

Q. You had to wait until the next freight train? A. Yes, sir.

Q. Now, at or about that time was there anything said by you to Mr. Thrift or to any one else on behalf of the lumber company with regard to the placing of further cars on this private siding? A. Not up to that time.

Q. Now, after that time, was anything said? A. Yes, sir.

Q. How long after? A. Until I received that notice not to place any more cars there.

Q. You received notice from whom? A. From the railroad company, from my superior officers.

Q. Did you send a letter to the lumber company in regard to that subject? A. I think I did.

Mr. Hobart :—I ask for a letter dated July 3, 1905, I offer it.

Marked Exhibit P-12. (Reads to the jury).

[Page 80, Book of Pleadings and Exhibits.]

Q. Before that letter was sent had you had any conversation with Mr. Thrift on that same subject? A. I think we had on different occasions, about the car service.

Q. Did you tell him anything about placing cars on the private siding? A. I think not.

Q. I mean did you say anything—

Mr. Hughes :—I think he has answered that.

A. I think my letter was the outcome of the orders that I received from the superintendent.

Q. Before the letter was sent did you have any talk with Mr. Thrift in regard to it? A. No, sir.

Q. You think not? A. Not that I know of.

Q. Now, your records show that that car was released on July 6th—what is meant by released? A. That means that the car was taken away from Wanaque-Midvale.

Q. Do you have any recollection as to this particular car as to whether it was taken away on that date, aside from your record? A. Yes, sir.

Q. What impresses that fact upon your memory? A. Well, that particular car, as I remember, had been opened, and I went and closed the door and notified the superintendent at Jersey City of the fact that the car had been opened and a portion of the contents had been taken out, and I went to Jersey City that same afternoon, and met the superintendent and other officers of the company, and they advised me to send the car out the next day, which I did.

Q. That was on July 6th? A. Yes, sir.

Q. That was the end of it as far as you were concerned? A. Yes, sir.

Q. I observe that according to your record you have got down here under the head of collection, $75.00—did the company ever pay that amount so far as you know? A. They did not collect that—did not collect that amount from them—that was advanced by Weehawken, and as far as that charge was concerned it was a credit to me the same as if I had collected it from the lumber company—I advanced it on the Weehawken office.

Q. You put it on the way-bill as an advance charge to be collected at the next station? A. Yes, sir.

Q. Were you or not authorized to make collections of car service? A. Authorized.

Q. Did you make collections from time to time? A. Yes, sir.

Q. But nothing was ever paid to you on account of this car? A. No, sir.

Q. Now, do you recall an occasion on the day when this letter was written, on July 3rd, 1905, Exhibit P-12, do you recall having any conversation that day with regard to Mr. Thrift? A. On the date the car was taken away?

Q. No, on the date the letter was written. A. I think not.

Q. Did you, at any time shortly after that letter, have any conversation with Mr. Thrift on the subject of delivering on the so-called private siding? A. He asked me to deliver other cars later on.

Q. Did you say anything to him about the subject matter of the letter? A. I think not, only that we could not place any more cars there for them?

Q. What did you tell him as the reason? A. Because of their refusal to recognize car service, and I did not consider the switches theirs; I had orders to place cars on the public delivery track—

Q. And what did he say in response to that as to whether or not he or his company would or would not pay car service? A. He said they did not recognize car service.

Q. Now, let us take the next car, number 70183. I will offer the original way-bill.

Mr. Cabell:—I shall have to object to your way-bill.

Q. (*By Mr. Hobart*) I show you what purports to be an original way-bill for car 70183; is that or not the original? A. Yes, sir.

Q. It came in the usual course of business to you as the station agent? A. Yes, sir.

Q. And this is the way-bill that came with B. & O., car 70183? A. Yes, sir.

Mr. Hobart:—I offer it.

Mr. Cabell :—Objected to.

The Court :—It relates to the history of the car—gives the date and direction—of course it is not binding on you.

Mr. Cabell :—I make the objection and take an exception.

Exception allowed.

Marked Exhibit P-13.

[Facing page 80, Book of Pleadings and Exhibits.]

Mr. Hobart :—I will offer the delivery order as to this car which has heretofore been marked Exhibit P-1 in the depositions, and will now be marked Exhibit P-14 in evidence.

Marked Exhibit P-14.

[Page 81, Book of Pleadings and Exhibits.]

Mr. Hobart :—I will ask the defendant to produce the bill of lading for this car.

Marked Exhibit P-15. Bill of lading from Engels, W. Va.

[Page 81, Book of Pleadings and Exhibits.]

Mr. Hobart :—I now ask the defendant to produce postal card, notice of arrival of this car, under date of June 20th.

Mr. Cabell :—I have this postal.

Marked Exhibit P-16.

[Page 87, Book of Pleadings and Exhibits.]

Mr. Hobart :—The postal card is dated June 20, 1905. I would like to read this one. (Reads it to the jury).

Q. Was this postal card, Exhibit P-16, sent in the usual course of the mail? A. Yes, sir.

Q. Have you letter press copies of it which indicate that— A. Yes, sir.

Q. Tell me whether the postal card notices that were sent all had this reference to car service rules—this printed reference? A. I think so—that was the general form that is used.

Q. Did you at the time these postal card notices were served have a copy of the rules in your place? A. Yes, sir.

Q. Did Mr. Thrift or any one in behalf of the lumber company ever ask to see them? A. No, sir.

Q. Now refer to your car service record book as to this car, I think you will find that in the next book, Mr. Campbell. I remember seeing it in the next book, that is the reason I speak of that. Now, you find it there, now what does that record—was this record kept in the same way as the other? A. Yes, sir; except this book was used prior to the release of this car, and these cars were transferred to the other book, a letter book.

Q. So that the record as to this car appears in both books? A. Yes sir.

Q. And this book was not in use; just get the other record; let us have them both together. Does the record of the same car also appear in a later book? A. This car appears in both books, because this car was transferred to another car 86472, I believe.

Mr. Hobart:—I will offer the record, the car service record of car 70183.

Cross Examination by Mr. Cabell:

Q. This record in the first book, was that made by you? A. No, sir; that was made by Mr. Farley.

Q. Do you know who made it? A. My assistant.

Q. While you were there? A. Yes, sir.

Q. I notice it says "Order placed by consignees, 6—20"? A. The car arrived on 6 | 19 at 11 P. M.; it should be 11 A. M. and the car was placed on switch number 1.

Mr. Cabell:—I ask to have that struck out as he is simply reasoning.

A. I could not swear that that is correct.

The Court:—Then strike it out.

Q. What is this notation that is scratched out there—that is the same error that was made in the former one; now, here is your column stating the date of placing, what is the first statement that has been made there that has been erased? How do you know anything about number 2 track? A. Number 2 track is our public delivery.

Q. Now, what is that notation that you have erased? A. 6—19, 1 P. M.

Q. And you have scratched that out? A. And made it 6—20, 4 P. M., giving them the benefit of one day.

Q. You don't say the notice was sent until the 20th? A. That was all right; the notice was sent the same day.

Q. I notice in your "Remarks" here you say "Time expires 6—23, 12 M." I don't notice that in any other in that column? A. No, sir.

Q. When was that put in? A. I could not say.

Q. Was it put in on the 23rd of June, or was it put in after? A. It might have been put in after, for those remarks have nothing to do with the record, only for our own personal information that is all, and when we are making up, in computing our time, it helps us in that way, that is it.

Q. I don't notice any other instance on that page. A. No, sir.

Q. Can you explain why there is no other remarks of that kind opposite any other car? A. It is only for the benefit of computing our time to show just exactly when the free time expired.

Mr. Hobart:—There are two records in this case, are they admitted?

The Court—Admitted.

Marked P-16½.

[Facing page 88, Book of Pleadings and Exhibits]

Mr. Hobart—Further Direct:

Q. Refer to the records and tell us the amount of the car service that accrued on this car? A. B. & O., car 70183 was transferred to Erie car 68-472, that was to release a foreign car, and get it into an Erie car, there was $14 car service earned on this car before the car was sent to Weehawken for storage.

Q. It was transferred—how much was earned on the two cars? A. The date of transfer was July 10, 1905, that is the date the transfer was made, July 10, 1905, it was transferred that date to this car.

Q. What is the total amount earned? A. $14.

Q. Now figure that and see, take the dates? A. From June 19th, 3 P. M., getting the time from that time to the date of release of the car, July 10th, 3 P. M., shows an earning of $14, deducting all Sundays—that includes Sundays and holidays and forty-eight hours, plus the time from 3 P. M. on the 19th to twelve o'clock the 20th.

Q. What does your record show as to that car into which this car was transferred? A. That was the same as arriving at 7.10 3 P. M.

Q. That is, you count the date of arrival as the date when the transfer was made? A. The same

as if it was a continued time, and that figures out to $33 on Erie car 86472.

Q. When was that car released? A. That car was released on August 18th at 12 o'clock noon.

Q. Now, was car B. & O., 70183, or the car into which its contents were transferred, ever placed on the private siding or the Wanaque siding? A. No, sir.

Q. Why not? A. I had orders not to place them there.

Q. Did you ever offer to do so? A. Only on the payment of previous charges, car service charges.

Q. Did you have conversations with Mr. Thrift in regard to the charges on this car? A. He asked me to have the car placed there, that is all.

Q. Did he ever offer to pay the car service on this car? A. I could not remember; he offered to pay me on several different occasions on different cars—I think possibly he did.

Q. Did he ever offer to pay car service? A. No, sir.

Q. When you say he offered to pay what do you mean? A. Accrued freight charges.

Q. Are you able to recall as to this car whether any car service charges had accrued before the request to place it on the Wanaque or private siding? A. That I could not say positively.

Q. You are not sure about that? A. No, sir.

Q. Where was the car 70183, and afterwards car 86472 during this period when car service was running as you claim? A. On switch 2 known as our public delivery track.

Q. There all that time? A. Yes, sir.

Q. Was that the place where other cars were waiting delivery from time to time? A. Yes, sir; known as our public delivery.

Mr. Hobart:—I will now ask the defendant to produce a letter, dated August 11th, 1905, with regard to this car.

Marked Exhibit P-17. (Reads to the jury.)

[Page 89, Book of Pleadings and Exhibits.]

Q. Did you receive any reply to that letter? A. Not that I remember.

Q. I think you have given the date when the car was sent away or released August 18th, was it? A. August 18th, at 12 o'clock noon.

Q. Now, between the date of the letter August 11th, and the date the car was taken away from the station, did the defendant or any of its officers or agents make any effort to receive the freight that was in the car? A. They offered to pay the freight charges but not the car service.

Q. (*By the Court*) How many of these cars were there? A. Six, altogether.

Mr. Hobart :—Now car number 42865 I will offer the way-bill.

Marked Exhibit P-18.

[Facing page 90, Book of Pleadings and Exhibits.]

I will offer the transfer slip from the Pennsylvannia Railroad Company.

Marked Exhibit P-19.

[Page 91, Book of Pleadings and Exhibits.]

Mr. Hughes :—I make the same objection as before; I presume it will be admitted.

Exception allowed to defendant.

Mr. Hobart :—I offer the bill of lading.
Marked Exhibit P-20.

[Page 92 Book of Pleadings and Exhibits.]

Mr. Hobart :—And I will offer the order for delivery.

Marked Exhibit P-21.

[Page 95, Book of Pleadings and Exhibits.]

I ask the defendant to produce the postal card notice. I offer it.

Marked Exhibit P-22.

[Page 96, Book of Pleadings and Exhibits.]

Q. (*By Mr. Hobart*) Please refer to your car service record book, for car 42865; when did it arrive? A. The car arrived July 29th at 3 P. M.

Q. The postal card notice which has already been offered and marked Exhibit P-22, is dated August 10th, 1905; where was the car in the meantime? A. At our public delivery track.

Q. Did you state why a notice of arrival was not sent sooner? A. No, sir; I could not tell you as to that.

Q. That car was consigned to Alcott & Company? A. That was a car that there was a delay in delivery order, and I had to notify the shippers to the consignees in New York City, who sent a copy, or the original, I don't know which, to me, of the order to deliver the car to the Wanaque Lumber Company, and this is the order Exhibit P-21.

Q. Have you any recollection, aside from the record, of how long after the date of this order, which is August 5th, 1905, the order was actually received by you at the station? A. Not that I know of—

Q. It came by mail? A. Yes sir; it came by mail direct to me.

Q. Now, as to this car, do you recall whether, after the postal card notice was sent, any one called to see about the car? A. I think that I had a call from Mr. Thrift, if I remember right, in regards to this car, that he wished the car delivered on the paper mill siding.

Q. Now, was anything said by Mr. Thrift or by

any one else on behalf of the paper company, with regard to the signing of a receipt for the car? A. I know that he refused to sign a receipt.

Q. Did you request that a receipt be signed? A. Yes, sir.

Q. Do you remember who it was refused to sign it? A. Mr. Thrift.

Q. And why did you refuse, that is, what reason did you give for not delivering; what reason did you give for not delivering the car until the receipt was signed? A. Because I did not consider that it was a proper thing to do.

Q. Are you able to recall how long after the postal card notice was sent, request was made for delivery of the car, whether it was a matter of a day or two or several days? A. It might have been a day or two; of course, I could not say as to that.

Q. Prior to that time had the lumber company signed receipts for delivery of freight? A. It had not been their custom until after they got their freight unloaded.

Q. Now then, in this case, why did you insist upon the receipt being signed? A. I had been informed by my superior officers that that was the proper thing to do.

Q. In other words it was orders from your superintendent? A. Yes, sir; from my superior officers.

Q. Now do you recall whether, about the time, or at the same time of this discussion about the receipt, anything was said or done with regard to freight charges? A. They offered to pay the freight charges but refused to sign the receipt.

Q. Did you at that time make any claim for car service on this particular car? A. No, sir; because it hadn't earned it.

Q. That is, you are figuring from the dates of the notice or arrival of the car? A. Yes, sir; and it had not earned car service when they

offered to make me payment for the freight charges.

Q (*By the Court*) As I understand, the only reason that you refuse to give them that car was because they would not sign the receipt? A. Yes, sir.

By Mr. Cabell:

Q. Do you say that they did pay the freight? A. Not until after they commenced to unload the car and got a portion of the car unloaded.

Q. (*By Mr. Hobart, continued*) Where was the car during this time? A. On switch number 2, known as the public delivery.

Q. You said something about part of the car being unloaded? A. Yes, sir; they had commenced to unload this car, and I notified the superintendent.

Q. And what happened next? A. And he sent officers out there and compelled them to stop.

Q. Was the car locked? A. No, sir; the car was not locked?

Q. Did they stop? A. I think they did.

Q. Did you ever get a receipt? A. I got a receipt—I think I got a receipt afterwards, I won't be positive.

Q. Some time afterwards? A. Yes, sir.

Q. Have you got it among your records? A. I think I have; if I have a receipt for it I have it in my records.

Q. The freight, I think you said, was paid, evidently? A. The freight was paid after I went to the lumber company's office and got the check for it.

Q. Are you sure about that receipt? A. Not as to my having it in the office; I could not swear positively, but I think I have it.

Q. How long did that car continue on the public delivery track? A. From that time?

Q. Yes. A. That car was transferred to Erie car 69930 on August 11th, at 4 P. M.

Q. And how long did the car into which it was transferred, remain? A. It remained until September 16th at 5 P. M.

Q. Can you tell what the total amount of car service that was earned by both cars? A. $29.

Q. On September 16th where was the car sent? A. To Weehawken for storage.

Q. That was the end of it so far as you were concerned? A. Yes, sir.

Q. Did you ever collect the car service? A. The car service was included in the advance.

Q. Did you ever collect it from the lumber company? A. No sir; I charged it against the contents of the car to the agent at Weehawken as advanced.

Record offered and admitted. Marked P-22½.

[Facing Page 96, Book of Pleadings and Exhibits.]

Mr. Hobart:—Now take car 1108—I offer the way-bill.

Mr. Cabell:—Same objection.
Same ruling. Exception to defendant.

Marked Exhibit P-23.

[Facing page 96, Book of Pleadings and Exhibits.]

Mr. Hobart:—I offer the delivery order P-24. [Page 97, Book of Pleadings and Exhibits.] I offer the bill of lading.

Same objection. Same ruling. Exception to defendant.

Marked Exhibit P-25.

[Page 98, Book of Pleadings and Exhibits.]

Mr. Hobart:—I ask the defendant to produce the postal card notice. I offer postal card notice dated August 19, 1905.

Marked Exhibit P-26.

[Page 100, Book of Pleadings and Exhibits.]

Mr. Hobart:—The next notice, same car, August 22nd.

Marked Exhibit P-27.

[Page 101, Book of Pleadings and Exhibits.]

Mr. Hobart:—The Exhibit being marked at the top "Second notice", and here is a third one also produced by the defendant, dated August 24th, 1905, marked at the top "Corrected notice,"

Marked Exhibit P-28.

[Page 102, Book of Pleadings and Exhibits]

Q. Have you any recollection as to any of these three notices as to whether they were all mailed, or whether any of them were delivered? A. In the general course we mailed them every day.

Q. Have you any independent recollection as to this particular car, aside from the course of business? A. No, sir.

Q. One of these is marked "Corrected notice"—the one marked Exhibit P-28—state the reason for the sending of that notice. A. The first notice and the second notice were marked prepaid.

Q. Freight prepaid? A. Freight charges prepaid—when, upon making my reports I found this bill on the part of my assistant, he had made that clerical error which should have been, collect 5-9-02 freight charges, so I sent a corrected notice, stating the amount of freight charges on that car.

Q. Where was that car placed? A. On the public delivery.

Q. Did the lumber company make any claim for delivery of its car to the Wanaque siding? A. They requested me to place it on the Wanaque River Paper siding.

Q. And you refused? A. Yes, sir.

Q. Did you give any reason? A. I told them I could not do it.

Q. Now, will you refer to your car service rocord for this car number 1108, and state the amount of car service that accrued on it? A. $17.00

Q. Reckoning from what date to what date? A. From August 19th, 1 P. M., to September 16th at 5 P. M.

Q. Now reckon that again, you have charged $17? A. $17—of course, there is the free time and from August 19th, 1 P. M., until 12 o'clock noon the next day, the 20th, that time is not computed in the free time.

Q. Now, take a pencil, Mr. Campbell, I want you to get that straight, the amount that is claimed on that car is $17? A. Yes, sir.

Q. The car was delivered—what was the date when the car was released? A. It was released on September 16th at 5 P. M.

Q. Now, then, we have charged $17, now reckon back—I want to get the date from which you claim that car service accrued?

Mr. Cabell:—He has told you.

A. It should be from August 24th, 1 P. M., it should have been from the date the car arrived on the 19th.

Q. As a mere matter of calculation, is $17 the amount that would accrue, reckoning from August 24th? A. I should judge, from the appearance of this record that the time was computed from August 24th instead of August 19th, which it should have been.

Q. All we claim is $17—have you figured from August 24th to September 16th—will it amount to $17? A. Yes, sir.

Q. Now, that car was released, I think you said, by your record, on September 16. A. September 16.

Q. Where was it sent? A. It was sent to Weehawken.

Q. Was the car service paid? A. No, sir; only as far as my was concerned in advances on Weehawken.

Q. You never got any money for it? A. No, sir; no money.

Q. Do you happen to remember as to this car, whether anything was said or done with regard to the freight? A. I don't remember.

Q. You have no independent recollection of that? A. No, sir; I have no recollection of anything unusual.

Record offered. Admitted marked P-28½.

[Facing page 102, Book of Pleadings and Exhibits.]

Mr. Hobart:—Now, let us take car 44988; I will offer the way-bill.

Same objection. Same ruling. Exception to defendant.

Marked Exhibit P-29.

[Facing page 102, Book of Pleadings and Exhibits.]

Mr. Hobart:—I offer the order for delivery.

Marked Exhibit P-30.

[Page 103, Book of Pleadings and Exhibits.]

I request the defendant to produce the bill of lading. (Which being produced by the defendant was marked Exhibit P-31.)

[Page 104, Book of Pleadings and Exhibits.]

Mr. Hobart:—Also I ask the defendant for the postal card notice.

Which being produced was marked Exhibit P-32.

[Page 105, Book of Pleadings and Exhibits.]

Q. Please refer to your car service record book and state when the car arrived, and when notice was sent? A. August 28th, notice sent the same day.

Q. Do you recall receiving any letter from the lumber company with regard to this car? A. I received a letter from them in regard to some car; I don't know whether it was this particular car or not, stating that we had such and such a car, stating which one it was, that they were in need of the contents of the car, and wanted it delivered down at their shed.

Q. Have you the letter? A. Yes, sir.

Q. Please produce the letter? A. I produce a letter dated August 29th, 1905.

Q. Was this received in the usual course of the mail? A. Yes, sir.

Mr. Hobart:—I offer it.

Marked Exhibit P-33.

[Page 106, Book of Pleadings and Exhibits.]

Mr. Hobart:—I will read this letter. (The letter being then read to the jury.)

Q. When was that car released according to your records? A. That car was released September 16th at 5 P. M.

Q. What was done on that day? A. That car was forwarded to—well, I think we had some disturbance up there in regard to that car—the car was taken to Weehawken.

Q. Do you remember whether at the time it was removed on September 16th, any car service had accrued, and does your records show any car service on that? A. Yes, sir.

Q. How much? A. September 16th shows about—

Q. We claim $14. A. $14, that is right.

Q. Can you tell us between what dates? A. Yes, between the date of the notice and the release of the car.

Q. That is August the 28th and September 16th? A. Yes, sir.

Q. Where was that car during that period? A. On public delivery track.

Q. Did the lumber company offer to pay car service? A. No, sir.

Q. Or any part thereof? A. No, sir.

Q. Did they offer to pay freight? A. They offered to pay freight charges if I remember right.

Q. Do you remember as to that car whether any question was raised as to the signing of a receipt? A. I could not say whether that was one of the cars.

Q. Was there more than one car as to which a question was raised about signing a receipt before the lumber was actually delivered? A. That I could not say positively, but there was one car that they refused to sign the receipt, accepting the car and paying charges.

Record offered and admitted—Marked P-33½.

[Facing page 106, Book of Pleadings and Exhibits.]

Mr. Hobart:

Q. Now, let us take car 32537, and I will offer the way-bill.

Marked Exhibit P-34.

[Facing page 106, Book of Pleadings and Exhibits.]

Also order for delivery.

Marked Exhibit P-35.

[Page 107, Book of Pleadings and Exhibits.]

Also transfer slip.

Marked Exhibit P-36.

[Page 107, Book of Pleadings and Exhibits.]

And copy of bill of lading.

Marked Exhibit P-37.

[Page 108, Book of Pleadings and Exhibits.]

Mr. Hobart :—I asked the defendant for postal card notice of arrival.

Mr. Cabell :—Here it is.

Mr. Hobart :—I offer it.

Marked Exhibit P-38.

[Page 110, Book of Pleadings and Exhibits.]

Mr. Hobart :—I ask you to refer to your car service record.

Q. State when car 32537 arrived? A. September 11th, 2 P. M.

Q. When was postal card notice sent? A. September 12th.

Q. The next day? A. Yes, sir.

Q. Where was the car placed? A. On public delivery siding.

Q. Was any demand made that it be placed on the private siding? A. I think so.

Q. Did you refuse? A. I did.

Q. When was it sent to Weehawken? A. It was sent to Weehawken, September 16th at 5 P. M.

Q. How much car service on that car? A. $2.00.

Q. Has it been paid? A. No, sir; only by advances.

Q. You never collected the money from the lumber company? A. No, sir.

Q. Now, do you have any recollection as to any event that took place with regard to that car on a certain Saturday? A. I think, if I am not mistaken, that that was a car that there was—that they undertook to unload without paying the car service, and I requested them to stop, and they continued and I reported the matter to the superintendent, who sent an officer out there, and others, to stop—

Q. And it was stopped, was it? A. Yes, sir.

Q. And was that the day before it was removed to Weehawken? A. I think it was removed the same date, if I am not mistaken.

Q. What does your record show? A. It went to Weehawken on the 16th.

Q. Was any freight charge tendered? A. Of that I could not say positively—I don't remember.

Record offered and admitted P-38½.

[Facing page 110, Book of Pleadings and Exhibits.]

Q. Now, subsequent to this time did you send any communication to the lumber company with regard to all of these cars? A. I have sent them a letter in regard to all these different cars.

Mr. Hobart:—I ask the defendant for letter dated October 5, 1905.

Marked Exhibit P-39.

[Page 111, Book of Pleadings and Exhibits.]

Letter dated October 5th, 1905, being produced by the defendant was then read to the jury by Mr. Hobart.

Mr. Hobart:—I would like to offer the records of the car service book, such as have not been already offered, and I would suggest that as a matter of convenience we might use this, which has been made up by Mr. Campbell as a copy from the books.

Mr. Cabell:—I would not want to take that as evidence.

Mr. Hughes:—There is no objection to having it used when we are talking.

Mr. Hobart:—If you are not going to let it go in, I will keep it for my own benefit.

The Court:—The books are in, however.

Cross Examination by Mr. Cabell:

Q. Now, Mr. Campbell, you have testified that car 100824, you recognized the signature—whose signature is that? A. That is not my signature, that is my assistant's signature.

Q. He had authority to sign your name? A. Yes, sir.

Q. Is that date in his hand, too? A. None of that is in my handwriting.

Q. That is all in his handwriting? A. Yes,sir.

Q. You recognize it as such? A. Yes, sir; I should judge that was his handwriting all the way through; it is not mine.

Q. There is a postmark on this, April 28th? A. Yes, sir.

Q. You have begun to figure your demurrage as that notice was given on the 27th? A. No, sir; April 4th.

Q. Why did you give this notice? A. That is a second notice—

Q. It does not say so. A. That is all right, but there has been two notices on that car.

Q. But I notice in another car you gave three notices, you said 1st, 2nd and 3rd notice; now, why didn't you use second notice on that? A. I don't know why he did not put second notice on there; of course, had I done it myself, I, no doubt, would have done so.

Q. Did Mr. Thrift come out the next day to see you? A. On April 28th?

Q. Yes. A. I could not tell you.

Q. Mr. Davis was there? A. Yes, sir.

Q. He was up in your office on the 27th? A. He was there some day.

Q. And it was because Mr. Davis was there that this postal notice was sent, wasn't it? A. I don't know.

Q. And was it because that Mr. Davis was there that this letter was sent? A. That was dictated by Mr. Davis.

Q. Up to that time you had not intended to send any notice for this car, had you? A. There had been a notice already.

Q. You had not intended to send a second notice, had you? A. Sometimes I do, and sometimes I do not.

Q. You were placing cars on the lumber company's switch; at this time you had not yet refused to place them on the lumber company's switch? A. No, sir.

Q. This car, according to your statement any demurrage, and you went there in early April, April 5th, it had not been down on the lumber company's switch, any time between the 5th of April and the 27th of April, had it? A. No, sir.

Q. And you allowed it to stay up in the yard? A. No, sir.

Q. Didn't you allow it to stay up in the yard? A. It was allowed to stay there; yes, sir.

Q. Where was it in the yard? A. At number 1 switch, our storage switch.

Q. Where is that? A. The storage switch is here (indicating on the map).

Q. But this was not on the public delivery track? A. No, sir.

Q. And you could not get at it with a wagon? A. No, sir.

Q. Was it north of the station, the present station, or south? A. When I went to Wanaque-Midvale, the second time, to take charge, they stood about there, in that position from the station, just about opposite there.

Q. And they moved it around from time to time? A. No, sir; the car stood in that position all the time.

Q. A minute ago you pointed to a point north of the station? A. No, sir.

Q. This switch that this car was on? A. That was on this switch, right here, the second track east of the main track.

Q. It was there on the 5th of April, wasn't it? A. Yes, sir.

Q. Did you say anything about it? A. Yes, sir; at the time I went there they had five or six cars; the lumber company had five or six cars at No. 1 switch, there was one for Erie cars, the rest were foreign; there were several foreign cars, I know that.

Q. And some other cars came in afterwards? A. I think not.

Q. Mr. Thrift complained about the bunching of these cars? A. He said they had been bunched; he told me that the cars had been ordered to come at certain periods of time.

Q. And you kept on placing between this time and April 27th, you placed cars? A. I placed all these other cars.

Q. But you had not placed this car anywhere

where it could be reached by a team? A. It was evidently placed on the paper mill switch.

Q. I mean on April 27th? A. No, sir; it was not ordered there.

Q. Why did you, on April 27th, suddenly mail a postal notice and a letter; why was it on April 27th suddenly you sent out these notices? A. That was the request from Mr. Davis, he told me to do so.

Q. He used to come out and jack the agents up; Mr. Davis was in the habit of coming out and interfering with the management of the office, wasn't he; didn't he direct you what you were to do? A. He gave me instructions—he instructed me as to the handling of the car service rules, and applying them to cars in general.

Q. And he directed you about the making up of the car service book, didn't he? A. Yes sir; he showed me how to apply the rules.

Q. He showed you how things that had not been entered up for several weeks, should be entered up now? A. No, sir.

Q. Wasn't it at that visit of Mr. Davis that this car service book was fixed up in its present form, and all those corrections made? A. No, sir; those cars were put on there before Mr. Davis came there.

Q. Mr. Davis is the car service inspector? A. I believe he had charge of that division.

Q. Mr. Davis made a particular investigation as to the Wanaque lumber cars, didn't he? A. No, sir; he took up every car.

Q. Why was it you sent both a postal notice and a letter at the same time? A. Well, the postal notice is supposed to be the legal notice for the arrival of cars; and he requested that to be made, and also a letter calling your special attention to the car, that particular car; it was the only car they had in the yard at the time.

Q. $17 demurrage, that is the charge, $17 demurrage? A. I believe so, at that date.

Q. Why was it when you placed that car, as you say, on May 5th, that you did not charge more than $17 demurrage; you say you think you demanded $17 demurrage, now, if there was $17 due on the 27th of April, why didn't you charge $5 or $6 more for the additional time, when you placed it there on May 5th? A. We don't usually do business that way.

Q. Why, April 27th, $17 was due? A. Yes, sir.

Q. When you placed it there on May 5th, why didn't you say, instead of "you must pay $17 more before you can get that car," why didn't you say 23 or 24, whatever the proper calculation might make it? A. I think the proper calculation is $27.

Q. Now, ten days later he says you placed this car on their own siding for the Wanaque Lumber Company's agent with a demand for $17 only for demurrage, now, why didn't you—why six or seven days later than the date of that letter when you say there was $17 due, why didn't you add six or seven dollars more and tell them it was twenty-three or twenty-four dollars? A. Because we don't do business that way, we don't compute that way; we charge a man what it had actually earned and no more.

Q. Why didn't you tell him there was twenty-two or twenty-three or twenty-four dollars due on May 4th instead of charging him $17? A. I could tell by computing the time.

Q. But why didn't you, is the question? A. I gave them the benefit of the doubt.

Q. If $17 was due on the 17th of April could there be any doubt that seven or eight dollars more would be due on the 5th day of May—you said you asked them for $17? A. I told them that was the amount due.

Q. You say you put the car in there locked, and

said, I will take those locks off when you pay me $17 demurrage? A. Yes, sir.

Q. Why didn't you then ask for $23 or $24? A. At the time Mr. Thrift came to the office in regard to this particular car, I run over the time and told him that the charges, those the car had earned in car service, were $17 at that time.

Q. It had earned $17 by your statement a week before—ten days before?

The Court:—Do you understand what he means?

A. He wants to remember that this car which arrived on March 27th, that was prior to my being there, and I did not know anything about that car, excepting that there were several cars in the yard at this same time.

The Court:—April 28th you wrote there were $17 due; subsequently to that you told Mr. Thrift there were $17 due, there must have been more than $17 due; now, why did you fix it at $17?

A. I am figuring on this from the date of the first postal notice.

Adjourned till 10.15 A. M.

Wednesday morning, 10.15 A. M., February 6, 1907.

Same witness resumes the witness stand.

Further Cross Examination by Mr. Cabell:

Q. It was their custom to mail postals at Wanaque for the Wanaque people? A. Yes, sir.

Q. Was this the uniform custom? A. No, sir; sometimes, if we don't have time to get them down there we would put them on the mail train.

Q. Where would they go then? A. They were supposed to go in the mail pouch—we asked them to put them in the Wanaque box.

Q. They would not have time to put them in there would they—the pouch is locked, isn't it? A. It is not supposed to be.

Q. How far is it from Wanaque-Midvale station down to Wanaque, how far is it? A. That I don't know.

Q. Is it a mile? A. Oh, no.

Q. Can the mail agent unlock the pouch and sort over letters that are handed to him and distribute the Wanaque mail in the pouch? A. We would not hand him only the ones to go to Wanaque.

Q. And doesn't he have to put his official stamp on the letters after he received them? A. Yes, sir.

Q. It is his duty? A. Yes, sir.

Q. Then, as a matter of course, this letter would be received by the mail agent, stamped by him and taken on to Jersey City? A. At times he would; yes, sir.

Q. And if you posted a notice up at Midvale for a Wanaque person, that would go through what course? A. That would be put in the mail pouch and taken out of the train; I am not posted on the post office rules.

Q. How long after the notices were dated did you post them? A. They were usually posted the same day that they were made or the next morning.

Q. Did you always date the postals the day that you made them out? A. Yes, sir; the same day that they were made out they were dated.

Q. I am going to ask you if you know the signature of that postal? A. Mr. Van Duyn.

Q. Is he your assistant? A. Yes, sir.

Marked Exhibit D-1½ for identification.

Q. Do you recognize that signature? A. Yes, sir.

Q. And this signature? A. Yes, sir.

Marked Exhibit D-2 for identification, the postal being dated 1-3-07.

Q. And do you know the signature on this postal? A. Yes, sir.

Marked Exhibit D-3 for identification, dated 1-3-07.

Q. Do you recognize that signature on that postal which I now show you, dated 1-3-07? A. Yes, sir.

Marked Exhibit D-4 for identification.

Q. Do you recognize that signature? A. Yes, sir; that is Mr. Van Duyn's also, dated 1-3-07.

Marked Exhibit D-5 for identification.

Q. Do you know the signature on that postal? A. Yes, sir; Mr. Van Duyn's.

Dated 1-2-07. Marked Exhibit D-6 for identification.

Q. Do you know the signature of that postal? A. Yes, sir; the same.

Marked Exhibit D-7 for identification, dated 1-1-07.

Q. Do you know the signature on that? A. Yes, sir; the same.

Marked Exhibit D-8 for identification, dated 1-1-07.

Q. Do you know the signature on that postal? A. Yes, sir; the same.

Marked Exhibit D-9 for identification, dated 1-1-07.

Q. Do you know the signature on that postal? A. Yes, sir; the same.

Marked Exhibit D-10 for identification, dated 12-31-06.

Q. Do you know the signature on that postal, dated 12-31-06? A. Yes, sir.

Marked Exhibit D-11 for identification.

Q. Do you know the signature on that postal? A. Yes, sir; the same, dated 12-31-06.

Marked Exhibit D-12 for identification.

Q. Do you know the signature on that postal? A. Yes, sir; the same, dated 12-31-06.

Marked Exhibit D-13 for identification.

Q. Do you know the signature on that postal? A. Yes, sir; the same, 12-31-06.

Marked Exhibit D-14 for identification.

Q. Do you know the signature on that postal? A. Yes, sir; the same, dated 12-31-06.

Marked Exhibit D-15 for identification.

Q. Do you know the signature on that postal? A. Yes, sir; the same, 12-31-06.

Marked Exhibit D-16 for identification.

Q. Do you know the signature on that postal? A. Yes, sir; the same, 12-31-06.

Marked Exhibit D-17 for identification.

Q. Do you know the signature on that postal? A. Yes, sir; the same, dated 12-31-06.

Marked Exhibit D-18 for identification.

Q. Do you know the signature on that postal? A. Yes, sir; the same, dated 12-31-06.

Marked Exhibit D-19 for identification.

Q. Do you recognize the signature on that postal, dated 12-29-06? A. Yes, sir; the same.

Marked Exhibit D-20 for identification.

Q. Do you recognize the signature on that postal? A. Yes, sir; the same, dated 12-28-06.

Marked Exhibit D-21 for identification.

Q. Do you recognize the signature on that postal, dated 12-28-06? A. Yes, sir; the same.

Marked Exhibit D-22 for identification.

Q. Do you recognize the signature on that, dated 6-12-06? A. That is a mistake.

Marked Exhibit D-23 for identification.

Q. Your system is the same for all—the system is uniform for all? A. Yes, sir; only in cases of the Wanaque Paper Company, besides the postal notices sent, we send them their freight bill—the freight bill is sent to the paper company—we send that down every day.

Q. When is it sent? A. That is taken down when they take the yard.

Q. Sent down every day? A. Yes, sir.

Q. That is the uniform practice? A. Yes, sir; to take the yard—when we take the yard, to take the freight bills, and leave them at the paper mill office.

Q. Then they got a special notice? A. Yes, sir; they get a special notice that way.

Q. And you take those down as the cars arrive? A. Yes, sir; that is so they can check against their freight.

Q. Are you sure you take them down as the cars arrive? A. Yes, sir; once in a great while we make a mistake and take one down before the car arrives.

Q. If there is a mistake on the freight bill, you

take them down, isn't there a mistake on your book, too? A. The postal notice would not go down until the car arrives.

Q. Car 100824, you said was on one of your storage sidings? A. Yes, sir.

Q. On what date did you first notice it there? A. The date I went there, it was there when I took charge.

Q. Did you go out and take all the cars in the yard that day? A. No, sir; but that car stood almost opposite the station, and it stood there until it was ordered placed on the paper mill switch.

Q. When was that? A. The book shows that.

Q. Don't they drill on that track—don't the locomotives drill there? A. Not at that time, they do not.

Q. Didn't you have any drills then? A. No drill at that time—we had a regular freight train.

Q. Didn't the freight train have to drill to take cars out that were unloaded, and put in cars that were not unloaded—that car 100824 was on a certain switch, I ask you did not the locomotives drill on that same switch? A. They did not have to move that car.

Q. Were there not any cars down this side of it—south? A. Yes, sir.

Q. Didn't they have to have those out? A. When the lumber company ordered them to take them out.

Q. Didn't they have to take other cars out below car 100824? A. They took cars out for the lumber company.

Q. Did they take them out? A. Yes, sir.

Q. What did they do with car 100824? A. It was put back again.

Q. But they had to remove it? A. Yes, sir.

Q. Then it was moved? A. Yes, sir.

Q. Did they always put it back in the same spot? A. They drew it back in No. 1 switch.

Q. In the same storage switch? A. Yes, sir.

Q. Did you have a track at that time, a rough track, going down through the gravel pit, or to the edge? A. There is a switch like that but it is not connected up now.

Q. Was it then? A. I think not.

Q. Have you any switch—had you any switch then to the east of the main track at Wanaque connected up with the other tracks at Midvale? A. Just as they are now.

Q. There is no such switch marked on this map, and I ask you if at that time there was such a switch, in 1905? A. The switches were as they are now.

Q. There was one going down to the edge of the gravel pit? A. Not connected with the main track as I remember.

Q. Didn't you push a car down there occasionally that you did not want? A. No sir; it was rather difficult to get down there with a number of cars.

Q. Then you could not get cars down? A. Not in the gravel pit.

Q. Didn't they move this car, 100824, down below the station in the course of their drilling? A. Yes, sir.

Q. How far down did they get it? A. They might have moved it perhaps 200 feet, maybe.

Q. It was moved back and forth in the switch? A. Yes, sir.

Q. But it would not be moved down as far as Drew's mill? A. No, sir.

Q. You charged car service for the time it was there on this track number 1? A. Yes, sir; for a portion of the time.

Q. Why didn't you put that car on the public team delivery track at Midvale? A. Because the car was placed in number 1 switch for storage, and it had been our custom before that to place lumber cars on their plant on the Wanaque switch.

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Q. You had no idea that they would unload it there? A. No, sir.

Q. They could not have done so, could they? A. Didn't expect them to.

Q. You said you delivered to everybody at Wanaque-Midvale on the public delivery switch. You would not place it on the lumber company switch or on the Wanaque switch, between the highway and the main track? A. That the car was placed on the Wanaque switch after it was ordered there.

Q. When? A. The book will tell.

Mr. Hobart:—You may refer to the book if you wish.

Mr. Cabell:—Never mind—when car 70183 arrived, where was it placed?

A. On the public delivery.

Q. What was the reason for the change? A. Because the lumber company would not pay car service.

Q. What car service? A. On 100824.

Q. Did they admit there was car service due on it? A. There was car service due on it.

Q. Did they admit it? A. I don't know.

Q. What did you say? A. I said Mr. Thrift would not recognize car service.

Q. Under any circumstances? A. Yes, sir.

Q. Then he did not recognize such a thing as car service on this car? A. Yes, sir.

Q. Then he disputed the car service on this car? A. Yes, sir.

Q. Didn't he tell you actually that he would not recognize the Car Service Association? A. He told me he would not pay car service.

Q. Didn't he tell you he would not recognize the Car Service Association? A. I don't think he did.

Q. You never did place car 70183 down on the

siding in front of the lumber shed, did you? A. No, sir.

Q. You never placed it down on the siding between the main track and the highway that is spoken of as the Wanaque siding? A. I don't think that car was ever down there.

Q. Freight was offered for that car, wasn't it? A. I think so, I won't say positive.

Q. When freight was offered were you requested to put it down on the siding by the lumber shed? A. Yes, sir.

Q. Were you requested to put it on the siding anywhere else? A. On the lumber company's sheds.

Q. Were you requested to put it anywhere else? A. No, sir.

Q. Were you requested to put it down on the siding between the main track and the highway, what is known as the Wanaque siding, were you requested to do that? A. I don't remember that.

Q. And freight was offered to you for that? A. As I remember, I think it was, I won't say positive.

Q. What did you say when they offered you the freight, did you take it? A. No, sir.

Q. Did he offer to pay the freight then and unload in the yard? A. As I remember at the time he asked for that car.

Q. Answer the question—did he offer you the freight then and offer to unload it in the Midvale yard? A. I think he did.

Q. Did you accept it? A. I did not.

Q. You refused to deliver this car to him in the Wanaque yard when he offered you the freight, did you? A. Yes sir.

Q. Car 42865—you received a way-bill for that, didn't you, from Alcott & Company? A. Not from Alcott & Company. I received the way-bill on the car as usual—

Q. A way-bill—a bill of lading, I mean; did you receive a bill of lading from Alcott & Company? A. No sir.

Q. Didn't you write to Alcott & Company asking them for it? A. I wrote to them asking for that car, for a delivery order.

Q. Didn't they send you the bill of lading? A. Not to me.

Q. Didn't they? A. I think not.

Q. Did you ever receive this bill of lading? A. Not that I know of.

Q. Don't you know you wrote to Alcott & Company and insisted on having it? A. I wrote to them for an order.

Q. Didn't you write to them insisting on the bill of lading itself? A. I don't think I did.

Q. Had you any reason for asking for a bill of lading for that car, from the consignee? A. I don't think I did.

Q. Did you ever ask a consignee for a bill of lading before except where a sight draft accompanied it or something of that kind--except in this case you have never asked before for a bill of lading? A. I don't think that I have.

Q. Why was it in this instance you asked for the bill of lading before the car arrived? A. I did not ask for it before the car arrived.

Q. Why did you ask for the bill of lading at all? A. I wanted to know whom it belonged to.

Q. Didn't the bill of lading show that? A. No, sir.

Q. You notified the Wanaque Lumber Company of it, didn't you? A. After a time.

Q. Were you not getting ready for a fight with the lumber company? A. No, sir.

Q. Were not your superior officers? A. I don't know.

Q. Didn't your superior officers instruct you to get this bill of lading? A. Not that I know of.

Q. Were you offered freight on this car? A. I was offered an unsigned check for that car.

Q. Were you offered the cash for that car? A. Yes, sir; after a time.

Q. Did they ask you to place it when the offer was made—place it on the lumber siding? A. They made the usual request.

Q. And did they request you then in default of the delivery to place it on the siding between the main track and the highway known as the Wanaque siding? A. I don't know of any Wanaque siding.

Q. Well, what has been spoken of as the Wanaque siding, where you delivered to everybody else? A. I don't deliver to everybody else.

Q. Oh, all right, we will get that pretty soon—then, did they offer the freight and say they would unload in the Midvale yard? A. I think they did make such an offer.

Q. When they offered you the cash, and offered for delivery in the Midvale yard, did you accept it? A. I did not.

Q. You refused it? A. Yes, sir.

Q. You refused to give them the freight? A. Yes, sir; I refused to give them the freight without the receipt.

Q. Did you make any additional demand there? A. Yes, sir.

Q. What was it? A. I wanted a receipt.

Q. Where did this colloquy take place? A. At the office, with Mr. Thrift.

Q. What did you do when he offered you the freight under those circumstances? A. I asked him to sign the receipt.

Q. Did you offer him a receipt to sign? A. I offered him the freight receipt right there.

Q. You did not take him up and show him the car? A. No, sir.

Q. You did not break the seal on the car? A. No, sir.

Q. Car 1108—did Mr. Thrift come up to see you about that car? A. I suppose so, or sent freight to me.

Q. Did he offer you the freight for me? A. That I could not remember whether he did or not.

Q. Did he request you to place it down on the lumber siding? A. Yes, sir.

Q. Did he request you to place it on the siding between the main track and the highway? A. I don't remember that he did, he wanted it placed down by the shed.

Q. Did he request you then to place it up on the switch in the Midvale yard? A. If I remember right, that car stood there.

Q. Did he offer to unload it there? A. That I could not remember.

Q. You know he did in that case just like he did in the others? A. I think he did, but I am not positive.

Q. He offered you the freight for that car, and he offered to take delivery at Midvale, and you refused it, didn't you? A. On the same ground as the others.

Q. And you handed the receipt up in the same way? A. Yes, sir.

Q. That was done at your office at the station? A. Yes, sir.

Q. I suppose you were inside the grating and he was outside the grating? A. Yes.

Q. You did not offer to show him the goods—you did not offer to break the seals on the car? A. As I remember, that was an open car.

Q. Now, L. S. & M. S. car 4988, did Mr. Thrift come up to see you about that car? A. I believe so.

Q. Did he ask you to deliver at the siding in front of the lumber shed? A. I believe so.

Q. Did he ask you to deliver it—in default of

that, did he ask you to deliver it on the Wanaque siding? A. I don't think so.

Q. You know he did? A. He wanted it placed down on the paper mill switch.

Q. Didn't he make the same offers that he did in the other case? A. No, sir.

Q. He offered you the freight? A. I believe so.

Q. He said he did anyhow. A. I believe so.

Q. He said that he did? A. I think so.

Q. Do you know? A. As I remember he offered me the freight.

Q. Did he offer you the freight and offer to take delivery up in the Midvale yard? A. I believe so.

Q. You know it, don't you? A. I think so; yes, sir.

Q. What did you do when he offered to give you the freight? A. I wanted a receipt.

Q. You were inside the grating then? A. Yes, sir.

Q. And you handed out the form? A. I did.

Q. You refused to deliver this car when he offered you the freight? A. I think there was car service on that car.

Q. I ask you if, that when he offered you the freight, on condition that you allow him to unload in the Midvale yard, you refused it, didn't you? A. Yes, sir.

Q. Car 32536, did Mr. Thrift come up to see you about that car? A. I believe so; or sent word to me.

Q. Did he offer you the freight? A. I think so.

Q. Did he ask you to place it down on the paper mill lumber yard switch? A. Usually.

Q. Did he then, in default of such delivery, ask you to place it on the siding between the main track and the highway, known as the Wanaque siding? A. Nothing that I remember of.

Q. Didn't he ask you to deliver it down there

where you deliver it to other people? A. I don't remember.

Q. Or where you deliver it to everybody else, wasn't that the expression? A. I don't remember.

Q. Then he offered the freight, offering to take delivery up at the yard, didn't he? A. That car, I don't just remember.

Q. You know he did, don't you—you were standing inside your grating and he was outside the window—now just refresh your recollection? A. I don't remember about that car, but there was some controversy about it.

Q. He offered you the freight and deliver it on the Midvale siding? A. Yes, sir.

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

Q. Did you offer him a receipt and say you would deliver it if he signed the receipt? A. Yes, sir; that is the usual custom.

Q. That is the way you did? A. Yes, sir.

Q. But it had not been your custom with the Wanaque Lumber Company before this little unpleasantness? A. No, sir; until this trouble commenced.

Q. You had instructions from your superior officers about this, hadn't you? A. I believe I had.

Q. Didn't they tell you not to deliver to the Wanaque Lumber Company under any circumstances if you could help? A. No, sir.

Q. Didn't they tell you to throw everything possible in their way? A. No, sir.

Q. Are you sure of that? A. Yes, sir.

Q. Didn't Mr. Davis come up there and see you about it? A. No, sir.

Q. Didn't he come up there and give you positive orders about these cars; didn't he say they refused to recognize the Car Service Association, and they must be brought to terms? A. He said I must enforce the car service rules.

Q. Didn't he tell you the Wanaque Lumber Com-

pany must be made to recognize—didn't he tell you to tell them that they had better come down and see the Car Service Association in the Car Service Association in New York? A. No, sir.

Q. Did Mr. Davis say that in your presence? A. I believe he told Mr. Thrift that in his office.

Q. To come down to the car service office, and recognize the Car Service Association? A. I believe that was the conversation in Mr. Thrift's office.

Q. Now, this car service was insisted on so positively; according to your books all these bills were made out according to that car service book? A. Yes, sir.

Q. And the bill must be paid according to its face, mustn't it, according to the regulations that you were enforcing—the bill must be paid in full on its face, if the bill called for $18, the $18 must be paid? A. Yes, sir.

Q. And if the person paying it alleged there was an error, he was to go down to the car service office or send in a claim to Mr. Morse at the car service office, and they would consider it, and if the claim was just they would give it back, wasn't that the way? A. I think not.

Q. Would you adjust a bill yourself? A. When I got corrections, I adjust them.

Q. I mean, you have made out a bill according to your books for car service, we will say you presented to the person receiving the freight, or Mr. Davis presents it to him, do they not demand settlement for that bill, as it stands, without making any correction in the bill itself? A. Yes, sir.

Q. And then the corrections will be taken up afterwards on an application for refund of the money? A. Yes, sir.

The Court:—There is no dispute about that.

Q. Was not that the dispute with the Wanaque

Lumber Company, about car service, that they would insist on correcting errors first and paying afterwards? A. Not with me.

Q. Wasn't that the reason that the Car Service Association was after the Wanaque Lumber Company, wasn't that the reason? A. Not that I know of.

Q. Did you have any authority to adjust a car service bill after it was made out and presented? A. Not on the bill itself.

Q. When car 42865 was placed on the Midvale siding, can you show us on the map about where that was? A. As I remember that car was located right about here, about one car length north of the coal sheds known as Trengrove's coal sheds.

Q. It was about this point? A. About one car length west of Trengrove's coal sheds, that is the Michigan Central cars.

Q. Now, to get to that car, the Wanaque Lumber Company, after coming up the public highway to a point opposite the Wanaque-Midvale station, would drive from the highway into the Wanaque-Midvale station? A. Drive through the highway.

Q. About how far? A. A short block.

Q. 150 yards? A. Yes, sir.

Q. Then, up to the crossing? A. Yes, sir.

Q. How far is that? A. Perhaps 200 feet.

Q. 250 feet? A. About that.

Q. Then it crossed the main track? A. Yes, sir.

Q. And by the sidings? A. Yes, sir.

Q. Then they turned off and go up around the coal sheds, and passed them to the easterly side of that car, east of all the tracks? A. Yes, sir.

Q. Did they make any attempt to unload this car after they made you the offer? A. Yes, sir.

Q. What did they do? A. They went into the car and commenced unloading it.

Q. Didn't they actually unload it? A. I think they did.

Q. They put it in a field opposite the car? A. I think they did.

Q. Their object was to get that out of the car? A. Yes, sir.

Q. They did not carry it away? A. No, sir.

Q. They just put it out on the ground? A. Yes, sir.

Q. Did you tell them to stop? A. Yes, sir.

Q. Then Mr. Thrift went on down to the lumber yard? A. I believe he did.

Q. The same day you went down to see Mr. Thrift at the lumber office? A. I think I did.

Q. When you went down to the lumber office you agreed to accept the freight then, didn't you? A. I went down there and I did accept the freight.

Q. And gave a receipt for it? A. I don't think so, at the time, as I remember, at the time.

Q. You received the money for that freight? A. The amount of freight.

Q. The first offer had been made in cash and this time then he gave you a check, and you accepted the check? A. I believe so.

Q. What did you tell Mr. Thrift when you went down there? A. I told him I had had instructions from my superintendent to have them arrested for taking the lumber out of the car, and he said that he would pay the freight charges.

Q. He had already offered to do that? A. Yes, sir; and I told him "All right," but on that car there was $2 car service.

Q. Did you say then there was car service on that car? A. Not at the time I did not.

Q. Afterwards you discovered there would be car service on it, did you A. Yes, sir.

Q. You then had the freight? A. I then had the freight.

Q. Then what did they do the next morning

with reference to that lumber? A. The lumber was put back in another car.

Q. What did the Wanaque Lumber Company do with reference to that car? A. They undertook to cart it away, I think, the next morning.

Q. What did the railroad company do about it? A. They stopped them.

Q. How? A. They had an officer there.

Q. For the purpose? A. They had him go there.

Q. They knew about it? A. Yes sir; I had notified them.

Q. Did you go out and see what went on? A. No, sir.

Q. Who was there for the company to see about that? A. I think Mr. Edsal was the one.

Q. Then you did not see what occurred? A. No, sir; I did not.

Q. I will pass to car 22532 again—where was that car placed? A. About the same position, I think.

Q. It was a little further up, wasn't it? A. It might have been.

Q. You have already testified that freight was offered for that? A. I believe so.

Q. Did the Wanaque Lumber Company do anything with reference to that car after they had made the offer? A. Yes, sir; they undertook to unload the car.

Q. Did they succeed? A. I don't think so.

Q. Did you see what went on? A. No, sir; I did not.

Q. Then you don't know? A. No, sir.

Q. Now, I forgot about car 42865—after the lumber company was driven away from it, the goods were placed on the ground? A. Yes, sir.

Q. The lumber people were driven away? A. Yes, sir.

Q. Then what became of the lumber? A. The

lumber was put back in another car, an Erie car, I think.

Q. It was not put back in the same car? A. No, sir.

Q. That was a foreign car? A. Yes, sir.

Q. You did not put it back in the foreign car? A. No, sir.

Q. Why did you make the change? A. Because we wanted it out of the foreign car because we had to pay a per diem on the foreign car.

Q. Then you held this car there for quite a while, this new car— A. This Erie car—yes, sir.

Q. And finally you did what? A. Sent it to Weehawken.

Q. Billed it to Weehawken? A. Yes, sir.

Q. To whom? A. To our general agent.

Q. It did not belong to him? A. No, sir; it was for storage.

Q. Why didn't you put it in storage in Midvale?

The Court:—What difference does it make where it was stored. I don't see any use asking why he did not put it in some other place. It makes the record longer and takes time.

Q. Are you familiar with the rules of the New York and New Jersey Car Service Association? A. Well, not as familiar as I ought to be.

Q. You attempt to enforce them? A. Yes, sir; I do as far as I know.

Q. When cars are consigned direct to a team or private tracks or on standing or advance orders, when does car service begin? A. It should begin from the time the car arrives.

Q. It should? A. Yes, sir.

Q. Will you look at the rules and see if you can find me a rule to that effect and read it to me—I will call your attention to rule number 2? A. Rule number 2 and 3 will cover that.

Q. I will read rule number 2 (reads rule number

2 as follows): "On cars consigned direct to team or private tracks, or which may be so delivered on standing or advance orders from the consignee, car service will be charged after the expiration of forty-eight hours from the time such cars are placed on the tracks designated." That is the rule, isn't it? A. I guess so.

Q. There is not any other rule about it, is there, about the time of arrival? A. Not that part, there is not.

Q. I show you Exhibit P-31, the bill of lading for car 44988—this is, Wanaque, New Jersey, at Paper Mill and Lumber Yard Siding? A. Yes, sir.

Q. Is that consigned to team delivery track? A. I don't know.

Q. It is consigned to a private track? A. Yes, sir.

Q. That rule seems to indicate that you should have placed it there, doesn't it—the rule we have just read—does that rule appear to you to designate that that car should be placed on the siding named in the bill of lading? A. It might have.

Q. Doesn't the rule appear to mean that to you? A. I should judge so.

Q. If you had seen such a bill of lading as that of anybody else's you would have placed it on the siding designated? A. I don't think so.

Q. (*By Mr. Cabell*) I show you Exhibit P-25 of bill of lading for car number 1108, destination, Wanaque, State of New Jersey, Paper Mill and Lumber Yard Switch? A. Yes, sir.

Q. Did you place it there? A. No, sir.

Q. Under that rule it appeared to be your duty to place it there? A. Well, it might, I suppose.

Q. If you had seen such a designation for anybody else's car you would have placed it there, wouldn't you? A. I don't know whether I would or not. I question it.

Q. You try to obey the car service rules? A. Yes, sir.

Q. Unless you get an order not to obey them from the car service people, isn't that it? A. Yes, sir.

Q. I show you Exhibit P-37, purporting to be a bill of lading for car 32537; it is consigned to Wanaque, New Jersey, Paper Mill and Lumber Yard Switch—you did not place it there? A. No, sir.

Q. It appears to be a specially designated switch, doesn't it? A. Yes, sir.

Q. Under the rules of the association it appears to you to be your duty to place it there, unless ordered differently by your superiors? A. Possibly, but it is a private switch, of course.

Q. Mr. Campbell, did you ever tell anybody that anybody could have delivery on that siding but the Wanaque Lumber Company? A. Not that I remember.

Q. But that was the fact? A. No, sir.

Q. Did you deliver goods down there during your administration to other people? A. I have done so.

Q. Whom have you refused prior to the summer of 1906? A. I think, if I am not mistaken, I refused David Reinsmith.

Q. Didn't he unload cars of manure on that siding? A. He started to unload one.

Q. When was that? A. I cannot tell you that.

Q. You stopped him there in December, 1906, didn't you? A. I put a car in on the hill.

Q. That is between the highway and the main track? A. Yes, sir; the car was in there and he commenced to unload the car; he was to have that car placed on Drew's switch.

Q. How do you know that? A. Because he had permission.

Q. How do you know he was going to place it

there? A. Because I was to put the car there the next day, and the following days he had commenced to unload the car, and he told the day crew to never mind that he would unload it where it was—he could get at it just as easy, and the freight crew left it there contrary to the orders that I had issued.

Q. Was a car, during your time, placed on the siding known as the Paper Mill and Lumber Yard Siding, to the west of the highway, for any person other than the lumber company or the paper company? A. I don't remember that.

Q. Do you remember Chester Slawson's car of furniture? A. I remember there was a car of furniture.

Q. Do you remember where that was placed—wasn't it placed near the lumber sheds west of the highway? A. I don't know.

Q. That was after the trouble there with the Wanaque Lumber Company? A. I don't know—it was since he came up there.

Q. You cannot tell whether it was before the trouble with the lumber company or after? A. No, sir.

Q. Mullen unloaded lumber there, didn't he? A. I don't think I ever had a car of lumber placed there for Mr. Mullen yet.

Q. Didn't you place some lumber for Mr. Mullen between the main track and the highway? A. I don't know that I did.

Q. There is no reason why you should not, is there? A. Not if he had permission.

Q. If he asked permission from whom? A. The paper mill.

Q. Isn't this land on which the siding is between the main track and the highway the property of the Erie Railroad Company? A. I never understood it as such.

Q. Well, it has been testified to here by all the

plaintiff's witnesses that it is? A. That is new to me—I didn't know it.

Q. You sat there and heard it? A. I never knew it before.

Q. You know the old Wanaque station was put on that land? A. I knew where it used to be.

Q. You knew that would be on the railroad company's land, didn't you? A. Sometimes they put them on other people's land.

Q. Do they? A. By lease or something of that kind.

Q. Can you tell us some such place on the Greenwood Lake branch? A. I don't know of any on the Greenwood Lake.

Q. Did anybody ever unload cars other than the Wanaque River Paper Company down on the paper switch—load cars—empties for shipping to other places?

The Court:—Was he asked about the use of that switch on direct examination?

Mr. Hobart:—I have no objections.

Mr. Cabell:—I will drop it.

The Court:—No; if it is cross examination you may have it.

Q. (*By Mr. Cabell*) Since this difficulty with the Wanaque Lumber Company, haven't you been a little more particular about your postal notices than you were before? A. Since July 1901, July 4, 1905, I have been more particular with all my work.

Q. Since July 1, 1906, you have been more particular than you were at any time before that, haven't you? A. No, sir.

Q. Then didn't you ever say since this trouble with the lumber company was on, you had to be careful now? A. I don't remember ever having said it.

Q. Are you sure? A. I won't be sure, but I don't think I did.

Re-Direct Examination by Mr. Hobart:

Q. Reference was made to the system of mailing —there is a post office at Wanaque? A. Yes, sir.

Q. Is that the post office address of the Wanaque Lumber Company? A. I believe so.

Q. And there is where all your postals were sent? A. Yes, sir.

Q. No objection was ever made to that method on their part? A. They asked me once or twice why I did not notify them direct to their office as long as we had to go right by it—

Q. Now, as to this first car, 100824, it appears that the charge was made for car service while it was on number 1 siding, which was not a place where it could be unloaded; now, why was car service charged during that period? A. Because I think that cars should be charged from the time of arrival—that is the understanding—the application of the rules.

Q. You had not received any order up to that time for placing it anywhere else? A. No, sir; none whatever.

Q. Was that car kept in the customary place? A. It was kept on our customary switch for storing cars.

Q. Awaiting orders for delivery? A. Yes, sir.

Q. And it was finally placed on the private siding? A. Yes, sir; after I got a notice to place the car down on the paper mill switch.

Q. Now, 70183 was never placed on the siding at all? A. No, sir.

Q. Now, something was said about freight being offered and delivery asked for at the public delivery track at the Wanaque-Midvale station—now at

that time was any offer made to pay the car service on that car? A. I don't think so.

Q. And had car service accrued at that time on that car? A. I believe there had.

Q. (*By the Court*) The fact is that you have never offered to pay any car service?

Mr. Cabell:—Not on any car in this lot.

Q. (*By Mr. Hobart*) Now, take car 42865, reference was made to the fact that freight was offered on that car, now, do you recall the reason for not accepting the freight on that car? A. I remember the freight was offered in an unsigned check.

Q. What was the point that you raised as to that car? A. Because they would not sign the receipt.

Q. Now, did you ever get a receipt for that car? A. No, sir.

Q. Have you looked for it since last night? A. I found my receipt, that is the freight bills, last night.

Q. You never got a receipt for that car? A. No, sir.

Q. You looked them over last night? A. Yes, sir; I have my files complete and I looked over them last night.

Q. Now, something was said as to the last three cars, 1108, 44988 and 32537, as to the freight being offered on those cars, and request being made for delivery on the public siding at Wanaque-Midvale? A. These cars were on that siding all the time.

Q. Now then, why did you not permit the lumber company to get the lumber on those three cars when they offered the freight?

Mr. Cabell:—That has been clearly testified to on the direct examination and cross examination.

Question withdrawn.

Q. Now, reference was made as to orders that were given by your officers with regard to deliveries to the Wanaque Lumber Company, what were the orders? A. I have them in my file.

Q. I don't want to go into all that detail, but state generally what they were?

Mr. Cabell:—Were they written?

The Witness:—Yes, sir; from the superintendent.

Mr. Cabell:—Then we object to that statement of them now.

Mr. Hobart:—I withdraw that.

Q. (*By Mr. Hobart*) Now, on cross examination reference was made to certain bills of lading for some of these cars which on their face consigned the car to paper mill and lumber yard switch, or in some cases lumber yard siding, did you, while you were at the station ever receive any other bills of lading, these specially consigned, except the certain cars for the lumber company? A. No, sir.

Q. Have you ever heard or known of any such switch or siding at Wanaque-Midvale as the paper mill and lumber yard switch?

Mr. Cabell:—Objected to.

The Court:—You asked him about the switches and about the consolidation of the stations and I cannot see how this is rebuttal. The objection is sustained.

Mr. Hobart:—I will state that the purpose of the inquiry is to show that there is not, and never was any such siding or switch described in that way at that station or anywhere else on the Greenwood Lake division.

Exception allowed to plaintiff.

Let it be sealed and it is sealed accordingly.

WILBUR A. HEISLEY, *J.* [SEAL]

MR. FRANK E. SMITH, sworn in behalf of the plaintiff, testified as follows:

Direct Examination by Mr. Hobart:

Q. You are the division freight agent of the Erie Railroad Company? A. Yes, sir.

Q. And have been for some years past? A. For eight or nine years.

Q. Does your division include the Greenwood Lake branch? A. Yes, sir.

Q. Which of course includes the Wanaque-Midvale station? A. Yes, sir.

Q. And as far as the freight business is concerned are you the immediate superior of the freight agent at Wanaque-Midvale? A. Yes, sir, from the freight standpoint.

Q. Have you been at Wanaque-Midvale? A. Yes, sir.

Q. And noted the conditions there? A. Generally speaking; yes, sir.

Q. And you are familiar with the general situation? A. Yes, sir.

Q. From the year 1905, where was the public delivery track at that station? A. At the Wanaque-Midvale station.

Q. How close to the station building? A. Almost directly opposite to it—a little west.

Q. Now, you, of course, know of the siding that has been referred to as the paper mill siding? A. Yes, sir.

Q. Do you know of any switch or siding anywhere on the Greenwood Lake division which is in anyway described or designated as the paper mill or lumber yard switch? A. No, sir.

Q. Do you recall the occasion when the two stations were combined into one at that place some two years ago? A. Yes, sir.

Q. Prior to the consolidation was there a public

siding at the station called Midvale? A. Yes, sir.

Q. And also one at the station called Wanaque? A. Yes, sir.

Q. After the stations were combined was the public siding in Midvale abandoned? A. For general deliveries; yes, sir.

Q. The tracks themselves were still there? A. The tracks are still continued.

Q. Now, reference has been made by the witnesses to certain so-called rules, I refer you to rules marked Exhibit P-4½, and ask you whether or not, so far as your division of the Erie railroad was concerned, those rules had been adopted by the Erie Railroad Company? A. Yes, sir; they had been.

Q. And during the year 1905, were they, so far as the freight department goes, rules of the railroad company? A. Yes, sir.

Mr. Cabell:—Objected to.

Objection overruled.

Mr. Hughes:—We object on the ground that it has not been shown that the witness knows it is a copy.

Q. (*By Mr. Hobart*) Have you looked at it Mr. Smith? A. I have looked at a book of the same date.

Q. Look at that again and read it all through and see if those are the rules?

Q. (*By Mr. Hughes*) Have you ever compared that with the original rules of the Car Service Association?

The Witness:—Which question shall I answer?

The Court:—Answer Mr. Hobart's question.

A. I have looked at the book and examined it sufficiently to be able to say that they are the rules

that were adopted by the Erie Railroad Company and were in force in 1905.

Q. (*By Mr. Hughes*) Did you ever see the original rules of the Car Service Association? A. The originals before they were printed?

Q. Yes. A. No, sir.

Q. Then, of course, you never compared this printed copy with these original rules? A. No, sir.

Q. Then you don't know whether this is a true copy of those original rules or not? A. No, sir.

Mr. Hughes:—Then we object.

The Court:—Objection overruled.

Cross Examination by Mr. Cabell:

Q. How often do you go to Wanaque-Midvale? A. That varies considerably—it might be two or three times a month,

Q. How long do you stay there? A. Half a day at a time, sometimes a day, and sometimes only an hour or so.

Q. Do you go through the yard and take the car numbers? A. I have done so, sir.

Q. Why? A. Because of conditions arising making it necessary to do so.

Q. That happens very seldom? A. Very seldom.

Q. You know where the lumber yard is? A. Yes, sir

Q. You know where the paper mill is? A. Yes, sir.

Q. You know where the siding is that runs through the lumber yard and paper mill property, don't you? A. Yes, sir.

Q. You know where Drew's switch is, don't you? A. Yes, sir.

Q. You know where the Erie Railroad Company property is between the highway and the main

track, and south of Drew's mil', don't you? A. I don't know the line of the Erie Railroad Company's property at that point.

Q. You know the station was on it? A. Not from positive knowledge.

Q. Before the stations were consolidated, Mr. Smith, you know that was the only siding, don't you, for public delivery? A. At Wanaque?

Q. Yes. A. Yes, sir.

Q. And a large number of the Midvale people received their freight there, didn't they? A. I am not prepared to admit that, because I don't know it.

Q. You don't know? A. No, sir; we, at that time, you understand, had a station at Midvale.

PLAINTIFF RESTS.

MR. CABELL OPENS FOR THE DEFENCE.

HENRY WRITENOUR, recalled in behalf of the defence, testified as follows:

Direct Examination by Mr. Cabell:

Q. Do you remember receiving freight at Wanaque when Clyde Smith was the station agent there? A. Yes, sir.

Q. What kind of freight? A. Just when Clyde Smith was station agent I only remember receiving one car, and that was a car of potatoes; I may have received other freight, but I have nothing else in my mind definitely.

Q. Just one car of potatoes? A. That is all I remember.

Q. Will you tell us about that car—tell us what really occurred with reference to that car? A. I will, it is the only car of potatoes that I ever did receive on the road; it was, I think, three years

ago last fall ; I bought that car of potatoes subject to payable by draft in First National Bank in Paterson ; I went up to the office and asked Mr. Smith if that car of potatoes was in, and he said it was, so I said to Mr. Smith that I would go to Paterson tomorrow and pay the draft and come back tomorrow night and show the draft and give a check for the freight. I said to him : "I have not the check with me now but I will give it to you Friday morning and in the meantime will you place the car down on the Wanaque switch so I can unload it and I will get it early Friday morning," and he said "All right." I came to Paterson and paid the draft and went back and showed Mr. Smith the payment of the draft, or the receipt for the draft, and found to my surprise that the car had not been placed. It was standing on the middle track. I asked him why he had not placed the car, and he said he had not placed the car because the freight was not paid ; that is the only objection that he had had for placing the car. I said "Why didn't you say you would not place the car until the freight was paid, and I would have come back last night, because I want the car unloaded before it freezes." He did not know what to say and that is about the conversation, and the next morning I went to unload the car and I took out two loads of potatoes and carried them across one of the tracks to get them to my wagon ; I told Mr. Smith, I said, "If these potatoes freeze I will have to get damages from the Erie Railroad Company." He said, "Well, I don't know. I cannot place them until dinner time." I said, "Well, that will put me back with my work ; I want them down at the Wanaque switch, and if they freeze the railroad company will have to pay me damages." He said, "I will telegraph to Jersey City and see if I can get the engine that brings up the 9 o'clock train to

place it on the switch." Afterwards he told me that he did telegraph to Jersey City, and when that engine came up they took it down and placed it on the Wanaque switch.

Cross Examination by Mr. Hobart:

Q. Nothing was said about getting permission from the paper company? A. I never received permission from the paper company in any respect, and I have never told any person that I ever did.

Q. That was the only car you ever had delivered there? A. No, sir; I have had other cars delivered there.

Q. Where are your cars usually delivered? A. On the Wanaque switch. I have unloaded two cars from the switch up at Midvale during the present fall; the one above the present station.

Q. Now, this car of potatoes that you have referred, that was placed on the siding to the east of the highway, wasn't it? A. That was not placed ready to unload at all, it was on a siding but not placed so that I could get at it with a team, it was east of the highway.

Q. And these other cars that you have spoken of they are also to the east of the highway? A. Yes, sir.

WILLIAM F. WOSS, sworn in behalf of the defendant, testified as follows:

Direct Examination by Mr. Cabell:

Q. You are employed by the Wanaque Paper Company? A. Yes, sir.

Q. What is your position? A. Shipping clerk.

Q. Do you receive the mail? A. I do.

Q. I show you these—they are the same that I

showed Mr. Campbell? A. Yes, sir; I know these, these are postal notices from the railroad company.

Mr. Hughes:—Formerly marked for identification.

Q. Can you tell by any marks upon them what time they were received? A. I can tell the date but not the hour of the day.

Q. What mark can you tell by? A. The postmark.

Q. When did you receive those postal cards—look at each one of them?

The Court:—If he is going to go by the postmark why cannot any one tell as well as he?

Q. Can you tell any way except by the postmark? A. Yes, sir; I got them on January 4th.

Q. All of them? A. Yes, sir.

Q. Of what year? A. 1907.

Mr. Hobart:—What has that got to do with this?

Mr. Cabell:—It is testified as to the system followed by this agent—he testified how he kept this book from the time he first came there to the present time, and he has testified that he follows his system better now than he used to when this controversy with the lumber company arose, and I want to show that even now he delivers—he dates postal cards the 28th of December and mails them on January 4th of the following year.

The Court:—I don't see how that affects what he did two years ago.

Mr. Cabell:—(Further argument.)

The Court:—After all the real question is, what did he do? The other is simply his opinion upon his own services, whether he is more

efficient, more careful now than he was two years ago.

Mr. Hughes:—The witness testified directly that it was his custom to mail the postal cards the day they were dated—he testified to that.

The Court:—He said he did that as a general thing.

Mr. Cabell:—This shows it was not.

The Court:—That shows that in 1907 he did not.

Q. (*By Mr. Cabell*) In 1905 have you any knowledge of the system? A. Whose system?

Q. Of notice to the paper company of the arrival of cars from the Erie Railroad Company? A. I have knowledge.

Q. Was it their custom to give you postal notices promptly on arrival? A. No, sir.

Q. How long after the arrival of cars would postals be sent? A. The cards were practically worthless; we kept no track of them; we only got one or two cards possibly in a week; we did not keep any track of it at all because it did not serve any purpose whatever.

Q. Did you frequently unload cars before you got the notices? A. Yes, sir.

Q. They testified that they served the freight bill promptly upon the arrival of the car, is that true? A. No, sir.

Q. How long after the arrival of the car do they serve them? A. I have one particular instance that the freight bill is dated October, 1906—(I don't know the exact date), that is the car arrived in October, 1906, and I got the freight bill in January.

The Court:—After the occurrence.

Q. In 1905 what was their system as to the ser-

vice of these freight bills upon you? A. Some days we would get them—now we would get them promptly—if we asked for them. If we did not ask for them every day they would wait until we did ask for them and we would get several days accumulation.

Q. At that time did you depend upon the postal cards at all for notice of arrival? A. No, sir.

No Cross Examination.

J. GASTON DREW, recalled in behalf of the defence.

Direct Examination by Mr. Cabell:

Q. You are in business as a feed and flour merchant at Wanaque? A. Yes, sir.

Q. Were in the same business in 1905? A. Yes, sir.

Q. Throughout the year? A. Yes, sir.

Q. Between April and September, 1905, have you any recollection of this system of notifying you of the arrival of freight at Wanaque? A. Well, sometimes I got their cards, and sometimes I did not.

Q. What was your first knowledge of the arrival of a car frequently? A. Why, when they did not put it up on my switch when the car came in, I would have to send a man sometimes to hunt it up, and when I found it was up there I would ask to have it put down there.

Q. Did they place cars without being asked; did they place cars on your switch without being asked? A. Oh, yes—after they got an order from the superintendent to that effect.

Q. Did you depend upon the postals for notice of arrival of cars? A. No, sir.

Q. Did you depend on the officers of the Erie Railroad Company at all for notice of arrival of the cars? A. I did when Mr. Smith came up and hunted the cars, sometimes, and Mr. Davis—

Q. Did you ever receive notices of arrival of cars which had not arrived? A. Yes, sir—demurrage bills, too.

Q. Demurrage for cars that had not arrived? A. They had arrived but they took them away before they were unloaded.

Q. (*By Mr. Hobart*) Did you pay it? A. I did not.

Q. (*Further Direct*) What is the condition of the tracks at Wanaque-Midvale with respect to the number of cars? A. I don't understand.

Q. At the Wanaque-Midvale station in the yard, in that neighborhood, are there many cars there? A. As a general thing there are.

Q. Did you ever see empty cars standing about there? A. Oh, yes.

Q. For any length of time? A. Yes, sir.

Q. Have they ever lost any cars of yours? A. Yes, sir.

Mr. Hobart:—Objected to.

The Court:—I don't see how that is relevant.

Cross Examination by Mr. Hobart:

Q. What is your post office address? A. Wanaque.

Q. Who is the post master there? A. Mr. E. J. Ricker.

MARTIN DREW, sworn in behalf of the defence, testified as follows:

Direct Examination by Mr. Cabell:

Q. Where do you live, Mr. Drew? A. I live at Wanaque.

Q. Where did you live in 1905? A. I lived in Midvale?

Q. You have moved lately, haven't you? A. Yes, sir; I am living now with my son, and he lives at Wanaque; it is right near the dividing line. My residence has always been in Wanaque, and then when the railroads came they made it Midvale, the inhabitants didn't have any say about it.

Q. Do you know where the Wanaque switch is? A. Yes, sir.

Q. Will you show us on this map? A. This is called the Wanaque switch here, (indicating the switch leading into the paper mill).

Q. Before the two stations were combined did you ever have occasion to receive the freight at Wanaque? A. Oh, yes.

Q. Where did you receive it? A. On the Wanaque switch—yes; I have received freight there.

Q. Since the consolidation of the stations have you had any occasion to— A. No; not me, not to receive any freight there.

Q. Have you seen other people do so? A. Yes, sir; I have seen other cars in there.

Q. Did you know of anybody ever having received delivery there prior to the difficulty with the lumber company? A. No, sir; I never heard of any objection.

Q. Anybody might have delivered there who wished? A. I never heard any one rejected; I know that different parties have received freight there; I have received freight there.

Q. Did you ever deliver ties there for the railroad company? A. No, sir; not me, I have not delivered any ties there; I will say that my son had a saw mill there, and I cut off my forest lumber, and I sawed lumber there—had the lumber sawed there, and I have loaded cars right there—parts of cars, and shipped it away. That was be-

fore 1905; that was before 1905 that I have shipped cars and lumber, etc., away from there.

Q. Have you seen ties delivered there for the railroad? A. Oh, yes.

Q. When? A. I cannot remember the year, but I guess it was about two years ago. I think some of the Mock pine people brought some there—I am not positive, but I know they delivered to the Mock pine people.

Cross Examination by Mr. Hobart:

Q. You don't know anything about any of the special circumstances, or any special reasons why these other cars might have been delivered there? A. By the lumber company and the railroad?

Q. No. A. Do I know anything about it myself?

Q. You spoke of some cars for other people that were delivered at what you call the Wanaque switch, since the stations were combined. A. Yes, sir.

Q. All you know about it is that you have seen them there? A. Yes, sir; and I have seen the people unload them.

Q. You don't know anything about the special reasons or circumstances? A. No, sir; only it would be handier for them to unload, because it is right against the public highway, and you did not have to cross the main stem to unload.

Q. That is what you think is the reason they were so placed? A. Yes, sir; I think so; I think it would be through the request of the receiver.

Q. Of course, you know nothing of it personally? A. No, sir; all I know is my own affairs and my son's.

Q. And these cars that you saw on that siding, they were to the east of the highway, were they not? A. Not all—I have seen west of the high-

way cars what did not belong to the lumber company—it was furniture really ; I have seen furniture, and I have seen coal loaded on the other side west of the highway.

Q. How many? A. Mr. Ricker dealt in coal and had a shed to unload cars there.

Q. And these cars of furniture you have spoken of, there were only one or two of those? A. The inhabitants would move away, and move in and unload their cars; there is quite a settlement there, and the inhabitants come and go—some come with the cars and some go.

Q. How many such cars did you notice west of the siding, on furniture business? A. For the last three or four years I have seen half a dozen different cars load and unload there.

JOHN W. PELLINGTON, sworn in behalf of the defence, testified as follows :

Direct Examination by Mr. Cabell :

Q. Where do you reside? A. Wanaque.

Q. What is your employment at present? A. Foreman of the Wanaque Lumber Company.

Q. Where did you work before that? A. For E. J. Ricker.

Q. Where did you work then ? A. In his store —in his post office at Wanaque.

Q. And before that? A. At the Wanaque Paper Company for five years.

Q. Do you know this paper mill and lumber company switch? A. Yes, sir ; pretty well.

Q. Do you know where the Wanaque delivery is? A. Yes, sir.

Q. Where? A. Wanaque delivery for everybody, has been, since I have known the place, and I have known it a long time, has been between the

main track and the highway, and I have seen cars below the highway.

Q. Where was the Wanaque post office in 1905? A. In Mr. E. J. Ricker's store.

Q. Can you designate on the map anywhere about its location; here is the switch crossing the highway—here is Drew's mill; now, this is the highway running along here? A. Right opposite Mr. Drew's mill on the west side of the road.

Q. Where is the post office now? A. It is right west of the coal trestle.

Q. On the highway? A. Yes, sir.

Q. Right there (indicating)? A. Yes, sir.

Q. Where, in 1905, was the Midvale team track switch of which they spoke; here is the Wanaque-Midvale station and here is the freight house, and here is the crossing, and here are Trengrove's coal sheds? A. I see now.

Q. Where, in 1905, was the team track delivery at Midvale, in the Wanaque-Midvale yard? A. North of the Trengrove coal sheds.

Q. How did they lie with reference to the main track of the Erie Railroad Company there? A. It lay on the east side of the main track—the fourth track over—to the east, that is—

Q. Where is the village of Midvale and Wanaque with reference to the railroad track? A. It is west.

Q. In that neighborhood is there any, or was there in 1905, any village to the east? A. No, sir.

Q. Were there any roads near the Wanaque-Midvale station, leading to the east? A. No, sir; there was one house back there, but only one house that I know of in that time, and they had to go across here to get to it, through the fields to get to that house.

Q. Do you remember when car 100824 was

placed upon the siding in front of the lumber shed? A. On May 5th.

Q. At what time? A. About three in the afternoon.

Q. What was the condition of the car? A. It had padlocks on each side.

Q. Did you ever know of the freight upon that car being offered? A. Yes, sir.

Q. At any time afterwards did you see the car opened? A. Yes, sir.

Q. What did you do? A. I took out some of the lumber.

Q. What happened to the car after that? A. It was drilled up and down the track there; it was put down behind some cars that stood there.

Q. Did they run it down towards the paper mill or the other way? A. Down towards the paper mill.

Q. What finally became of it? A. Why, they took it away with the other cars; I don't know what became of it; they took it out; I don't know what they did with it.

Q. Did you see it at any time before May 5th? A. Oh, yes; I saw it over on the track, over on the switch.

Q. Will you show us where you saw it prior to May 5th? A. That car stood over here almost opposite Drew's mill, over at this second track, along the switch here—almost opposite the Wanaque switch—right there; it stood there for almost two weeks that I know of.

Q. Did you ever see it anywhere further down? A. No further down; it could not come much further, but it stood right across here, where I could see it plain.

Q. Did you ever ask that that car be placed for unloading? A. Yes, sir.

Q. About when? A. Well, along in April, at

different times; we wanted a car and I ordered it in; we wanted the lumber that was in the car.

Q. You know it was before May 1st? A. Yes, sir.

Q. Could you tell with any degree of accuracy how far before May 1st? A. No, sir; I could not tell what day it was; I did not keep any record of that.

Q. Have you seen any deliveries made on the Wanaque siding since the lumber company has been refused delivery there? A. Yes, sir.

Q. Have you any memorandum that will help you in identifying? A. I have them in my books. (Witness gets his books.)

Q. Have you ever seen E. J. Ricker, since this trouble began, unload a car there? A. Yes, sir; lumber, that was on August 10, 1905. I remember that.

Q. Did you ever hear any conversation with the station agent at Midvale on the subject of deliveries at Wanaque? A. Yes, sir.

Q. Can you tell when that was? A. Yes, sir; I can tell that, too.

Q. Just look at that, and then find it in your book?

Q. (*By Mr. Hobart*) What is this paper you have in your hands? A. This is a paper taken from the books.

The Court:—Turn to the book.

Q. Made for use in this trial?

Mr. Cabell:—The paper is like an index to the book.

Mr. Hobart:—All right.

The Witness:—On August 22nd, the agent at Midvale—

Q. State what you can recollect. A. On August

22nd, the agent at Midvale said that he would place cars on the Wanaque siding for any one but the Wanaque Lumber Company.

Q. Who was present at the conversation besides the agents? A. Mr. Thrift and Mr. John Voss.

Q. What was Mr. Voss at that time? A. And Mr. Evans.

Q. What was Mr. John Voss at that time? A. Assistant agent.

Q. Did you ever see any cars of material for Gabriel Decker unloaded on that siding since this trouble? A. Yes, sir; I saw cars of manure unloaded there.

Q. Can you give us the date of one of them? A. Yes, sir; on May 24, 1906.

Q. Have you the car number in your memorandum? A. Yes, sir.

Q. Erie car 48204? A. Yes, sir.

Q. Did you see him at any other time unload a car of manure there? A. Yes, sir.

Q. Can you find in your memorandum the date? A. Well, on August 1st, he unloaded one on Drew's switch—that was it.

Q. The other was on the Wanaque switch? A. Yes, sir.

Q. Have you seen Mr. Drew unload any cars on the Wanaque switch? A. Yes, sir; a number of them.

Q. Since this difficulty with the Wanaque Lumber Company? A. Yes, sir.

Q. Have you ever seen John Segar load cars on the Wanaque switch since this trouble? A. Last spring.

Q. Have you seen Henry Writenour load cars there? A. I have seen him unload charcoal there, and I have seen him unload potatoes.

Q. Since the trouble with the Wanaque Lumber Company have you seen furniture unloaded on this switch? A. That was unloaded in front of the

lumber company's office, below the crossing, down towards the paper mill—for Chester Slawson.

Q. Do you remember car 42865, Michigan-Central? A. Yes, sir; I know that car well.

Q. Where did you first see that car? A. Why, up on the number 2 switch, as they call it.

Q. Midvale? A. Yes, sir.

Q. North of the coal sheds? A. Yes, sir.

Q. Can you give the date? A. I can by referring to the books.

Q. Well, refer to them—by referring to your index you will probably find it. (Witness looks for it.) A. 42865 on August the 11th.

Q. What took place with reference to that car that came under your observation? A. I was sent there to unload the car.

Q. Did you do it? A. Yes, sir.

Q. Where did you unload it? A. On the ground there.

Q. To the east or to the west of the track? A. On the east of the track—just north of the coal sheds.

Q. Did you hurry up about it? A. Nothing particular that I know of.

Q. You wanted to get it out before any demurrage accrued? A. I had not heard anything about any demurrage.

Q. (*By Mr. Hobart*) You wanted to get it out before you were stopped, didn't you? A. No, sir.

Q. (*By Mr. Cabell*) After you unloaded it, tell us what happened the next day, if anything? A. The next day I went there to cart the lumber away and we had not been there long before two men came, and I think Mr. John Voss was with them, and two railroad men, and he told us to stop taking the lumber away—off the pile—this was on the pile, you know, and I did not pay any attention to him, of course—I went on loading the lumber on the wagon—I took it from this pile.

Q. Was the car empty then? A. Yes, sir; I think the car had been moved, and he said, "Stop taking that lumber off the pile"; I kept right on to work—I had my orders from the Wanaque Lumber Company to bring the lumber to the yard. One man went up, and I believe one man, Mr. Edsal, he said to the man, "Take them off the pile," and the other man made a grab for me, and I stepped back so he could not reach me, and Mr. Thrift was there, and he said to get off the pile and he would take the lumber off and for me to keep tally, so I did, and I stepped on one side and kept tally of the lumber, and he got on the pile, and started to take it off, and Mr. Edsal said, "Pull him off there"; and the other man walked up and grabbed him by the leg and arm and jerked him off the pile of lumber down on the ground.

Q. Do you know what became of the lumber after that? A. Yes; they loaded it into another car, and took it away with them somewhere; I never saw it again; the freight was paid on that lumber.

Recess till two o'clock.

Same witness resumes the witness stand.

Direct Examination continued by Mr. Cabell:

Q. Do you remember car 1108, P., S. & N.? A. Yes, sir.

Q. Did you have anything to do with that car? A. Yes, sir; I ordered it placed in on the switch, and I also offered the freight for it.

Q. How did you offer the freight? A. In cash.

Q. When you offered the freight will you explain what request you made—state as nearly as you can what passed between you and the agent when

you offered the freight? A. I went there and asked him to place the car below, and he said he would not, and then I offered him the freight for the car placed above on the regular delivery siding and he refused to take it because I would not receipt for it.

Q. Do you remember car 32537? A. Yes, sir.

Q. Where did you first see it? A. About two car lengths above the Trengrove coal bin on number 2 switch.

Q. About there, (indicating)? A. Yes, sir.

Q. What did you do with reference to that car? A. I was ordered to go and unload it.

Q. Did you do it? A. No, sir; they would not let me; I started to unload the car.

Q. Did you get in the car? A. Yes, sir; and I took a load out.

Q. What happened? A. I went back to get another load and then three men came around the corner and told me to stop unloading the car—on the corner of the coal bin—three strangers to me—I had seen one of them before though, and they told me to stop unloading the car, and I refused to do it, and kept on unloading the car; one of the men told me to stop and come out of the car.

Q. Do you know who the men were? A. They were all Erie men; one was Mr. Edsal, and the other was a man named Robert Evans, and the other was a detective, Rutheringer, an Erie detective.

Q. Who was Mr. Evans? A. He was an operator down the line somewhere.

Q. One of the agents of the company? A. Yes, sir.

Q. After you refused to get out of the car what happened? A. They climbed up in the car and Mr. Edsal told them to get me out of the car, and one of them grabbed hold of me, and I said, "What authority have you to put me out of the car"? I told him I would not come out of the car,

and he said if I didn't come out he would throw me out, and I said that was the only way they would get me out, or the Wanaque Lumber Company could do it.

Q. About that time did Mr. Thrift come there? A. Just at that time.

Q. With whom? A. Alone.

Q. Did you hear anything said about the freight between Mr. Thrift and the Erie man then? A. Yes, sir; Mr. Thrift offered him the cash for that car.

Q. What happened; what did they say to that, if anything? A. He would not take the freight unless he receipted for the car.

Q. Go on. A. I asked this detective what authority he had to order me out of the car, and he said he did not want any authority and he pulled a badge out of his pocket and said that was all the authority I want; he held the badge up to me, and I said, "Is that all," and he said "Yes"; I said I did not think he had any authority to take me out of the car, and he said he had authority to take me to Paterson and lock me up or throw me out of there, and kill me if he wanted to; I said, "Why don't you do it"; but he did not do it, and he didn't even get me out of the car; Mr. Edsal said, "Fetch him out of the car," and him and Evans, one grabbed hold of my arm, and the other took hold of my leg and commenced to pull me, and the detective drew his club, and I said "Don't you hit me with that club," but he did, and he struck me three times across the shoulder, and once on the arm just below the elbow, with the club, but I stayed in.

Q. You did get out? A. Yes, sir; when you came and told me to get out; I sent for you, and you came.

Q. Then what happened—was there anybody

else there? A. Yes, sir; the driver was there, and there were two other witnesses.

Q. Where was the wagon? A. The wagon was there.

Q. What happened about the wagon? A. After we got down on the ground the officer closed the car door, and then you gave the order, I believe, to drive on to the yard. I told the driver to drive on, and the driver started to drive the horse away, and they grabbed the horse; the officer grabbed the horse with his hand, and said, "Don't touch the horse. I forbid you to touch it," and he put his hand in his hip pocket, as if to draw something out, and then you said, "Go on to the office," and we left the horse and wagon there, and they left it also, and the horse wandered around.

Q. When did you next see the horse? A. When it came to the yard alone.

Cross Examination by Mr. Hobart:

Q. This car 100824, you said was delivered at 3 P. M. on May 5th? A. About 3.

Q. You gave the order for that delivery the day before, isn't that so? A. No, sir; I gave the order along in April sometime.

Q. You cannot fix the date? A. No, sir.

Q. It might have been the latter part of April? A. Well, after the middle of April or about the middle of April; I don't know just when.

Q. You didn't give the order on which it was finally delivered on May 5th? A. I don't think I did.

Q. This car, when it was put on the siding, was locked, wasn't it? A. Yes, sir.

Q. How did you get in? A. I found it opened.

Q. Did you know who opened it? A. No, sir.

Q Do you know how long it had been opened? A. I do not.

Q. When you speak of its being opened, do you mean the lock was not fastened? A. Yes, sir.

Q. That the door was closed? A. I think so.

Q. You went in and got the lumber? A. The door was unlocked and I got inside the car.

Q. And was this done under orders from Mr. Thrift? A. Yes, sir.

Q. Did you push the door open? A. I think so.

Q. Was he present when you first went in the car? A. No, sir.

Q. You, personally, did not make any offer of freight as to this particular car, did you? A. I don't remember about that, but I remember Mr. Thrift offering the freight.

Q. When you were present? A. Yes, sir.

Q. When was that? A. When they placed the car, and he told them to take the locks off.

Q. That was sometime in May? A. On the 5th of May, I believe it was.

Q. Now, it was the custom, wasn't it, for cars that came for the lumber company to be kept on what they call the storage track until an order was given to place them on the siding of the paper mill?

Mr. Cabell:—This witness has not testified anything to make this kind of examination cross examination.

Mr. Hobart:—Oh, yes, he has; the witness was asked with respect to the delivery of this car on the private siding, so-called, and he said he ordered it to be delivered several times before it was finally delivered, and he has stated where it was, pending the time when the order was given, and when it was finally delivered; now I want to ask him whether it was not customary for cars that came to that lumber company to be kept on the storage track until an order was given for placing?

The Court:—I think that is competent. The objection is overruled.

A. They kept this car on there; I know that.

Q. There were other cars that came there, of course, long before this one for the lumber company? A. Yes, sir.

Q. You knew about them? A. Yes, sir.

Q. And when those cars arrived they were put on the storage tracks were they not? A. I suppose so.

Q. They were not put on the private siding as soon as they arrived? A. Well, some were.

Q. Some were not? A. That is right.

Q. Those that were not were kept on the storage track until an order was given for placing them? A. Yes, sir; that is right.

Q. For how long a time have you kept a written record of the cars delivered on what has been called the Wanaque siding? A. I have kept a record since the spring of 1905.

Q. Who asked you to keep the record? A. Mr. Thrift.

Q. Did he tell you he was going to have a lawsuit? A. No, sir; I knew there was trouble, and that is why I kept it.

Q. It was after the trouble began before you began to keep a record? A. Of that kind of work; yes, sir.

Q. You were there every day during that year, 1905? A. Probably.

Q. And your record, of course, is correct? A. Yes, sir.

Q. And you put down every time you saw a car on this Wanaque siding? A. No, sir; I only kept a few of them—my record intends to show just a few of the cars.

Q. How did you decide which ones to put on your record and which ones to leave off—just as you took a notion, or just as Mr. Thrift told you? A. No sir; I kept that of my own accord—just as the notion took me.

Q. The only cars you are sure of as being on that Wanaque siding, since the trouble arose, are those of which you have a record? A. No, sir; there were other cars.

Q. How do you know that? A. I cannot give date, but I know Mr. Drew has unloaded on that siding.

Q. That is the only one you know of outside of your records? A. Yes, sir; and E. J. Ricker has unloaded there--several unloaded there that I cannot remember now.

Q. You had on your record Mr. Ricker? A. Yes, sir.

Q. So the only one outside of your record were some cars from Mr. Drew—that you can remember, I mean? A. That I can remember of just now; yes.

Q. Now, these cars that you did take a record of, I understand from what you have said, were all placed on the easterly side of the highway, with the exception of that one car of furniture—am I correct in that understanding? A. Yes, sir; all I kept record of.

Q. And was it one car of furniture? A. One car; yes, sir.

Q. That is the one you have spoken of as being consigned to Mr. Slawson? A. Yes, sir.

Q. And that was put down by the lumber yard? A. Yes, sir.

Q. Do you know why? A. No, sir.

Q. Do you know whether anything was said to the railroad company about unloading it there rather than somewhere else? A. No, sir.

Q. You simply observed it there, and that is all? A. Yes, sir.

Q. Now this car 42865 which you refer to your book about, was that an open car or a box car? A. A box car.

Q. Now, by reference to your book you told us

that on August 11th you went to unload that car? A. Yes, sir.

Q. Who sent you? A. Mr. Thrift.

Q. Did you go with the team and wagon? A. Yes, sir.

Q. Was the car full of lumber? A. No, sir;

Q. How many wagon loads? A. About half a car, I think that car was.

Q. Did you find that car locked? A. No, sir.

Q. Were the doors shut? A. I don't remember.

Q. Do you remember whether you opened them or not? A. I certainly did if it was shut.

Q. You got in somehow? A. I got in, but it was not locked, I know that.

Q. Mr. Thrift had told you to get it off the car as quickly as possible, hadn't he? A. No, sir.

Q. Hadn't he said anything about that? A. No, sir.

Q. Why didn't you get a load on your wagon and carry it to the lumber company? A. I did; we took the horse with us, put a load on the wagon, and then we unloaded until noon hour.

Q. You put a load on your wagon? A. Yes, sir.

Q. And after you put the load on did you drive your team— A. Drove the team on one side and took the rest of the lumber out.

Q. You didn't drive your team to the lumber shed? A. No, sir.

Q. Was anybody helping you? A. The driver.

Q. Did you succeed in getting away with that one load? A. Yes, sir.

Q. And the trouble you have spoken of was the next day when you came after the other lumber? A. The next day; yes, sir.

Q. Now, we come to car 1108 that you spoke of; you remember the agent asking you for the receipt for the lumber, don't you? A. Yes, sir; I offered him the cash for the car, and he would not take it because we did not give the receipts.

Q. You refused to give him a receipt? A. I had orders not to sign a receipt.

Q. And that is the reason you did not? A. Yes, sir.

Q. Mr. Thrift gave you those orders? A. I had those orders before that.

Q. Now, car 32537, was that car locked? A. No, sir.

Q. Were the doors shut? A. I don't remember about the doors being shut.

Q. If they were shut, you, of course, opened them? A. Yes, sir.

Q. Box car? A. Yes, sir.

Q. Mr. Thrift ordered you to unload that car? A. Yes, sir.

Q. And did Mr. Thrift give you any orders about signing a receipt or otherwise for that car? A. I don't remember that he did.

Q. You did not sign any receipt for that car? A. No, sir.

Q. Were you asked to sign one? A. I don't think so. I don't remember.

Q. I understood you to say on your direct examination that you were present when Mr. Thrift offered the freight money in cash? A. Yes sir; I was.

Q. And I understand you to say that the agent refused to let him get it unless a receipt was given? A. The agent?

Q. Yes. A. I think he was dealing with Mr. Edsal at that time—the agent was not there.

Q. Something was said about a receipt—that you remember? A. Yes, sir.

Q. And Mr. Thrift was asked to sign a receipt for it, and he refused? A. That is right.

Q. He said he would sign a receipt after he got his goods? A. Yes, sir.

Q. And Mr. Edsal or somebody asked him to sign the receipt? A. Mr. Edsal was the man.

Q. And that was the special controversy as to that car, wasn't it? A. As far as that is concerned; yes, sir.

Q. What was the name of the detective that struck you across the shoulder? A. His name was Ruthinger—that is what I found out after.

Q. He had a badge? A. He had one in his pocket.

Q. He showed it to you? A. I did not read—he said, "Here is all the authority I want," and he handed that out.

Q. Now, you had got the one load of lumber out of that car, before they attempted to take you out? A. Yes, sir.

Q. That was out on the wagon? A. That had gone down.

Q. It had already been taken; you had a second load on the wagon? A. No, sir; I had some on the wagon.

Q. Before you were interfered with? A. Yes, sir.

Q. And then that particular quarrel was settled by Mr. Cabell, who came along and told you to leave the car, is that right? A. Yes, sir.

Q. Then was the car locked—do you know if the car was locked? A. Not in my presence they didn't lock it—they just shut the doors.

WALTER H. THRIFT recalled.

Direct Examination by Mr. Cabell:

Q. Where do you live? A. Paterson.

Q. What was your employment in 1905? A. Manager of the Wanaque Lumber Company.

Q. How long had you been such? A. Since the 19th of May, 1903.

Q. And you are such yet? A. Yes, sir.

Q. Do you remember placing a car number

100824 on the lumber company's siding? A. I do.

Q. When was that? A. The 5th day of May, 1905, at about 3.15 P. M.

Q. What was its condition? A. It was under lock and key—brass padlocks on each door.

Q. Did you see the agent about it? A. I called to see the agent on my way home that evening.

Q. What time? A. 3.46—I reached there that night about 3.30.

Q. Had you ever ordered this car on the siding? A. Yes, sir.

Q. When? A. On one occasion on the 20th of April, I think it was—it might have been the 21st.

Q. Was anything said about car service then? A. No, sir.

Q. Did he refuse to place it? A. No, sir.

Q. Did you ever speak to him about it again? A. Yes, sir.

Q. When? A. On the 22nd or 23rd of April, and again on the 28th of April.

Q. He refused to place it then? A. No, sir.

Q. Did he say anything about car service? A. No, sir.

Q. Had you then, on the 28th of April, when you ordered it in, received a letter, already in evidence, dated April 27th, Exhibit P-11, had you yet received that letter on the 28th of April, demanding that that car be placed? A. No, sir.

Q. I show you Exhibit P-10, had you yet received this postal? A. No, sir.

Q Just examine that postal and see if you can tell anything about it? A. No, sir.

Q. Did you order that car in any time after April 28th? A. No, sir.

Q. Did you say anything more to the agent after placing it April 28th? A. Yes, sir; I said, "When are you going to get that car in," and he said, "In a day or two, when the engine comes up."

Q. Did he say anything about car service? A. No, sir.

Q. Did you say anything to him about placing that on May 4th? A. No, sir; positively no.

Q. I show you Exhibit P-16; is there anything on that postal that will enable you to tell when you received it? A. On June 22.

Q. Postmarked the same date? A. Yes, sir.

Q. And dated when? A. June 20th.

Q. Did you do anythng with reference to the car when you received that notice? A. I supposed they would put the car in as usual on the switch.

Q. Where had cars been placed for the Wanaque Lumber Company prior to the placing of this car 70183, or prior to the arrival of car? A. On the switch at Wanaque, leading into the paper mill.

Q. Car 42865—you paid the freight on that? A. Yes sir.

Q. Did you offer it in cash before you paid it? A. Yes, sir.

Q. When? A. The morning of August 11th—I think that is the car—the morning of August 11th, 1905.

Q. That is the car that Mr. Pellington testified he unloaded on the ground? A. August 11th, 1905.

Q. Car 44988, did you offer the freight on that car? A. I did.

Q. Just tell us the circumstances under which you offered it? A. That is the car that was billed to Alcott & Company.

Q. Tell us what you did about paying the freight? A. I went to the depot to pay the freight on to it and he passed out a receipt—the agent did—I said, "Give me the bill," and he said, "You cannot get the bill until I get the receipt for the car"; I said, "I shall not give a receipt for that until I get it." He refused to give me the bill of the car, and I re-

fused to pay the freight until Mr. Cabell gave him a receipt for the car.

Q. (*By Mr. Hobart*) What do you mean by bill? A. The freight bill of the car.

Q. (*By Mr. Cabell*) Go back to car 42865, the car that was unloaded off to the east—do you know that check? A. I do.

Marked Exhibit D A-1.

[Page 113, Book of Pleadings and Exhibits.]

Q. How did you pay this—under what circumstances did you pay that check to Mr. Campbell? A. I had tendered the freight in the morning in cash, and he shoved the receipt out to me, and said, "Sign that receipt," and I said, "I won't; I don't know what is in the car," and I said, "Give me the bill of it and I will pay it," and he refused, and I immediately ordered Mr. Pellington to go on and unload the car; that was in the morning; during the afternoon, probably after 2, Mr. Campbell came to the office and said, "I have been ordered by my superintendent to either collect the cash for this car and have you sign a receipt for it, or make a charge of larceny," I said, "You can do as you please. I will give you a check for it right now, or you can make your charge of larceny, but I don't sign any receipt until I get the lumber," so he took the check. That took place at Midvale station on the east side of the track.

Q. Where did this check transaction take place? A. In the office of the Wanaque Lumber Company.

Q. When you gave Mr. Campbell this check, did he give you anything back? A. He gave me the receipt for the car.

Q. Is this the receipt? A. Yes, sir.

Q. This is the receipt for the freight? A. Yes, sir.

Mr. Cabell:—I offer the receipted bill in evidence.

Q. Then he went away? A. Yes, sir.

Q. And it was the next day that the difficulty arose? A. I saw Mr. Edsal that same evening.

Mr. Cabell—I offer the receipt in evidence.

Marked Exhibit D A-2.

[Page 114, Book of Pleadings and Exhibits.]

Q. I will take you to car 32537—that was the last car—do you remember any conversation with the agent about the freight on that car? A. The same conditions. I went up there to pay the freight.

Q. What did he say? A. He offered me the blank receipt for the car and wanted my signature to it.

Q. For you to sign? A. Yes, sir; I refused to sign it.

Q. Did he show you the lumber? A. No, sir.

Q. Did he show you the car? A. No, sir.

Q. Did he show you a bill for the freight? A. No, sir.

Q. Mr. Thrift, did you ever have any difficulty with the Erie Railroad Company over receipts before? A. No, sir.

Q. Had they ever requested you to sign for a carload before this first time you have mentioned; have they ever asked you to receipt for a carload before you had got it? A. No, sir.

Q. Had you ever receipted for small packages before you got them? A. Mr. Pellington, the driver, in going up there had; yes, I allowed him to do that—little lots taken from the depot. I told him to receipt for them.

Q. These little lots were put where? A. At the freight depot at Midvale; put in the freight house there; I finally stopped them from signing receipts until they got the goods.

Q. Why was that? A. They generally went up there and paid the bills as they told me, and paid

the bill when they paid the freights, and signed for the freight when they paid the bill, and then went up to the freight house, some distance away; on one occasion they came back with a lot of broken stock, and I said, "Did you sign for this," and he said "Yes"; I said, "Why"? he said, "We signed for this when we paid the freight charges"; I said, "Hereafter you get your stock before you sign any release." Mr. Smith, Frank E. Smith, happened to be at the freight depot that day, and I sent the damaged stock back to the depot and told them it was not properly signed, and we had a wire connection, and Mr. Smith immediately telephoned to me regarding that and said that they could show delivery by the Erie Railroad Company by our receipt for the stock; I said "If we are going to have it that way, hereafter we will always have our stock from the Erie railroad before we sign for it." This was long before this particular day—months before.

Cross Examination by Mr. Hobart:

Q. At the time that this first car, 100824, was on the storage track up at the station, there were several other cars there—were there not? A. The first day do you mean?

Q. When the car arrived. A. When the car arrived in Wanaque?

Q. Yes. A. There was a number; six or eight at the time.

Q. And those cars were delivered to your company from time to time before anything was said about 100824? A. There was something said about all those cars when they first arrived there.

Q. And these other cars between the time that they arrived and the time when they were put on the private siding were kept on the storage siding? A. I believe so.

Q. Do you happen to know why these other cars were put on your siding before 100824 was so placed? A. Yes.

Q. Did you have some talk with the agent about that? A. No; not with the agent at Wanaque.

Q. There was some arrangement made about it? A. Yes, sir.

Q. It was at your request, wasn't it, that the others were placed on the siding first? A. No, sir.

Q. Against your will? A. No, sir.

Q. I don't understand then; you say it was not against your will, and yet you say it was not with your will—explain it? A. What do you want me to explain?

Q. These other cars were placed on the siding before 100824? A. I believe so, somewhere. I don't know where they were placed—the other cars.

Q. Were you not manager when they were placed? A. You mean placed on the siding of the lumber company?

Q. Yes. A. Oh, yes, sir; now I understand you.

Q. These other cars were placed on the private siding before 100824 was placed? A. Yes, sir.

Q. And they were all placed down by the lumber shed, I suppose? A. Yes, sir.

Q. Then, what I would like to know is, what the arrangement was with regard to the placing of those cars—that is to say why were the other cars put on the siding before 100824? A. Because Mr. Edsal, I think it was, I was not well acquainted with the Erie railroad outside of the agents, but I think it was Mr. Edsal, said to me on the train, the night the cars arrived, that he would request me as a favor, to unload all foreign cars first and would put them—he says he would like to have the foreign cars unloaded first, and I said "All

right, we will do all we can to facilitate matters in that way."

Q. And in pursuance of that understanding you asked the agent to deliver these other cars first? A. Just as I wanted them; yes.

Q. And this particular car was an Erie railroad car? A. Yes, sir.

Q. And the others, or some of them, were foreign cars? A. Yes, sir.

Q. Now, you spoke of requesting the agent to place car 100824 on the siding A. That is the lumber company's siding?

Q. Yes. A. Yes, sir.

Q. Did you tell him to put it at any particular place at that siding? A. No, sir.

Q. Always, up to that time, the cars had been placed by your lumber shed, hadn't they? A. Yes, sir.

Q. As near as possible to it? A. Yes, sir.

Q. As to car 32537, that is the last one of all, you said on your direct examination something to the effect that the agent did not show you the car? A. He did not show me the car.

Q. And that is the reason you would not sign the receipt? A. He did not even give me the bill of the car; I cannot sign a receipt until I get the bill.

Q. Did you know the car was there? A. Yes, sir.

Q. Now, there was a question raised as to some other cars on the signing of receipts? A. Yes, sir.

Q. Did you know they were there? A. Yes, sir.

DEFENCE RESTS.

REBUTTAL.

MR. GEORGE M. EDSAL, sworn in rebuttal.

Direct Examination by Mr. Hobart:

Q. As to car 32537, were you present on the day when that car and some other cars were removed from the station? A. Yes, sir; I was in Wanaque-Midvale on that day.

Q. Did you see Mr. Thrift? A. I did.

Q. Did you send him any bill for that car for car service? A. I presented Mr. Thrift, in the presence of three witnesses, with a bill for the freight charges, and a bill for the car service charges then due, requesting him to pay the charges and sign the receipt before they continued to unload the lumber.

Q. He refused? A. He refused to sign the receipt.

Q. You were the station supervisor at that time? A. Yes, sir.

Cross Examination by Mr. Cabell:

Q. How much was the car service bill? A. One dollar.

PLAINTIFF RESTS.

SUR-REBUTTAL.

MR. WALTER H. THRIFT, recalled in sur-rebuttal.

Direct Examination by Mr. Cabell:

Q. Is it true that he ever presented you with a car service bill? A. He did not.

Q. Was there any doubt? A. I don't think so; could not have been.

Cross Examination by Mr. Hobart:

Q. Was anything said about car service? A. I don't think so.

BOTH SIDES REST.

MOTION TO DIRECT A VERDICT FOR THE PLAINTIFF.

Mr. Hobart :—On behalf of the plaintiff I desire to ask your Honor for the direction of a verdict in its favor for the amount of the car service and freight charges, and I should like to take a few minutes to present to your Honor the reasons on which the motion is based.

The Court :—Certainly.

Mr. Hobart :—Now, the first question that your Honor, no doubt, has had in mind, and which you may have been considering whether it should be submitted to the jury or not, is the reasonableness of this charge. I take it that is the first step, as far as the plaintiff is concerned. Now, I desire to submit as matter of law on that point, that there is no question for the jury, for this reason, so far as the time is concerned, the statute fixes it at twenty-four hours; that is to say the Railroad Act of 1903 to which I referred your Honor the other day—

The Court :—That statute says, "Refuse," is that equivalent to neglect or fail to receive.

Mr. Hobart :—I will read the act. (Reading Section 47 of the General Railroad Law of 1903, page 670.)

Now I take it, that under the evidence, as it is undisputed in this case, a regulation of the railroad companies with respect to the so-called free time, must be held to be reasonable, as matter of law, because that provides for forty-eight hours' notice, whereas the statute only calls for twenty-four hours, and it appears also, without dispute, that notice was given to the consignee.

Now, of course, some argument might be made as to what might be meant by the word "given"; I claim on behalf of the plaintiff that when, in the ordinary course of business, we have mailed a notice, which, perhaps, for some reason, may not be received within a day or two thereafter, that the notice is given when it is mailed in the ordinary course, which is the only practicable way of doing business, but, however that may be, the case, I think shows us there can be no question of fact on the point that as to all of these cars they were detained more than the twenty-four hours allowed by statue, and therefore, the rule applies, and the regulation of forty-eight hours' free time must be held to be reasonable.

That is so far as the time goes; now, the result of that is, that the only question really that might be opened to debate in your Honor's mind would be the, question of the charge, whether the charge was reasonable, because the statute does not fix the charge.

On that point the testimony is likewise undisputed so far as relates to these facts: First, that the car when in active service earns considerably more than $1 a day—making it as low as possible and assuming that every car is in use every day in the year. It is also demonstrated by the undisputed facts that all over the United States the charge is at least that amount; in some places it is $2., but it is at least a dollar; so that the conclusion would seem to be irresistible that the rate is likewise a reasonable rate to charge for detention. Now, that very point has been passed upon in a number of similar cases, to which I would like briefly to call your Honor's attention, as I know that

your Honor wants to charge the law as it is on the subject, and that is my excuse for taking more time on this than I would otherwise.

We start with this situation, that the facts as to the rate are undisputed, and the fact that the car earns more than that—now then, is that a reasonable rate? Now, we have a case, have a large number of cases —I will refer to a few of them which have been printed in a little pamphlet for convenience: Union Pacific vs. Cook. 50 Am. & Eng., a charge of $2.00 a day was held reasonable as a matter of law—the jury was directed to find for the plaintiff.

My present point is simply that your Honor should hold and charge the jury as a matter of law that the charge is reasonable.

In the case of Milwaukee vs. Lynch, the Court held that this rate was reasonable, as matter of law, both as to the time and as to the charge; page 45 of this little pamphlet; a number of cases I might say, are not reported in the regular reports.

(Citing a number of cases.)

My point is that it is the duty of your Honor to charge one way or the other as to whether or not this rule is reasonable, and I base that on this ground, that it is a regulation or a rule of the railroad. Now, your Honor, of course, will remember the old case of Ayres vs. Morris and Essex, which I shall have occasion to refer to on the question of freight receipts. In that case the Court did say that the question whether a rule or regulation of a railroad company required a re-

ceipt to be signed before the goods were delivered, was a question of fact for the jury to pass on, but it so happens that that case has recently been disapproved in the case of Daniels vs. North Jersey in 35 Vroom, 603, (reading).

Of course, if your Honor thinks that the question of the reasonableness of the charge is a question for the jury, I need not take much further time in discussing these other points.

The Court:—I feel that way, but, of course, I should like to pay all respect to any foreign decision which would be respected by our higher court.

If you have a decision, the opinion of any very respectable authority in this country where there was a dispute as to the reasonableness of the charge, I should very much like to see it.

Mr. Hobart:—The only cases I have are the ones that I have referred to here.

Now, there are a number of other legal questions in the case, but if your Honor decides against the plaintiff as to this point, of course, we are not entitled to a direction of a verdict.

If your Honor desires I would like to state my position briefly as to some of the other legal points in the case, so that, if it should finally be held that $1 a day is a reasonable charge as a matter of law, the other points may also be presented for consideration.

Now, with regard to the delivery on the paper company siding, the plaintiff's position is that the lumber company had no right to insist on delivery on that particular siding,

but that, even if it did have such right by custom or otherwise, the railroad was legally justified in refusing to deliver on that siding because of the non-payment of car service charges on previous cars--one or more of them ; that is to say, if it appears that any particular consignee refuses to recognize car service charges, then our position is that the railroad is entitled, in law, to refuse to continue deliveries on the private siding ; not for the purpose of compelling payment on previous cars, but if they are reasonably satisfied of the attitude of the consignee as to other cars, they are justified in retaining the cars in their own possession, for the purpose of maintaining their lien.

Now then, we also take the position as to the last three cars—the railroad, notwithstanding a special direction to a so-called lumber yard siding, was authorized at law to refuse delivery on such siding for the following reasons : First, the agents of the connecting carrier had no authority to make any such contract for shipment at that particular siding, in this case the lumber yard siding, so-called.

Second, That even if such a contract was authorized it must nevertheless be subject to the reasonable rules and regulations of the railroad for delivery, including the rule that has been referred to, that the railroad is not bound to place a car on a private siding until accrued car service charges have been paid on other cars, if they are reasonably satisfied that the consignee will refuse to recognize car service charges on other cars ; and, finally, that the evidence shows without dispute that there is no such private siding as paper mill and

lumber yard siding ; the evidence being that it is known as paper mill siding or as Wanaque siding, or perhaps as both ; there being no evidence to indicate that there is any such siding there, or anywhere else on that division, in which the words "Lumber Yard" in any way appear.

Now, so far as the last two cars, 1108, and, I think, 44988, the ones referred to in the deposition of Mr. Alcott, the question is raised as to whether this defendant would be liable for the freight. Your Honor will recall that the stipulation expressly states that as to these two cars defendant claims somebody else would be liable ; and we claim that as to that, and I think I ought to say now that I will ask your Honor to charge that the evidence shows that the defendant is liable for the freight on those two cars, provided it be found as matter of fact, or matter of law, that proper delivery was made or tendered on the ground that by reason of the agreement between Alcott and the consignee—

The Court :—That was not contradicted. What do you say about that? Is there any dispute about that?

Mr. Cabell :—No ; I do not object to Alcott's deposition.

Mr. Hobart :—It seems to me it is a question of law which your Honor must pass upon one way or the other, and my understanding of the deposition is, and I think it will bear me out, that there was a course of business established between Alcott and the lumber company, whereby, in all cases, the lumber company was to pay the freight ; and that being so, the cases are quite clear that the owner

of the goods is the one that is liable for the freight; the consignor in certain cases may also be liable, but when title to the goods has passed, then the owner is liable for the freight.

Mr. Cabell:—Mr. Alcott distinctly states in his deposition that the title of that property was in him until about January 2nd, 1906; that is his deposition.

The Court:—What does the freight amount to—the two cars—is it a large item?

Mr. Cabell:—$452.62.

Mr. Hobart:—I just desire to make my legal position clear on that. Then another point which I would like to submit to your Honor's consideration is as to one car in particular, 42-865, on which it is admitted the freight was paid; I desire to submit as a legal proposition that the right to charge for car service is not in any respect waived by accepting the payment of the freight; that has been decided.

The Court:—I think that is true, but these requests ought to be put in writing.

Mr. Hobart:—I think I shall have time to put them in writing.

Then, finally, so that your Honor may understand our position as to the question of the freight receipts—of a demand for a receipt—our position is that the carrier is not bound to deliver until a receipt is signed; that is to say, they have the right to insist upon the signing of the receipt, even before the goods are actually delivered. (Citing the Ayres case and cases in 5 A. and E., 231.)

Of course, your Honor's view as to the first

point disposes of my motion for a direction of a verdict.

The Court:—In that Ayres case, was that a railroad case?

Mr. Hobart:—Yes, sir; against the Morris & Essex.

Adjourned till 10 o'clock A. M., Thursday, February 7th.

MOTION DENIED.

The Court:—I shall deny the motion to direct a verdict for the plaintiff.

To which ruling of the Court the plaintiff's counsel prays an exception. Exception allowed. Let it be sealed, and it is sealed accordingly.

WILBUR A. HEISLEY,

J. [SEAL]

Counsel sum up for each side.

Charge by the Court.

HEISLEY, *J.*

GENTLEMEN OF THE JURY:—The cause of dispute between the litigants in this case involves two items, one is a charge for freight amounting to $791.27 and the other a charge for what is termed "car service," amounting to $184, upon six cars of lumber consigned to the defendant. For your convenience, counsel have prepared two statements, one showing the number of the car, the direction on the bill of lading, and the direction on the way-bill; the other showing the number of the car, the amount of freight and car service charged on each car, and the dates between which car service was claimed. These papers you may take with you, and you will find them of much aid, I think, in determining the number of the cars and the various facts referred to in these statements.

There is very little dispute about the freight, because it is admitted by the defendant, that if you find from the evidence that it owes freight on these cars, it then owes the amount of freight charged by the plaintiff; of course, it does not admit that it owes any freight, but, nevertheless, if you find that it does owe freight on all of these cars, then it is admitted that the amount of freight, the rate of freight is the amount specified in this paper just referred to. In that connection, and before passing to another branch of the case, let me say, there is some dispute about who was to pay the freight on two cars which, I think, came from Virginia. It is insisted by the railroad company that that freight was to be paid by the defendant. The defendant contends the contrary—that there was some arrangement made between it and the shipper in Virginia, whereby the freight was to be really charged to somebody else, pre-

sumably the shipper, instead of to the defendant, but that has been testified to in depositions which have been read in your presence, and you must recall what the fact is.

Now, the serious point to determine in this case (because, upon its solution depends very largely the question of the liability for freight) is the charge for car service.

I think we all generally have an idea what "car service" means; it is sometimes spoken of as "demurrage"; it is a charge imposed by a common carrier (of which, of course, a railroad company is one), against a consignee, who neglects, after a certain time, to unload a car; and that sort of a charge is recognized in the law; not only does the statute of this state recognize it, but also the common law—that is the law expounded by the courts for a long time—and it goes upon this theory, it is a reasonable theory, but we don't have to inquire as to the reason of the law—if we know what the law is it is our duty to accept it whether it appeals to our reason or not, but the reason is simply this: a common carrier is a common servant, public servant; it is obliged to receive freight under proper conditions whether it wants to or not; it has no discretion in the matter; and it is charged with the custody—with exercising care for the safe transportation of freight committed to its charge. After the freight arrives at the destination, it is under the duty—not, as I recall it, imposed by any statute, but simply at common law, to notify the consignee of the arrival of the freight. Now, up to that time it is acting as a common carrier. It is an insurer of the safe arrival of those goods at the point of destination; but after the freight has arrived and it has served this notice, and the mailing of a written notice in the regular course of business is the only notice that the common carrier has to give the consignee of the arrival of the

goods, the postage being prepaid, it ceases to be a common carrier, and becomes a bailee, just the same as a man having a warehouse, a storehouse, in which he receives for his hire goods which he takes care of until the owner calls for them.

Bailment, usually, not always, entitles the bailee, that is, the person who takes charge of the goods, to a certain compensation, and in the case of a common carrier, after the goods arrive, and it gives this notice, it becomes the bailee, and it is only right that that bailee (just the same as any other bailee, whose property is occupied for the use of another) is entitled to a reasonable compensation ; it required no statute to say that ; that is the plain principle of bailment. So, when the railroad company gives a consignee notice of the arrival of goods, it is the consignee's duty to come forward, pay the freight and take his goods, and if he fails to do it, and allows the goods to remain upon the premises, occupying the car and the tracks of the railroad company, it seems to me it only requires the exercise of common sense, to say in a case of that kind, he ought to pay a reasonable sum for the use of the railroad company's cars, and its tracks ; because the cars are built for the purpose of transportation and not for the purpose of warehouses.

While a common carrier is under duty to transport goods and passengers for hire, the law gives to the common carrier certain privileges ; one is the right to adopt all regulations which may be necessary for the operation of its line of transportation, subject to the qualification and limitation that the rule must be a reasonable rule. No railroad company or common carrier, engaged either in transportation of passengers or freight, has the right to adopt an arbitrary rule simply because it is a railroad. It has, however, the right to adopt any rule which is necessary and reasonable, subjecting

freight confided to its care to certain reasonable regulations and restrictions necessary for the performance of the duty of the corporation to the public, as a public servant.

In this case this freight did not originate on the line of the Erie railroad; it originated on connecting roads, and you have before you in this synopsis already referred to, the billing of these cars, all, I think, except one. We know from general experience—not simply from testimony—that railroads have stations where passengers alight from the cars and get on the cars. They usually have freight stations where freight is deposited, and where it is discharged. They have sidings for the purpose of switching cars and generally of having cars unloaded there. We all know that, and, consequently, we must know when we ship freight that in all probability it will be shipped to the usual, regular, ordinary place for the reception of freight on the line of that road. So, an agent of another company may, to certain degree, be acting as the agent of the Erie railroad in receiving freight and consigning it to points of destination along the line of the Erie railroad, but his power is limited to shipping that freight to the ordinary regular places of reception of freight on the Erie railroad. He has no right, simply because he is an agent, to ship it to an unusual place, to a private siding, unless he has had some authority from the Erie railroad to do it, any more than he would have the right to ship it to a particular point on the main line of a road between stations; and a person dealing with him must be charged with the knowledge of that fact, that the agent is supposed to receive and ship freight to the usual place of reception of such freight.

This freight, some of it, as shown by the bills of lading, was directed to "Alcott and Company, Wanaque, New Jersey," and instructed to be de-

livered by Alcott and Company to the defendant. Anybody, it seems to me in reading that would say "Wanaque, New Jersey," meant just exactly what it said; it meant the usual place for the reception of freight at Wanaque, wherever that was.

Another car, 1108, is billed to "Alcott and Company, Paper Mill and Lumber Yard Switch, Wanaque, New Jersey." If this latter siding was an unusual place for the reception of freight, then it is the duty of the defendant to show the agent's authority to ship freight to such unusual place; if the agent of the connecting railroad was authorized to ship to a private siding, and I think this is a private siding, I don't think that is disputed,—the defendant, by the car being placed upon such siding, would be subject to any reasonable rules of the Company for car service attaching, including the Company's refusal to so place it, if it was reasonably to be assumed that the consignee would not recognize the liability to pay car service on such private siding. But, of course, gentlemen, the fact that it was shipped to this siding does not say that the agent must have some special authority for shipping it there, because it is contended by the defendant that this was one of the usual places for the reception of freight. There undoubtedly was a siding up near the Wanaque-Midvale passenger station, opposite the freight station, where they receive freight of various kinds. That has been testified to quite extensively, but the contention of the defendant is, that nowithstanding that siding, that this siding in particular—so called "paper mill siding"—was also a siding used by the Railroad company for the purpose of switching and depositing freight cars, and allowing people to load and unload cars therefrom; and they say that that use was so common that it was known, and that the agent on the connecting road had the right to bill this car as he did—some of these

cars—to the paper mill and lumber yard switch at Wanaque.

Well, if that is so, if you find that this was a track, used, not at rare intervals, but usually used for the reception of freight consigned to various people—if it was a place where people were permitted to load cars—not isolated instances, but a usual thing, then the agent had a right in the law to designate in the bill of lading to which of these switches the cars should go, provided you find they were both switches common to the public use for the loading or unloading of cars.

This is one of the pivotal questions of the case for you to determine; was this one of the usual loading places or unloading places of cars?

If the defendant had a right to insist upon delivery at the siding known as the Wanaque or paper company siding, the plaintiff was legally justified in refusing to deliver on such siding as soon as it became reasonably assured that the defendant would refuse to recognize or pay charges that might accrue for car service on cars so delivered.

The fact that after delivery has been made on a private siding the railroad company loses its lien for freight and demurrage, justified the railroad in refusing to make delivery on the siding known as the Wanaque or Paper Company siding at the place demanded by the defendant, provided you find it was a private siding, and not a siding used generally by the company for the unloading or reception of freight.

Now, one of the reasons why this car service has not been paid upon some of these cars, at least one of them, but I think upon several, is the fact that the railroad company demanded a receipt for the lumber before the defendant was permitted to take it from the car; upon demanding that receipt the defendant refused to sign it; thereupon the

railroad company refused to deliver the lumber. That may have been a reasonable requirement of the company or not; ordinarily if a man pays you money for a debt, he may not require you to sign a receipt for it, and you are not obliged to give him any evidence that he has paid you at all, but that does not apply to a railroad company, to a common carrier. A common carrier has the right to require, simply as a reasonable regulation, every consignee to sign a receipt for the goods, and oft-times it becomes the duty of the consignee to sign a receipt even before he gets the goods, but the receipt ought to be merely a receipt. A receipt could be required of a man, for instance, where he was shown the goods—where he saw the goods—the railroad company would have the right to say—"I want you to admit, in writing, before you take these goods out, here they are, but I want you to admit in writing that you have received them." You would be obliged to sign such a receipt; but if the railroad company should go on and connect with that receipt an admission (contradicting the fact) that it was in first-class order, when it was apparent that the goods were damaged, you would not be required to sign such a receipt; because, while you can contradict the terms of a receipt, yet, nevertheless, the receipt is an admission of the facts stated therein, until the contrary is proven.

In this case, the defendant declined to sign the receipt; and you must determine whether, under all the circumstances of the case, he was justified in so declining—whether the requirement by the company that the receipt should be signed was a reasonable requirement. Here was a car—the one car which I have in mind was a car with locks on the door, I think; the manager of the defendant says that he told the railroad's representative that he did not know whether the car contained wood or

stones. Suppose they had required him to sign a receipt admitting the car contained not only lumber but bricks, when he had no reason to suppose the car did contain brick, he would not be required to sign a receipt like that. Suppose that he had any reason to believe—suppose that a prudent man would have any reason to believe that the car did not contain the lumber; he would not be required to sign it; it may be that the locking of this car was a circumstance which would make a prudent man think that perhaps the car did not contain just what was represented—not necessarily so, but that is a fact to be considered in ascertaining whether he acted reasonably.

On the other hand, it must be remembered that there had been considerable feeling between these parties as to the receipt of other freight, and perhaps the locking of the car under those circumstances would have no significance at all; but unless this officer of the defendant had some reason which would justify a prudent man in believing that the car did not contain his lumber—the lumber referred to—it was his duty to sign the receipt even before the car was given. That is the law as I understand it.

After the delivery of them has been tendered, and the consignee does not pay the freight, and does not unload the cars, sign the receipt, or comply with any reasonable regulation of the defendant, then this car service attaches as a matter of law, and he is obliged to pay for it. It is the duty of the company to place the car where the consignee can unload it—it won't do for the company to take a car of lumber and put it on an inaccessible side track, where there are engines in your way all the time; or alongside of a ditch, or in some place of danger, where it makes it practically inaccessible and then serve notice to unload, and then if you don't unload, charge you; they must

place it where it is accessible for the purpose of having it unloaded, and until they do that, they may send all the notices they wish—they can impose no liability upon the consignee because the demurrage only begins to run from the time that the car is placed and kept placed in a position where it may be unloaded and due notice given. In that case, if the demurrage is not paid, the company has the right to take possession of the car, and of the contents, and hold it, keep it away from the owner, until its freight and car service are paid. That is what this plaintiff says was done in this case.

I think all these cars have been taken from Wanaque and are now in the custody of the plaintiff, being held until their claim for freight and car service is paid.

I do not see any use in the Court referring to the facts any more generally than it has; the case has been a long and tedious one—perhaps tedious because of necessity—dry and rather uninteresting; but you listened with great attention, and it is your recollection which must prevail.

You are the judges of the facts; it is for you to determine whether or not there was a proper delivery made of this freight at a place within the contemplation of these parties; the railroad as well as the defendant; whether there was notice sent of the arrival; whether the defendant was remiss in failing to comply with any reasonable regulations of the company regarding the reception of this freight and paying for it; and if you find it was not a proper delivery, not in an accessible place; or if you find the defendant has complied with all reasonable regulations of the plaintiff, then your verdict should be for the defendant. If, on the other hand, you find that the freight is due, that there has been a proper tender, due notice and a proper delivery of the freight; that the rail-

road company has done all it should be required to do in reason, then the verdict should be for the railroad company.

The freight is a matter of very easy computation, subject, of course, to what the Court has said as to these two cars from Virginia; it is figured out on the paper.

As to the charge for car service. It has been intimated, perhaps said by counsel, that they care more about the feature of the car service, of having that determined, than any other feature in this case; of course, they want their freight if it is due, but they want the question of the reasonableness of the car service fixed.

We have here a list already referred to, showing the number of days for which car service is claimed ; the railroad has charged one dollar a day forty-eight hours after the arrival and notice of the arrival of the car to the owner. Forty-eight hours is a reasonable time ; the question in dispute, in case you find there is car service due, is as to the reasonableness of this charge of one dollar a day. Is that, or is it not, a reasonable charge? There is the original cost of the car ; there is the value of the car as an investment ; there is the earning power of the car which, of course, is a feature ; and they say, particularly railroad people say, it is over two dollars a day—the average earning capacity of an average freight car ; there is the cost of the track which it occupies. On the other hand the defendant says that that is an unreasonable charge ; they have offered evidence here, which is undisputed, that as between themselves, railroads now charge each other fifty cents a day for the very cars for which they charge the consignee one dollar a day. It used to be twenty-five cents a day, now it is fifty cents a day ; and the defendant also says that there is evidence that fifty cents a day is a reasonable charge, and one

dollar a day is an unreasonable charge; that the railroad company makes it a point to release foreign cars, on which they are charged fifty cents, and that they keep their own cars idle rather than use the foreign cars or retain them at a rate of fifty cents a day. Personally it does not matter what the Court thinks about the reasonableness or unreasonableness of this charge; that is a question of fact for you to determine; it is the duty of the plaintiff to prove the reasonableness of the charge, before they may have your verdict, but there ought to be a verdict for something for car service, if car service accrued; I mean by that simply that the deprivation of the company of the use of a car must be some loss to the company; it must be some loss; what the loss is, I don't know; that is a point in dispute between these parties.

The fact that the freight was shipped—transferred from one car to another car, would not prevent the company from collecting, or defeat its right of collecting, a reasonable sum for the use of the car.

Now, I have been requested by the railroad company to charge you that regardless of your finding as to the other cars in suit, you must find a verdict for the plaintiff for freight and car service due on car 100824, as it appears that said car was delivered at the place requested by defendant, provided you find the rate of one dollar per day for car service to be reasonable.

I forget the testimony about this car in question. If it was placed by the railroad company at the point designated by the defendant, of course it was the duty of the defendant to receive it, and, if required, to sign a receipt for it, pay the freight and to unload it; and if they did not do that, they would be liable for car service after forty-eight hours' notice, and if you find that is the case, then there should be car service charged.

Plaintiff's Requests to Charge.

1. The jury must bring in a verdict for the plaintiff for the full amount claimed with interest.

1a. The rules of the New York & New Jersey Car Service Association having been adopted by the plaintiff as part of its rules for the regulation of freight transportation such rules are binding on the defendant provided they are reasonable and the defendant had notice thereof before car service charges accrued on the cars in suit.

2. It appearing by the undisputed evidence that defendant did have notice of the rules prior to the date when car service charges accrued on any of the cars in suit, such rules were binding upon the defendant if the jury find the same were reasonable.

3. The rule providing that a charge of one dollar per car per day or fraction thereof shall be made for delivery of cars and use of track on all cars not unloaded within forty-eight hours after arrival, not including Sunday or legal holidays, is a reasonable rule.

4. The notice required by the statute to be given to the consignee is sufficient if such notice is given in writing and mailed in the usual course of business.

5. The rule providing that when freight is transferred from one car to another charges for detention will continue as if the freight had been originally shipped in the car to which transfer is made, is reasonable; and the fact that the contents of cars 70183 and of 42865 were transferred to Erie cars, does not affect the right of the railroad to recover car service charges thereon either before or after such transfers were made.

6. The provision in the bills of lading that a carrier may make a reasonable charge per day for the detention of cars and use of tracks after the car has been held forty-eight hours for loading or unloading, is binding on the defendant; and as to those cars which it appears were shipped under bills of lading containing said provision, the plaintiff is entitled by reason of the terms of the bill of lading to recover a reasonable charge per day after the car or cars have been so held.

7. If the jury find that cars while in actual use for the purposes of transportation could earn more than one dollar per day, then the rate of one dollar per day is a reasonable charge to be made by the railroad for the detention of cars on siding. It being undisputed that freight cars earn on an average more than one dollar per day and that the rate of one dollar per day for demurrage is the rate in use throughout the United States (except as to such places where the charge is more than one dollar per day), the jury must find that said rate is reasonable.

8. It appearing that the public delivery track at Wanaque-Midvale is the siding opposite the freight station, the defendant had no legal right to insist on delivery of cars on the siding described as the Wanaque or paper company's siding.

9. If the defendant had any such right to insist upon delivery at the siding known as Wanaque or paper company siding, the plaintiff was legally justified in refusing to deliver on such siding as soon as it became reasonably assured that the defendant would refuse to recognize or pay charges that might accrue for car service on cars so delivered.

10. The fact that after delivery had been made on a private siding the railroad company loses its

lein for freight and demurrage, justified the railroad company in refusing to make delivery on the siding known as the Wanaque or paper company siding at the place demanded by the defendant.

11. Under the statute of this state, the railroad company had a lien for its reasonable charges for the detention of railroad cars and for use of its tracks occupied by such cars, and for the purpose of enforcing this lien the railroad was justified in refusing to deliver to defendant on a private siding if reasonably assured from the past conduct of the defendant that the defendant would refuse to recognize such lien or pay such charges.

12. It appearing that there was no siding on the plaintiff's Greenwood Lake division (on which was located the station called Wanaque-Midvale) known as "paper mill and lumber company yard switch" (or siding) the plaintiff was not bound to make or tender delivery at such switch or siding.

13. As to those cars the bills of lading for which called for delivery at "paper mill and lumber yard switch" (or siding,)Wanaque N. J., the plaintiff was not bound to make or tender delivery at the siding known as the Wanaque siding or the paper mill siding.

14. It appearing that the bills of lading as to cars 1108, 44988 and 32537 called for delivery at a siding or station other than a regular station of the plaintiff, the burden of proof is upon the defendant to show that the agent who issued such bills of lading had authority to make such contract on behalf of the carrier.

15. The agents of connecting carriers who issued bills of lading as to said three cars had no authority to bind the plaintiff to make delivery at the siding known as Wanaque siding or paper mill siding.

16. Even if such bill of lading was authorized to be issued by agents of connecting carriers, it is subject to the reasonable rules and regulations of the railroad company as to delivery, including the regulations that the company may refuse to place the car on a private siding if reasonably assured that the consignee will not recognize or pay such car service charges as may accrue thereon.

17. The plaintiff was legally justified in refusing to make delivery of car 42865 and other cars arriving for the lumber company after the arrival of said car until a receipt was first signed by the lumber company or some one authorized to do so on its behalf.

18. The defendant is liable for the freight charges on all the cars in suit, including cars 1108 and 44988, if proper delivery thereof was made or tendered by the plaintiff.

19. Regardless of the findings of the jury as to the other cars in suit, they must find a verdict for plaintiff for freight and car service due on car 100824, as it appears that said car was delivered at the place requested by defendant, provided they find the rate of one dollar per day for car service to be reasonable.

Exceptions to the Charge and to Refusal to Charge as Requested.

Mr. Hobart:—The plaintiff desires to note the following exceptions: First to the refusal to charge as requested. I don't know that I need give them all in detail, the refusal to charge such of the requests submitted, as the Court refused to charge, and also to the modification of certain of the requests.

The Court:—Exception allowed.

WILBUR A. HEISLEY.

J. [SEAL]

Mr. Hobart:—I will not stop to give the numbers of those unless your Honor desires it.

The Court:—No; that is not necessary.

The plaintiff excepts to the refusal to charge as follows:

1. The jury must bring in a verdict for the plaintiff for the full amount claimed with interest.

Exception allowed. Let it be sealed and it is sealed accordingly.

WILBUR A. HEISLEY,

J. [SEAL]

The plaintiff excepts to refusal to charge as follows:

1a. The rules of the New York & New Jersey Car Service Association having been adopted by the plaintiff as part of its rules for the regulation of freight transportation such rules are binding on the defendant provided they are reasonable and the defendant had notice thereof before car service charges accrued on the cars in suit.

Exception allowed. Let it be sealed and it is sealed accordingly.

WILBUR A. HEISLEY,
J. [SEAL]

The plaintiff excepts to refusal to charge as follows:

2. It appearing by the undisputed evidence that defendant did have notice of the rules prior to the date when car service charges accrued on any of the cars in suit, such rules were binding upon the defendant if the jury find the same were reasonable.

Exception allowed. Let it be sealed and it is sealed accordingly.

WILBUR A. HEISLEY,
J. [SEAL]

The plaintiff excepts to refusal to charge as follows:

3. The rule providing that a charge of one dollar per car per day or fraction thereof shall be made for delivery of cars and use of track on all cars not unloaded within forty-eight hours after arrival, not including Sunday or legal holidays, is a reasonable rule.

Exception allowed. Let it be sealed and it is sealed accordingly.

WILBUR A. HEISLEY,
J. [SEAL]

The plaintiff excepts to refusal to charge as follows:

4. The notice required by the statute to be given to the consignee is sufficient if such notice is given in writing and mailed in the usual course of business.

Exception allowed. Let it be sealed and it is sealed accordingly.

WILBUR A. HEISLEY,
J. [SEAL]

The plaintiff excepts to refusal to charge as follows:

5. The rule providing that when freight is transferred from one car to another charges for detention will continue as if the freight had been originally shipped in the car to which transfer is made, is reasonable; and the fact that the contents of cars 70183 and of 42865 were transferred to Erie cars, does not affect the right of the railroad to recover car service charges thereon either before or after such transfers were made.

Exception allowed. Let it be sealed and it is sealed accordingly.

WILBUR A. HEISLEY,
J. [SEAL]

The plaintiff excepts to refusal to charge as follows:

6. The provision in the bills of lading that a carrier may make a reasonable charge per day for the detention of cars and use of tracks after the car has been held forty-eight hours for loading or unloading, is binding on the defendant; and as to those cars which it appears were shipped under bills of lading containing said provision, the plaintiff is entitled by reason of the terms of the bill of lading to recover a reasonable charge per day after the car or cars have been so held.

Exception allowed. Let it be sealed and it is sealed accordingly.

WILBUR A. HEISLEY,
J. [SEAL]

The plaintiff excepts to refusal to charge as follows:

7. If the jury find that cars while in actual use for purposes of transportation could earn more than one dollar per day, then the rate of one dollar per day is a reasonable charge to be made by

the railroad for the detention of cars on sidings. It being undisputed that freight cars earn on an average more than one dollar per day and that the rate of one dollar per day for demurrage is the rate in use throughout the United States (except as to such places where the charge is more than one dollar per day) the jury must find that said rate is reasonable.

Exception allowed. Let it be sealed and it is sealed accordingly.

WILBUR A. HEISLEY
J. [SEAL]

The plaintiff excepts to refusal to charge as follows:

8. It appearing that the public delivery track at Wanaque-Midvale is the siding opposite the freight station, the defendant had no legal right to insist on delivery of cars on the siding described as the Wanaque or paper company's siding.

Exception allowed. Let it be sealed and it is sealed accordingly.

WILBUR A. HEISLEY.
J. [SEAL]

The plaintiff excepts to refusal to charge as follows:

9. The fact that after delivery had been made on a private siding the railroad company loses its lien for freight and demurrage, justified the railroad company in refusing to make delivery on the siding known as the Wanaque or paper company siding at the place demanded by the defendant.

Exception allowed. Let it be sealed and it is sealed accordingly.

WILBUR A. HEISLEY,
J. [SEAL]

The plaintiff excepts to refusal to charge as follows:

10. It appearing that there was no siding on the plaintiff's Greenwood Lake division (on which was located the station called Wanaque-Midvale) known as "Paper Mill and Lumber Company Yard Switch" (or Siding), the plaintiff was not bound to make or tender delivery at such switch or siding.

Exception allowed. Let it be sealed and it is sealed accordingly.

WILBUR A. HEISLEY,
J. [SEAL]

The plaintiff excepts to refusal to charge as follows:

11. As to those cars the bills of lading for which called for delivery at "Paper Mill and Lumber Yard Switch" (or Siding), Wanaque, N. J., the plaintiff was not bound to make or tender delivery at the siding known as the Wanaque siding or the paper mill siding.

Exception allowed. Let it be sealed and it is sealed accordingly.

WILBUR A. HEISLEY,
J. [SEAL]

The plaintiff excepts to refusal to charge as follows:

12. It appearing that the bills of lading as to cars 1108, 44988 and 32537, called for delivery at a siding or station other than a regular station of the plaintiff, the burden of proof is upon the defendant to show that the agent who issued such bills of lading had authority to make such contract on behalf of the carrier.

Exception allowed. Let it be sealed and it is sealed accordingly.

WILBUR A. HEISLEY,
J. [SEAL]

The plaintiff excepts to refusal to charge as follows:

13. The agents of connecting carriers who issued bills of lading as to said three cars had no authority to bind the plaintiff to make delivery at the siding known as Wanaque siding or paper mill siding.

Exception allowed. Let it be sealed and it is sealed accordingly.

WILBUR A. HEISLEY,
J. [SEAL]

The plaintiff excepts to refusal to charge as follows:

14. Even if such bill of lading was authorized to be issued by agents of connecting carriers, it is subject to the reasonable rules and regulations of the railroad company as to delivery, including the regulations that the company may refuse to place the car on a private siding if reasonably assured that the consignee will not recognize or pay such car service charges as may accrue thereon.

Exception allowed. Let it be sealed and it is sealed accordingly.

WILBUR A. HEISLEY,
J. [SEAL]

The plaintiff excepts to refusal to charge as follows:

15. The plaintiff was legally justified in refusing to make delivery of car 42865 and other cars arriving for the lumber company after the arrival of said car until a receipt was first signed by the lumber company or someone authorized to do so on its behalf.

Exception allowed. Let it be sealed and it is sealed accordingly.

WILBUR A. HEISLEY,
J. [SEAL]

The plaintiff excepts to refusal to charge as follows:

16. The defendant is liable for the freight charges on all the cars in suit, including cars 1108 and 44988, if proper delivery thereof was made or tendered by the plaintiff.

Exception allowed. Let it be sealed and it is sealed accordingly.

WILBUR A. HEISLEY,
J. [SEAL]

The plaintiff excepts to refusal to charge as follows :

17. Regardless of the findings of the jury as to the other cars in suit, they must find a verdict for plaintiff for freight and car service due on car 100824, as it appears that said car was delivered at the place requested by defendant, provided they find the rate of one dollar per day for car service to be reasonable.

Exception allowed. Let it be sealed and it is sealed accordingly.

WILBUR A. HEISLEY,
J. [SEAL]

The plaintiff submits the following exceptions to the charge :

18. To that part of the charge which left it to the jury to determine whether the defendant owes anything for freight charges. This part of the charge reads follows :

"There is very little dispute about the freight, because it is admitted by the defendant, that if you find from the evidence that it owes freight on these cars, it then owes the amount of freight charged by the plaintiff. Of course, it does not admit that it owes any freight, but, nevertheless, if you find that it does owe freight on all of these cars, then it is admitted that the amount of freight, the rate of freight, is the amount specified in this paper, just referred to. In that connection,

and before passing to another branch of the case, let me say, there is some dispute about who was to pay the freight on two cars which, I think, came from Virginia. It is insisted by the railroad company that that freight was to be paid by the defendant. The defendant contends the contrary—that there was some arrangement made between it and the shipper in Virginia, whereby the freight was to be really charged to somebody else, presumably the shipper, instead of to the defendant, but that has been testified to in depositions which have been read in your presence, and you must recall what the fact is."

Exception allowed. Let it be sealed and it is sealed accordingly.

WILBUR A. HEISLEY,
J. [SEAL]

19. To that part of the charge which left it to the jury to determine whether the place, namely, the siding or switch referred to as the Wanaque switch or Paper Mill switch, was the usual place of delivery. This part of the charge reads as follows:

"Another car, 1108, is billed to 'Alcott and Company, Paper Mill and Lumber Yard Switch, Wanaque, New Jersey.' If this latter siding was an unusual place for the reception of freight, then it is the duty of the defendant to show the agent's authority to ship freight to such unusual place; if the agent of the connecting railroad was authorized to ship to a private siding, and I think this is a private siding, I don't think that is disputed—the defendant, by the car being placed upon such siding, would be subject to any reasonable rules of the company for car service attaching, including the company's refusal to so place it, if it was reasonably to be assumed that the consignee

would not recognize the liability to pay car service on such private siding. But, of course, gentlemen, the fact that it was shipped to this siding does not say that the agent must have some special authority for shipping it there, because it is contended by the defendant that this was one of the usual places for the reception of freight. There undoubtedly was a siding up near the Wanaque-Midvale passenger station, opposite the freight station, where they received freight of various kinds. That has been testified to quite extensively but the contention of the defendant is, that, notwithstanding that siding, that this siding in particular—so called 'paper mill siding,'—was also a siding used by the railroad company for the purpose of switching and depositing freight cars, and allowing people to load and unload cars therefrom; and they say that that use was so common that it was known, and that the agent on the connecting road had the right to bill this car as he did—some of these cars—to the paper mill and lumber yard switch at Wanaque."

Exception allowed. Let it be sealed and it is sealed accordingly.

WILBUR A. HEISLEY,
J. [SEAL]

20. To that part of the charge which left it to the jury to determine whether said switch or siding was common to the public use for the loading or unloading of cars. This part of the charge reads as follows:

"Well, if that is so, if you find that this was a track, used, not at rare intervals, but usually used for the reception of freight consigned to various people—if it was a place where people were permitted to load cars—not isolated instances, but a usual thing, then the agent had a right in the law to designate in the bill of lading, to which of these

switches the cars should go, provided you find they were both switches common to the public use for the loading or unloading of cars.

"This is one of the pivotal questions of the case for you to determine; was this one of the usual loading places or unloading places of cars."

Exception allowed. Let it be sealed and it is sealed accordingly.

WILBUR A. HEISLEY,
J. [SEAL]

21. To that part of the charge wherein the Court modified request No. 10 submitted on behalf of the plaintiff. This part of the charge reads as follows:

"The fact that after delivery has been made on a private siding the railroad company loses its lien for freight and demurrage, justified the railroad in refusing to make delivery on the siding known as the Wanaque or Paper Company siding at the place demanded by the defendant provided you find it was a private siding, and not a siding used generally by the company for the unloading or reception of freight."

Exception allowed. Let it be sealed and it is sealed accordingly.

WILBUR A. HEISLEY,
J. [SEAL]

22. To that part of the charge which left it to the jury to determine the question whether or not the requirement that a receipt should be signed before delivery of the cars was made was reasonable or not, and whether defendant was justified in refusing to sign a receipt. This part of the charge reads as follows:

"Now, one of the reasons why this car service has not been paid upon some of these cars, at least one of them, but I think upon several, is the fact

that the railroad company demanded a receipt for the lumber before the defendant was permitted to take it from the car; upon demanding that receipt the defendant refused to sign it; thereupon the railroad company refused to deliver the lumber. That may have been a reasonable requirement of the company or not; ordinarily if a man pays you money for a debt, he may not require you to sign a receipt for it, and you are not obliged to give him any evidence that he has paid you at all, but that does not apply to a railroad company, to a common carrier. A common carrier has the right to require, simply as a reasonable regulation, every consignee to sign a receipt for the goods, and oft-times it becomes the duty of the consignee to sign the receipt even before he gets the goods, but the receipt ought to be merely a receipt. A receipt could be required of a man, for instance, where he was shown the goods—where he saw the goods—the railroad company would have the right to say—'I want you to admit, in writing, before you take these goods out, here they are, but I want you to admit in writing that you have received them.' You would be obliged to sign such a receipt; but, if the railroad company should go on and connect with that receipt an admission (contradicting the fact) that it was in first class order, when it was apparent that the goods were damaged, you would not be required to sign such a receipt; because, while you can contradict the terms of a receipt, yet, nevertheless, the receipt is an admission of the facts stated therein, until the contrary is proven.

"In this case, the defendant declined to sign the receipt; and you must determine whether, under all the circumstances of the case, he was justified in so declining—whether the requirement by the company that the receipt should be signed was a reasonable requirement. Here was a car—the one

car which I have in mind was a car with locks on the door, I think; the manager of the defendant says that he told the railroad's representative that he did not know whether the car contained wood or stones. Suppose they had required him to sign a receipt admitting the car contained not only lumber but bricks, when he had no reason to suppose the car did contain brick, he would not be required to sign a receipt like that. Suppose that he had any reason to believe—suppose that a prudent man would have any reason to believe that the car did not contain the lumber; he would not be required to sign it; it may be that the locking of this car was a circumstance which would make a prudent man think that perhaps the car did not contain just what was represented—not necessarily so, but that is a fact to be considered in ascertaining whether he acted reasonably.

"On the other hand, it must be remembered that there had been considerable feeling between these parties as to the receipt of other freight, and perhaps the locking of the car under those circumstances would have no significance at all; but unless this officer of the defendant had some reason which would justify a prudent man in believing that the car did not contain his lumber—the lumber referred to—it was his duty to sign the receipt even before the car was given. That is the law as I understand it."

Exception allowed. Let it be sealed and it is sealed.

WILBUR A. HEISLEY.
J. [SEAL]

23. To that part of the charge which left it to the jury to determine whether or not proper delivery of the cars was offered by the plaintiff, and whether proper notice of arrival was sent, and

whether defendant was remiss in complying with the plaintiff's regulations. This part of the charge reads as follows :

"You are the judges of the facts ; it is for you to determine whether or not there was a proper delivery made of this freight at a place within the contemplation of these parties—the railroad as well as the defendant ; whether there was notice sent of the arrival ; whether the defendant was remiss in failing to comply with any reasonable regulations of the company regarding the reception of this freight and paying for it; and if you find it was not a proper delivery, not in an accessible place ; or if you find the defendant has complied with all reasonable regulations of the plaintiff, then your verdict should be for the defendant. If, on the other hand, you find that the freight is due, that there has been a proper tender, due notice and a proper delivery of the freight ; that the railroad company has done all it should be required to do in reason, then the verdict should be for the railroad company."

Exception allowed. Let it be sealed and it is sealed accordingly.

WILBUR A. HEISLEY,
J. [SEAL]

24. To that part of the charge which left it to the jury to determine whether the charge of $1 per day for demurrage was reasonable in amount. This part of the charge reads as follows :

"We have here a list already referred to, showing the number of days for which car service is claimed ; the railroad has charged one dollar a day forty-eight hours after the arrival and notice of the arrival of the car to the owner. Forty-eight hours is a reasonable time ; the question in dispute, in case you find there is car service due, is as

to the reasonableness of this charge of one dollar a day. Is that, or is it not, a reasonable charge? There is the original cost of the car; there is the value of the car as an investment; there is the earning power of the car which, of course, is a feature; and they say, particularly railroad people say, it is over two dollars a day—the average earning capacity of an average freight car; there is the cost of the track which it occupies. On the other hand the defendant says that that is an unreasonable charge; they have offered evidence here which is undisputed, that, as between themselves, railroads now charge each other fifty cents a day for the very car for which they charge the consignee one dollar a day. It used to be twenty-five cents a day, now it is fifty cents a day; and the defendant also says that there is evidence that fifty cents a day is a reasonable charge, and one dollar a day is an unreasonable charge; that the railroad company makes it a point to release foreign cars, on which they are charged fifty cents, and that they keep their own cars idle rather than use the foreign cars or retain them at a rate of fifty cents a day. Personally it does not matter what the court thinks about the reasonableness or unreasonableness of this charge; that is a question of fact for you to determine; it is the duty of the plaintiff to prove the reasonableness of the charge, before they may have your verdict, but there ought to be a verdict for something for car service if car service accrued; I mean by that simply that the deprivation of the company of the use of a car must be some loss to the company; it must be some loss; what the loss is, I don't know; that is a point in dispute between these parties.

Exception allowed. Let it be sealed and it is sealed accordingly.

WILBUR A. HEISLEY,
J. [SEAL]

Statement Referred to in the Charge.

NEW JERSEY SUPREME COURT.

ERIE RAILROAD COMPANY,

vs.

WANAQUE LUMBER COMPANY.

Statement for use of Court and Jury.

No.	Direction on Bill of Lading.	Direction of Way-bill.
100824	(No bill of lading produced)	Wanaque Lbr.Co.W. via. N. Y. & G. L.
70183	(See note below)	Wanaque Lumber Co., Wanaque, N. J.
42865	Alcott & Company, Wanaque, N. J.	Alcott & Co., Wanaque-Midvale, N. J.
1108	Alcott & Co., Paper Mill & Lbr. Yd. Switch, Wanaque, N. J.	Alcott & Co., Paper Mill & Lbr. Yd. Switch, Wanaque, N. J.
44988	Alcott & Co., Wanaque, N. J. at Paper Mill and Lbr. Yard Sidg.	Alcott & Co., at Paper Mill and Lumber Yard Siding, do
32537	Alcott & Co., Paper Mill & Lumber Yard Switch, Wanaque, N. J.	Alcott & Co., Paper Mill & Lbr. Co. Yard Switch, Wanaque, M.

Note as to 70183.—Bill of lading from Engels, Va., to J. C. reads: F. E. Morse Co., Jersey City, cf. Erie R. R., N. J.

Order from Morse Co. reads:

Forward to "Wanaque Lumber Co., Wanaque, N. J."

Statement Referred to in the Charge.

NEW JERSEY SUPREME COURT.

ERIE RAILROAD COMPANY,

vs.

WANAQUE LUMBER COMPANY,

Statement for use of Court and Jury.

Car No.	Amt. of Freight	Am. of Car Service	Dates between which car service is claimed.
100824	$237.25	$75.	April 4 to May 4, and May 5 to July 6.
70183	48.	47.	June 20 to August 18.
42865	Paid	29.	August 10 to September 16.
1108	59.02	17.	August 24 to September 16.
44988	343.60	14.	August 28 to September 16.
32537	103.40	2.	September 12 to September 16.
	$791.27	$184.	

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4	Rules of N. Y. & N. J. Car Service Association, reprint of 1901	66	58
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Writ of Error.

Returnable April 5, 1907.

STATE OF NEW JERSEY

SEAL

The State of New Jersey to the Chief Justice and other Justices of our Supreme Court of Judicature, GREETING:

Forasmuch as in the record and proceedings, and also in the giving of judgment in a certain plaint which was in our said Supreme Court of Judicature before you between Erie Railroad Company, plaintiff, and Wanaque Lumber Company, defendant, in an action of contract, manifest error hath intervened, to the great damage of the said plaintiff, as it is said; we being willing that the error, if any there be, should in due manner be corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you that if judgment be thereupon given and affirmed, that you distinctly and openly send, under your seal, the record and proceedings aforesaid, with all things touching the same, to our Judges of our Court of Errors and Appeals in the last resort in all causes, at Trenton, on the fifth day of April, nineteen hundred and seven, together with this writ, that the record and proceedings aforesaid being inspected, we may cause to be further done thereupon for correcting that error what of right and according to law ought to be done.

Witness, William J. Magie, Esquire, our Chancellor and President Judge of said Court of Errors and Appeals, at Trenton aforesaid, the sixteenth day of March, nineteen hundred and seven.

COLLINS & CORBIN,
Attorneys.

S. D. DICKINSON,
Clerk.

Return.

The answer of the Justices of the Supreme Court of the State of New Jersey within named. The record and proceedings whereof mention is within made, with all things touching and concerning the same, we do certify to the Court of Errors and Appeals of said State in a certain schedule to this writ annexed, as within we are commanded.

WM. S. GUMMERE, (SEAL)
C.J.

Declaration.

New Jersey Supreme Court of the fourth day of November, nineteen hundred and five.

PASSAIC COUNTY, SS :

Wanaque Lumber Company, a corporation, was summoned to answer unto Erie Railroad Company, a corporation, in an action upon contract and thereupon the said plaintiff by Collins & Corbin, its attorneys, complains :

1. Erie 100824 (Car Service.) (*a*) For that whereas, the said plaintiff at all the times hereinafter mentioned, was and is a corporation engaged in the business of a common carrier by its railroad of goods and merchandise for hire, and heretofore, to wit, on the fifth day of April, nineteen hundred and five, at the special instance and request of the said defendant, carried and conveyed to the said defendant for a certain hire and reward, agreed to be paid by the said defendant, at Wanaque-Midvale (one of the railroad stations of the said plaintiff), to wit, at Paterson, Passaic county, aforesaid, a certain railroad freight car known and designated as "Erie car 100824", loaded with goods

and merchandise and consigned to the said defendant at Wanaque-Midvale, to wit, at Paterson, Passaic county, aforesaid; and whereas, prior to the said fifth day of April, nineteen hundred and five, and prior to the making of the contract for the carriage of said goods and merchandise, the plaintiff had adopted and put in operation for the management of its business as a common carrier, certain reasonable rules and regulations of the New York and New Jersey Car Service Association (of which Association the said plaintiff at all the times herein mentioned was and is a member), which rules and regulations were in force and effect at all the times herein mentioned and of which rules and regulations and of the adoption thereof by the said plaintiff the said defendant had notice, prior to the said fifth day of April, nineteen hundred and five, and prior to the making of the contract for the carriage of said goods and merchandise. Said rules and regulations required that the railroad freight cars, owned or operated by the plaintiff in connection with its business as a common carrier, should be unloaded and released within a certain reasonable time, to-wit, within forty-eight hours (exclusive of Sunday and holidays) after the arrival of said cars at their destination or after the placing of the same for unloading; and in default of unloading and releasing the said cars within the said period of forty-eight hours, a certain reasonable charge for demurrage, to wit, a charge of one dollar per day or a fraction thereof, should be made for each car not unloaded and released within said period of forty-eight hours (exclusive of Sundays and holidays); and whereas, the carriage and conveyance of said Erie car 100824 was performed by the said plaintiff, subject to the said rules and regulations and thereby it became and was the duty of the said defendant to unload and release said car

consigned to the defendant as aforesaid, within said period of forty-eight hours (exclusive of Sundays and holidays), after the arrival thereof at its destination at Wanaque-Midvale aforesaid, or after the placing thereof for unloading; yet the said defendant did not unload and release said car within forty-eight hours after said car had arrived at Wanaque-Midvale aforesaid, and after the same had been placed for unloading, but unreasonably neglected and refused to unload and and release the said car until the sixth day of July, nineteen hundred and five, and thereby the said defendant became and was liable to pay the said plaintiff the sum of one dollar per day for each day or a fraction thereof (exclusive of Sundays and holidays), subsequent to said period of forty-eight hours until the said car was unloaded and released as aforesaid; whereby the defendant became and was indebted to the plaintiff in the sum of seventy-five dollars for its reasonable charges for car service or demurrage, in accordance with said rules and regulations; and being so indebted, the said defendant in consideration thereof, promised the plaintiff to pay the said sum of seventy-five dollars when it, the said defendant, should be thereunto afterward requested, yet the said defendant, though often requested so to do, has not as yet paid the said sum of money or any part thereof to the plaintiff's damage one hundred dollars.

1. (*Erie 100824 Car Service.*) (*b*) And whereas also, the said defendant afterwards, to wit, on the sixth day of July, nineteen hundred and five, at Wanaque-Midvale, to wit, at Paterson, Passaic County, aforesaid, was indebted to the said plaintiff in the further sum of seventy-five dollars for warehouse room and storage room by the said plaintiff before

that time provided and furnished in and about the stowing, keeping and storing of certain goods and merchandise, before that time, to wit, from the fifth day of April, nineteen hundred and five, to the sixth day of July, nineteen hundred and five, stowed, kept and stored in a certain railroad freight car of plaintiff, known and designated as "Erie car 100824" for the said defendant at its special instance and request; and being so indebted, the said defendant in consideration thereof on the day and year aforesaid, to wit, the sixth day of July, nineteen hundred and five, at Wanaque-Midvale, to wit, at Paterson, Passaic County, aforesaid, undertook and then and there promised the said plaintiff to pay it the said sum of seventy-five dollars when it should be thereunto afterwards requested; yet the said defendant, though often requested so to do, has not as yet paid the said sum of money or any part thereof, to the plaintiff's damage one hundred dollars.

4. (*Erie 100824 Car Service.*) (c) And whereas also, the said defendant afterwards, to wit, on the sixth day of July, nineteen hundred and five, at Wanaque-Midvale, to wit, at Paterson, Passaic county, aforesaid, was indebted to the said plaintiff, a common carrier of freight for hire, in the further sum of seventy-five dollars for the use of a certain railroad freight car, known and designated as "Erie car 100824," whereof said plaintiff was the owner, which said car was kept and retained by the said defendant with certain of the said defendant's goods and merchandise on board thereof for the defendant's convenience for a long time then elapsed, to wit, from the fifth day of April, nineteen hundred and five, to the sixth day of July, nineteen hundred and five, at the defendant's special instance and request; and being so indebted, the said defendant in consideration thereof, after-

wards, to wit, on the sixth day of July, nineteen hundred and five, at Wanaque-Midvale, to wit, at Paterson, Passaic county, aforesaid, undertook and then and there promised the said plaintiff to pay it the said sum of seventy-five dollars when it should be thereunto afterwards requested; yet the said defendant, though often requested so to do, has not as yet paid the said sum of money, or any part thereof, to the plaintiff's damage one hundred dollars.

(*Erie 100824 Freight.*) And whereas, heretofore, to wit, on the fifth day of April, nineteen hundred and five, at Paterson, Passaic county, aforesaid, the said defendant became and was indebted to the said plaintiff in the sum of two hundred and thirty-seven dollars and twenty-five cents for freight charges on certain goods and merchandise by the said plaintiff carried and conveyed in one of its railroad cars, known and designated as "Erie car 100824," from Jersey City to Wanaque-Midvale, in the state of New Jersey, at the special instance and request of the said defendant; and being so indebted, the said defendant, in consideration thereof, undertook and then and there promised the said plaintiff to pay it the said sum of money when it should be thereunto afterwards requested; yet the said defendant, though often requested so to do, has not as yet paid the said sum of money or any part thereof, to the plaintiff's damage three hundred dollars.

5. (*B. & O. 70183 Car Service.*) (*a*) And whereas also, the said plaintiff at all the times hereinafter mentioned was and is a corporation engaged in the business of a common carrier by its railroad of goods and merchandise for hire, and heretofore, to wit, on the twentieth day of June, nine-

teen hundred and five, at the special instance and request of the said defendant, carried and conveyed to the said defendant for a certain hire and reward, agreed to be paid by the said defendant at Wanaque-Midvale, (one of the railroad stations of the said plaintiff) to wit, at Paterson, Passaic county, aforesaid, a certain railroad freight car, known and designated as "B. & O. car 70183," loaded with goods and merchandise and consigned to the said defendant at Wanaque-Midvale, to wit, at Paterson, Passaic county, aforesaid; and whereas, prior to the said twentieth day of June, nineteen hundred and five, and prior to the making of the contract for the carriage of said goods and merchandise, the plaintiff had adopted and put in operation for the management of its business as a common carrier, certain reasonable rules and regulations of the New York and New Jersey Car Service Association (of which Association the said plaintiff at all the times herein mentioned was and is a member), which rules and regulations were in force and effect at all the times herein mentioned, and of which rules and regulations and of the adoption thereof by the said plaintiff the said defendant had notice, prior to the said twentieth day of June, nineteen hundred and five, and prior to the making of the contract for the carriage of said goods and merchandise. Said rules and regulations required that the railroad freight cars, owned or operated by the plaintiff in connection with its business as a common carrier, should be unloaded and released within a certain reasonable time, to wit, within forty-eight hours (exclusive of Sundays and holidays) after the arrival of said cars at their destination or after the placing of the same for unloading; and in default of unloading and releasing the said cars within the said period of forty-eight hours, a certain reasonable charge for demurrage, to wit, a charge of one dollar per

day or a fraction thereof, should be made for each car not unloaded and released within said period of forty-eight hours (exclusive of Sundays and holidays); and whereas, the carriage and conveyance of said B. & O. car 70183 was performed by the said plaintiff, subject to the said rules and regulations and thereby it became and was the duty of the said defendant to unload and release said car consigned to the defendant as aforesaid, within said period of forty-eight hours (exclusive of Sundays and holidays), after the arrival thereof at its destination at Wanaque-Midvale aforesaid, or after the placing thereof for unloading; yet the said defendant did not unload and release said car within forty-eight hours after said car had arrived at Wanaque-Midvale aforesaid, and after the same had been placed for unloading, but unreasonably neglected and refused to unload and release the said car until the eighteenth day of August, nineteen hundred and five, and thereby the said defendant became and was liable to pay the said plaintiff the sum of one dollar per day for each day or a fraction thereof (exclusive of Sundays and holidays), subsequent to said period of forty-eight hours until the said car was unloaded and released as aforesaid; whereby the defendant became and was indebted to the plaintiff in the sum of forty-seven dollars for its reasonable charges for car service or demurrage, in accordance with said rules and regulations; and being so indebted, the said defendant in consideration thereof, promised the plaintiff to pay the said sum of forty-seven dollars when it, the said defendant, should be thereunto afterward requested, yet the said defendant, though often requested so to do, has not as yet paid the said sum of money or any part thereof, to the plaintiff's damage one hundred dollars.

6. (B. & O. 70183 Car Service.) (b) And whereas also, the said defendant afterwards, to wit, on the eighteenth day of August, nineteen hundred and five, at Wanaque-Midvale, to wit, at Paterson, Passaic county, aforesaid, was indebted to the said plaintiff in the further sum of forty-seven dollars for warehouse room and storage room by the said plaintiff before that time provided and furnished in and about the stowing, keeping and storing of certain goods and merchandise, before that time, to wit, from the twentieth day of June, nineteen hundred and five, to the eighteenth day of August, nineteen hundred and five, stowed, kept and stored in a certain railroad freight car of plaintiff, known and designated as "B. & O. 70183," for the said defendant at its special instance and request; and being so indebted, the said defendant in consideration thereof on the day and year aforesaid, to wit, the eighteenth day of August, nineteen hundred and five, at Wanaque-Midvale, to wit, at Paterson, Passaic county, aforesaid, undertook and then and there promised the said plaintiff to pay it the said sum of forty-seven dollars when it should be thereunto afterwards requested; yet the said defendant, though often requested so to do, has not as yet paid the said sum of money or any part thereof, to the plaintiff's damage one hundred dollars.

7. (B. & O. 70183 Car Service.) (c) And whereas also, the said defendant afterwards, to wit, on the eighteenth day of August, nineteen hundred and five, at Wanaque-Midvale, to wit, at Paterson, Passaic county, aforesaid, was indebted to the said plaintiff, a common carrier of freight for hire, in the further sum of forty-seven dollars for the use of a certain railroad freight

car, known and designated as "B. & O. 70183," whereof said plaintiff was the owner, which said car was kept and retained by the said defendant with certain of the said defendant's goods and merchandise on board thereof for the defendant's convenience for a long time then elapsed, to wit, from the twentieth day of June, nineteen hundred and five, to the eighteenth day of August, nineteen hundred and five, at the defendant's special instance and request; and being so indebted, the said defendant in consideration thereof, afterwards, to wit, on the eighteenth day of August, nineteen hundred and five, at Wanaque-Midvale, to wit, at Paterson, Passaic county, aforesaid, undertook and then and there promised the said plaintiff to pay it the said sum of forty-seven dollars when it should be thereunto afterwards requested; yet the said defendant, though often requested so to do, has not as yet paid the said sum of money or any part thereof, to the plaintiff's damage one hundred dollars.

8. (*B. & O. 70183 Freight.*) And whereas, heretofore, to wit, on the twentieth day of June, nineteen hundred and five, at Paterson, Passaic county, aforesaid, the said defendant became and was indebted to the said plaintiff in the sum of ninety-five dollars for freight charges on certain goods and merchandise by the said plaintiff carried and conveyed in one of its railroad cars, known and designated as "B. & O. car 70183," from Jersey City to Wanaque-Midvale, in the State of New Jersey, at the special instance and request of the said defendant; and being so indebted, the said defendant in consideration thereof, undertook and then and there promised the said plaintiff to pay it the said sum of money when it should be thereunto afterwards requested; yet the said defendant, though often requested so to do, has not as yet paid the said

sum of money or any part thereof, to the plaintiff's damage one hundred dollars.

9. (M. C. 42865 Car Service.) (a) And whereas also the said plaintiff at all the times hereinafter mentioned, was and is a corporation engaged in the business of a common carrier by its railroad of goods and merchandise for hire, and heretofore, to wit, on the tenth day of August, nineteen hundred and five, at the special instance and request of the said defendant, carried and conveyed to the said defendant for a certain hire and reward, agreed to be paid by the said defendant at Wanaque-Midvale (one of the railroad stations of the said plaintiff), to wit, at Paterson, Passaic county, aforesaid, a certain railroad freight car known and designated as "M. C. car 42865," loaded with goods and merchandise and consigned to the said defendant at Wanaque-Midvale, to wit, at Paterson, Passaic county, aforesaid; and whereas, prior to the said tenth day of August, nineteen hundred and five, and prior to the making of the contract for the carriage of said goods and merchandise, the plaintiff had adopted and put in operation for the management of its business as a common carrier, certain reasonable rules and regulations of the New York and New Jersey Car Service Association (of which association the said plaintiff at all the times herein mentioned was and is a member), which rules and regulations were in force and effect at all the times herein mentioned, and of which rules and regulations and of the adoption thereof by the said plaintiff the said defendant had notice, prior to the said tenth day of August, nineteen hundred and five, and prior to the making of the contract for the carriage of said goods and merchandise. Said rules and regulations required that the railroad freight cars, owned or operated

by the plaintiff in connection with its business as a common carrier, should be unloaded and released within a certain reasonable time, to wit, within forty-eight hours (exclusive of Sundays and holidays) after the arrival of said cars at their destination or after the placing of the same for unloading; and in default of unloading and releasing the said cars within the said period of forty-eight hours, a certain reasonable charge for demurrage, to wit, a charge of one dollar per day or a fraction thereof, should be made for each car not unloaded and released within said period of forty-eight hours (exclusive of Sundays and holidays); and whereas, the carriage and conveyance of said M. C. car 42865 was performed by the said plaintiff, subject to the said rules and regulations, and thereby it became and was the duty of the said defendant to unload and release said car consigned to the defendant as aforesaid, within said period of forty-eight hours (exclusive of Sundays and holidays), after the arrival thereof at its destination at Wanaque-Midvale aforesaid, or after the placing thereof for unloading; yet the said defendant did not unload and release said car within forty-eight hours after said car had arrived at Wanaque-Midvale aforesaid, and after the same had been placed for unloading, but unreasonably neglected and refused to unload and release the said car until the sixteenth day of September, nineteen hundred and five, and thereby the said defendant became and was liable to pay the said plaintiff the sum of one dollar per day for each day or a fraction thereof (exclusive of Sundays and holidays), subsequent to said period of forty-eight hours until the said car was unloaded and released as aforesaid; whereby the defendant became and was indebted to the plaintiff in the sum of twenty-nine dollars for its reasonable charges for car service or demurrage, in accordance with said rules and

regulations; and being so indebted, the said defendant, in consideration thereof, promised the plaintiff to pay the said sum of twenty-nine dollars when it, the said defendant, should be thereunto afterward requested, yet the said defendant, though often requested so to do, has not as yet paid the said sum of money or any part thereof to the plaintiff's damage one hundred dollars.

10. (*M. C. 42865 Car Service.*) (*b*) And whereas also, the said defendant afterwards, to wit, on the sixteenth day of September, nineteen hundred and five at Wanaque-Midvale, to wit, at Paterson, Passaic county, aforesaid, was indebted to the said plaintiff in the further sum of twenty-nine dollars for warehouse room and storage room by the said plaintiff before that time provided and furnished in and about the stowing, keeping and storing of certain goods and merchandise, before that time, to wit, from the tenth day of August, nineteen hundred and five, to the sixteenth day of September, nineteen hundred and five; stowed, kept and stored in a certain railroad freight car of plaintiff, known and designated as "M. C. car 42865," for the said defendant at its special instance and request; and being so indebted, the said defendant in consideration thereof on the day and year aforesaid, to wit, the sixteenth day of September, nineteen hundred and five, at Wanaque-Midvale, to wit, at Paterson, Passaic county, aforesaid, undertook and then and there promised the said plaintiff to pay it the said sum of twenty-nine dollars when it should be thereunto afterwards requested; yet the said defendant' though often requested so to do, has not as yet paid the said sum of money, or any part thereof, to the plaintiff's damage one hundred dollars.

11 (*M. C. 42865 Car Service.*) (*c*) And whereas also, the said defendant afterwards, to wit, on the sixteenth day of September, nineteen hundred and five, at Wanaque-Midvale, to wit, at Paterson, Passaic county, aforesaid, was indebted to the said plaintiff, a common carrier of freight for hire, in the further sum of twenty-nine dollars for the use of a certain railroad freight car, known and designated as "M. C. 42865," whereof said plaintiff was the owner, which said car was kept and retained by the said defendant with certain of the said defendant's goods and merchandise on board thereof for the defendant's convenience for a long time then elapsed, to wit, from the tenth day of August, nineteen hundred and five, to the sixteenth day of September, nineteen hundred and five, at the defendant's special instance and request; and being so indebted, the said defendant in consideration thereof, afterwards, to wit, on the sixteenth day of September, nineteen hundred and five, at Wanaque-Midvale, to wit, at Paterson, Passaic county, aforesaid, undertook and then and there promised the said plaintiff to pay it the said sum of twenty-nine dollars when it should be thereunto afterwards requested; yet the said defendant, though often requested so to do, has not as yet paid the said sum of money or any part thereof, to the plaintiff 's damage one hundred dollars.

12. (*P. S. & N. 1108 Car Service.*) (*a*) And whereas also, the said plaintiff at all the times hereinafter mentioned, was and is a corporation engaged in the business of a common carrier by its railroad of goods and merchandise for hire, and heretofore, to wit, on the twenty-fourth day of August, nineteen hundred and five, at the special instance and request of the said defendant, carried and

conveyed to the said defendant for a certain hire and reward, agreed to be paid by the said defendant at Wanaque-Midvale, (one of the railroad stations of the said plaintiff), to wit, at Paterson, Passaic county, aforesaid, a certain railroad freight car, known and designated as "P. S. & N. car 1108," loaded with goods and merchandise and consigned to the said defendant at Wanaque-Midvale, to wit, at Paterson, Passaic county, aforesaid; and whereas, prior to the said twenty-fourth day of August, nineteen hundred and five, and prior to the making of the contract for the carriage of said goods and merchandise, the plaintiff had adopted and put in operation, for the management of its business as a common carrier, certain reasonable rules and regulations of the New York and New Jersey Car Service Association (of which association the said plaintiff at all the times herein mentioned was and is a member), which rules and regulations were in force and effect at all the times herein mentioned and of which rules and regulations and of the adoption thereof by the said plaintiff the said defendant had notice, prior to the said twenty-fourth day of August, nineteen hundred and five, and prior to the making of the contract for the carriage of said goods and merchandise. Said rules and regulations required that the railroad freight cars, owned or operated by the plaintiff in connection with its business as a common carrier, should be unloaded and released within a certain reasonable time, to wit, within forty-eight hours (exclusive of Sundays and holidays) after the arrival of said cars at their destination or after the placing of the same for unloading; and in default of unloading and releasing the said cars within the said period of forty-eight hours, a certain reasonable charge for demurrage, to wit, a charge of one dollar per day or a frac-

tion thereof, should be made for each car not unloaded and released within said period of forty-eight hours (exclusive of Sundays and holidays); and whereas, the carriage and conveyance of said P. S. and N. car 1108 was performed by the said plaintiff, subject to the said rules and regulations and thereby it became and was the duty of the said defendant to unload and release said car consigned to the defendant as aforesaid, within said period of forty-eight hours (exclusive of Sundays and holidays), after the arrival thereof at its destination at Wanaque-Midvale aforesaid, or after the placing thereof for unloading; yet the said defendant did not unload and release said car within forty-eight hours after said car had arrived at Wanaque-Midvale aforesaid, and after the same had been placed for unloading, but unreasonably neglected and refused to unload and release the said car until the sixteenth day of September nineteen hundred and five and thereby the said defendant became and was liable to pay the said plaintiff the sum of one dollar per day for each day or a fraction thereof (exclusive of Sundays and holidays), subsequent to said period of forty-eight hours until the said car was unloaded and released as aforesaid; whereby the defendant became and was indebted to the plaintiff in the sum of seventeen dollars for its reasonable charges for car service or demurrage, in accordance with said rules and regulations; and being so indebted, the said defendant in consideration thereof promised the plaintiff to pay the said sum of seventeen dollars when it, the said defendant, should be thereunto afterward requested, yet the said defendant, though often requested so to do, has not as yet paid the said sum of money or any part thereof, to the plaintiff's damage one hundred dollars.

13. (*P. S. & N. 1108 Car Service.*) (*b*) And whereas also, the said defendant afterwards, to wit, on the sixteenth day of September, nineteen hundred and five, at Wanaque-Midvale, to wit, at Paterson, Passaic county, aforesaid, was indebted to the said plaintiff in the further sum of seventeen dollars for warehouse room and storage room by the said plaintiff before that time provided and furnished in and about the stowing, keeping and storing of certain goods and merchandise, before that time, to wit, from the twenty-fourth day of August, nineteen hundred and five, to the sixteenth day of September, nineteen hundred and five, stowed, kept and stored in a certain railroad freight car of plaintiff, known and designated as "P. S. & N. 1108," for the said defendant at its special instance and request; and being so indebted, the said defendant in consideration thereof on the day and year aforesaid, to wit, the sixteenth day of September, nineteen hundred and five, at Wanaque-Midvale, to wit, at Paterson, Passaic county, aforesaid, undertook and then and there promised the said plaintiff to pay it the said sum of seventeen dollars when it should be thereunto afterwards requested; yet the said defendant, though often requested so to do, has not as yet paid the said sum of money or any part thereof, to the plaintiff's damage one hundred dollars.

14. (*P. S. & N. 1108 Car Service.*) (*c*) And whereas also, the said defendant afterwards, to wit, on the sixteenth day of September, nineteen hundred and five, at Wanaque-Midvale, to wit, at Paterson, Passaic county aforesaid, was indebted to the said plaintiff, a common carrier of freight for hire, in the further sum of seventeen dollars for

the use of a certain railroad freight car, known and designated as "P. S. & N. 1108," whereof said plaintiff was the owner, which said car was kept and retained by the said defendant with certain of the said defendant's goods and merchandise on board thereof for the defendant's convenience for a long time then elapsed, to wit, from the twenty-fourth day of August, nineteen hundred and five, to the sixteenth day of September, nineteen hundred and five, at the defendant's special instance and request; and being so indebted, the said defendant in consideration thereof, afterwards, to wit, on the sixteenth day of August, nineteen hundred and five, at Wanaque-Midvale, to wit, at Paterson, Passaic county, aforesaid, undertook and then and there promised the said plaintiff to pay it the said sum of seventeen dollars when it should be thereunto afterwards requested; yet the said defendant, though often requested so to do, has not as yet paid the said sum of money or any part thereof, to the plaintiff's damage one hundred dollars.

15. (*P. S. & N. 1108 Freight.*) And whereas, heretofore, to wit, on the twenty-fourth day of August, nineteen hundred and five, at Paterson, Passaic county, aforesaid, the said defendant became and was indebted to the said plaintiff in the sum of fifty-nine dollars and two cents for freight charges on certain goods and merchandise by the said plaintiff carried and conveyed in one of its railroad cars, known and designated as "P. S. & N. 1108," from Jersey City to Wanaque-Midvale, in the state of New Jersey, at the special instance and request of the said defendant; and being so indebted, the said defendant, in consideration thereof, undertook and then and there promised the said plaintiff to pay it the said sum of money when it should be thereunto afterwards requested; yet the said de-

fendant, though often requested so to do, has not as yet paid the said sum of money or any part thereof, to the plaintiff's damage one hundred dollars.

(*L. S. & M. S. 44988 Car Service.*) (*a*) And whereas also, the said plaintiff at all the times hereinafter mentioned, was and is a corporation engaged in the business of a common carrier by its railroad of goods and merchandise for hire, and heretofore, to wit, on the twenty-eighth day of August, nineteen hundred and five, at the special instance and request of the said defendant, carried and conveyed to the said defendant for a certain hire and reward, agreed to be paid by the said defendant at Wanaque-Midvale (one of the railroad stations of the said plaintiff), to wit, at Paterson, Passaic county, aforesaid, a certain railroad freight car known and designated as "L. S. & M. S. car 44988," loaded with goods and merchandise and consigned to the said defendant at Wanaque-Midvale, to wit, at Paterson, Passaic county, aforesaid; and whereas, prior to the said twenty-eighth day of August, nineteen hundred and five, and prior to the making of the contract for the carriage of said goods and merchandise, the plaintiff had adopted and put in operation for the management of its business as a common carrier, certain reasonable rules and regulations of the New York and New Jersey Car Service association (of which association the said plaintiff at all the times herein mentioned was and is a member), which rules and regulations were in force and effect at all the times herein mentioned and of which rules and regulations and of the adoption thereof by the said plaintiff the said defendant had notice, prior to the said twenty-eighth day of August, nineteen hundred and five,

and prior to the making of the contract for the carriage of said goods and merchandise. Said rules and regulations required that the railroad freight cars, owned or operated by the plaintiff in connection with its business as a common carrier, should be unloaded and released within a certain reasonable time, to wit, within forty-eight hours (exclusive of Sundays and holidays) after the arrival of said cars at their destination or after the placing of the same for unloading; and in default of unloading and releasing the said cars within the said period of forty-eight hours, a certain reasonable charge for demurrage, to wit, a charge of one dollar per day, or a fraction thereof, should be made for each car not unloaded and released within said period to forty-eight hours (exclusive of Sundays and holidays); and whereas, the carriage and conveyance of said L. S. & M. S. car 44988 was performed by the said plaintiff, subject to the said rules and regulations, and thereby it became and was the duty of the said defendant to unload and release said car consigned to the defendant as aforesaid, within said period of forty-eight hours (exclusive of Sundays and holidays), after the arrival thereof at its destination at Wanaque-Midvale aforesaid, or after the placing thereof for unloading, yet the said defendant did not unload and release said car within forty-eight hours after said car had arrived at Wanaque-Midvale aforesaid, and after the same had been placed for unloading, but unreasonably neglected and refused to unload and release the said car until the sixteenth day of September, nineteen hundred and five, and thereby the said defendant became and was liable to pay the said plaintiff the sum of one dollar per day for each day, or a fraction thereof, (exclusive of Sundays and holidays), subsequent to said period of forty-eight hours until the said car

was unloaded and released as aforesaid ; whereby the defendant became and was indebted to the plaintiff in the sum of fourteen dollars for its reasonable charges for car service or demurrage, in accordance with said rules and regulations ; and being so indebted, the said defendant, in consideration thereof, promised the plaintiff to pay the said sum of fourteen dollars when it, the said defendant, should be thereunto afterward requested, yet the said defendant though often requested so to do, has not as yet paid the said sum of money or any part thereof, to the plaintiff 's damage one hundred dollars.

17. (*L. S. & M. S. 44988 Car Service.*) (*b*) And whereas also, the said defendant afterwards, to wit, on the sixteenth day of September, nineteen hundred and five, at Wanaque-Midvale, to wit, at Paterson, Passaic county, aforesaid, was indebted to the said plaintiff in the further sum of fourteen dollars for warehouse room and storage room by the said plaintiff before that time provided and furnished in and about the stowing, keeping and storing of certain goods and merchandise, before that time, to wit, from the twenty-eighth day of August, nineteen hundred and five, to the sixteenth day of September, nineteen hundred and five, stowed, kept and stored in a certain railroad freight car of plaintiff, known and designated as "L. S. & M. S. car 44988" for the said defendant at its special instance and request ; and being so indebted, the said defendant in consideration thereof, on the day and year aforesaid, to wit, the sixteenth day of September, nineteen hundred and five, at Wanaque-Midvale, to wit, at Paterson, Passaic county, aforesaid, undertook and then and there promised the said plaintiff to pay it the said sum of fourteen dollars when it should be there-

unto afterwards requested ; yet the said defendant, though often requested so to do, has not as yet paid the said sum of money or any part thereof, to the plaintiff's damage one hundred dollars.

18
(*L. S. & M. S.*
44988
Car Service.)
(*c*)

And whereas also, the said defendant afterwards, to wit, on the sixteenth day of September, nineteen hundred and five, at Wanaque-Midvale, to wit, at Paterson, Passaic county, aforesaid, was indebted to the said plaintiff in the further sum of fourteen dollars for the use of a certain railroad freight car, known and designated as "L. S. & M. S. 44988," whereof said plaintiff was the owner, which said car was kept and retained by the said defendant with certain of the said defendant's goods and merchandise on board thereof for the defendant's convenience for a long time then elapsed, to wit, from the twenty-eighth day of August, nineteen hundred and five, to the sixteenth day of September, nineteen hundred and five, at the defendant's special instance and request ; and being so indebted, the said defendant in consideration thereof, afterwards, to wit, on the sixteenth day of September,nineteen hundred and five,at Wanaque-Midvale, to wit, at Paterson, Passaic county, aforesaid, undertook and then and there promised the said plaintiff to pay it the said sum of fourteen dollars when it should be thereunto afterwards requested ; yet the said defendant though often requested so to do, has not as yet paid the said sum of money or any part thereof, to the plaintiff 's damage one hundred dollars.

19.
(*L. S. & M. S.*
44988
Freight.)

And whereas, heretofore, to wit, on the twenty-eighth day of August, nineteen hundred and five, at Paterson, Passaic county, aforesaid, the said defendant became and was in-

debted to the said plaintiff in the sum of three hundred and forty-three dollars and sixty cents for freight charges on certain goods and merchandise by the said plaintiff carried and conveyed in one of its railroad cars, known and designated as "L. S. & M. S. car 44988", from Jersey City to Wanaque-Midvale, in the state of New Jersey, at the special instance and request of the said defendant; and being so indebted, the said defendant, in consideration thereof, undertook and then and there promised the said plaintiff to pay it the said sum of money when it should be thereunto requested; yet the said defendant though often requested so to do, has not as yet paid the said sum of money or any part thereof, to the plaintiff's damage four hundred dollars.

(*Southern 32537 Car Service.*) (*a*) And whereas also, the said plaintiff, at all the times hereinafter mentioned, was and is a corporation engaged in the business of a common carrier by its railroad of goods and merchandise for hire, and heretofore, to wit, on the twelfth day of September, nineteen hundred and five, at the special instance and request of the said defendant, carried and conveyed to the said defendant, for a certain hire and reward agreed to be paid by the said defendant at Wanaque-Midvale (one of the railroad stations of the said plaintiff), to wit, at Paterson, Passaic county, aforesaid, a certain railroad freight car, known and designated as "Southern 32537", loaded with goods and merchandise and consigned to the said defendant at Wanaque-Midvale, to wit, at Paterson, Passaic county, aforesaid; and whereas prior to the said twelfth day of September, nineteen hundred and five, and prior to the making of the contract for the carriage of the said goods and merchandise, the plaintiff had adopted and put in

operation for the management of its business as a common carrier, certain reasonable rules and regulations of the New York and New Jersey Car Service Association (of which Association the said plaintiff at all the times herein mentioned was and is a member) which rules and regulations were in force and effect at all the times herein mentioned, and of which rules and regulations and of the adoption thereof by the said plaintiff the said defendant had notice, prior to the said twelfth day of September, nineteen hundred and five, and prior to the making of the contract for the carriage of said goods and merchandise. Said rules and regulations required that the railroad freight cars, owned or operated by the plaintiff in connection with its business as a common carrier, should be unloaded and released within a certain reasonable time, to wit, within forty-eight hours (exclusive of Sundays and holidays) after the arrival of said cars at their destination or after the placing of the same for unloading; and in default of unloading and releasing the said cars within the said period of forty-eight hours, a certain reasonable charge for demurrage, to wit, a charge of one dollar per day or a fraction thereof, should be made for each car not unloaded and released within said period of forty-eight hours (exclusive of Sundays and holidays); and whereas, the carriage and conveyance of said Southern R. R. car 32537 was performed by the said plaintiff, subject to the said rules and regulations, and thereby it became and was the duty of the said defendant to unload and release said car consigned to the defendant as aforesaid, within said period of forty-eight hours (exclusive of Sundays and holidays), after the arrival thereof at its destination at Wanaque-Midvale aforesaid, or after the placing thereof for unloading; yet the said defendant did not unload and release said car within forty-

eight hours after said car had arrived at Wanaque-Midvale aforesaid, and after the same had been placed for unloading, but unreasonably neglected and refused to unload and release the said car until the sixteenth day of September, nineteen hundred and five, and thereby the said defendant became and was liable to pay the said plaintiff the sum of one dollar per day for each day or a fraction thereof (exclusive of Sundays and holidays), subsequent to said period of forty-eight hours until the said car was unloaded and released as aforesaid; whereby the defendant became and was indebted to the plaintiff in the sum of two dollars for its reasonable charges for car service or demurrage, in accordance with said rules and regulations; and being so indebted, the said defendant in consideration thereof, promised the plaintiff to pay the said sum of two dollars when it, the said defendant, should be thereunto afterward requested, yet the said defendant, though often requested so to do, has not as yet paid the said sum of money or any part thereof, to the plaintiff's damage one hundred dollars.

21 (*Southern* *32537* *Car Service.*) (*b*) And whereas also, the said defendant afterwards, to wit, on the sixteenth day of September, nineteen hundred and five, at Wanaque-Midvale, to wit, at Paterson, Passaic county, aforesaid, was indebted to the said plaintiff in the further sum of two dollars for warehouse room and storage room by the said plaintiff before that time provided and furnished in and about the stowing, keeping and storing of certain goods and merchandise, before that time, to wit, from the twelfth day of September, nineteen hundred and five, to the sixteenth day of September, nineteen hundred and five, stowed, kept and stored in a

certain railroad freight car of plaintiff, known and designated as "Southern 32537," for the said defendant at its special instance and request; and being so indebted, the said defendant in consideration thereof on the day and year aforesaid, to wit, the sixteenth day of September, nineteen hundred and five, at Wanaque-Midvale, to wit, at Paterson, Passaic county, aforesaid, undertook and then and there promised the said plaintiff to pay it the said sum of two dollars when it should be thereunto afterwards requested; yet the said defendant, though often requested so to do, has not as yet paid the said sum of money or any part thereof, to the plaintiff's damage one hundred dollars.

22
(*Southern 32537 Car Service.*)
(*c*)

And whereas, also, the said defendant afterwards, to wit, on the sixteenth day of September, nineteen hundred and five, at Wanaque-Midvale, to wit, at Paterson, Passaic county, aforesaid, was indebted to the said plaintiff, a common carrier of freight for hire, in the further sum of two dollars for the use of a certain railroad freight car, known and designated as Southern 32537, whereof said plaintiff was the owner, which said car was kept and retained by the said defendant with certain of the said defendant's goods and merchandise on board thereof for the defendant's convenience for a long time then elapsed, to wit, from the twelfth day of September, nineteen hundred and five, to the sixteenth day of September, nineteen hundred and five, at the defendant's special instance and request; and being so indebted, the said defendant in consideration thereof, afterwards, to wit, on the sixteenth day of September, nineteen hundred and five, at Wanaque-Midvale, to wit, at Paterson, Passaic county, aforesaid, undertook and then and there promised the said

plaintiff to pay it the said sum of two dollars when it should be thereunto afterwards requested ; yet the said defendant, though often requested so to do, has not as yet paid the said sum of money or any part thereof, to the plaintiff 's damage one hundred dollars.

23. (*Southern 32537 Freight.*) And whereas, heretofore, to wit, on the twelfth day of September, nineteen hundred and five, at Paterson, Passaic county, aforesaid, the said defendant became and was indebted to the said plaintiff in the sum of one hundred and three dollars and forty cents, for freight charges on certain goods and merchandise by the said plaintiff carried and conveyed in one of its railroad cars, known and designated as "Southern 32537," from Jersey City to Wanaque-Midvale, in the State of New Jersey, at the special instance and request of the said defendant ; and being so indebted the said defendant, in consideration thereof, undertook and then and there promised the said plaintiff to pay it the said sum of money when it should be thereunto afterwards requested; yet the said defendant, though often requested so to do, has not as yet paid the said sum of money or any part thereof, to the plaintiff's damage two hundred dollars.

24. Common Counts. And also whereas the said defendant, Wanaque Lumber Company, on the twenty-first day of October, in the year of Our Lord one thousand nine hundred and five, at Paterson, in the county of Passaic, aforesaid, was indebted to the plaintiff in two thousand dollars, for the price and value of goods sold and delivered by the plaintiff to the defendant at its request; and in the like sum of money for the price and value of goods bargained and sold by the plaintiff to the defendant at its request; and in

the like sum of money for the price and value of work done and materials for the same provided by the plaintiff for the defendant at its request; and in the like sum of money for money lent by the plaintiff to the defendant at its request; and in the like sum of money for money received by the defendant for the use of the plaintiff; and in the like sum of money for money paid by the plaintiff for the use of defendant at its request; and in the like sum of money for interest due from the defendant to the plaintiff for the plaintiff's having forborne moneys due from the defendant to the plaintiff at the defendant's request, for a long time then elapsed; and in the like sum of money for money found to be due from the defendant to the plaintiff on an account then and there stated between them; and the defendant afterwards, to wit, on the day and year last aforesaid, in the county aforesaid, in consideration of the premises, respectively promised to pay the said several last mentioned moneys respectively to the plaintiff on request; yet the defendant disregarded its promises, and has not paid any of the said moneys or any part thereof; to the plaintiff's damage two thousand dollars, and thereupon it brings its suit, &c.

COLLINS & CORBIN,
Attorneys for Plaintiff.

The following is a particular statement of the plaintiff's demand against the defendant:

Plaintiff claims payment of car service and freight charges as follows:

(1) On Erie car No. 100824;

(a) Car service charges, from April 5, 1905, to May 4, 1905, and from May 5, 1905, to July 6, 1905, exlusive of Sundays and holidays, seventy-five days at the rate of one dollar per day $75.00

(b) Freight charges.
Advances earned by Clyde Steamship Co. $203.65
Freight earned by Erie R. R. $33.60—$237.25—$312.25

(2) On B. & O. (Baltimore & Ohio) car No. 70183.

(a) Car service charges from June 20, 1905, to July 10, 1905, exclusive of Sundays and holidays, 14 days at the rate of one dollar per day, $14.00
On July 10, 1905, contents of this car were transferred to Erie car No. 86472 on which car service charges accrued from July 10, 1905, to August 18, 1905, exclusive of Sundays and holidays, thirty-three days at the rate of one dollar per day, $33.00 $47.00

(b) Freight charges.
Advances earned by Baltimore and Ohio R. R. $36
Freight earned by Erie R. R. $12.-$48.-$95.

(3) (a) On M. C. (Michigan Central) car No. 42865 ;
(Transferred to Erie car No. 69930)
Car service charges from Aug. 10, 1905, to Sept. 16, 1905, exclusive of Sundays and holidays, 29 days at the rate of one dollar per day, $29.

(4) On P., S. & N. (Pittsburg, Shawmut & Northern) car No. 1108 ;

(a) Car service charges from Aug. 24, 1905, to Sept. 16, 1905, ex-

clusive of Sundays and holidays, 29 days at the rate of one dollar per day $17.

(b) Freight charges from Hallton, Pa., to Wanaque-Midvale, N. J. $59.02 $76.02

(5) On L. S. & M. S. (Lake Shore and Michigan Southern) car No. 44988;

(a) Car service charges from Aug. 28, 1905, to Sept. 16, 1905, exclusive of Sundays and holidays, 14 days at the rate of one dollar per day $14.

(b) Freight charges from Chicago, Ill., to Wanaque-Midvale, N. J.
Advances to connecting carriers, $268.20
Freight earned by Erie R. R. $75.40-$343.60 $357.60

(6) On Southern R. R. car 32537;

(a) Car service charges from Sept. 12th, 1905, to Sept. 16, 1905, exclusive of Sundays and holidays, 2 days at the rate of one dollar per day $2.

(b) Freight charges from Norfolk, Va., to Wanaque-Midvale, N.J.
Advances to connecting carriers, $93.04
Freight earned by Erie R. R. $10.36-$103.40 $105.40

Total $975.27

Judgment will be claimed for the said sum of nine hundred and seventy-five 27-100 dollars, besides interest and costs.

COLLINS & CORBIN,
Attorneys of Plaintiff.

Plea.

The Wanaque Lumber Company, defendant, by W. Carrington Cabell, its attorney, comes and defends the said action, and, to all the matters in said declaration complained of, answers and says that it, said defendant, did not promise in manner and form alleged; and of this it puts itself upon the country.

Judgment.

Therefore let a jury thereupon come before our Chief Justice or some other Justice of the Supreme Court of the State of New Jersey, at a Circuit Court to be holden at Paterson, in and for the county of Passaic, on the first Tuesday in January, in the year of our Lord one thousand, nine hundred and seven, by whom, etc., and the same day is given to the parties aforesaid there, etc.

And now at this day, to wit, the nineteenth day of February, A. D., nineteen hundred and seven, before our said Supreme Court at Trenton come the said parties by their attorneys aforesaid, and the justice before whom, etc., having first sent hither his record had before him in these words, to wit:

Afterwards, to wit, at a Circuit Court holden at Paterson, in and for the county of Passaic, before the Honorable Wilbur A. Heisley, Judge of the Circuit Court, the cause having been sent to him for trial, on the fourth day of February, nineteen hundred and seven, according to the form of the statute in such case made and provided, comes as well the said plaintiff as the said defendant, by their respective attorneys, and the jurors of the jury, between the parties aforesaid, in the plea

aforesaid, being summoned, also come who to speak the truth of the matters and things within contained, being chosen, tried and sworn, say upon their oath, that the said Wanaque Lumber Company did not undertake or promise in manner and form as the said Erie Railroad Company hath within complained against it.

Therefore it is considered that the said plaintiff, the Erie Railroad Company, take nothing by its said writ, and that the said defandant, Wanaque Lumber Company, do go thereof without day, &c.

And it is further considered that the said defendant, Wanaque Lumber Company, do recover against the said plaintiff, the Erie Railroad Company, the sum of

for its costs and charges by it about its defence in this behalf laid out and expended by the Court now here adjudged to the said defendant and with its assent according to the form of the statute in such case made and provided, and that the said defendant, the Wanaque Lumber Company, have execution thereof, etc.

Judgment signed this nineteenth day of February, A. D., nineteen hundred and seven.

WM. S. GUMMERE, *C. J.*

Assignments of Error.

Afterwards, that is to say, on the fifth day of April, nineteen hundred and seven, comes the Erie Railroad company, by Collins & Corbin, its attorneys, and says that in the record and proceedings aforesaid, and also in the matters recited and contained in the bill of exceptions, and the giving of verdict and judgment aforesaid, there is manifest error, to wit:—

(1) That at the trial of the cause in the Passaic Circuit of the Supreme Court, the judge who tried the cause overruled legal evidence offered by the plaintiff, Erie Railroad Company, to which ruling the said plaintiff, by its counsel, objected, and admitted illegal evidence offered by the defendant, Wanaque Lumber Company, to which evidence the said plaintiff, by its counsel, objected and by which it was injured.

(2) That at the said trial the plaintiff offered in evidence certain rules known as the car service rules, and said court refused to admit the same in evidence, to which ruling the plaintiff objected and by which it was injured.

(3) That at the said trial the plaintiff offered in evidence a certain joint freight tariff known as No. 415, showing the traffic connections and the joint tariff relating to freight cars consigned to Erie Railroad Company by its connecting carrier, the Pittsburg, Shawmut & Northern Railroad Company, (referring to Car 1108), and said court refused to admit the same in evidence, to which ruling the plaintiff objected and by which it was injured.

(4) That at the said trial David L. Gray, a witness for the plaintiff, was asked by plaintiff's counsel the following question:

"In the case of a tariff such as we have referred

to (being the tariff referred to under Assignment No. 3), what was the custom of the business with respect to a foreign agent shipping to any place other than that designated on the tariff?"
to which the counsel for the defendant objected and the question was overruled, to the injury of the plaintiff.

(5) That at the said trial David L. Gray, a witness for the plaintiff, was asked by plaintiff's counsel the following question:

"Had any agent of the Pittsburg, Shawmut & Northern, so far as the Erie railroad is concerned, any authority to in any way vary from the instructions given in the joint tariff, Exhibit A for identification?"
to which the counsel for the defendant objected and the question was overruled to the injury of the plaintiff.

(6) That at the said trial David L. Gray, a witness for the plaintiff, was asked by plaintiff's counsel the following question:

"Had any agent of the P., S. & N. R. R. any authority to issue from Alton, Pa., a bill of lading consigned to what purports to be a private siding at Wanaque-Midvale?"
to which the counsel for the defendant objected and the question was overruled, to the injury of the plaintiff.

(7) that at the said trial the plaintiff offered in evidence a certain joint freight tariff together with a book containing what is known as East Bound Billing Instructions (referring to car 44988), and said Court refused to admit the same in evidence, to which ruling the plaintiff objected, and by which it was injured.

(8) That at the said trial David L. Gray, a wit-

ness for the plaintiff, was asked by plaintiff's counsel the following question :—

"Is it the custom to post these tariffs as required by law?"

to which the counsel for the defendant objected and the question was overruled, to the injury of the plaintiff.

(9) That at the said trial David L. Gray, a witness for the plaintiff, was asked by plaintiff's counsel the following question :—

"Now, in this tariff that has been referred to, I observe on page 64 a reference to Wanaque, N. J.; was any agent of any connecting carrier of the Erie Railroad Company authorized to ship goods to a private siding at Wanaque, or at Wanaque-Midvale?"

to which the counsel for the defendant objected and the question was overruled, to the injury of the plaintiff.

(10) That at the said trial David L. Gray, a witness for the plaintiff, was asked by plaintiff's counsel the following question :

"I will call your attention to what are called General Instructions on the fly leaf of the tariff which read—'Agents are cautioned not to sign bills of lading calling for delivery at destination via any line or at any particular station unless tariff information provides that such deliveries can be made,'"

to which the counsel for the defendant objected and the question was overruled, to the injury of the plaintiff.

(11) That at the said trial David L. Gray, a witness for the plaintiff, was asked by plaintiff's counsel the following question :

"I also call your attention to the fact that in this same tariff there are foot notes which purport

to refer to so-called individual sidings at certain points, and I ask you whether in this tariff there is anything to indicate that there is any individual siding at Wanaque or at Wanaque-Midvale,"
to which the counsel for the defendant objected and the question was overruled to the injury of the plaintiff.

(12) That at the said trial the plaintiff offered in evidence a certain joint freight tariff known as No. M-847 of the Atlantic Coast Despatch (referring to Car 32537), and said Court refused to admit the same in evidence, to which ruling the plaintiff objected, and by which it was injured.

(13) That at the said trial Robert D. Carter, a witness for the plaintiff, was asked by plaintiff's counsel the following question :—

"Has the Wanaque Paper Company ever paid any car service charges ?"
to which the counsel for the defendant objected and the question was overruled, to the injury of the plaintiff.

(14) That at the said trial Irving P. Alcott, a witness for the plaintiff, was asked by plaintiff's counsel the following question :—

" Let us go back to the first car which has been referred to as car No. 42865 ; can you state from your records the invoice value of the lumber that was consigned in that car ?"
to which the counsel for the defendant objected and the question was overruled, to the injury of the plaintiff.

(15) That at the said trial Irving P. Alcott, a witness for the plaintiff, was asked by plaintiff's counsel to identify a certain detailed statement or invoice showing the sale of lumber (shipped on car 1108) by said witness to the defendant ; and said statement or invoice was offered in evi-

dence by the plaintiff's counsel for the purpose of showing the agreement between said witness and the defendant with respect to payment of freight on said car. On the objection of counsel for the defendant, said offer was overruled, to the injury of the plaintiff.

(16) That at the said trial plaintiff's counsel demanded production from the defendant's counsel of the receipted bills or invoices referred to by said witness, Irving P. Alcott, so far as the same related to cars 1108 and 44988, for the purpose of offering the same in evidence in order to show who was the owner of the lumber shipped in said cars and to show that the agreement between said witness and the defendant was that the defendant should pay the freight thereon; and thereupon defendant's counsel admitted that he had said bills or invoices, but objected to the production of same, and said objection was sustained to the injury of the plaintiff.

(17) That at the said trial Clyde L. Smith, a witness for the plaintiff, was asked by plaintiff's counsel the following question:

"What led you to that consideration?" (referring to a preceding answer of said witness in which he stated that he considered the siding a private siding of the Wanaque Paper Company)

to which the counsel for the defendant objected and the question was overruled, to the injury of the plaintiff.

(18) That at the said trial C. C. Campbell, a witness for the plaintiff, was asked by plaintiff's counsel the following question:

"Have you ever heard or known of any such switch or siding at Wanaque-Midvale as 'The Paper Mill and Lumber Yard Switch?'"

to which the counsel for the defendant objected

and the question was overruled, to the injury of the plaintiff.

(19) That at the said trial, on the conclusion of the testimony in the cause the counsel for the plaintiff moved the said judge before whom the cause was tried to direct a verdict in favor of the plaintiff for the amount of the car service and freight charges claimed in the plaintiff's declaration on the ground that on the undisputed facts the plaintiff was entitled to judgment as a matter of law, and that there was no question of fact to be submitted to the jury ; said judge denied said motion, which ruling was illegal and to the injury of the plaintiff.

(20) That at the said trial the judge before whom the case was tried was requested by plaintiff's counsel to charge the jury as follows :

"The jury must bring in a verdict for the plaintiff for the full amount claimed with interest."

Said judge refused so to charge. Said refusal was illegal and to the injury of the plaintiff.

(21) That at the said trial the judge before whom the case was tried was requested by plaintiff's counsel to charge the jury as follows :

"The rules of the New York & New Jersey Car Service Association having been adopted by the plaintiff as part of its rules for the regulation of freight transportation, such rules are binding on the defendant provided they are reasonable and the defendant had notice thereof before car service charges accrued on the cars in suit."

Said judge refused so to charge. Said refusal was illegal and to the injury of the plaintiff.

(22) That at the said trial the judge before whom the case was tried was requested by plaintiff's counsel to charge the jury as follows :

"It appearing by the undisputed evidence that

defendant did have notice of the rules prior to the date when car service charges accrued on any of the cars in suit, such rules were binding upon the defendant if the jury find the same were reasonable."

Said judge refused so to charge. Said refusal was illegal and to the injury of the plaintiff.

(23) That at the said trial the judge before whom the case was tried was requested by plaintiff's counsel to charge the jury as follows:

"The rule providing that a charge of one dollar per car per day or fraction thereof shall be made for delivery of cars and use of track on all cars not unloaded within forty-eight hours after arrival, not including Sunday or legal holidays, is a reasonable rule."

Said judge refused so to charge. Said refusal was illegal and to the injury of the plaintiff.

(24) That at the said trial the judge before whom the case was tried was requested by plaintiff's counsel to charge the jury as follows:

"The notice required by the statute to be given to the consignee is sufficient if such notice is given in writing and mailed in the usual course of business."

Said judge refused so to charge. Said refusal was illegal and to the injury of the plaintiff.

(25) That at the said trial the judge before whom the case was tried was requested by plaintiff's counsel to charge the jury as follows:

"The rule providing that when freight is transferred from one car to another charges for detention will continue as if the freight had been originally shipped in the car to which transfer is made, is reasonable; and the fact that the contents of cars 70183 and of 42865 were transferred to Erie cars, does not affect the right of the railroad to recover car service charges thereon either before or after such transfers were made."

Said judge refused so to charge. Said refusal was illegal and to the injury of the plaintiff.

(26) That at the said trial the judge before whom the case was tried was requested by plaintiff's counsel to charge the jury as follows:—

"The provision in the bills of lading that a carrier may make a reasonable charge per day for the detention of cars and use of tracks after the car has been held forty-eight hours for loading or unloading, is binding on the defendant; and as to those cars which it appears were shipped under bills of lading containing said provision, the plaintiff is entitled by reason of the terms of the bill of lading to recover a reasonable charge per day after the car or cars have been so held."

Said judge refused so to charge. Said refusal was illegal and to the injury of the plaintiff.

(27) That at the said trial the judge before whom the case was tried was requested by plaintiff's counsel to charge the jury as follows:—

"If the jury find that cars while in actual use for purposes of transportation could earn more than one dollar per day, then the rate of one dollar per day is a reasonable charge to be made by the Railroad for the detention of cars on sidings. It being undisputed that freight cars earn on an average more than one dollar per day and that the rate of one dollar per day for demurrage is the rate in use throughout the United States (except as to such places where the charge is more than one dollar per day) the jury must find that said rate is reasonable."

Said judge refused so to charge. Such refusal was illegal and to the injury of the plaintiff.

(28) That at the said trial the judge before whom the case was tried was requested by plaintiff's counsel to charge the jury as follows:

"It appearing that the public delivery track at

Wanaque-Midvale is the siding opposite the freight station, the defendant had no legal right to insist on delivery of cars on the siding described as the Wanaque or Paper company siding."

Said judge refused so to charge. Such refusal was illegal and to the injury of the plaintiff.

(29) That at the said trial the judge before whom the case was tried was requested by plaintiff's counsel to charge the jury as follows:

"The fact that after delivery had been made on a private siding the Railroad company loses its lien for freight and demurrage, justified the Railroad company in refusing to make delivery on the siding known as the Wanaque or Paper company siding at the place demanded by the defendant."

Said judge refused so to charge. Such refusal was illegal and to the injury of the plaintiff.

(30) That at the said trial the judge before whom the case was tried was requested by plaintiff's counsel to charge the jury as follows:

"It appearing that there was no siding on the plaintiff's Greenwood Lake Division (on which was located the station called Wanaque-Midvale) known as 'Paper Mill and Lumber Company Yard Switch' (or Siding), the plaintiff was not bound to make or tender delivery at such switch or siding."

Said judge refused so to charge. Such refusal was illegal and to the injury of the plaintiff.

(31) That at the said trial the judge before whom the case was tried was requested by plaintiff's counsel to charge the jury as follows:

"As to those cars the bills of lading for which called for delivery at 'Paper Mill and Lumber Yard Switch' (or Siding), Wanaque, N. J., the plaintiff was not bound to make or tender delivery

New Jersey State Library

at the siding known as the Wanaque Siding or the Paper Mill Siding."

Said judge refused so to charge. Such refusal was illegal and to the injury of the plaintiff.

(32) That at the said trial the judge before whom the case was tried was requested by plaintiff 's counsel to charge the jury as follows :

"It appearing that the bills of lading as to cars 1108, 44988 and 32537 called for delivery at a siding or station other than a regular station of the plaintiff, the burden of proof is upon the defendant to show that the agent who issued such bills of lading had authority to make such contract on behalf of the carrier."

Said judge refused so to charge. Such refusal was illegal and to the injury of the plaintiff.

(33) That at the said trial the judge before whom the case was tried was requested by plaintiff's counsel to charge the jury as follows :

"The agents of connecting carriers who issued bills of lading as to said three cars had no authority to bind the plaintiff to make delivery at the siding known as Wanaque siding or Paper Mill siding."

Said judge refused so to charge. Such refusal was illegal and to the injury of the plaintiff.

(34) That at the said trial the judge before whom the case was tried was requested by plaintiff's counsel to charge the jury as follows :

"Even if such bill of lading was authorized to be issued by agents of connecting carriers, it is subject to the reasonable rules and regulations of the railroad company as to delivery, including the regulations that the Company may refuse to place the car on a private siding if reasonably assured that the consignee will not recognize or pay such car service charges as may accrue thereon."

Said judge refused so to charge. Such refusal was illegal and to the injury of the plaintiff.

(35) That at the said trial the judge before whom the case was tried was requested by plaintiff's counsel to charge the jury as follows:—

"The plaintiff was legally justified in refusing to make delivery of car 42865 and other cars arriving for the Lumber Company after the arrival of said car until a receipt was first signed by the Lumber Company or some one authorized to do so on its behalf."

Said judge refused so to charge. Such refusal was illegal and to the injury of the plaintiff.

(36) That at the said trial the judge before whom the case was tried was requested by plaintiff's counsel to charge the jury as follows:—

"The defendant is liable for the freight charges on all the cars in suit, including cars 1108 and 44988, if proper delivery thereof was made or tendered by the plaintiff."

Said judge refused so to charge. Such refusal was illegal and to the injury of the plaintiff.

(37) That at the said trial the judge before whom the case was tried was requested by plaintiff's counsel to charge the jury as follows:

"Regardless of the findings of the jury as to the other cars in suit, they must find a verdict for plaintiff for freight and car service due on car 100824, as it appears that said car was delivered at the place requested by defendant, provided they find the rate of one dollar per day for car service to be reasonable."

Such refusal was illegal and to the injury of the plaintiff.

(38) That at the said trial the judge before whom the case was tried charged the jury as follows:

"There is very little dispute about the freight, because it is admitted by the defendant, that if you find from the evidence that it owes freight on these cars, it then owes the amount of freight charged by the plaintiff; of course, it does not admit that it owes any freight, but, nevertheless, if you find that it does owe freight on all of these cars, then it is admitted that the amount of freight, the rate of freight is the amount specified in this paper just referred to. In that connection, and before passing to another branch of the case, let me say, there is some dispute about who was to pay the freight on two cars which, I think, came from Virginia. It is insisted by the Railroad Company that that freight was to be paid by the defendant. The defendant contends the contrary—that there was some arrangement made between it and the shipper in Virginia, whereby the freight was to be really charged to somebody else, presumably the shipper, instead of to the defendant, but that has been testified to in depositions which have been read in your presence, and you must recall what the fact is."

The said charge was illegal and to the injury of the plaintiff.

(39) That at the said trial the judge before whom the case was tried charged the jury as follows :—

"Another car, 1108, is billed to 'Alcott and Company, Paper mill and Lumber yard switch, Wanaque New Jersey.' If this latter siding was an unusual place for the reception of freight, then it is the duty of the defendant to show the agent's authority to ship freight to such unusual place; if the agent of the connecting railroad was authorized to ship to a private siding, and I think this is a private siding, I don't think that is disputed,—the defendant, by the car being placed upon such

siding, would be subject to any reasonable rules of the Company for car service attaching, including the Company's refusal to so place it, if it was reasonably to be assumed that the consignee would not recognize the liability to pay car service on such private siding. But, of course, gentlemen, the fact that it was shipped to this siding does not say that the agent must have some special authority for shipping it there, because it is contended by the defendant that this was one of the usual places for the reception of freight. There undoubtedly was a siding up near the Wanaque-Midvale passenger station, opposite the freight station, where they receive freight of various kinds. That has been testified to quite extensively, but the contention of the defendant is, that nowithstanding that siding, that this siding in particular—so called 'paper mill siding,'—was also a siding used by the Railroad company for the purpose of switching and depositing freight cars, and allowing people to load and unload cars therefrom; and they say that that use was so common that it was known, and that the agent on the connecting road had the right to bill this car as he did—some of these cars—to the paper mill and lumber yard switch at Wanaque."

The said charge was illegal and to the injury of the plaintiff.

(40) That at the said trial the judge before whom the case was tried charged the jury as follows :—

"Well, if that is so, if you find that this was a track, used, not at rare intervals, but usually used for the reception of freight consigned to various people—if it was a place where people were permitted to load cars—not isolated instances, but a usual thing, then the agent had a right in the law to designate in the bill of lading to which of these switches the cars should go, provided you find they

were both switches common to the public use for the loading or unloading of cars.

"This is one of the pivotal questions of the case for you to determine; was this one of the usual loading places or unloading places of cars?"

The said charge was illegal and to the injury of the plaintiff.

(41) That at the said trial the judge before whom the case was tried charged the jury as follows:

"The fact that after delivery has been made on a private siding the railroad company loses its lien for freight and demurrage, justified the railroad in refusing to make delivery on the siding known as the Wanaque or Paper Company siding at the place demanded by the defendant, provided you find it was a private siding, and not a siding used generally by the company for the unloading or reception of freight."

The said charge was illegal and to the injury of the plaintiff.

(42) That at the said trial the judge before whom the case was tried charged the jury as follows:

"Now, one of the reasons why this car service has not been paid upon some of these cars, at least one of them, but I think upon several, is the fact that the Railroad Company demanded a receipt for the lumber before the defendant was permitted to take it from the car; upon demanding that receipt the defendant refused to sign it; thereupon the Railroad Company refused to deliver the lumber. That may have been a reasonable requirement of the company or not; ordinarily if a man pays you money for a debt, he may not require you to sign a receipt for it, and you are not obliged to give him any evidence that he has paid you at all, but that does not apply to a railroad company, to

a common carrier. A common carrier has the right to require, simply as a reasonable regulation, every consignee to sign a receipt for the goods, and oft-times it becomes the duty of the consignee to sign a receipt even before he gets the goods, but the receipt ought to be merely a receipt. A receipt could be required of a man, for instance, where he was shown the goods—where he saw the goods—the railroad company would have the right to say— 'I want you to admit, in writing, before you take these goods out, here they are, but I want you to admit in writing that you have received them.' You would be obliged to sign such a receipt; but if the railroad company should go on and connect with that receipt an admission (contradicting the fact) that it was in first-class order, when it was apparent that the goods were damaged, you would not be required to sign such a receipt; besides, while you can contradict the terms of a receipt, yet, nevertheless, the receipt is an admission of the facts stated therein, until the contrary is proven.

"In this case, the defendant declined to sign the receipt; and you must determine whether, under all the circumstances of the case, he was justified in so declining—whether the requirement by the company that the receipt should be signed was a reasonable requirement. Here was a car—the one car which I have in mind was a car with locks on the door, I think; the manager of the defendant says that he told the railroad's representative that he did not know whether the car contained wood or stones. Suppose they had required him to sign a receipt admitting the car contained not only lumber but bricks, when he had no reason to suppose the car did contain brick, he would not be required to sign a receipt like that. Suppose that he had any reason to believe—suppose that a prudent man would have any reason to believe that the car

did not contain the lumber; he would not be required to sign it; it may be that the locking of this car was a circumstance which would make a prudent man think that perhaps the car did not contain just what was represented—not necessarily so, but that is a fact to be considered in ascertaining whether he acted reasonably.

"On the other hand, it must be remembered that there had been considerable feeling between these parties as to the receipt of other freight, and perhaps the locking of the car under those circumstances would have no significance at all; but unless this officer of the defendant had some reason which would justify a prudent man in believing that the car did not contain his lumber—the lumber referred to—it was his duty to sign the receipt even before the car was given. That is the law as I understand it."

The said charge was illegal and to the injury of the plaintiff.

(43) That at the said trial the judge before whom the case was tried charged the jury as follows:

"You are the judges of the facts; it is for you to determine whether or not there was a proper delivery made of this freight at a place within the contemplation of these parties; the railroad as well as the defendant; whether there was notice sent of the arrival; whether the defendant was remiss in failing to comply with any reasonable regulations of the company regarding the reception of this freight and paying for it; and if you find it was not a proper delivery, not in an accessible place; or if you find the defendant has complied with all reasonable regulations of the plaintiff, then your verdict should be for the defendant. If, on the other hand, you find that the freight is due, that there has been a proper tender, due notice and a proper delivery of the freight; that the rail-

road company has done all it should be required to do in reason, then the verdict should be for the railroad company."

The said charge was illegal and to the injury of the plaintiff.

(44) That at the said trial the judge before whom the case was tried charged the jury as follows:

"We have here a list already referred to, showing the number of days for which car service is claimed; the railroad has charged one dollar a day forty-eight hours after the arrival and notice of the arrival of the car to the owner. Forty-eight hours is a reasonable time; the question in dispute, in case you find there is car service due, is as to the reasonableness of this charge of one dollar a day. Is that, or is it not a reasonable charge? There is the original cost of the car; there is the value of the car as an investment; there is the earning power of the car which, of course, is a feature; and they say, particularly railroad people say, it is over two dollars a day—the average earning capacity of an average freight car; there is the cost of the track which it occupies. On the other hand the defendant says that that is an unreasonable charge; they have offered evidence here, which is undisputed, that as between themselves, railroads now charge each other fifty cents a day for the very cars for which they charge the consignee one dollar a day. It used to be twenty-five cents a day, now it is fifty cents a day; and the defendant also says that there is evidence that fifty cents a day is a reasonable charge, and one dollar a day is an unreasonable charge; that the railroad company makes it a point to release foreign cars, on which they are charged fifty cents, and that they keep their own cars idle rather than use the foreign cars or retain them at a rate of

fifty cents a day. Personally it does not matter what the court thinks about the reasonableness or unreasonableness of this charge; that is a question of fact for you to determine; it is the duty of the plaintiff to prove the reasonableness of the charge, before they may have your verdict, but there ought to be a verdict for something for car service, if car service accrued; I mean by that simply that the deprivation of the company of the use of a car must be some loss to the company; it must be some loss; what the loss is, I don't know; that is a point in dispute between these parties."

The said charge was illegal and to the injury of the plaintiff.

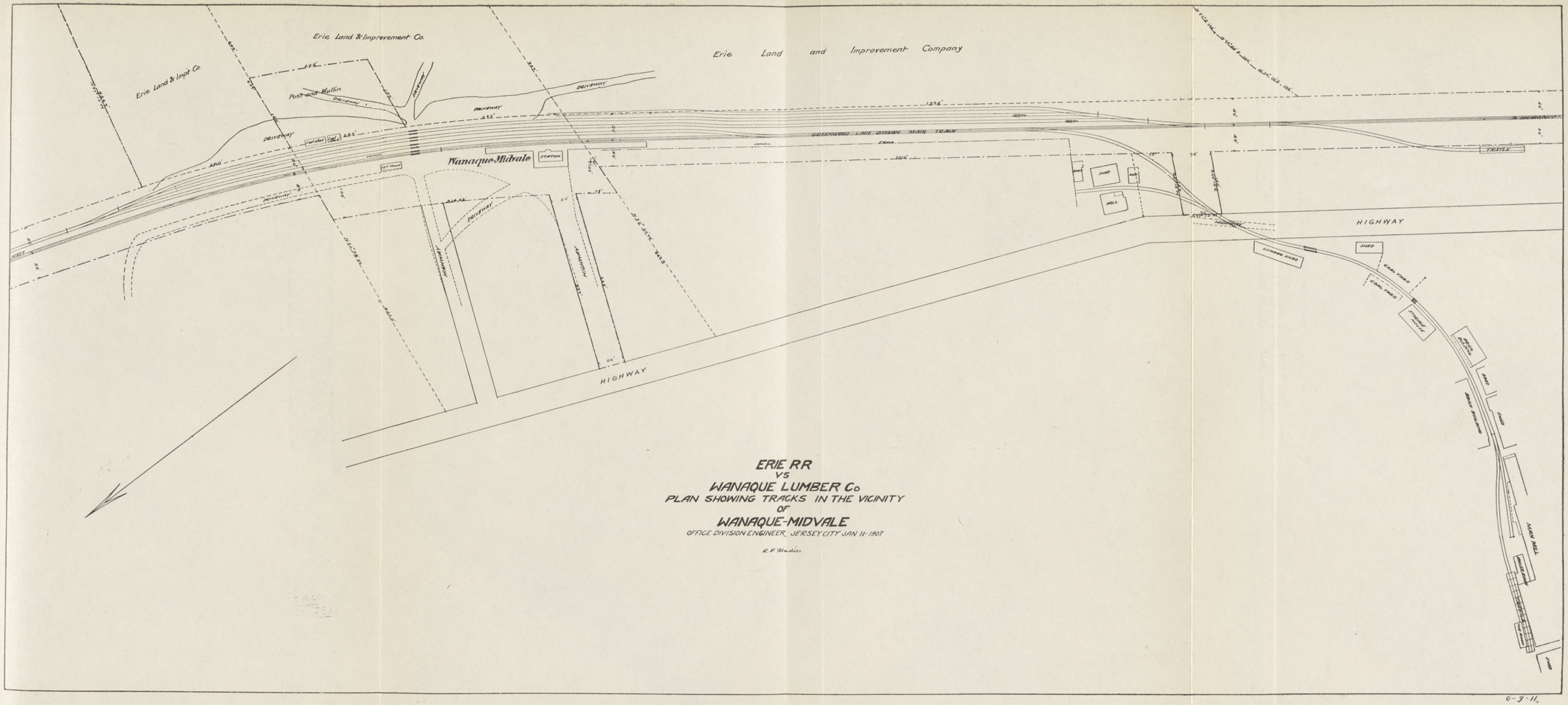
(45) That the judgment in said cause was given in favor of said Wanaque Lumber Company and against said Erie Railroad Company; whereas by law it should have been given against the said Wanaque Lumber Company and in favor of the said Erie Railroad Company.

Wherefore, the plaintiff in error prays that the judgment aforesaid may be reversed and for nothing holden, and that it may be restored to all things which it has lost by reason of said judgment.

COLLINS & CORBIN,

Attorneys of Plaintiff in Error.

EXHIBIT P-1.



ERIE RR
VS
WANAQUE LUMBER Co
PLAN SHOWING TRACKS IN THE VICINITY
OF
WANAQUE-MIDVALE
OFFICE DIVISION ENGINEER JERSEY CITY JAN 11-1907

R. P. Hendricks

0-9-11.

EXHIBIT P-2.

(Stipulation of Attorneys.)

NEW JERSEY SUPREME COURT.

ERIE RAILROAD COMPANY *vs.* WANAQUE LUMBER COMPANY.	*Stipulation.*

The parties hereto, by their attorneys, hereby stipulate and agree that the following facts are to be admitted at the trial of the above cause, with the same force and effect as if the same were legally proved, reserving to both parties all legal objections as to materiality, competency or relevancy of said facts.

As to (1) Erie Car No. 100824 Freight $237.25,

(2) Baltimore & Ohio Car 70183, Freight $48.00

(3) Michigan Central Car 42865, Freight Paid

(6) Southern R. R. Co. Car 32537, Freight $103.40;

it is agreed that the correct amount of freight charge on each car is as above, and defendant admits that such sums would have been due plaintiff from defendant upon proper delivery, but defendant contends that proper delivery was not made.

As to (4) Pittsburg, Shawmut & Northern Car 1108, Freight $59.02.

(5) Lake Shore and Michigan Southern Car 44988, freight $343.60, it is agreed that the amount of freight charge on each of these cars is as above, but defendant insists that neither was properly delivered, and defendant also denies any liability upon these two cars, insisting that some

other person would be liable to plaintiff for the freight charges upon proper delivery. Defendant does not contest the amount of the freight charge on any of these cars, or dispute that, if due, plaintiff would be entitled thereto.

Defendant further agrees that, at the trial, the printed rules and regulations of the New York and New Jersey Car Service Association may be admitted with the same force and effect as if the original thereof were produced, all objections being reserved as to their materiality, competency and relevancy.

Dated June 21, 1906.

COLLINS & CORBIN,
Attorneys of Plaintiff.
W. CARRINGTON CABELL,
Attorney of Defendant.

EXHIBIT P-3.

(Certificate of Incorporation of the Wanaque Lumber Company.)

This is to certify that the undersigned do hereby constitute themselves into a corporation, under and by virtue of an act of the legislature of the State of New Jersey entitled "An Act Concerning Corporations (Revision of 1896)" and the several supplements thereto and acts amendatory thereof, and do severally agree to take the number of shares of capital stock set opposite our respective names.

I. The name of the corporation is

THE WANAQUE LUMBER COMPANY.

II. The location of the principal office in this state is at Wanaque, in the township of Pompton, in the county of Passaic.

The name of the agent therein and in charge

thereof, upon whom process against this corporation may be served, is Charles T. Lewis.

III. The objects for which this corporation is formed are to carry on the business of dealers in lumber and builders' supplies, to buy, sell, and deal in lumber, lime, cement, brick, stone, and builders' supplies; to purchase or anywise acquire any property, real or personal, and any rights or privileges the directors may consider necessary or convenient for the company's business, and to carry on any other business conveniently to be carried on in connection with the above or adapted to improve or to utilize any of the corporation's property or rights. The corporation shall have power also to conduct its business and hold, acquire, and convey property, real as well as personal, outside of the State of New Jersey, anywhere.

IV. The total authorized capital stock of this corporation is twenty thousand dollars ($20,000.00), divided into two hundred ($200) shares of a par value of one hundred dollars ($100.00) each.

The amount of capital stock with which it will commence business is one thousand and two hundred dollars ($1,200.00).

V. The names and postoffice address of the incorporators and the number of shares subscribed for by each, the aggregate of such subscriptions being the amount of capital stock with which the company will commence business, are as follows:

Names.	Postoffice Address.	Number of Shares.
Charles T. Lewis,	Wanaque, N. J.	Four
Robert D. Carter,	Wanaque, N. J.	Four
W. Carrington Cabell,	Wanaque, N. J.	Four

VI. The Board of Directors shall from time to time determine whether and to what extent and under what conditions and regulations the accounts of the corporation, or any of them, shall be

open to the inspection of the stockholders; and no stockholder shall have any right to inspect any account or book or document of the corporation except as conferred by statute or authorized by the directors or by resolution of the stockholders.

The Board of Directors shall have power to fix the amount to be reserved as a working capital.

With the consent in writing and pursuant to the vote of two-thirds of the outstanding stock, the directors shall have power and authority to sell, assign, transfer or otherwise dispose of any or all the property of the company.

In witness whereof, we have hereunto set our hands and seals this 17th day of June, A. D. Nineteen hundred and two.

CHARLES T. LEWIS (L. S.)
ROBERT D. CARTER (L. S.)
W. CARRINGTON CABELL (L. S.)

Sealed and delivered
in the presence of
E. J. BROWN.

STATE OF NEW JERSEY }
COUNTY OF PASSAIC. } ss.

Be it remembered that on this 17th day of June, A. D. nineteen hundred and two, before me, Edward J. Brown, a commissioner of deeds, personally appeared Charles T. Lewis, Robert D. Carter and W. Carrington Cabell, who, I am satisfied, are the persons named in and who executed the foregoing certificate; and I having first made known to them the contents thereof, they did each acknowledge that they signed, sealed and delivered the same as their voluntary act and deed.

EDWARD J. BROWN,
Commissioner of Deeds Passaic Co., N. J.

Endorsed :

"Received in the Clerk's office of the county of Passaic, on the 18th day of June, A. D. 1902, at .... o'clock, in the .....noon, and recorded in Book K of Certificates for said county, on pages 305, &c.

JNO. J. SLATER,
Clerk."

"Filed June 20, 1902,

S. D. DICKINSON,
Secretary of State."

(Certificate of Secretary of State attached.)

EXHIBIT "A" (for identification).

(Joint freight tariff)
(Car No. 1108)
(First page of cover)

Reissue and Advance. To Be Posted.

I. C. C. No. 177 I. C. C. No. 3455 I. C. C. No. 88 I. C. C. No. 415. Mt. J. K. & R. R. R. Erie R. R. B., B. & K. R. R. P. S. & N. R. R. Tariff No. 283 Tariff No. E. R. No. 3790 Tariff No. 402 Tariff No. 425.

Canceling Mt. J., K. & R. 167, I. C. C. 72 ; Erie 1980, I. C. C. 1932 ; B. B. & K. 218, I. C. C. 31 ; K., St. M. & S. 157, I. C. C. 14 ; S. B. 12, I. C. C. 12 ; P., S. & N. 212, I. C. C. 202 ; C. R. 47, I. C. C. 47.

Joint Freight Tariff
on
Articles Taking Group 1 Rates.

Lumber, Heading, Timber, Shavings in bales, Bark, Hoop poles in the Hoops, Last blocks, Shingles, Basket Material rough, Kindling Wood, Logs, Shooks, Chair Stock in the rough, Bundles, Pickets, Staves, Fence Posts, Lath, Piles, Telegraph Poles and Cross Arms, Grape Posts, Sawdust in bales.

Articles Taking Group 2 Rates.

Cord Wood, Heading Bolts, Slab Wood, Stave Bolts in Carloads. Minimum Weight as per Official Classification.

Sixth class rates will apply when lower than those shown herein.

Between the

Erie Railroad Company.

Bradford, Bordell & Kinzua Ry.
Pittsburg, Shawmut & Northern R. R.
New Jersey & New York R. R.
New York, Susq.& Western R. R.
Baltimore & Ohio R. R.
Bangor & Portland Ry.
Boston & Albany R. R. (Gr. Jc. Br.)
Central New England Ry.
Central R. R. of New Jersey.
Cumberland Valley R. R.
Delaware River R. R.
Lehigh Valley R. R.
New York, Ontario & Western Ry.
Western Maryland R. R.
Mt. Jewett, Kinzua & Riderville R. R. (Kushequa Route.)
Lehigh & New England R. R.
New York, New Haven & Hart. R. R.
Philadelphia & Reading Ry.
Wilmington & Northern R. R.
Northern R. R. of New Jersey.
Wilkesbarre & Eastern R. R.
Atlantic City R. R.
Boston & Maine R. R.
Central R. R. of Pennsylvania.
Delaware & Hudson Co.
Lehigh & Hudson River Ry.
Pennsylvania R. R.
Portland & Rochester R. R.
York Southern R. R.

From

Stations shown on page 2, to stations on Erie Railroad and connections.

Rates named herein must not be exceeded to intermediate points.

Under this tariff, when freight is to be loaded by consignor or unloaded by consignee, one dollar ($1.00) per car per day or fraction thereof for delay beyond 48 hours in loading or unloading will be added to the rates named herein, and constitute a part of the total charges to be collected by the carrier on the property; except, however, when in conflict with Car Service Association or local regulations at shipping point or destination, in which case such Car Service Association or local regulations shall prevail.

Rates shown herein will be charged for inland transportation of shipments intended for export by sea. The through rates to foreign ports shall be determined by adding to said inland rates the actual ocean rates from time to time obtainable.

Route: Mt. J., K. & R. R. to Mt. Jewett; P. S. & N. R. R. to Mt. Jewett, Croyland, Dagus Crossing; B. B. & K. Ry. to Bradford; Erie R. R. to Newberry Junction, Carbondale, Waverly, Elmira, Binghamton, Newburgh, Goshen, Greycourt, Bergen Junction, Spring Valley, Sparkill or Johnsonburg and connections to destination.

Issued February 28, 1903. Taking effect March 9, 1903.

Issued by
D. F. PARISH,
General Freight Agent,
Mt. J., K. & R. R. R.,
Kushequa, Pa.

Issued by
R. M. PARKER,
General Freight Agent
Erie R. R. N. J. & N. Y.
R. R., N. R. R. of N. J., N. Y.
S. & W. R. R. and W. & E. R. R.
New York, N. Y.

Issued by
C. H. HAMMOND,
General Freight Agent,
P. S. & N. R. R.,
St. Marys, Pa.

Issued by
A. B. CAMPBELL,
General Freight Agent,
B., B. & K. Ry.
Bradford, Pa.

The Freight Traffic Officers of the above named roads will certify to the Interstate Commerce Commission their concurrence in the rates herein given.

(On page 2.)

Rates named herein will apply from the following stations:

[Then follows list of a number of stations, among them the station known as "Hallton, Pa."]

(On page 3.)

Div. Ref. No.	To	Rates in Cents per Net Ton Group 1	Group 2
3	Wanaque-Midvale	260	260

(In margin of page)—Greenwood Lake Division.

[Note :—No billing point appears in this tariff as "Wanaque" or "Midvale," or as "Paper Mill and Lumber Yard Switch," (or Siding.)]

EXHIBIT "B" (for identification).

(Joint Freight Tariff and East-bound Billing Instructions).

(Car No. 44988)
(First page of cover of Tariff)
To be posted.
I. C. C. No. A-2637
Superseding I. C. C. No. A-2071
Erie Railroad Company.
Chicago & Erie Railroad Co.
In connection with

Atlantic Coast Line.
Baltimore & Ohio R. R. (Cleveland Div.).
Baltimore & Ohio Southwestern R. R.
Baltimore Steam Pkt.Co.
Bessemer & Lake Erie R. R.
Boston & Albany R. R.
Boston & Maine R. R.
Buffalo, Rochester & Pittsburgh Ry.
Central New England Ry.
Central Railroad of New Jersey.
Central Vermont Ry.
Chesapeake & Ohio Ry.
Cincinnati, Hamilton & Dayton Ry.
Cleveland, Cincinnati, Chicago & St. Louis Ry.
Clyde Line
Delaware & Hudson Co.
Pittsburg & Lake Erie R. R.
Delaware, Lackawanna & Western R. R.
Detroit Southern R. R.
Dunkirk, Allegheny Val. & Pitts. R. R.
Grand Trunk Ry. System.
Hocking Valley Ry.
Lake Erie & Western R. R.
Lake Shore & Michigan Southern Ry.
Lehigh Valley R. R.
Maine Central R. R.
Merchants & Miners Trans. Co.
Montpelier & Wells River R. R.
New York & Ottawa R. R.
New York Central & Hudson River R. R.
New York, Chicago & St. Louis R. R.
New York, New Haven & Hartford R. R.
Norfolk & Western Ry.

Philadelphia & Reading Ry.
Portland & Rumford Falls Ry.
St. Johnsbury & Lake Champlain R. R.
Southern Ry.
Wheeling & Lake Erie R. R.
Ohio Central Lines.
Old Dominion Steamship Co.
Pennsylvania Co. (Toledo Div.).
Pennsylvania R. R.
Pittsburgh, Shawmut & Northern R. R.
Quebec Southern Ry.
Rutland R. R.
St. Lawrence & Adirondack Ry.
Seaboard Air Line.
Western Maryland R. R.

Joint Freight Tariff No. A-2200.

Applying on

Classes, live stock, iron and commodities

from

Chicago, Ill.,

Englewood, Ill., Auburn Park, Ill., Hegewisch, Ill., Hammond, Ind.,

To

Eastern Cities.

Reached via

Erie Despatch

And other fast freight lines mentioned on Page 3.

Under this tariff when freight is to be loaded by consignor or unloaded by consignee, one dollar ($1.00) per car per day, or fraction thereof, for delay beyond 48 hours in loading or unloading, will be added to the rates named herein and constitute a part of the total charges to be collected by the carrier on the property; except, however, when in conflict with rules of Car Service Association or local regulations at shipping point or destination, in which case such Car Service Association or local regulations shall prevail.

Issued June 25, 1904. Effective June 30,1904.

Subject to change upon Requisite Notice.

Issued by

S. P. SHANE,
Freight Traffic Manager,
Chicago, Ill.

C. L. THOMAS,
General Freight Agent,
Chicago, Ill.

H. W. FORWARD,
Assistant General Freight Agt.,
Chicago, Ill.

GEO. B. WHITTLESEY,
Assistant General
Freight Agent,
Chicago, Ill.

W. E. EATON,
Agent, Erie Despatch,
Chicago, Ill.

W. D. SCOTT,
Southern Freight Agt.,
Chicago, Ill.

(On page 20)

List of points on
Erie Railroad (Erie Division).
N. Y., S. & W. R. R., N. J. & N. Y. R. R. and N. R. R. of N. J.
And rates to be used.

Station	State	Rates to be used.
Wanaque-Midvale	N. J.	New York.

[Note—No billing point appears in this tariff as "Wanaque" or "Midvale" or as "Paper Mill and Lumber Yard Switch" (or Siding).].

EXHIBIT "B" (for identification).

(Continued)
(East Bound Billing Instructions)
(Car 44988)
(First page of Cover.)

I. C. C. No. 3. Effective July 5, 1905
Cancelling I. C. C. No. 2.

Erie
Despatch
East—Bound
Billing Instructions
No. 16
via
Erie Railroad Company And Connections.

Cancelling No. 15, dated April 1, 1903, and Supplements thereto.

C. W. CLARKE,
General Manager,
(12,500) 3109

Railway Exchange,
Chicago, Ill.

(Page 70)

48.—Erie R. R. (Greenwood Lake Division Stations.)

Table No. 1.—Through Rates.

To make the through rates to each station, use New York rates when so stated hereunder. For other stations add to New York rates the arbitraries noted hereunder, the total being the through rate to such station.

Erie R. R.—Greenwood Lake Div. Arbitraries to be added to New York rates in cents per 100 lbs.

1	2	3	4	5	6	Stations.
New	York	Rates				Wanaque-Midvale (See note A) N. J.

Note A.—Carload shipments of freight, except perishable property, must be routed via Middletown, N. Y., the New York, Susquehanna & Western Railroad and Pompton Junction. All less than carload shipments and perishable freight in carloads, must be forwarded via Bergen Junction as heretofore, no separate division will be shown in billing as accruing to N. Y., S. & W. R. R.

(Page 180.)

East-bound Billing Instructions.—Cotton, Provisions, Grain, Flour, Lumber, etc.—Carloads.

Reference Number	Stations	County	State	Railroad Located on
48	Wanaque-Midvale	Passaic	N. J.,	Erie

Make Way-bill read

To	Rates New	Divisions	Divisions via
See Note 48	York	New York	Sal'a or Sus. Br.

["Note 48" is same as copied under heading of page 70.]

[Note.—No billing point appears as "Wanaque" or "Midvale" or "Paper Mill and Lumber Yard Switch" (or Siding).].

EXHIBIT "C" (for identification).

(Joint Freight Tariff.)
(Car 32537).
(First page of cover.)
Atlantic Coast Despatch.
Rate Issue No. A 1450 Supersedes No. 25384.
I. C. C. No. M. 847 To Be Posted.
Superseding Joint North-Bound Freight Tariff No. 196, I. C. C. No. 2, March 26th, 1905, and Supplements thereto.

All Rail
Joint Freight Tariff
of the
Atlantic Coast Despatch,
Via Richmond or Pinner's Point, Va.,
and the
Richmond and Danville Despatch,
Via Alexandria or Pinner's Point, Va.,
In Connection With the
Pennsylvania Railroad Company
And Transportation Lines Indicated on Page 3 of Cover.

Publishing Rates on
Lumber,
Logs, Timber, Shingles, Shooks, Staves, Headings, Hoops, Hoop Poles, Hop Poles, Telegraph Poles.

Car Load Minimum 30,000 Pounds.

From
Common and Local Points in Georgia, North Carolina, South Carolina and Virginia,
To
Eastern Cities and Interior Eastern Points as Designated Herein.

Effective April 1st, 1901.

Issued March 20th, 1901.
By F. W. PARSONS,
General Eastern Agent,
Baltimore, Md.
(On page 2 of cover.)
General Instructions.

Routing.

Shipments must be forwarded via gateway to and from which Arbitrary or Proportional Rates are shown.

Agents are cautioned not to sign Bills of Lading calling for delivery at destination via any line or at any particular station unless tariff information provides that such deliveries can be made.

These lines will not be responsible for additional delivery expenses arising through failure of consignors to give proper and complete routing directions.

(On page 3 of cover.)

Note—On this page appears a list of railroad companies who concurred in the rates published. In the list appears the name of Erie Railroad Company.

(On page 14)

Rates in cents per hundred pounds

From Station No.	to Points taking rate bases								
Southern Railway, Danville Division. Between Danville and West Norfolk ...	1	2	3	4	5	6	7	8	9
14 Boydton, Va.	14½		18½	19½	20½	21½	22½	23½	24½

(On page 64)

Rate Bases and Points of Destination.

Stations	Delivering Road	Rate Basis
Wanaque, N. J.	Erie	8

[Note: In the list of stations certain stations are starred, and at the bottom of page 64 is the following legend, with respect thereto:

"Individual siding. Shippers must arrange with owners for use of same."

The station listed as "Wanaque" is not starred. No station by name of "Midvale, N. J." appears in the list.

No billing point appears as "Paper Mill and Lumber Yard Switch" (or Siding).].

EXHIBIT P-4.

(Rules of N. Y. & N. J. Car Service Association—Reprint of 1901.)

Rules.

Taking effect at 12.01 A. M. November 1st, 1892.

Charges and rules for computing time.

1. A charge of one dollar ($1.00) per car per day or fraction thereof shall be made for delay of cars and use of track, on all cars not unloaded within forty-eight (48) hours after arrival, not including Sundays or legal holidays, except as hereinafter provided.

Forty-eight (48) hours will be allowed for loading cars on carload delivery tracks or private sidings, after the expiration of which time a charge will be made of one dollar ($1.00) per car per day or fraction thereof, Sundays and legal holidays excepted.

Four-wheel cars will be charged one-half the rates per car as set forth above.

On cars arriving after seven (7) A. M., car service will be charged after the expiration of forty-eight (48) hours from 7 A. M. following. On cars arriving after twelve (12) o'clock, noon, car service will be charged after the expiration of forty-eight (48) hours from 12 noon following.

2. On cars consigned direct to team or private tracks, or which may be so delivered on standing or advance orders from the consignee, car service will be charged after the expiration of forty-eight (48) hours from the time such cars are placed on the tracks designated. If placed after seven (7) A. M. the forty-eight (48) hours will begin at seven (7) A. M., following placing; if placed after twelve (12) o'clock, noon, the forty-eight (48) hours will begin at twelve (12) o'clock, noon, following placing.

3. On cars not consigned direct to team or private tracks, the forty-eight (48) hours allowed for unloading will begin at seven (7) A. M. or twelve (12) o'clock, noon, (see Rule I), following arrival, will continue until order for disposition is given by the consignee, and will begin again at the actual hour when placed according to such order, excepting that cars so placed between the hours of six (6) P. M. and seven (7) A. M. will be regarded as placed at seven (7) A. M.

4. When cars are delayed, after arrival beyond the time allowed by Rule I, on account of failure of shipper or consignee to give prompt notice of disposition, the time so consumed shall be considered a part of the forty-eight (48) hours allowed for unloading.

Cars for Delivery on Carload Delivery Tracks and Private Sidings.

5. Cars containing freight to be delivered on team tracks or private sidings shall be delivered on

the tracks designated on the way-bills immediately upon arrival, or as soon thereafter as the ordinary routine of yard work will permit. The time consumed in placing such cars, or in switching cars for which directions are given by consignee after arrival, shall not be included when computing detentions. No car shall be held from delivery in any manner if it can be delivered as provided in these rules, and the Manager is charged with the duty of seeing that the purposes for which this Association is formed are not evaded by any member of the same.

6. Delivery of cars shall be considered to have been effected at the time when such cars have been placed on recognized or designated delivery tracks or (if such track or tracks contain cars belonging to the same consignee and detained over forty-eight (48) hours) when the road offering the cars would have delivered them had the condition of such tracks permitted. Cars containing coal or coke for delivery on public or private tracks will be governed by this rule.

7. The delivery of cars consigned to or ordered to private tracks shall be considered to have been effected, either when such cars have been placed on the tracks designated, or if such track or tracks be full when the road offering the cars would have made delivery had the condition of such tracks permitted.

Withholding of Cars from Place to Which Consigned.

8. Cars must not be held back, from or outside of the place to which they are consigned, for the purpose of evading car service charges. When cars are so held back by reason of the consignee not being ready to receive and unload the same, the agent at destination shall be informed of such

detention, and such cars shall be included in his reports to the manager from the time at which they would otherwise have arrived and been delivered to consignee, as provided in Rules 6 and 7.

Cars Reconsigned or Freight Transferred by Consignee.

9. Consignees will not be allowed to detain cars more than forty-eight (48) hours without charge because they intend to reconsign or load such cars with other freight. Cars will not be subject to orders for loading by the owners of property contained therein, or by any other shipper, until the same are empty.

10. When freight is transferred from one car to another, charges for detention will continue the same as if the freight had originally been shipped in the car to which transfer is made; but the consignee will not be charged with the time lost by reason of such transfer unless the same is caused by his fault or done by his orders.

Cars Ordered for Delivery to Connecting Roads.

11. When cars which have been ordered for delivery on the tracks of another road are refused by the latter on account of the inability of the consignee to receive and unload the same, immediate notice thereof shall be given the road offering such cars, and car service shall be continued thereon until accepted by the receiving road or otherwise disposed of by the shipper.

12. When cars on which car service charges have accrued are ordered for delivery to a connecting road, such charges shall be collected by the agent of the forwarding road.

13. When cars upon which car service charges have accrued are ordered to another point, such charges shall be collected by the forwarding agent, except when there is no local representative

of the shipper or consignee, when, if collection cannot otherwise be made, charges will be billed forward as advances.

Collecting and Refunding Charges.

14. Car service charges shall be collected in the same manner and with the same regularity and promptness as other transportation charges, and agents will report to the Manager of the Association the name of any corporation, firm or individual refusing to pay the same.

15. Property upon which car service charges have accrued shall be held by the road and the consignees shall not be allowed to remove the same from the Company's premises or from cars on its team tracks until the charges that have accrued thereon are paid.

16. Claims for refunding of car service charges must be made upon the Manager of the Association, and not upon the road or agent collecting the same. Car service charges collected under these rules shall not be refunded, except by order of the Manager, and claims for the refunding of such charges will not be considered unless accompanied by receipted bills for the amounts paid.

17. Agents will collect car service charges accruing under the rules, as explained herein regardless of the condition of the weather. On receipt of claims for the refund of car service charges alleged to have been incurred by reason of bad weather, the Manager will decide each case on its merits, taking into consideration the nature of the freight in connection with the weather, and will authorize such refund as in his judgment may be right and proper.

Reference of Complaints and Violation of Rules.

18. All complaints which may arise from nonconformity to any of the rules of this Association,

or from neglect or discrimination in enforcing the same, and all doubtful or complicated cases involving any uncertainty as to the proper meaning and application of these rules, shall be referred to the Manager for decision.

Private Cars and Tracks.

19. When both cars and tracks are owned by the same private parties no charges will be made ; but when private cars are detained on the tracks belonging to or operated by members of this Association, or when cars belonging to the latter are detained on private tracks, the established charge will apply.

Reports.

20. Agents of the roads, members of this Association, shall make and send to the Manager a full record of the arrival and disposition of all cars to be loaded or unloaded on recognized load or delivery tracks by consignors or consignees on such forms and in such manner as may from time to time be prescribed by him. Cars loaded with live stock, shipments billed or consigned through over rail or water lines, shipments which are to be unloaded in the freight houses, and company material, are not covered by the Car Service Agreement and should not be included in reports to the Manager.

Cars for Lighterage.

21. Cars containing freight to be lightered shall be governed by these rules, except as provided in Rule 20.

Coal or Coke.

22. Cars containing coal or coke shipped by or on account of any member of this association to itself or its regular sales agent, and standing on its own tracks or on the private tracks of such agent, connected with or operated by its own road, will not be subject to car service until consigned for

delivery to a local consignee ; this not to apply to coal sold from such tracks.

23. Cars containing coal or coke shipped to tidewater for delivery direct to vessels, or to be stored for shipment by vessels, shall not be included in reports to the Manager.

How to Compute Detentions.

Cars consigned direct to team or private tracks or which may be so delivered on standing or advance orders from consignees.

Time will be computed from 7 A. M. or 12 noon following *placing.*

On cars placed after 7 A. M., up to and including 12 noon, the forty-eight hours allowed for loading or unloading will begin at 7 A. M. following, and expire at 7 A. M. the second day thereafter, unless the second day is Sunlay or a legal holiday, in which case it will expire at 7 A. M. the third day thereafter, or in case both Sunday and a legal holiday intervene, it will expire at 7 A. M. the fourth day thereafter.

On cars placed between 12 noon and 7 A. M. following, the forty-eight hours allowed for loading and unloading will begin at 12 noon following (except where Sundays or legal holidays intervene, as explained above), and expire at 12 noon the second, third or fourth day thereafter.

Cars not consigned direct to team or private track and not subject to advance or standing order for placing, but which have to be held after arrival pending orders for placing.

Time will be computed from 7 A. M. or 12 noon, following *arrival* ; will continue until ordered placed ; will cease until placed, and begin again at *actual hour* placed and cease when released. Except (as per Rule 3) cars placed at 6 P. M. or after, up to 7 A. M., will be regarded as placed at 7 A.

M., although they may be reported at actual hour placed.

The same rule regarding Sundays and legal holidays following the arrival will govern as heretofore explained.

On cars arriving after 7 A. M., up to and including 12 noon, the forty-eight hours should be computed from 7 A. M., following day up to the hour when order for placing is given, when it will cease until placed and begin again at actual hour placed (except when placed during the night, as explained above), and finally cease when released. If, in accordance with this manner of computing the time between the 7 A. M. following the arrival and the time of ordering and the time between the hour of placing and releasing together equals more than forty-eight hours, the car service has been earned.

On cars arriving after 12 noon, up to and including 7 a. m. following, the forty-eight hours should be computed from 12 noon following arrival, continue until ordered placed, begin again at actual hour placed (except when placed during the night), and cease when released. Computed in this way, if the time between the arrival and ordering, and between the placing and releasing, together equals more than forty-eight hours, car service has been earned.

On cars arriving after 12 noon, Saturday, up to and including 7 a. m., Monday, the forty-eight hours should be computed from 12 noon, Monday.

EXHIBIT P-5.

(Lease from Wanaque River Paper Co. to Wanaque Lumber Co.)

This agreement, made the twenty-fifth day of July, A. D., nineteen hundred and three, between the Wanaque River Paper Company, a New Jersey corporation, of the first part, and the Wanaque Lumber Company, a New Jersey corporation, of second part, witnesseth that for and in consideration of the annual rent of one hundred and eighty dollars, payable in monthly installments in advance, the party of the first part has let and demised, and does hereby let and demise unto the party of the second part for the term of two years from the first day of July, A. D., nineteen hundred and three, All that certain tract of land and premises now occupied by said lessee as a lumber yard in the Township of Pompton, in the County of Passaic and State of New Jersey, at Wanaque, lying west of the main road, north of the road into the Paper Mill, south of the church grounds and east of a line one hundred and twenty-five feet westerly from said main road and parallel therewith, excepting therefrom the railroad switch, but allowing said lessee the use thereof ; and also excepting the land south of the present lumber buildings, east of switch and west of main road, and the land on west of switch and south of the northern end of a coal bin, now used as extra storage for coal for Wanaque River Paper Company. It is understood that the Wanaque Lumber Company has right during the lease to use road on the western side of coal bin, said road leading to the right of way from main road into the main property the Wanaque River Paper Company is using at present.

It is a condition of this lease that it be not assignable, but that on vacation by said Wanaque

Lumber Company of said premises, the same revert to said Wanaque River Paper Company. Further, said lessee is to make ordinary repairs but permanent improvement mutually agreed upon shall be made at the expense of said party of the first part.

Witness the seal of said The Wanaque River Paper Company and the signature of its President.

ROBERT D. CARTER, President.

Attest :

CHAS. T. LEWIS,
Secretary.

[SEAL]

The Wanaque River Paper Company
Incorporated
1891
New Jersey.

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EXHIBIT P-6.

(Car Service Record. Car No. 100824)

CAR SERVICE RECORD.

Initial	Car No.	Contents	Arrived Date	Arrived Hour	Ordered by Consignee. Date	Ordered by Consignee. Hour	Placed Date	Placed Hour	Released Date	Released Hour	Total Time Days	Total Time Hours	Car Service earned	Date Notice of Arrival sent to Consignee	Date of Way-Bill	W. B. Number	From	Consignee
E	100824	Lumber	4-4 3-27	3 P 3 P	5-4	3 P.	5-5	3 P.	7-6	1 P	75		$75.00	4-4	3-23	5513	Lg. Dk.	Wanaque Lbr.Co.

EXHIBIT P-7.

Waybill of Car No. 100824

WAY-BILL.

Date of Way-bill March 23, 1905.
Series and number of W. B.—L-5513.
Car Initial E—Car number 100824.
Erie Railroad Co.
via N. Y. & G. L.
From 11 Long Dock, J. C.
To G 97 Wanaque-Midvale, N. J.

Original Point of Shipment :
N. Y. Co. Boat.

Marks, Consignee and Destination [T]	Articles and Classification Conditions O. R., C. R., Rel., Gtd., etc.	Weight	Rate and Rate Reference Number.	Freight	Advances in Detail.
Wanaque Lbr. Co.	Lumber.	48,000	4	1920	
W.		Ltge.		1440	
via N. Y. & G. L.	Clyde S-S Co. on 2 cars			——	203.65
				3360	

EXHIBIT P-8.

(Transfer Slip of Car No. 100824.)

Erie Order.

The Clyde Steamship Company. (New York Charleston & Florida Lines.)

Pier 45, North River, (North Side Christopher Street Ferry).

No. 183.

Wanaque Lbr. Co. New York, Mar. 18, 1905.

Wanaque, N. J.

To Wm. P. Clyde & Co., General Agents, Dr.

For Transportation from Mt. Brook to New York, per Steamship Comanche, Voy. No. 68.

To 2400 ft. Lumber To New York 203.65

L 1847

203.65 added to L. D. List Mch. 23, 1905.

W. B. No. 5513.

Shipper's Name T. L. Co.

Wm. P. Clyde & Co., Gen. Agts.

Paid.

Mar. 29, 1905.

EXHIBIT P-9.

(Copy of Postal-Card Notice of Car No. 100824.)
(Dated April 4, 1905.)
(On face.)
(Address.)
The Wanaque Lumber Co.,
Wanaque, N. J.
(On back.)

Form 550. Erie Railroad Company.
Chicago & Erie Railroad Company.
New York, Susquehanna & Western Railroad Co.
New Jersey & New York Railroad Co.

Special Notice.—A failure to receive and remove the property mentioned below within *twenty-four hours* after this notice, or to return this notice within the same time, with instructions as to delivery, will be regarded as showing an intention to allow the Erie Railroad Company to store the said property at the expense of the owner, either in the warehouses of the said Company, or elsewhere, there to remain uninsured at the risk of the owner or claimant, subject, however, to the lien of this Company for transportation and removal charges, and subject to charges for storage and repairs, and as releasing the said Erie Railroad Company after the expiration of the said twenty-four hours, from liability as common carriers or warehousemen, for negligence or otherwise. Terms, cash on delivery.

Wanaque-Midvale Station, 4-4, 1905.

The Wanaque Lbr. Co.

The Erie Railroad Company have the following Freight, consigned to your address, and now ready for delivery. Car service in accordance with rules of the Car Service Association will be applied. *Copy.*

1 Car Lumber E. R. R. 100824

Amount of Freight and Charges $23 7.25.

Fisher, Agent.

Return Notice to this Office and get Receipted Bill.

[Note—Original card not provided. Foregoing is agent's copy.]

EXHIBIT P-10.

(Postal Card Notice Car No. 100824.)
(Dated Apl. 27, 1905.)
(On face.)
(P. O. mark.)
Wanaque.
Apl. 28,
11 a. m.,
1905.
N. J.
(Address)
Wanaque Lumber Co.,
Wanaque, N. J.
(On back.)

Form 550.

Erie Railroad Company
Chicago & Erie Railroad Company.
New York, Susquehanna & Western Railroad Co.
New Jersey & New York Railroad Co.

Special Notice.—[Similar to notice on P-9.]

Wanaque-Midvale Station, April 27, 1905.

Wanaque Lbr. Co.

The Erie Railroad Company have the following freight consigned to your address, or for you, and now ready for delivery. Car service in accordance with rules of the Car Service Association will be applied.

Cars as follows : E-100824.

C. C. CAMPBELL, Agent.

Return Notice to this Office and get Receipted Bill.

EXHIBIT P-11.

(Letter to Lumber Co from agent of Erie R. R.) Co. re car 100824

Erie Railroad Company.

Wanaque-Midvale 4-27-05

Wanaque Lbr. Co.,
Wanaque, N. J.

Dear Sirs:

Car Erie 100824 arrived at this station March 27th loaded with lumber consigned to you is still on hand awaiting payment of freight, car service and orders from you to place.

Freight on this car is $237.25-100 payment of which together with accrued car service must be paid before car is unloaded by you.

Car service up to twelve (12) noon today amounts to seventeen dollars, $17.00, and is accruing at the rate of one dollar per day.

Please give release of this car your early attention.

Respectfully yours,

Dic. Davis. C. C. CAMPBELL.

EXHIBIT P-12.

(Letter to Lumber Co. from agent of Erie R. R. Co. re car 100824.)

Erie Railroad Company.

Wanaque-Midvale, N. J., July 3, 1905.

Wanaque Lbr. Co.,
Wanaque, N. J.

Dear Sirs:

I am instructed by my superintendent to notify you that as long as all charges on Erie Car No. 100-824 remains unpaid no cars can be placed on your siding for unloading and all cars consigned to you will be placed on public siding for unloading.

Yours truly,

C. C. CAMPBELL, Agent.

EXHIBIT P-13.

Way bill of Car No. 70183.

Inter-Line Way-bill.

Date of Way-bill June 17, 1905.
Series and number of W. B. T-4558
Car Initials B. & O. Car number 70183.

Erie Railroad Co.

N. Y. & G. L. Line.

From 11 Long Dock J. C.

To G-97 Wanaque-Midvale, N. J.

Original point of shipment.
From J. C. Outside Boat.
Date June 7, 1905
Original car.
Initls B. & O. No. 70183.

1st Transfer made at Midvale Date 7-10, 1905 Into Car Initials E. 86472.

Consignor	Marks, Consignee and destination.	Articles and Classification Conditions, O. R, C. R., Rel., Gtd., etc.	Weight.	Rate and Rate Reference Number.	Freight.	Advances in detail.
F. E. Morse & Co.	Wanaque Lumber Co., Wanaque, N. J.	Lime B. & O. R. R.	30,000	4	12.00	36.00

EXHIBIT P-14.

(Ex. P-1 in Depositions)
(Order for Delivery Car 70183.)
The Frank E. Morse Co.
17 State street, New York

Dict EBM 9 a. m. June 8, 1905.
Freight Agent Erie R. R.
Jersey City, N. J.

Dear Sir :—

The B. & O. R. R. Co. will deliver by float from St. George, S. I., car B & O 70183 consigned to us c-o Erie R. R. at Jersey City. When you receive this car, please forward it to Wanaque Lumber Co. Wanaque, N. J.—they paying all freight charges.

Yours truly,
The FRANK E. MORSE CO.
Per E. B. MORSE.

(Stamp)
Long Dock Station
Erie R. R. Co.
Received.
Jun. 9, 1905 A. M.
Lighterage.

EXHIBIT P-15.

(Bill of Lading, Car No. 70183.)
The Baltimore & Ohio Railroad Company.

Received, subject to the classification in effect on the date of the receipt by the carrier of the property described in this Original Bill of Lading, at Engles, W. Va., station, June 6, 1905, from Washn. Bldg. Lime Co., the property described below, in apparent good order, except as noted (contents and condition of contents of packages unknown), marked, consigned and destined as indicated below, which said Company agrees to carry to its usual place of delivery at said destination, if on its road, otherwise to deliver to another carrier

on the route to said destination. It is mutually agreed, in consideration of the rate of freight hereinafter named as to each carrier of all or any of said property over all or any portion of said route to destination, and as to each party at any time interested in all or any of said property, that every service to be performed hereunder shall be subject to all the conditions, whether printed or written, herein contained (see conditions on back hereof), and which are agreed to by the shipper and and accepted for himself and his assigns as just and reasonable.

Not Negotiable.
If the word "Order", &c. [Similar to Ex. P-20.]

Marks:	Description of articles	Weight Subject to Correction)
Consignee, F. E. Morse Co.	Lime	30000

Destination { Place, Jersey City
County, c-o Erie R. R.
State, N. J.

Route, St. Geo.
(Original Bill of Lading.)
B. O. Car No. 70183
C. W. Brautner, Agent.
(The signature of the Agent here acknowledges only the receipt of the property, and the charges advanced, if any.)

It is mutually agreed that the rate of freight from_____to_____ is to be, in cents per 100 pounds :—

Sixth class 240
C. W. Brautner, Agent.
(The signature of the Agent here acknowledges only the rate given.)

(On Back.)

Uniform Bill of Lading Conditions.

1. No carrier or party in possession of all or any of the property herein described shall be liable for any loss thereof or damage thereto by cause beyond its control; or by floods or by fire; or by quarantine; or by riots, strikes or stoppages of labor; or by leakage, breakage, chaffing, loss in weight, changes in weather, heat, frost, wet or decay; or from any cause, if it be necessary or is usual to carry such property upon open cars.

2. No carrier is bound to carry said property by any particular train or vessel, or in time for any particular market, or otherwise than with as reasonable despatch as its general business will permit. Every carrier shall have the right, in case of necessity, to forward said property by any railroad or route between the point of shipment and the point to which the rate is given.

3. No carrier shall be liable for loss or damage not occurring on its own road or its portion of the through route, nor after said property is ready for delivery to the next carrier or to consignee. The amount of any loss or damage for which any carrier becomes liable shall be computed at the value of the property at the place and time of shipment under this bill of lading, unless a lower value has been agreed upon or is determined by the classification upon which the rate is based, in either of which events such lower value shall be the maximum price to govern such computation. Claims for loss or damage must be made in writing to the agent at point of delivery promptly after arrival of the property, and if delayed for more than thirty days after the delivery of the property, or after due time for the delivery thereof, no carrier hereunder shall be liable in any event.

4. All property shall be subject to necessary cooperage and baling at owner's cost. Each carrier over whose route Cotton is to be carried hereunder shall have the privilege, at its own cost, of compressing the same for greater convenience in handling and 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 an elevator may (unless otherwise expressly noted herein, and then if it is not promptly unloaded) be there delivered and placed with other grain of same kind, without respect to ownership, and if so delivered shall be subject to a lien for elevator charges in addition to all other charges hereunder. No carrier shall be liable for differences in weights or for shrinking of any grain or seed carried in bulk.

5. Property not removed by the person or party entitled to receive it within twenty-four hours after its arrival at destination may be kept in the car, depot or place of delivery of the carrier at the sole risk of the owner of said property, or may be, at the option of the carrier, removed and otherwise stored at the owner's risk and cost and there held subject to lien for all freight and other charges. The carrier may make a reasonable charge per day for the detention of any vessel or car and for use of tracks after the car has been held forty-eight hours for loading or unloading, and may add such charge to all other charges hereunder, and hold said property subject to a lien therefor. Property destined to or taken from a station at which there is no regularly appointed agent shall be entirely at risk of owner when unloaded from cars or until loaded into cars ; and when received from or delivered on private or other sidings, shall be at owner's risk until the cars are attached to, and after they are detached from trains.

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

7. Every party, whether principal or agent, shipping inflammable, 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.

8. Any alteration, addition or erasure in this bill of lading which shall be made without the special notation hereon of the agent of the carrier issuing this bill of lading, shall be void.

9. If the word "Order" is written hereon immediately before or after the name of the party to whose order the property is consigned, without any condition or limitation other than the name of a party to be notified of the arrival of the property, the surrender of this bill of lading, properly endorsed, shall be required before the delivery of the property at destination. If any other than the aforesaid form of consignment is used herein, the said property may, at the option of the carrier, be delivered without requiring the production or surrender of this bill of lading.

10. Owner or consignee shall pay freight at the rate herein stated, and all other charges accruing on said property, before delivery and according to weights as ascertained by any carrier hereunder; and 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, and at the rates and

under the rules provided for by published classification.

11. 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 conditions, whether printed or written, contained in this bill of lading, including the condition that no carrier or party 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 hull, machinery or appurtenances; or from collision, stranding or other accidents of navigation; or from the prolongation of the voyage. And any vessel carrying any or all of the property herein described shall have liberty to call at intermediate ports; to tow and be towed, and to assist vessels in distress, and to deviate for the purpose of saving life or property.

Note—Unless otherwise provided in the classification, property will be carried at the tariff rates, if shipped subject to the conditions of the Uniform Bill of Lading.

If the shipper elects not to accept the said tariff rates and conditions, he should so notify the Agent of the receiving carrier at the time his property is offered for shipment; and if he does not give such notice, it will be understood that he desires his property carried subject to the Uniform Bill of of Lading conditions in order to secure the reduced class rates thereon. Property carried not subject to the conditions of the Uniform Bill of Lading will be at the carriers' liability, limited only as provided by common law and by laws of the United States and of the several states, in so far as they apply. Property thus carried will be charged twenty per cent. higher (subject to minimum increase of one cent per one hundred pounds)

than if shipped subject to the conditions of the Uniform Bill of Lading, and the cost of marine insurance will be added over any part of the route that may be by water.

EXHIBIT P-16.

(Postal Card Notice of Car 70183, dated June 20, 1905.)

(On Face.)

(P. O. Mark.)
Wanaque.
Jun. 22
8 a. m.
1905.
N. J.

(Address.)
Wanaque Lumber Co.
Wanaque, N. J.

(On Back.)

Form 550. Received June 22, 11 a. m.
Erie Railroad Company.
Chicago & Erie Railroad Company.
New York, Susquehanna & Western Railroad Co.
New Jersey & New York Railroad Co.
Special Notice.—[Similar to notice on Ex. P-9.]
From Long Dock, J. City. Wanaque-Midvale
W. B. 4558. Station June 20, 1905.
Wanaque Lbr. Co.

The Erie Railroad Company have the following Freight, consigned to your address, and now ready for delivery. Car service in accordance with rules of the Car Service Association will be applied.
B. & O. 70183, Lime. *Copy.*
Car is placed on public unloading siding.
Free time expires June 23, 12 m.
Amount of Freight and Charges, $48.00.

C. C. CAMPBELL, Agent.

Return Notice to this Office and get Receipted Bill.

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EXHIBIT P-16 1-2.

(Car Service Record.—Car No. 70183.)

CAR SERVICE RECORD. (Old Book.)

Initi'l	Car No.	Contents	Arrived Date	Arrived Hour	Ordered placed by Consignee. Date	Ordered placed by Consignee. Hour	Placed Date	Placed Hour	Date Notice of Arrival sent to Consignee.	Date of Way-Bill.	W. B. Number.	From	Consignor.	Consignee.	Remarks.
B.&O.	70183	Lime	6 | 19	11 P	6 | 20		6 | 20 19	4 P. 1 P.M.	6 | 20	6 | 17	4558	Long Do	F. E. Morse Co.	W.Lumber Co	Time expires 6 | 23 12 m.

CAR SERVICE RECORD. (New Book.)

Initial.	Car No.	Contents.	Arrived. Date	Arrived. Hour	Placed Date	Placed Hour	Released Date	Released Hour	Total Time Days	Total Time Hours	Overtime. Days	Overtime. Hours	Car Service Earned.	Date Notice of Arrival sent to Consignee.	Date of Way-Bill	W. B. Number	From	Consignee.	Remarks.
B. & O.	70183	Lime	6 | 19	3 P.	6 | 20	2 P.	7 | 10	3 P.	19	3	13	3	$14.00	June 20.	June 17.	4558	Long Do.	Wanaque Lbr Co	Transferred to Erie 8647 on July 10 | 05.

EXHIBIT P-17.

(Letter from Agent of Erie R. R. Co. to Lumber Co., re Car 70183.)

Erie Railroad Company.

Wanaque-Midvale, N. J., Aug. 11th, 1905.

Wanaque Lumber Co.,

Wanaque-Midvale, N. J.

Gentlemen:

I beg again, as per my written notice of June 20th, 1905, to call your attention to the fact, that the lime from B. & O. car 70183 is ready for delivery upon payment of charges and that unless the car containing this property is unloaded without further delay this property will be placed in store at your expense.

Yours truly,

C. C. CAMPBELL,

Agt.

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EXHIBIT P-19.

(Transfer Slip of Car No. 42865.)

FREIGHT BILL.

Bill No. 8636. Waverly Transfer station, 7-27-1905

Way-bill No. 32804. Date 7-25.

From Richmond, Va.

M. C. Car No. 42865.

Shipped by McK Mfg Co.

Original point of shipment, McKenny, Va.

Original M. C. Car No. 42865.

Alcott & Company,

To Pennsylvania Railroad Company, Dr.,

For charges on the articles named below :

Wanaque, N. J.

Marks.	Articles.	Wei't.	Rate.	Freight Char'es.	Ad-vances.	To'l.
			20			
Erie.	Lumber.	39294	15	48.71	6.53	
					13.12	
	21-21					
	7-28					68.36

EXHIBIT P-20.

(Exhibit P-4 in Depositions.)
(Bill of Lading of car No. 42865.)
(On Face)

Special attention is called to the Rules and Conditions on the Face and Back of this Bill of Lading.

Seaboard
Air Line Railway

Chas. R. Capps, General Freight Agent,
Portsmouth, Va.
O. B. Bidwell, Jr., Freight Claim Agent
Portsmouth, Va.

If the shipper elects not to accept the conditions on the back and face hereof, his failure to sign the acceptance clause provided at the foot of this bill of lading will be accepted as notice of such intention, and the property will be at the carrier's liability, limited only as provided by common law, the laws of the United States, and the several states in so far as they may apply; and will be charged the higher *carrier's liability rate* as provided for in the classification (with the minimum increase of one (1) cent per hundred pounds). The cost of marine insurance will be added over any part of the route that may be by water.

Received by the Seaboard Air Line Railway, at McKenny, Va., station, July 21st, 1905, from B. E Cogbill, shipper as owner, or agent for the owner, the property described below, in apparent good order, except as noted (contents and condition of contents of packages unknown,) marked, consigned and destined as indicated below, which said Railway agrees to carry to said destination if on its road or line, otherwise to deliver to another carrier on the route to said destination.

In consideration of the rate charged under the

EXHIBIT P-18.

(Way-Bill of Car No. 42865.)

WAY-BILL.

Date of Way-Bill, July 28, 1905.
Series and number of W. B., T-2121.
Car Initials, M. T. Car number, 42865.

Erie Railroad Co.

From 15 Bergen Junct., N. J.
To G 97 Wanaque-Midvale, N. J.
1st Transfer made at Wanaque-Midvale.
Date Aug. 11, 1905, into car initials E R R. Car No. 69930.
Original point of shipment:
From Richmond.
Date 32804 the 7-25.
Original car.
Initls same.
Roads routed over up to this station.
P R R.
Connecting roads transfer to this Co.
No. 8636. Date 7-27.

Marks, Consignee and Destination.	Articles and Classification Conditions, O. R., C. R., Rel., Gtd., etc.	Weight	Rate and Rate Reference No.	Freight	Advances in Detail.	
Alcott & Co., Wanaque-Midvale, N. J.	Lumber P. R. R. Sou.	39294	24 126 —— 5	9.23	48.71 19.65 1.00	E. S. Chgs.
					69.36	

$1.00 deducted before prorating
P. R. R. 80% Erie 20%

conditions of this bill of lading, it is mutually agreed as to each carrier, severally but not jointly, of all or any of said property, over all or any portion of said route to destination, and as to each party at any time interested in all or any of said property, that every service to be performed hereunder shall be subject to all the conditions, whether printed or written, on the face and back hereof, all of which are agreed to by the shipper as owner, or agent for the owner, and accepted for himself and his assigns as just and reasonable, as evidenced by the signing of this bill of lading by the shipper as owner, or agent for the owner.

Not Negotiable.

If the word "Order" is written immediately before or after the name of the party to whose order the property is consigned, the surrender of the Bill of Lading, properly endorsed, shall be required before the delivery of the property at destination, as provided by Section 9 of the Conditions on the back hereof.

Marks, consignee and destination
Alcott & Company,
Wanaque, N. J.

Description of articles
Car dressed lumber
Erie R. R. Delivery
(Stamp)
Received,
Jul
21
1905
B. E. COGBILL.

Car number 42865.

The rate of freight from Grandy, Va.,
to Wanaque, N. J.
Special Class—20c.

W. C. CARTER, JR.,
Agent for the carrier, severally but not jointly.

Receive, carry and deliver the articles described above subject to the conditions on the face and back hereof, all of which are agreed to.

J. R. BECK,
Shipper as owner, or agent for the owner.

B.

N. B.—All claims for loss or damage to freight, or for overcharge under this bill of lading, will be promptly investigated and settled for upon application to O. B. Bidwell, Jr., Freight Claim Agent, Portsmouth, Va.

(On Back.)

Please deliver this car to the order of the Wanaque Lbr. Co., upon payment of freight, and oblige

ALCOTT & Co.

Uniform Bill of Lading Conditions.
(Same as Exhibit P-15.)

EXHIBIT P-21.

(Exhibit P-3 in Depositions.)
(Order for delivery from Alcott & Co. to Erie R. R. Co. Car 42865.)

Alcott & Co.,
Wholesale Lumber,
29 Broadway.
New York, August 5th, 1905.

Freight Agent Erie Railroad,
Wanaque, N. J.

Dear Sir :

Please deliver Car No. 42865 to the order of the Wanaque Lumber Co., of your station, upon payment of freight charges, and oblige

Yours very truly,
ALCOTT & COMPANY.

P. S. We herewith enclose Bill of Lading for the above car.

EXHIBIT P-22.

(Postal Card Notice of Car 42865 dated Aug. 10, 1905.)

(On face.)

(Memo. of defendant.)—On this date made tender of cash for freight chgs. which were refused by Agent unless we gave receipt for car, not being placed on our switch; refused to do so until car was unloaded.

(P. O. mark.)
Wanaque
Aug. 11
A. M.
1905
N. J.

(Address)
Wanaque Lbr. Co.,
Wanaque, N. J.

(On back.)

Form 550.

Erie Railroad Company.
Chicago & Erie Railroad Company.
New York, Susquehanna & Western Railroad Co.
New Jersey & New York Railroad Co.

Special Notice.—[Similar to notice on Ex. P-9.]

From Br. Jct. Wanaque-Midvale Station, Aug. 10, 1905.

W. B. 2121.

Alcott & Co. nfy. Wanaque Lbr. Co.

The Erie Railroad Company have the following Freight consigned to your address, and now ready for delivery. Car service in accordance with rules of the Car Service Association will be applied.

Car M. C. 42865. Lbr.

Amount of Freight and Charges $78.59.

C. C. CAMPBELL, Agent.

Return Notice to this Office and get Receipted Bill.

EXHIBIT P-22 1-2.

(Car Service Record of Car No. 42865.)

CAR SERVICE RECORD.

Initial	Car No.	Contents	Arrive Date	Arrive Hour	Order Placed by Consignee Date	Order Placed by Consignee Hour	Placed Date	Placed Hour	Released. Date	Released. Hour	Total Days	Time Hours	Overtime Days	Overtime Hours	Car Service Earned	Collected Date	Collected Amount	Date collection reported to Association.	Date of Way-Bill.	W.-B. No.	From	Consignee.	Remarks.
M. C.	42865	Lbr.	7-29	3 P	illegible		8-10	1 P	9-16	5 P	36	5	28	5	$29.00	9-16	$29.00	9-16	July 28.	2121	Bergen Jct.	Alcott & Co.	Advance Charges to Weehawken Transfer 8.11. 4 P.
Erie	69930																illegible				Frt Charges Paid.		

EXHIBIT P-23.

(Way Bill of Car No. 1108.)

THE PITTSBURG, SHAWMUT & NORTHERN R. R. CO.

Date of W. B. Aug. 7, 1905.
Number of W. B. J-61.
Car Initial P. S. & N., Car No. 1108.
Weighed at Hallton.
Date Aug. 7, 1905.

Gross	Tare	Net
890	336	45400

From Hallton, Pa.
To Wanaque, N. J.

(Stamp) H. Ville, Aug. 12, 1905, A. M., N. Y.
" Received at Susquehanna, Aug. 13, 1905.
" Recd. at Port Jervis, Aug. 15, 1905.
" Arrived Aug. 16, 1905, Bergen Jct.

Consignor	Marks, Consignee and Destination	Lading	Weight	Rate and Rate reference number	Freight	
H. G. & Co.	Alcott and Co. Paper Mill Lbr. Yd. Switch Wanaque, N. J.	Lbr	45400	2.60	59.02	59.02

First Connecting Road
Erie R. R.
First Junction Point
Croyland.
(Stamp)
Erie Reports
Aug. 8, 1905
Croyland, Pa.,
Sta. No. 661

Second Junction Point.
J—burg.
(Stamp)
Auditors settlements between
Clarion River and Erie Roads.

EXHIBIT P-24.

(Exhibit P-5 in Depositions.)

(Order for delivery from Alcott & Co. to Erie R. R. Co., re Car 1108.)

Alcott & Company,
Wholesale Lumber.

29 Broadway, New York, Aug. 9th, 1905.

Freight Agent Erie R. R.,
Wanaque, N. J.

Dear Sir:

Please deliver Car P., S. & N. No. 1108 billed to our address to the order of the Wanaque Lumber Co., upon payment of freight on same, and oblige,

Yours very truly,

ALCOTT & COMPANY.

EXHIBIT P-25.

(Bill of Lading of Car No. 1108.)

Pittsburg, Shawmut & Northern Railroad Company.

Uniform Bill of Lading—Original. Shipper's No. 995.

(Copy)

Received subject to the classification in effect on the date of the receipt by the carrier of the property described in this Original Bill of Lading at Hallton, Pa., Aug. 7, 1905, from H. G. & Co. the property described below, in apparent good order, except as noted (contents and condition of contents of packages unknown), marked, consigned and destined as indicated below, which said Company agrees to carry to its usual place of delivery at said destination, if on its road; otherwise to deliver to another carrier on the route to said destination. It is mutually agreed, in consideration of the rate of freight hereafter named as to each carrier of all or any of said property over all or any portion of said route to destination, and as to each party at any time interested in all or any of said property, that every service to be performed hereunder shall be subject to all the conditions, whether printed or written, herein contained (see conditions on back hereof), and which are agreed to by the shipper and accepted for himself and his assigns as just and reasonable.

If the word "Order" is written immediately before or after the name of the party to whose order the property is consigned, the surrender of this original bill of lading, properly endorsed, shall be required before the delivery of the property at destination, as provided by Section 9 of the conditions on the back hereof.

Consigned to Alcott & Co.
Destination Wanaque, State of N. J.
Paper Mill & Lbr. Yd. Switch.
Route Erie R. R. Car Initial P. S. & N.
Car No. 1108.

Description of articles and special marks.	Weight	Class of Rate.
Hemlock Lumber	45400	2.60

Copy

H. G. & Co. Shipper F. B. Cook, Agent.
Per S. E. B.

(On Back.)

Uniform Bill of Lading Conditions.
Same as Ex. P-15.

EXHIBIT P-26.

(Postal Card Notice—Car No. 1108 dated Aug. 19, 1905.)

(Memo. of deft.) Received this notice 10 a. m., Aug. 22, 1905. (No post-mark.)

(On face.)

Wanaque Lbr. Co.
Wanaque-Midvale
N. J.

(On back)

Form 550.

Erie Railroad Company.

Special Notice.—[Similar to notice on Ex. P-9.] From Hallton Pa. Wanaque-Midvale Station, 1 P. M. Aug. 19, 1905.

W. B. J-61

Wanaque Lbr. Co.

The Erie Railroad Company have the following Freight, consigned to your address, and now ready for delivery. Car service in accordance with rules of the Car Service Association will be applied.

P. S. & N. 1108.

Lumber consigned to Alcott & Co.

Amount of Freight and Charges prepaid.

C. C. CAMPBELL, Agent.

Return Notice to this Office and get Receipted Bill.

JON VOSS.

EXHIBIT P-27.

(Postal Card notice of car No. 1108 dated Aug. 22, 1905.)

(On face.)

(P. O. Mark)

Greenwood Lake & N. Y. R. P. O. Aug. 24, 1905.

(Address)

Wanaque Lumber Co.

Wanaque-Midvale, N. J.

(On Back.)

Form 550.

Erie Railroad Company.

Chicago & Erie Railroad Company.

New York, Susquehanna & Western Railroad Co.

New Jersey & New York Railroad Co.

Special Notice.—[Similar to notice on P-9.]

2nd Notice.

Wanaque-Midvale, Station, 1 P M.

Aug. 22, 1905.

From Hallton, Pa.

W. B. J-61

Wanaque Lbr. Co.

The Erie Railroad Company have the following Freight consigned to your address, and now ready for delivery. Car service in accordance with rules of the Car Service Association will be applied.

P. S. & N. 1108.

Lumber consigned to Alcott & Co.

Amount of Freight and charges prepaid.

C. C. CAMPBELL,

Agent.

Ruturn Notice to this Office and get Receipted Bill.

EXHIBIT P-28.

(Postal card notice of Car No. 1108, dated Aug. 24, 1905.)

(On face.)

(Memo. of deft.) Tendered freight chgs. Aug. 24.

(P. O. Mark.)

Wanaque
Aug. 24
P. M.
1905
N. J.

(Address.)

Wanaque-Midvale, N. J.
Wanaque Lumber Co.
Wanaque, N. J.

(On Back.)

Form 550.

Erie Railroad Company.
Chicago & Erie Railroad Company.
New York, Susquehanna & Western Railroad Co.
New Jersey & New York Railroad Co.

Special Notice.—[Similar to notice on Ex. P-9.]

Corrected Notice.

Wanaque-Midvale Station, 1 p. m.
Aug. 24, 1905.

From Hallton, Pa.
W. B. J-61
Wanaque Lbr. Co.

The Erie Railroad Company have the following freight consigned to your address, and now ready for delivery. Car service in accordance with rules of the Car Service Association will be applied.

P. S. & N. 1108.

Lumber consigned to Alcott & Co.

Amount of freight and charges $59.02.

C. C. CAMPBELL, Agent.
per Voss.

Return Notice to this Office and get Receipted bill.

EXHIBIT P-30

(Exhibit P-6 in Depositions.)
(Order for delivery from Alcott & Co. to Erie R. R. Co., re Car 44988.)

Alcott & Company,
Wholesale Lumber.

29 Broadway, New York, Aug. 12th, 1905.

Freight Agent Erie R. R.
Wanaque, N. J.

Dear Sir:

Please deliver Car L. S. & M. S. No. 44988 billed to our address to the order of The Wanaque Lumber Co. of Wanaque, N. J., upon payment of freight on same, and oblige,

Yours very truly,
ALCOTT & COMPANY.

EXHIBIT P-31.

(Exhibit P-7 in depositions.)

(Bill of Lading of Car No. 44988.)

BILL OF LADING.

Midway Warehouse Co.

C. M. & St. P. Ry. Aug. 9, 1905.

Received from The Menz Lumber Co. in apparent good order, properly marked and described as below (contents and value otherwise unknown) to be forwarded subject to the rules and conditions printed on the regular shipping bills now used by the company signing this receipt, said rules and conditions being accepted and agreed to by the shipper, addressed to

Consignee—Alcott & Co.

Destination—Wanaque, N. J. at Paper Mill & Lumber Siding.

Via. Mil. & Chicago c-o Erie

L. S. & M. S. 44988.

Original.

Not negotiable unless delivery is to be made to consignee or order.

Number and description of articles.

R. Cedar Siding & Shingles

Loaded to full visible capacity.

The Menz Lumber Co.,

Minneapolis, Oct. 24, 1905.

Recd.

Instructions to Agent in Billing.

Protect through tariff rate on original car No. S. N. 79386.

Collect as advance charges payable to Midway warehouse.

Advance charges in addition to above amounting to $230.50.

Also to follow on outbilling.

Payable to C. M. & St. P. Ry.

Signed Received

Aug. 10, 1905.

C. H. CROUSE, Agt. Ry.

EXHIBIT P-281-2.

Car Service Record of Car No. 1108.

CAR SERVICE RECORD.

Initial	Car No.	Contents	Arrived Date	Arrived Hour	Placed Date	Placed Hour	Released Date	Released Hour	Total Time Days	Total Time Hours	Overtime Days	Overtime Hours	Car Service Earned	Collected Date	Collected Amount	Date Collection Reported to Association.	Date of Way-Bill	W. B. Number	From	Consignor	Consignee	Remarks.
P. S. & N.	1108	Lumber	8-19	1 P	8-24	1 P	9-16	5 P	22	5	16	5	$17.00	9-16	$17.00	9-1-16	Aug. 7	61	Hallton, Pa.	H. G. & Co.	Alcott & Co. Wanaque Lbr. Co.	Adance charges to Weehawken on W. B. 55, 9 | 16 | 05

EXHIBIT P-29.

(Way-Bill of Car No. 44988).

INTER-LINE WAY-BILL.

Date of Way-bill Aug. 17, 1905.
Series and number of W-B 51.
Car Initials L. S. Car number 44988.

Erie Despatch, S. W.

From Chgo. G.

To Wanaque, N. J.

Original point of Shipment :
From Mpls.
C. M. & B. P.
Connecting Roads transfer to this Co.

Consignor	Marks, Consignee and Destination	Articles and Classification, Cnditions O. R., C. R., Rel., Gtd. etc.		Rate and Rate Reference Number	Freight	Advances in Detail.	Routing of Freight.
							First connecting Road (Stamp)
						230.50	N. Y., S. & W.
G. N.	Alcott & Co.		Weight			37.70	
	at Paper Mill & Lumber					——	First Junction Point. Erie Railroad
	Yard Siding					268.20	Middletown & Pompton Jct. Greenwood Lake Div.
		R. C. sidg.					Aug. 20, 05.
	do	& shingles	37,700	20	75.40		Wanaque, N. J.

EXHIBIT P-32.

(Postal Card notice of Car No. 44988, dated Aug. 28, 1905.)

(On face.)

(Memo. of deft.)—Made tender of freight charges but refused by the agent.

Aug. 31, 10.45 A. M.

(P. O. Mark)

Wanaque.

Aug. 28,

P. M.

1905.

N. J.

(Address)

Wanaque Lbr. Co.,

Wanaque, N. J.

(On Back.)

Form 550.

Erie Railroad Company.

Special Notice.—[Similar to notice on Ex. P-9.]

Wanaque-Midvale Station, Aug. 28, 1905.

From Chicago.

W. B. 51.

Alcott & Co. Deliver to Wanaque Lbr. Co.

The Erie Railroad Company have the following Freight, consigned to your address, and now ready for delivery. Car service in accordance with rules of the Car Service Association will be applied.

Car L. S. & M. S. 44988.

Lumber.

Amount of freight and charges $343.60

C. C. CAMPBELL,

Agent.

Return Notice to this Office and get Receipted Bill

EXHIBIT P-33.

(Letter from Lumber Co. to Erie R. R. Co., re car 44988.)

Wanaque, N. J. Aug. 29, 1905.

Agent Erie R. R. Co.,
Wanaque, N. J.

Dear Sir:

Your postal notice of L. S. & M. S. Car 44988 rec'd this P. M. As soon as placed on our switch will receipt for the same and pay charges thereon.

Yours truly,
WANAQUE LBR. CO.,
THRIFT.

EXHIBIT P-33 1-2.

Car Service Record of Car No. 44988.

CAR SERVICE RECORD.

Initial	Car. No.	Contents	Arrived Date	Arrived Hour	Placed Date	Placed Hour	Released Date	Released Hour	Total Time Days	Total Time Hours	Overtime Days	Overtime Hours	Car Service Earned	Collected Date	Collected Amount	Date Notice of Arrival sent to Consignee	Date of Way-bill.	Way-bill Number	From	Consignor	Consignee	Remarks Advance charges to Weehawken on W. B. 54 9-16-05
L. S.	44988	Lumber	8-28	1 P	8-28	2 P	9-16	5 P	18	5	13	5	$14.00	9-16	$14.00.	Aug. 28	Aug. 17	51	Chicago	G. N.	Alcott & Co.	

EXHIBIT P-34.

(Way-bill of Car No. 32537).

WAY-BILL.

Date of Way-bill Sept. 6, 1905.
Series and number of W. B. F-452.
Car Initials Sou. Car number 32537.

Erie Railroad Co.

From 15 Bergen Junct.

To G. 97 Wanaque Midvale, N. J.

Original Point of shipment:
From Norfolk, Va.
Date 9-2 75994

Original car
Initls same

Roads Routed Over up to this Station.
P. R. R.

Connecting Roads transfer to this Co.
No. 9-5 Date 941.

(Stamp)
Erie Railroad
Greenwood Lake Div.
Sep.
7
1905
Wanaque, N. J.

Marks, Consignee and Destination	Articles and classification Conditions O. R., C. R., Rel., Gtd. etc.	Weight.	Rate and Rate reference number	Freight	Advances in detail
Alcott & Co.	Lumber	44000	24	10.36	
	P. R. R.		126		54.64
Paper Mill & Lbr. Co.	Sou.		85		37.40
Yard Switch,	Thro.		235		
		44000		10.36	92.04
Wanaque M.		$1.00 deducted before prorating			1.00 E. S. Chg.
		Erie 20% P. R. R. 80%			93.04

EXHIBIT P-35.

(Exhibit P-8 in Depositions.)

(Order for delivery from Alcott & Co. to Erie R. R. Co.)

Alcott & Company.
Wholesale Lumber.
29 Broadway, New York, Aug. 28th, 1905.

Freight Agent Erie R. R.,
Wanaque, N. J.

Dear Sir:

Please deliver Car Southern No. 32537 billed to our address to the order of The Wanaque Lumber Co., of Wanaque, N. J., upon payment of freight on same, and oblige,

Yours very truly,
ALCOTT & COMPANY.

EXHIBIT P-36.

(Transfer Slip of Car No. 32537.)

FREIGHT BILL.

Bill No. 941.

Waverly Transfer Station, 9-5, 1905.
Way-Bill No. 75994. Date 9-2
From Norfolk, Va.
Sou. Car No. 32537
Shipped by C. G.
Original point of shipment Boynton, Va
Original Sou. Car No. 32537.

Alcott & Co.,
Paper Mill & Lbr. Co. Yard Switch, Wanaque. N. J.

To Pennsylvania Railroad Company, Dr.
For charges on the articles named below:—

Marks	Art'les	Weight	Rate	Freight	Advances	Tot'l charges
Erie	Lbr.	44000	23 1-2	54.64	37.40	92.04
		for	$54.64			
		Byd.	11.36			
		452 9-6		E		

EXHIBIT P-37

(Exhibit P-9 in Depositions.)
(Bill of Lading of Car No. 32537.)
Southern Railway Company.
L. Green, Freight Traffic Manager, Washington, D. C.
R. L. McKellar, Ass't Freight Traffic Manager, Louisville, Ky.
G. R. Browder, General Freight Agent, Atlanta, Ga.
J. J. Hooper, Freight Claim Agent, Washington, D. C.

The shipper may elect to accept the conditions printed on the face and or back hereof, and the reduced rates applying thereunder, or may, as provided below, require the carriage of the property at carrier's liability.

If the shipper elects not to accept the said reduced rates and conditions, he should so notify the agent of the receiving carrier, in writing, at the time his property is offered for shipment, and if he does not give such notice it will be understood that he desires the property carried subject to the Standard Bill of Lading conditions in order to secure the reduced rate thereon. Property carried not subject to the conditions of the Standard Bill of Lading will be at the carrier's liability, limited only as provided by common law and by the laws of the United States and of the several states, in so far as they apply. Property thus carried will be charged twenty (20) per cent. higher (subject to a minimum increase of one (1) cent per hundred pounds) than if shipped subject to the conditions of the Standard Bill of Lading.

Received by the Southern Railway Co.at Boydton, Va. Station, Aug. 24, 1905 from B. E. Cogbill, the property described below, &c. [Similar to Ex. P-20.]

Marks and numbers :	Articles	Weight
Consignee Alcott & Co.	1 Car Roofer	(Subject to Correction)
Paper Mill & Lbr. Yard Switch.		
Destination :—	Sou. 32537	40000 lbs.
Place,—Wanaque		
County,_____		
State N. J.		

Receive, carry and deliver the articles described above, subject to the conditions on the face and or back hereof ; (see above).

B. E. COGBILL,
Shipper, as owner or agent for the owner.
H. B. BRIGGS, Agent.

(The signature of the Agent here acknowledges only the receipt of the property, and the charges advanced, if any.)

Not Negotiable.

If the word " Order" is written, &c. [Similar to Ex. P-20.]

(On Back)

(Bill of Lading)

Southern Railway Company.

Uniform Bill of Lading Condition 7.

[Same as Exhibit P-15.]

EXHIBIT P-38.

(Postal Card Notice Car No. 32537 dated Sept. 12, 1905.)

(On Face.)

(Memo of deft.) Sept. 16. Tendered cash for freight charges for 32537.

Agent refused to deliver.

(P. O. Mark).

Wanaque
Sep. 12
P. M.
1905
N. J.

(Address)

Wanaque Lbr. Co.,
Wanaque, N. J.

(On Back.)

Form 550.

Erie Railroad Company,

Special notice.—[Similar to notice on Ex. P-9.]

Wanaque Midvale Station, N. J. Sept.
From Bergen Jct. 12, 1905.
W. B. 452.

Wanaque Lbr. Co.

The Erie Railroad Company have the following Freight, consigned to your address, and now ready for delivery. Car service in accordance with rules of the Car Service Association will be applied.

Car Sou. 32537 Lumber.

Amount of Freight and Charges $103.40.

C. C. CAMPBELL, Agent.

Return Notice to this Office and get Receipted Bill.

EXHIBIT P-38 1-2.

(Car Service Record of Car No. 32537.)

CAR SERVICE RECORD.

Initial	Car No.	Contents	Arrived Date	Arrived Hour	Placed Date	Placed Hour	Released Date	Released Hour	Total Time Days	Total Time Hours	Overtime Days	Overtime Hours	Car Service Earned	Collected Date	Collected Amount	Car Service refunded by Manager's voucher.	Date Notice of Arrival sent to Consignee	Date of Way-bill	W. B. Number	From	Consignee	Remarks
Southern	32537	Lumber	9-11	2 P.	9-12	5 P.	9-16	5 P.	3	10	1	10	$2.00	9-16	$2.00	9-16	9-12	9-6	452	Bergen Jct.	Alcott & Co.	Advance charges to Weehawken on W. B. 56 9-16-05.

EXHIBIT P-39.

(Letter from Erie R. R. Co. to Lumber Co.)

Erie Railroad Co.

Wanaque-Midvale, N. J.,
Oct. 5th, 1905.

" Wanaque Lumber Company,
Wanaque-Midvale, N. J.

Dear Sirs :

The Erie Railroad company has the following claims for car service and freight charges your company :

(1 a.)	Car service charges on car 100824.	$ 75.00
(1 b.)	Freight charges on car 100824.	237.25
	Total.	$312.25
(2 a.)	Car service charges on B. & O. car 70183	$ 14.00
(2 b.)	Freight charges on B. & O. car 70183.	48.00
	Total	$ 62.00
(3 a.)	Car service charges on Michigan Central car 42865	$ 29.00
(4 a.)	Car service charges on P. S. & M. car 1108	17.00
(4 b.)	Freight charges on P. & S. N. car 1108	59.02
		$ 76.02
(5 a.)	Car service charges on car L. S. & M. S. 44988	$ 14.00
(5 b.)	Freight charges on L. S. & M. S. 44988.	343.60
		$357.60
(6 a.)	Car service charges Southern R. R. car 32537.	$ 2.00
(6 b.)	Freight charges Southern R. R. 32537	$103.40
		$105.40

Such of the contents of the above numbered cars as have not been removed by you have been stored by the Railroad Company and, if you so desire, the Railroad Company will return the same to you at Wanaque-Midvale, on payment of the amount due the Railroad Company for car service and freight charges on the several cars without further charge for storage, handling or transportation to and from Wanaque-Midvale. Delivery will be made at the public siding at Wanaque-Midvale, within sixty hours after receipt of notice from you that you desire the shipments or any of them to be made and after payment of the amount due.

If you desire to have the contents of any one or more of the cars and not all, then the Railroad Company will return to Wanaque-Midvale on the terms above stated, the contents of any one or more cars on receipt from you of the amount due on such car or cars.

This offer will hold good until one week from date.

Yours truly,
C. C. CAMPBELL,
Agent.

DEFENDANT'S EXHIBITS.

EXHIBIT D-A 1.

(Check for freight Car No. 42865.)

(Front.)

No. 99 Paterson N. J., Aug. 9th, 1905.

The Paterson National Bank

Pay to the order of Erie Railroad Co. . . . $78 59-100

Seventy-eight and 59-100 . . . . . Dollars

For Lot on M. C. Car No. 42865.

The Wanaque Lumber Co.,

W. CARRINGTON CABELL,

Treas.

Across face:—

Paid

8-14-05

(Back.)

Pay to the order of

Paterson National Bank,

Paterson, New Jersey,

Commercial Trust Company

of New Jersey,

William J. Field,

Treasurer.

Pay G-97

Commercial Trust Company,

Jersey City, on order

Erie Railroad Co.,

D. W. Bigomy, Treasurer,

By C. C. Campbell,

Agent.

Wanaque-Midvale Station.

EXHIBIT D-A 2.

(Receipted Freight Bill Car No. 42865)

FREIGHT BILL.

Wanaque Midvale Station 451.

Date of arrival July the 29, 1905.

Date of W. B. July 28, 05. W. B. No. 2121

Car Initials N. C. Car No. 42865.

Original point of Shipment : Richmond.

Consignee Alcott & Co.

Destination : Wanaque Midvale, N. J.

To Erie Railroad Co. Dr.,

For charges on Articles waybilled from Bergen via Jct.

Articles and Marks	Weight	Rate	Amount
Lumber	39294	24	9.23
P. R. R. Adv.			48.71
Sou. "			19.65
E. S. Chgs.			1.
		Total	$78.59

$1.00 deducted before proration.

P. R. R. 80% Erie 20%

Received Payment,

C. C. Campbell, Agent

8.11 the——— 190———

Draw checks to the order of Erie Railroad Co.

The Baker Printing Co., Law Case Printers, 251 Market St., Newark, N. J.

New Jersey Court of Errors and Appeals

ERIE RAILROAD COMPANY,
Plaintiff in Error,
vs.
WANAQUE LUMBER COMPANY,
Defendant in Error.

On Error to Supreme Court.

BRIEF OF COLLINS & CORBIN, IN BEHALF OF PLAINTIFF IN ERROR.

The writ of error in this case is sued out to review a judgment entered in the Supreme Court in favor of the defendant in error (defendant below) on the verdict of a jury at the Passaic Ciruit. The suit was brought to recover the amount of certain demurrage (or car service) and freight charges, claimed by the plaintiff in error (plaintiff below) to have accrued on six freight cars consigned to defendant and delivered or tendered to it at various times at the station known as Wanaque-Midvale, on the Greenwood Lake Division of the plaintiff.

The following is a table showing the date of arrival and the amount claimed on each car:

Description of Car.	Date of Arrival.	Freight.	Car Service.
Erie 100824	April 4, 1905	$237.25	$75.00
B. & O. 70183	June 19, 1905	48.00	47.00
M. C. 42865	July 29, 1905	Paid	29.00
P. S. & N. 1108	Aug. 19, 1905	59.02	17.00
L. S. & M. S. 44988	Aug. 28, 1905	343.60	14.00
Southern 32537	Sept 11, 1905	103.40	2.00
Total		$791.27	$184.00

New Jersey State Library

There are twenty-three counts in the declaration for the above items. The counts for the car service charges are three in number for each car, as follows.

(a) Alleges adoption of car service rules by the plaintiff and carriage of freight thereunder whereby defendant required to unload cars within forty-eight hours after arrival; defendant's failure so to do and resultant liability at the rate of one dollar per car per day.

(b) Alleges defendant's indebtedness to plaintiff for warehouse and storage room between certain dates.

(c) Alleges defendant's indebtedness to plaintiff for use of certain freight cars retained for a certain time by defendant for its own convenience with certain merchandise on board thereof.

There are five counts in the usual form for freight charges due on five cars, the freight on car No. 42865 having been paid. The declaration concludes with the common counts and attached is a bill of particulars giving the details of the several claims.

HISTORY OF THE WANAQUE-MIDVALE STATION AND SIDINGS.

In order to have a clear understanding of the controversy which occasioned this suit, it is essential to refer to the history of the station and sidings at Wanaque-Midvale. It appears that a corporation known as the Wanaque River *Paper* Company (which is to be distinguished from the defendant—Wanaque *Lumber* Company) has a large plant, comprising several buildings, some distance to the south of the present Wanaque-Midvale station. (See southeast corner of map—Exhibit P 1, facing p. 50 of Exhibits Book).

A siding, which is about 1500 feet in length, leads in a southeasterly direction from the main tracks

of the plaintiff, starting at a point about 900 feet south of the present passenger station, into the Paper Company's plant. This siding crosses a public road (marked "highway" on the map) about 350 feet from its starting point. Near the *west* side of the highway and on the northerly side of this siding is a tract of land (marked "lumber shed" on the map) which was occupied by the defendant under a lease from the Paper Company dated, July 25th, 1903 (Ex. P. 5, p. 74 of Exhibit Book). That part of the siding which is to the west of the highway is constructed on property of the Paper Company (p. 49, l. 10 of Testimony); that part of the siding which is constructed on the *east* side of the highway is on the property of the Railroad Company (p. 49, ll. 20-30; p. 61, l. 30 to p. 62, l. 20 of Testimony). The Paper Company has an agreement whereby the cars are delivered on its private siding (p. 49, l. 5). This agreement dates from 1890 when the Paper Company began business (p. 49, l. 35). The original agreement is lost, but in substance it provided that the Paper Company should do the grading and lay the ties, and the Railroad Company should furnish the rails, the Railroad Company, however, refunding to the Paper Company the amount expended by the latter on the basis of 10% of the freight earnings. At the time of the suit this had been returned to the Paper Company (p. 50, ll. 1-10); *the defendant had nothing to do with this agreement* (p. 50, ll. 10-15).

Prior to the year 1901, there were two stations in this vicinity, about 1500 feet or more apart. One was known as "Wanaque," the other as "Midvale." In December of 1901, both the old stations were removed and a new station was built in the place where the present Wanaque-Midvale station is located (pp. 69-71). The new station was placed about half way be-

tween the two old stations (p. 71, l. 20). It will be observed from the map that the present passenger station is located about 1000 feet to the north of the siding leading into the Paper Company's plant, and the present freight house is about 300 feet to the north of the passenger station.

Before the two stations were combined, a part of the siding which led into the Paper Mill was used as a public siding (p. 51, l. 20; p. 71, ll. 25-30), but beginning in the year 1903 and extending down to the time of this controversy, the public delivery track was opposite the freight house and passenger station, and freight was customarily delivered to the public on that track. See testimony of Clyde Smith, station agent in 1903 and 1904 (p. 108, ll. 1-25); Campbell, station agent from July 1, 1904 to January 1905, and again from April 5, 1905 to the present time (p. 111, l. 35; p. 118, l. 10); Carter, president of the Paper Company (p. 51, ll. 10-35); Ricker, coal agent (p. 104, ll. 20 to 40); Frank Smith, division freight agent (p. 181, ll. 20-30).

In the year 1905 there were three sidings at the new station, one being used for a passenger siding, another for a storage switch, and the third for a general delivery track (p. 72, ll. 10-15). In a few isolated instances cars were placed on the old switch, that is, the one leading into the Paper Mill (p. 106); such cars, however, when put on the old switch were usually placed to the *east* of the highway (p. 64, l. 35; p. 205, l. 20).

There is also another private switch known as Drew's siding which branches off from the Paper Mill siding at a point near the easterly side of the highway and extends in a northerly direction to Drew's flour mill (pp. 59, 60).

Prior to the controversy between the parties to this suit, it was customary to place cars consigned to the defendant on one of the sidings opposite the new station and keep them there until the defendant ordered them to be placed on the Paper Mill switch, and on receipt of such orders the cars would be placed on that switch (p. 118, ll. 20 to 40).

In the year 1904 certain charges for car service had accrued against the defendant, and bills for the same were sent but never paid (p. 119, ll. 1-5); defendant's manager stated that he would not recognize car service (p. 122, l. 19); as a result of this attitude of the defendant, coupled with a refusal to pay car service charges on car 100824 (which is the first car in suit), the agent of the plaintiff in accordance with instructions to that effect refused to place any more cars for the defendant on the Paper Mill siding (p. 118, l. 35; p. 137, l. 10). The last car thus placed was car 100824 which defendant broke open and on which it tendered the freight but refused to pay demurrage (pp. 128, 129).

STATEMENT OF FACTS AS TO THE SEVERAL CARS IN SUIT.

The case of each car must be considered by itself. We have an account involving several disputed items and a trial which might properly have been sent to a referee.

We will take up each car in the order of arrival at Wanaque-Midvale.

(a) *Car* 100,824.

On this is due for freight, $237.25, and car service, $75.00. The lumber in this car was shipped from Florida via the Clyde Line, addressed to the Wanaque Lumber Company, Wanaque, New Jersey. The Clyde

Line forwarded it by the Erie from Jersey City (Ex. P. 7, p. 76; P. 8, p. 77).

According to the agent's record of car service it arrived at Wanaque-Midvale, April 4. (Ex. P. 6, p. 76).

Notice, by mail, of the arrival of this car was sent to the defendant, on April 4th, 1905, with a statement that car service would be applied in accordance with the rules of the Car Service Association. (Ex. P. 9, p. 78). These rules had been adopted by the plaintiff (p. 182, ll. 10-20), and the defendant's President had been served with a copy. They provide for a car service charge of $1.00 per day, beginning 48 hours after arrival. (Ex. P. 4, p. 66; Testimony, p. 56).

On April 5th, 1905, Mr. Campbell took charge as station agent at Wanaque, and found there the car in question and five or six cars of roads other than the Erie, all consigned to defendant. These cars, in accordance with a custom previously followed between the parties, were placed upon a storage track; the defendant could not unload so many cars at once, and, therefore, called for the cars to be placed, one at a time, on a private switch, where they could be unloaded as defendant wanted them (p. 152, ll. 20 to 40).

The Railroad Company was requested by the defendant to deliver first the cars of the other roads, and this was done at the desire of the Railroad Company, so as to release the cars of other roads as soon as possible (p. 213, ll. 24 to 40; p. 214, ll. 25 to 40).

They were delivered as defendant wanted them (p. 215, ll. 1-10).

All the cars, except the Erie car now in question, were called for by the defendant, and were delivered upon the private siding of the Paper Company, with the permission of that company.

It was the custom of the defendant to call for a car from the storage track when ready to unload it (p. 203, l. 18, to p. 204, l. 15).

The defendant, however, neglected to call for the car in question (p. 152, l. 36, to p. 153, l. 4).

On April 27th, therefore, a second notice was mailed, by a postal card, and also a letter from the railroad company was written, warning the defendant that car service charges amounted to $17.00, and urging a speedy release of the car (Ex. P. 10 & P. 11, p. 79, p. 80). At that time this was the only car of the defendant in the yard (p. 153, l. 39).

The Manager of defendant says he thinks that he first called verbally for the placing of this car about April 20th or April 21st (p. 209, l. 12). If that is so, the car service would then be $15.00, and further charges would be suspended until the car was placed (Ex. P. 4, p. 72, l. 35). The agent says that the defendant's order for the car was not given until May 4th, as his records show, and he placed the car on the private siding the next day (p. 129, ll. 32 to 40; p. 130, ll. 1 to 8).

The agent told the manager that car service amounting to $17.00, and the freight must be paid, and left the car locked on the private siding of the paper company, and refused to take the locks off until payment should be made of the car service and freight charges (p. 128, ll. 16 to 40). The manager offered to pay the freight, but refused to pay any car service at all, not objecting to the amount, but to any payment, saying that he did not "recognize" car service (p. 129, ll. 1 to 18).

The car stood there several weeks, and then the foreman of defendant opened it, without the consent of plaintiff, and without any payment of freight or car service, and began removing the lumber (p. 195, ll. 1

to 13). The foreman says he did this by order of his manager (p. 203, l. 5). The precise date does not appear, but the agent says that he found that the car had been broken open and lumber removed, and that he sent the car away next day, which was July 6th (p. 131, ll. 4 to 24). So, it appears, that the car had been held there on the private switch some two months. It will be seen that if car service is lawfully collectible at all, under the rules something was clearly due in this case.

While defendant's Manager does not, in terms, admit that he received notice on April 5th, of the arrival of the car, the proof shows that it was sent April 4th, and he does admit that he knew that the car was there, and does not claim to have called for it before April 20th.

If that is all the delay, the proper charge for car service at that time would have been $15.00, instead of $17.00; but the testimony of the Manager as to the date of this demand is vague, and, if true, would not justify his refusal to pay anything at all. He offered to pay the freight, but refused to pay anything for car service. He knew perfectly the amount of the charge, and if his objection was merely to the number of days, he was bound to state it.

The case of this car, therefore, raises distinctly the question whether the charge of $1.00 per day is lawful and reasonable, and it is a question of law for the court. It was error to leave it to the jury (see Point II.). The rule as to car service applicable in this case differs from that in the other cases, because here the Railroad Company acceded to the desire of the defendant to follow a previous practice and put the car on the private siding of the Paper Mill. Car service rule No. 1 computes car service in general 48 hours

after arrival (Ex. P. 4, p. 66). Exceptions are stated, and the one applicable to this case is the second case stated in Rule 23; namely, the case of cars held pending the orders of the consignee for placing (Ex. P. 4, p. 72, l. 35); in such cases the charges run until orders for placing are given, and are then suspended from the date of such order until the car is placed, when the charge at once begins to run again.

For convenience, we append a table of the dates relating to this car:

April 4th—Arrived at Wanaque-Midvale.

April 4th—Notice of arrival sent.

April 27th—Second notice sent.

April 27th—Letter sent to defendant stating amount of car service charges.

May 4th—Ordered placed.

May 5th—Placed on paper mill siding.

July 3rd—Letter sent to defendant that no more cars would be placed on paper mill siding, unless charges were paid.

July 6th—Car opened and partly unloaded; removed by order of plaintiff's superintendent.

(b) *Car* 70,183.

This was a car load of lime shipped from West Virginia, June 6th, 1905, delivered by the B. & O. R. Co. to the Erie, with bill of lading to the Morse Company, and with a delivery order of the Morse Company directed to the Erie, to deliver to "Wanaque Lumber Company, Wanaque, New Jersey, they paying all freight charges" (Ex. P. 14, p. 81).

The bill of lading required all freight and charges to be paid before delivery (p. 85, l. 31, of exhibits). The car arrived at Wanaque, June 19th, and the usual notice, by mail, of the arrival of the car at Wanaque was given to defendant June 20th, 1905, with notice

of car service, and that "free time expires June 23rd" (Ex. P. 16, p. 87; Testimony, p. 133, l. 30). The notice was received by defendant on the morning of June 22d (Ex. P. 16, p. 87, l. 15; Testimony, p. 210).

The manager of the defendant requested the agent to place this car on the private siding, and the agent declined to do so except on payment of the previous car service charges (p. 137, ll. 10-30; p. 163, ll. 10-20). The defendant would not pay the car service (p. 137, l. 20). The car was placed upon the common public siding, known as the public delivery track (p. 137, ll. 30 to 40). The defendant offered to pay the freight, but on condition that the car should be placed upon the private siding (p. 163, ll. 10 to 17). After car service charges had accrued, the defendant offered to pay freight, and to unload from the common public siding, but refused to pay car service at that time, and, therefore, delivery of the freight was refused (p. 163, ll. 26 to 36; p. 178, l. 37, to p. 179, l. 8).

The plaintiff held the car on the siding until July 10th, and then in order to release the B. & O. car transferred the lime to Erie car 68,472 (p. 136, l. 14). On August 11th, defendant was advised in writing that the contents of the car were ready for delivery, and that unless unloaded without further delay the property would be stored. No attention was paid to this letter, and finally that car was sent to Weehawken for storage, on August 18th (p. 137, l. 3).

It will be seen that at first the defendant refused to pay freight, unless the car should be put on the private siding. Plaintiff, for good cause, refused to put it there, but kept it on the common public siding, where it was at all times accessible to wagons (p. 118, l. 18). After car service had run up, the defendant was willing to pay the freight and take the lime

from the public siding, but the company then demanded the car service charge, and refused to make delivery unless it was paid.

The case of this car, therefore, raises two questions:

1st. Could the plaintiff lawfully refuse to deliver upon the private siding?

2nd. Could the plaintiff require the payment of car service charges?

As a matter of law we think that these questions must both be answered in the affirmative, and, therefore, the judge erred in his charge and in his refusals to charge, as requested.

The following is a table of dates:

June 8—Date of delivery order.
" 19—Car arrived.
" 20—Notice of arrival sent.
" 22—Notice received.
Aug. 11—Letter to defendant requesting unloading.
" 18—Car removed.

(e) *Car* 42,865.

In this case the consignors, Alcott & Co., shipped lumber from Virginia to their own order as consignees, at Wanaque, New Jersey, and they gave a written order upon the agent there to deliver to defendant (p. 84, ll. 30-40 of Testimony; Ex. P. 20, p. 92, and P. 21, p. 95 of Exhibits). This order was, in terms, to deliver "on payment of freight," and defendant, by the terms of its transaction with Alcott & Co., was to pay freight, and deduct it from the bill for lumber; settlement with Alcott & Co. was made by defendant on this basis (p. 86, ll. 1 to 40; p. 96, ll. 23 to 40).

The car arrived at Wanaque-Midvale, July 29th, 1905, consigned to Alcott & Co. They, as consignees, were notified, and then sent on an order to deliver the car to defendant. Their order is dated August 5th, 1905 (Ex. P. 21). The next day was Sunday, and as

the order was sent by mail it was probably not received by the agent until August 7th (p. 139, l. 31).

By that time six days' car service was due, but was not claimed (p. 140, l. 30). Notice, by the usual postal card, was then given to the defendant (Ex. P. 22, p. 96), and the Manager of defendant asked for delivery upon the private siding, which was refused.

The agent also insisted that the car should be receipted for before possession was delivered (p. 140, ll. 1 to 13; p. 165, ll. 20 to 40).

The defendant offered to pay freight on the morning of August 11th, but would not give a receipt (p. 210, ll. 18 to 27; p. 211, ll. 10 to 40; p. 165, ll. 1-4). The defendant then unloaded the car by force, but was prevented from taking the lumber away (p. 170, l. 35; p. 171, l. 10; pp. 198, 199). In the afternoon of the same day, August 11th, the freight was paid (Ex. D. 2, p. 114), but a receipt for the lumber was refused by the defendant, and the plaintiff thereupon put the lumber back into another car. The defendant again tried to take it away, without giving a receipt, but was resisted (p. 171, l. 24, to p. 172, l. 10; p. 173, ll. 1 to 10; p. 199, ll. 1 to 25; p. 216, ll. 10-20).

The first payment tendered for this car was by an unsigned check (p. 179, ll. 10-15). Payment was finally tendered on August 11th, and, afterwards, accepted the same day.

No receipt for the car was ever given or offered by the defendant (p. 179, ll. 9-25), although defendant had unloaded the lumber, and, after payment of the freight, was requested to sign the receipt (p. 216, l. 10).

Upon the postal card received by the defendant on August 11th there is a memorandum of the defendant

that it had refused to give a receipt until the car was unloaded (Ex. P. 22, p. 96).

The car was finally sent to Weehawken for storage on September 16. The car service at that time amounted to $29, and was never paid (p. 142, l. 20).

The refusal of the defendant to give a receipt was the ground of plaintiff's refusal to make delivery and raises the question of plaintiff's right to withhold delivery until and unless a receipt is given.

The following is a table of dates:

July 29th—Car arrived.

Aug. 5th—Date of delivery order.
" 7th—Delivery order received.
" 10th—Notice of arrival sent.
" 11th—Notice received.
" 11th, A. M.—Defendant tendered freight and unloaded lumber.
" 11th, P. M.—Freight paid; receipt for lumber refused by defendant, and lumber reloaded on car by defendant.

Sept. 16th—Car removed.

(d) *Car* 1108.

This car came from Hallton, Pa., consigned to Alcott & Co. (of N. Y. City) "at Paper Mill and Lumber Yard Switch," Wanaque. (Ex. P. 25, p. 98). That company gave the railroad an order on August 9th, to deliver the car to the defendant. (Ex. P. 24, p. 97). The bargain between Alcott & Co. and the defendant was the same as in the case of car 42865. According to the car service record, it arrived on August 19th (Ex. P. 28½, p. 10), and notice of arrival was mailed to the defendant the same day. It was received by the defendant on August 22nd (Ex. P. 26, p. 10).

A second notice was sent on August 22nd (Ex. P. 27, l. 101), and a third notice was sent on August

24th (Ex. P. 28, p. 102). The last notice was sent by reason of a clerical mistake in the second notice in stating that the freight had been prepaid (p. 143). The car was placed on the public delivery track (p. 143, l. 40). The defendant requested the agent to place it on the Paper Mill siding, and the request was refused (p. 144, l. 1-10). It was an open car, and on the public delivery siding, accessible to inspection and to wagons. Defendant offered to pay freight on August 24, but refused to receipt for the goods (p. 166; p. 199, l. 30 to p. 200, l. 5; p. 207, ll. 1 to 5 of Testimony; Ex. P. 28, p. 102, l. 5 of Exhibits). The car was kept at the station until September 16th, when the defendant, still refusing to accept it, it was sent to Weehawken. The car service charges reckoned from August 24th to September 16th amount to $17.00. This was never paid (p. 145).

This car raises four questions:

First. Was the plaintiff bound to deliver on the private siding of the Paper Mill by reason of the fact that the bill of laiding expressly designated it as a place of delivery?

Second. Could plaintiff require a receipt before turning over the car to the defendant to be unloaded?

Third. Could the plaintiff decline to make delivery because of defendant's refusal to pay car service charges?

Fourth. Was the defendant liable to pay the freight if proper delivery had been made?

The following is a table of dates:

Aug. 9—Date of delivery order.
" 19—Car arrived.
" 19—Notice of arrival sent.
" 22—Notice received.
" 22—Second notice sent.

Aug. 24—Third notice sent.
" 24—Defendant tendered freight; refused to give receipt.
Sept. 16—Car removed.

(e) *Car* 44988.

This car came from the Menz Lumber Co., of Minneapolis, consigned to Alcott & Co., "Wanaque, N. J., at Paper Mill and Lumber Siding" (Ex. P. 31, p. 104). That company directed the Erie railroad to deliver it to defendant (Ex. P. 30, p. 103). The transaction between Alcott & Co., and defendant, was the same as in the case of car 42865. According to the car service record it arrived August 28 (Ex. P. 33½, p. 106). Notice of arrival was sent the same day (Ex. P. 32, p. 105). Defendant acknowledged receipt of the notice the next day, August 29th, saying "as soon as placed on our switch will receipt for the same and pay charges thereon" (Ex. P. 33, p. 106). The car was kept on the public delivery track from the time of its arrival, August 28th, until September 16th, when it was taken to Weehawken (pp. 146 & 147). The defendant afterwards offered to pay the freight, but refused to pay any car service charges (p. 147). The date of this offer is shown to be August 31, by the defendant's memorandum on the postal notice (Ex. P. 32, p. 105). At that time, at least one dollar was due for car service. The question as to the signing of a receipt arose as to this car also. Defendant's Manager offered to pay plaintiff the freight, but refused to sign the receipt until he got the car (p. 210, ll. 30 to 40).

This car raises the same questions as car 1108.

The following is a table of dates:

Aug. 12—Date of delivery order.
" 28—Car arrived.
" 28—Notice of arrival sent.

Aug. 29—Notice received.
" 31—Defendant tendered freight; refused to sign receipt.
Sept. 16—Car removed.

(f) *Car* 32537.

This car was consigned from Boydton, Va., to Alcott & Co., of N. Y. City (Ex. P. 37, p. 108), and by that company transferred to the defendant (Ex. P. 35, p. 107), under the same bargain as that set forth above is the case of car 42865. The bill of lading names "Paper Mill and Lumber Yard Switch, Wanaque, N. J." It arrived September 11th (Ex. P. 38½, p. 110). Notice of arrival was sent on September 12th, and, according to the postmark, was received at Wanaque the same day (Ex. P. 38, p. 110). The car was placed on the public delivery track, and the usual demand to put it on the Paper Mill siding was made and refused (p. 148, ll. 30 to 40). The defendant's foreman received orders to unload it and started to do so. He removed one load and was prevented from continuing by some of the railroad men (p. 200). During the controversy the defendant's Manager came and offered to pay the freight to one of the Erie men, but the offer was refused unless a receipt was signed (p. 201, ll. 1-15; p. 207, ll. 20-40).

The defendant's Manager says that a blank receipt was ordered made and he refused to sign it. His excuse for so doing was that the agent did not show him the car (p. 212, ll. 10-20). He admits, however, that he knew the car was there (p 215, l. 25).

The defendant's memorandum on the postal notice shows that the offer to pay freight was not made until September 16th, at which time at least $2.00 was due for car service (Ex. P. 38, p. 110 of Ex. P. 5).

This case raises precisely the same questions as that of car 1108 and 44988, except that defendant did not deny its liability to pay the freight if proper delivery had been made.

The following is a table of dates:

Aug. 28—Date of delivery order.

Sept. 11—Car arrived.

" 12—Notice of arrival sent.

" 12—Notice received (per postmark).

" 16—Defendant tendered freight; refused to sign receipt.

" 16—Car removed.

OUTLINE OF ARGUMENT.

I.

A railroad company has the legal right to make rules establishing charges for delay in unloading cars after the expiration of a reasonable time after arrival, and has a lien for the amount of such charges.

II.

The rate of one dollar per car per day is reasonable, as a matter of law, and it was error for the trial judge to submit to the jury the question of the reasonableness of such charge.

(a) The rate was part of the regulation adopted by the plaintiff for the management of its business.

(b) The rate of one dollar per day has been approved as reasonable by judicial authority in other states.

(c) The right to charge car service was fixed by contract between the parties.

(1) Contract in the bills of lading.

(2) A contract to pay charge was implied from usage.

(3) A contract to pay the charge was implied by the reason of the fact that the consignee had actual notice of the rules.

(4) A contract to pay the charge was implied as to some of the cars, by reason of the notice on the tariff sheets.

(d) The Interstate Commerce Act makes the rate of demurrage as fixed by the filed tariff, conclusive, and it cannot be questioned in the state courts.

(e) The rate is reasonable because it corresponds to the custom throughout the United States.

(f) The rate is reasonable, because it is less than the average daily earnings of a freight car.

III.

The trial judge erred in the charge with regard to the right of the railroad company to exact a receipt before delivery of the car.

IV.

The trial judge erred in leaving to the jury the question whether the railroad company was bound to deliver cars upon the private siding.

(a) The private siding was not the usual place of delivery.

(b) The agents of the connecting carrier had no authority to issue bills of lading for delivery on the private siding.

(c) The burden of proof was on the defendant to show that the agents of the connecting carrier had authority to issue bills of lading calling for delivery at some other than the usual place.

(d) The bills of lading which called for delivery on the private siding, even if authorized, were subject to the railroad's regulations for delivery.

(e) If the defendant ever had a legal right, by custom or otherwise, to demand delivery on the private siding of the paper mill, the plaintiff was justified in refusing to continue such delivery, because of defendant's refusal to pay demurrage.

V.

It was error for the trial judge to leave to the jury the question of the liability of the defendant for the freight charges on cars 1108 and 44988.

VI.

It was error for the trial judge to overrule the offer of the tariff sheets and billing instructions.

VII.

It was error for the trial judge to leave to the jury the question of defendant's liability for freight and car service charges due on car 100824.

VIII.

Verdict should have been directed for the plaintiff for the full amount claimed.

I.

A RAILROAD COMPANY HAS THE LEGAL RIGHT TO MAKE RULES ESTABLISHING CHARGES FOR DELAY IN UNLOADING CARS AFTER THE EXPIRATION OF A REASONABLE TIME AFTER ARRIVAL, AND HAS A LIEN FOR THE AMOUNT OF SUCH CHARGES.

The above proposition hase been settled both by statute and decisions. For the decisions we refer to

the cases cited under Point II (b). The statute is found in P. L. 1903, p. 670, section 47. It provides as follows:

> "When any freight has been carried on the "railroad and delivered by the company at any "point specified by the consignor other than a "station of the Company, the Company shall not, "after such delivery, be responsible for the safety "and security thereof; where the consignee of "property transported by railroad to any point "in this state cannot be found, or refuses to re- "ceive and pay charges and remove such prop- "erty, the Company may make and collect a rea- "sonable charge per day for the detention of any "railroad car containing such property or for "the use of the railroad track occupied by such "car or for both such detention and use, after "such car has been held twenty-four hours for "unloading at the place of destination; *provided,* "notice is given to the consignee or owner or to "the shipper in cases where the consignee or "owner cannot be found on whom to serve such "notice, and to add such charge to the charge "for the transportation of such property; and "such company shall have a lien upon such prop- "erty, or so much thereof as has not been taken, "for the charges for such detention and use."

It will be observed that under this statute there are certain conditions precedent to the right of the railroad company to charge demurrage, as follows:

(1) The consignee must refuse to receive and pay the charges and remove the property.

(2) Notice must be given to the consignee or owner.

(3) The time begins to run 24 hours after the car has been held for unloading at the place of destination.

(4) The charge for the detention of the car or for use of the track, or both, must be "reasonable."

There is no doubt about the fact that the first condition was fulfilled in this case as to all of the cars. As to the second condition the statute is not very precise as to what notice must be given, but it evidently means notice of the arrival of the car. Such notice was given as to all of the cars in question in this suit, and as to some of them several notices were given. The notice in each case specified that the failure to receive and remove the property within 24 hours after the notice would be regarded as showing an intention to allow the railroad to store the said property at the owner's expense, "subject to the company's lien for transportation and removal charges, and subject to the charges for storage and repairs." The notice further specified that car service in accordance with the rules of the Car Service Association would be applied (Ex. P. 9, p. 78). The rules of the Car Service Association provided that a charge would be made on all cars not unloaded within 48 hours after arrival, not including Sundays or legal holidays (p. 66, ll. 20 to 30 of Exhibits). The statute provides that a charge may be made after the car has been held for 24 hours. The rules extend the time to 48 hours, so that there can be no question that the rules are reasonable, as a matter of law, so far as relates to the time allowed for removal, and the trial judge properly charged that forty-eight hours was a reasonable time (p. 234, l. 20). The third condition was, therefore, fulfilled. For discussion of the fourth condition, we refer to Point II.

For the purpose of enforcing charges for demurrage, Car Service Associations have been established by practically all the railroads. There are thirty-nine in the United States (p. 23, l. 40). The New York and New Jersey Car Service Association was established in 1891, and takes in the railroads in the vicinity of New York, including among others the Erie R. R. Co. and its Greenwood Lake Branch.

The reasons for establishing Car Service Associations and for the enforcement of charges incurred because of unreasonable delay by consignees, are succinctly set forth in the recent third edition of *Hutchinson on Carriers* (Matthews & Dickinson), from which we quote:

> "On account of the great growth of commerce "during recent years and the consequent increase "in bulk of through freight requiring the cars of "one company to be transported over the lines of "other companies, it became a matter of some dif- "ficulty for railroad companies to keep a proper "record of the whereabouts of their cars. To cor- "rect this evil and to secure a prompt return of "cars after the arrival of the goods at their desti- "nation, it has become common for railroad com- "panies operating within a certain territory to "form what are known as Car Service Associa- "tions. The object of these associations is to keep a "record of the whereabouts of the cars of the "various railroad companies of which the associa- "tion is composed, and to promulgate and enforce "rules and regulations to prevent cars standing "idle at one place when needed to meet the traffic "demands of another. Such associations are "recognized as being lawful, and their rules and "regulations, when reasonable, will be upheld.
>
> "To effect the purposes for which car service "associations are organized, their rules uniformly "provide that cars shall be unloaded within a cer- "tain time, and that, after the expiration of such "time, a stated charge, spoken of as demurrage, "will be collected; and when a rule thus promul- "gated by the association is reasonable, shipments "made over the roads adopting it will be subject "to its provisions, and for any detention of cars "beyond the time provided for unloading, the "stated charge may be collected."

(Vol 2, p. 953, sec. 861.)

See further: 4 *Elliott on Railroads,* sections 1567, 1568; 9 *A. & E. Ency.,* p. 261 (2nd ed.).

A leading case in which the same question is discussed is *Miller* vs. *Georgia R. R. Co.*, 88 Ga., 563, 15 S. E. 316; 18 L. R. A., 323, where the court says:

> "It is the undoubted right of a common carrier "to adopt and enforce, as between itself and its "customers, any reasonable regulations for the "conduct of its business, the purpose and effect "of which are the protection of the carrier and "the benefit of the public. The rule in question, "we think, falls clearly within the scope of this "power. It seeks to prevent the diversion and "detention of cars from the legitimate work of "transportation, as well as to secure compensa- "tion for service not otherwise paid for, by pre- "scribing, in cases where by contract or custom "the carrier is under no duty to unload the cars, "but they are to be unloaded by the customer, a "rate per diem in the nature of a charge for "storage, to begin at a certain time after the cars "have been delivered to the customer or placed at "his disposal for unloading. Such regulation "cannot be regarded as unreasonable so long as a "reasonable time is allowed for unloading, and "so long as the charge for the use of the cars "beyond that time is not excessive. The law com- "pels the carrier to receive the goods of the public, "and to transport and deliver them within a rea- "sonable time. Code 1882, sec. 2073; 2 Am. & "Eng. Encyclop. Law, title, *Carriers*, p. 787. To "do this, it is necessary that the means of trans- "portation shall be under the carrier's control, "and that, after the duty of carriage has been "performed, its vehicles shall not be converted "into storehouses, at the will of consignees, to "remain such indefinitely, and without compen- "sation. If no check could be placed upon such "detention, it is plain that the business of trans- "portation would be at the mercy of private in- "terest or caprice, and that carriers thus ham- "pered in their facilities, and unable to foresee "the time or extent to which their vehicles would

"be diverted from the work of carriage, could "not provide properly for the demands of traffic, "or perform with dispatch their legitimate func- "tion. It would place upon the carrier the bur- "den and expense of supplying numerous "vehicles not needed for the hauling of freights, "thus requiring it to provide extra facilities, as "well as to render extra service, without compen- "sation beyond that received for transportation. "It would result in the accumulation of cars on "the carrier's tracks, and the obstruction in a "greater or less degree of the movement and un- "loading of trains. Not only would loss ensue to "the carrier, but consignees and shippers in "general and the people at large must suffer "seriously from this hindrance to the due and "regular course of transportation. In this mat- "ter the public have rights paramount to those "of any individual or class of individuals, and "the business of the common carrier must be "so conducted as to subserve the general "interest and convenience. Especially is "this true as to railroad companies, in view of "the important franchises granted them by the "public, and the use and control thus acquired of "highways upon which the commerce of the coun- "try is so largely dependent."

Numerous other cases which establish the right of a railroad to collect demurrage are cited under Point II (b).

As to the right to a lien, the decisions are not in accord. The case of *C. & N. W. R. Co.* vs. *Jenkins,* (103 Ill., 588), denies the existence of such right, and this same was followed in the cases of *C. C. C. & St. L. R. Co.* vs. *Lamm,* (73 Ill. App., 592) and *C. C. C. & St. L. R. Co.* vs. *Holden,* (73 Ill. App., 582). But these decisions were discredited, if not overruled in the later case of *Schumacher* vs. *C. & N. W. R. Co.,* 207 Ill. 199; 69 N. E., 825. (followed in *Chicago, etc.*

R. Co. vs. *Dorsey Fuel Co.,* 112 Ill. App. 385 and *C. C. C. & St. L. R. Co.* vs. *Propst Lumber Co.,* 114 Ill. App., 660).

There are two other early cases holding that no lien exists. See *Burlington & M. R. R. Co.* vs. *Chicago Lumber Co.,* (15 Neb., 390) and *Cromelin* vs. *N. Y. & H. R. Co.,* (4 Keyes 90).

The Jenkins case was likewise relied upon in *Wallace* vs. *B. & O. R. R.,* 65 Atl. 665 (Pa.), and in *Nicolette Lumber Co.* vs. *People's Coal Co.,* 213 Pa. 379; 62 Atl., 1060; 3 L. R. A. (N. S.) 327. In the report of the last mentioned case in 3 L. R. A., the editor points out that the decision is contrary to the weight of authority, and cites as holding otherwise the following cases:

Miller vs. *Mansfield,* 112 Mass., 260.

Darlington vs. *Missouri Pacific R. Co.,* 99 Mo. App., 1; 72 S. W., 122.

New Orleans, etc. R. Co. vs. *George,* 82 Miss., 710; 35 So., 193.

Yazoo & M. Valley R. Co. vs. *Searles,* 85 Miss., 520; 68 L. R. A., 715; 37 So., 939.

So. R. Co. vs. *Lockwood Mfg. Co.,* 142 Ala., 322; 68 L. R. A., 227; 37 So., 667.

However, the question of whether a lien for demurrage exists, independent of the statute, need not be further considered, so far as the case in hand is concerned, for the reason that the New Jersey statute above cited expressly provides that the railroad has a lien upon the property, or so much thereof as has not been taken for its charges for detention of cars and use of tracks.

II.

THE RATE OF ONE DOLLAR PER CAR PER DAY IS REASONABLE, AS A MATTER OF LAW, AND IT WAS ERROR FOR THE TRIAL JUDGE TO SUBMIT TO THE JURY THE QUESTION OF THE REASONABLENESS OF SUCH CHARGE.

The rule in question reads as follows:

> "1. A charge of one dollar ($1) per car per "day or fraction thereof, shall be made for delay "of cars and use of track, on all cars not unloaded "within forty-eight hours after arrival, not in- "cluding Sundays or legal holidays, except as "hereinafter provided."
> (p. 66 of Exhibits).

The trial judge left it to the jury to determine, as a matter of fact, whether the charge of one dollar ($1) per car, per day, was reasonable (p. 234, l. 15 to p. 235, l. 20). Exception was duly taken thereto (pp. 252, 253), and error assigned thereon. We submit that whether or not the other questions at issue were properly questions of fact for the consideration of the jury, the trial judge was clearly wrong in leaving to them to determine the question of the reasonableness of the charge.

As we have shown under Point I, three of the four conditions precedent to the right to charge demurrage which are named in section 47 of the General Railroad Act were undoubtedly complied with in this case as to all of the cars. The only question left for consideration, therefore, is whether the rate which was charged is reasonable. We submit that this is a question of law, and not of fact. The only evidence on the subject shows that the amount is very moderate (p. 23, l. 20). The trial judge was requested to charge the jury that the rule providing for a charge of $1 per day was reasonable (p. 236, l. 20). He refused the request, and instead said:

"Forty-eight hours is a reasonable time; the "question in dispute, in case you find there is car "service due, is as to the reasonableness of this "charge of one dollar ($1) a day. Is that or is it "not a reasonable charge?"
(P. 234, ll. 20-25).

We claim that it was error to refuse this request and to charge as above. The question may be considered from several points of view.

(a) *The rate was part of the regulations adopted by the plaintiff for the management of its business.*

The regulations of the N. Y. & N. J. Car Service Association (Ex. P. 4, p. 66) were adopted by the plaintiff, and during the year nineteen hundred and five were rules of the freight department (p. 182, ll. 10-20; p. 183, l. 1.

Even without reference to judicial authority, it is a matter of common sense that the reasonableness of a regulation of this kind must be passed on by the court, as a question of law, instead of submitting it to the vagaries of juries. To permit the jury to pass on such question leads to a *reductio ad absurdum*. If the rate of $1 is in the opinion of the jury not reasonable, what would be? Suppose there was a bargain-counter rate of 98c, would that be reasonable in the minds of the jury? Suppose the rate had been fixed as low as 10c. Under the ruling of the trial judge it would still be for the jury to say whether or not the charge was reasonable. The trial judge in his charge stated that there ought to be a verdict for "something" for car service, for the reason that the deprivation of the company of the use of a car must be some loss, and then he continues, "it must be some loss; but what the loss I don't know, that is a point in the dispute between these parties." (P. 235, ll, 10-20.) We respectfully submit that he misconceived

the theory upon which car service is established as a regulation of the railroad company. It is not intended to compensate the railroad for the deprivation of the use of its cars. If $1 per day were a fair compensation to the railroad for the use of cars, then it might as well stop its business as a common carrier and become a warehouseman and use the cars exclusively for storage purposes. The purpose of the charge, and the only purpose, is to facilitate the movement of cars so that both the railroad and the public may derive the utmost benefit from their use. The matter is quite as important to the public as to the railroad. It is no object to the railroad to collect car service; in fact the less it collects the better it is satisfied. The rate is so fixed that it shall not be too small to be insignificant in the eyes of the freight-using public, and yet not so large as to be an unfair burden.

As explained by Mr. Curtis, Assistant Manager of the Association:

> "The object of the charge is to primarily pre-
> "vent an unreasonable detention of the car, and
> "in the case of an unreasonable detention to im-
> "pose a charge, a nominal charge that won't be
> "too severe upon the shipping public, but will act
> "as a restraint from a further detention after
> "forty-eight hours" (p. 26, ll. 15, 20).

The question of whether the reasonableness of a corporate regulation is for the jury or for the court has been under consideration in several cases in this state and it was formerly held to be a jury question. In *State* vs. *Overton,* 24 N. J. L., 435, the defendant (Overton) was convicted of assault and battery in ejecting a passenger, one Canfield, from a railroad train. The cause of the ejectment was the refusal of Canfield to tender to the defendant, who was

a conductor on the train, any proper ticket or fare. The conviction was set aside. In the course of its opinion the Supreme Court said that certain regulations would undoubtedly be reasonable; that certain others might not be, and then continues:

> "The distinction between such regulations as "are necessary and conducive to the comfort and "convenience of travelers, or to protect the rights "of the company, must from its very nature be "a question of fact rather than of law. The "reasonableness and unreasonableness is proper-"ly for the consideration not of the court but of "the jury" (p. 441).

In *Morris & Essex R. Co.,* vs. *Ayres,* 29 N. J. L., 393, the Supreme Court, following the Overton case, held that the question of the reasonableness of a regulation of a railroad company was for the jury. The regulation in that case required that the consignee give a receipt for all of the goods before any part was removed.

In *Compton* vs. *Van Volkenburgh,* 34 N. J. L., 134, the plaintiff was put off a ferryboat in violation of a regulation which prohibits passengers from passing on a boat through a gateway appropriated for the use of teams and vehicles.

The Supreme Court, under the authority of the two above cases held that the question of the reasonableness of the regulation was for the jury. But in the course of the opinion, Beasley, *C. J.,* says:

> "There is no doubt that the rule thus "intimated is in opposition to recent Amer-"ican authorities. * * * The submission "of such a question to a jury, appears "on many grounds objectionable and in op-"position to legal analogies. * * * * The "question is one of so much importance that it "will doubtless, before long, be presented for the

"consideration of the Court of Errors, when it "will be definitely adjudicated." (p. 135).

In *Ripley* vs. *N. J. R. R. & Trans. Co.,* 31 N. J. L., 388, a rule of the company required a commutation ticket to be shown whenever required. Plaintiff lost his ticket and was refused transportation, unless he would produce evidence of the loss and pay half the rate for the unexpired term, according to a resolution of the board of directors. He refused to do this and, therefore had to pay the regular fare. A demurrer to the declaration was sustained, and Elmer, *J.,* in the course of his opinion said that the case comes within the principle that the ticket furnished is evidence of the contract "and that a rule requiring them to be shown must be complied with" (p. 393). This comes pretty near deciding that the particular regulation in question was reasonable as a matter of law, although Vredenburgh, *J.,* in his opinion says that the question involved was not one of the reasonableness of the rule but one of contract (p. 390).

In *Penn R. R.* vs. *Parry,* 55 N. J. L., 551, the regulation in question required passengers to change cars at a certain station. The plaintiff got off the train before it reached this station, and the question was, whether the contract between the parties permitted the plaintiff to leave the train on which he had started before it reached its destination, and proceeding in advance of it, continue his journey in a train with which it did not connect, and which was made available to him only by an additional delay. The Court of Errors & Appeals by McGill, *C.,* says:

"The ticket is a mere token that the fare has "been paid, and that the passenger has the right "to be carried to the destination it indicates, according to the reasonable regulations of the rail-"road company. Such regulations, at least, so

"far as they are known to the pessenger, enter "into the contract of the passenger, and it is "the duty of the passenger to conform to them" (p. 554).

He concludes that the conductor was justified in demanding a new fare, and upon the refusal of plaintiff to pay it, to remove him from the train, and that plaintiff should have been non-suited.

In *Rogers* vs. *Atlantic City R. R.*, 57 N. J. L., 703, this court sustained a non-suit on the ground that a regulation with regard to the surrender of monthly commutation tickets was reasonable; it was assumed that there was no question for the jury.

The latest case on the subject in this court, is *Daniel* vs. *North Jersey St. R. Co.*, 64 N. J. L., 603. The plaintiff attempted to carry a small goat with him onto a trolley car. The regulations of the company prohibited the carrying of animals in cars. Judgment for plaintiff was reversed, by reason of an error in the charge. In the course of the opinion, Garrison, *J.*, says:

"No general rule upon the question of the rela- "tive functions of court and jury with respect to "the reasonableness of corporate regulations can "be laid down at this time. A majority of the "court, however, are of the opinion that the de- "fendant company might lawfully adopt some "regulation with respect to the carrying of ani- "mals on its cars, and that the reasonableness of "such a rule would be a question for the trial "court and not for the jury. * * * It was "error to leave to the jury the reasonableness "of this regulation. It should have been decided "by the court. To this extent the cases of *State* "vs. *Overton*, 4 Zab., 435; *Morris and Essex Rail-* "*road Co.*, vs. *Ayres*, 5 Dutcher, 393; *Compton* "vs. *Van Volkenburgh*, 5 Vroom, 134, are disap- "proved."

The question of the rate car service is vastly more important than the question of whether or not a passenger has a right to carry a live goat with him into a trolley car. It is of the utmost importance that there shall be no conflicting adjudications with respect to the reasonableness of the charge. A jury in one county might find a charge of one dollar to be reasonable; a jury in another county might say that a charge of two dollars was reasonable, and the next day another jury, in another county, might figure that fifty cents was unreasonable. Such a chaotic condition would be disastrous, both to the shipping public and to the railroad companies, as neither would have any assurance as to what its rights were in any particular case.

In the cases of *I. C. R. R. Co.* vs. *Whittemore,* 43 Ill., 420; *R. R. Co.* vs. *Rhoads,* 25 Fla., 40 and *Little Rock etc. R. Co.* vs. *Barry,* 84 Fed., 944; 43 L. R. A., 349, the doctrine was announced unequivocally that the reasonableness of the railroad's rules is a question of law.

A number of cases are cited by the editor in the report of this last case in 43 L. R. A., at p. 362, and he concludes that the reasonableness of a rule is a mixed question of law and fact, *except in plain cases.*

One of the latest text books, after an examination of the different theories, concludes that the weight of judicial opinion and reason makes the question one of law. 3 Thomp. On Negligence, section 3108, p. 564. The author cites with approval the following quotation from the case of *Vedder* vs. *Fellows,* 20 N. Y., 126, 131.

> "There are strong reasons why the reasonable-
> "ness of railroad regulations should, in the ab-
> "sence of any positive proof as to their effect, be
> "submitted to the court as a question of law,

"rather than to the jury as one of fact. Ordin-
"arily jurors are not aware, nor can they readily
"be made aware, of all the reasons calling for the
"rule. They are apt to listen readily to any
"allegations of injuries on railways. What one
"jury might deem an inconvenient rule, another
"might approve as judicious and proper. There
"would be no uniformity."

The gist of the argument is in the last sentence of the above quotation, namely, that if the jurors were allowed to pass on the question of the reasonableness of the regulations of a railroad, there would be no uniformity.

If this court should conclude that the question in this case should be submitted to the jury as one of fact, the result would be most unfortunate, as it would be impossible to foresee what jurors, in other cases that might arise, would find. It would be better for the railroad to have the rule found unreasonable, as a matter of law, rather than submit it to the jury as a question of fact; as then, it would at least know what was regarded as unreasonable. We submit, however, that if ever there was a plain case where the rule was reasonable, as a matter of law, it is the case in hand. A rule is literally identical with the one in question has been approved as reasonable in every court in which the question has come up. We refer to the decisions on this point under the next subdivision.

(b) *The rate of one dollar per day has been approved reasonable by judicial authority in other states.*

In *Miller* vs. *Georgia R. R. Co.*, 88 Ga., 563, 15 S. E. 316; 18 L. R. A., p. 323, the railroad brought suit to recover car service charges, and the jury found a verdict in its favor. The trial judge charged that the regulation of the company providing for a charge of

one dollar per car, for each day, if the car is not unloaded at the expiration of 48 hours, was a reasonable regulation and binding upon the customers of the railroad who had notice thereof. The Appellate Court sustained the charge as legal, and the judgment was affirmed.

The court said:

> "We cannot, as matter of law, say that the rate "of one dollar per day for each car is unreason- "able. It is not necessarily unreasonable because "the cars vary in capacity, nor because a part of a "day is charged for as a whole day. Nor can we "hold that the customary rates for storage in "warehouses and elevators must be the measure "of compensation where the storage is in the cars "on the tracks of a railroad. Indeed, if it be a "legitimate object of this rule to prevent the di- "version of cars from the work of carriage, it "would seem but proper that the charge for their "use when detained as a means of storage should "not be such as to encourage customers to adopt "that means, instead of the more regular and "usual methods. Moreover, there was no evidence "to show that the rate fixed by this rule was "higher than those customary for storage of other "kinds. On the contrary, there was evidence "tending to show that storage in a car, at the rate "fixed by the rule, might be much less expensive "than storage elsewhere; the general manager of "the railroad company testifying that the modern "car carries from 50,000 to 60,000 pounds, and "that storage in the company's depot of a carload "of 50,000 pounds would amount to $1.25 per "day. He testified further: 'The rate of $1 per "day does not compensate us for the detention of "the cars, and it was simply to induce the shipper "to unload that the rule was passeed.' "

In *Kentucky Wagon Co.* vs. *Ohio, etc. R. Co.*, 98 Ky., 152; 32 S. W., 595; 36 L. R. A., 850, it was held that a

charge of one dollar per day was not unreasonable, the court saying:

> "That the rate of $1 per day is also reason-
> "able, is conclusively shown. It may be some-
> "what more than the usual per cent of the first
> "cost of the car, but this is not the proper cri-
> "terion. A railroad company does not construct
> "cars for the purpose of storing property in
> "them, and their use for transportation involves
> "the use of costly railway tracks and other ex-
> "penditures. * * * * Manifestly the object
> "of the rule fixing a uniform charge for the de-
> "tention of cars, is not for the purpose of rais-
> "ing revenue at all. That feature is insignificant,
> "the purpose being to facilitate transportation,
> "and the less revenue there is derived from the
> "enforcement of the charge, the greater the car-
> "riers are benefitted and their facilities increased
> "for serving the public. * * * * We are
> "convinced, therefore, that no valid objection can
> "be urged against the enforcement of these rules
> "of the appellees, as announced through this As-
> "sociation. They not only commend themselves
> "to the reason and common experience of those
> "observant of such matters, but as we have in-
> "dicated, they have found approval at the hands
> "of a number of the courts of the country, and,
> "we may add, of a number of State Boards of
> "Railroad Commissioners, whose business has
> "been to carefully investigate such questions in
> "behalf of the general business public."

In *Union Pacific &c. R. Co.,* vs. *Cooke,* 50 A. & E. R. R. Cas., 89 (Col.), suit was brought by the railroad to recover for demurrage. The court held that a rate of two dollars per day was reasonable, and directed the jury to find a verdict in favor of the plaintiff for the full amount sued for.

In *Norfolk & Western R. Co.* vs. *Adams & Co.*, Cas. 90 Va., 393; 18 S. E., 516, 22 L. R. A., 530; 56 A. & E. R.R. Cas. 330, Adams & Co. sued the railroad to recover back certain sums alleged to have been illegally exacted by the railroad for car service charges. Judgment was entered for the plaintiff. The Appellate Court held that the judgment was erroneous and directed that the plaintiff's action be dismissed, saying:

> "The evidence in the record is that the car is "much more valuable to the company than the "charge of $1 per day; and it is manifest that if "cars can be delayed and held by shippers or con-"signees for months, (as the record shows was "done in this case) without any regulation that "would be operative, the business of the rail-"road and public service must necessarily suffer. "In view of the authorities and the facts of this "case, we are of opinion that the money paid by "the plaintiff to the defendant company was "properly charged by the said company, and was "due to it by the plaintiff's, Adams, Clement & "Co., and that they had no right to recover it "back; and that the Circuit Court erred in the "law as applicable to the facts of the case, and "erred in refusing to set aside the verdict of the "jury; that the judgment complained of is er-"roneous and the same is reversed and annulled."

The foregoing is a leading case on the subject. A report of it in 22 L. R. A. has a note on the general subject of the right to charge for car service, and refers to several cases not in the general reports, in which the right to make the charge was sustained and the rate held to be reasonable. The editor says:

> "It will be seen that the recent course of de-"cisions has been uniform in enforcing a reason-"able regulation of the railroad carrier, making a "reasonable charge for the unreasonable deten-

"tion of its cars by consignees, when by custom "or contract the consignees were to unload the "goods. That such a rule or regulation is not on- "ly manifestly justice to the railroad carriers, but "is of the highest public importance, can be de- "nied neither upon principle or authority."

Reference is made in the same note to the conclusions of the railroad commissioners in Kansas, where a demurrage charge of $1 per day was held to be reasonable, and also in Iowa, where a charge of *three* dollars was held to be reasonable.

After referring to these decisions, the editor continues:

"Undoubtedly an expeditious and economic "public service by the railroad carriers renders "the charging of demurrage absolutely necessary, "on the ground of public policy alone. The "theory of the principal case is sustained by logic, "authority and common sense" (22 L. R. A., 532).

The case of *Milwaukee, &c., R. Co.* vs. *Lynch* is referred to in this note. That case was in one of the county courts of Wisconsin. A demurrage charge had accrued and the consignee refused to receive the car and pay the demurrage. The car was allowed to stand on the track for ten days, and in a suit to recover for the demurrage the court held that as a matter of law a charge of $22 for the ten days' time was reasonable in amount, and ordered judgment for the plaintiff.

In *Schumacher* vs. *C. & N. W. R. Co.*, 207 Ill., 199; 69 N. E., 825, the plaintiff brought replevin to obtain possession of three tons of coke. On appeal to the county court, verdict was directed for the railroad (108 Ill. App., 520). The judgment of the county court was affirmed by the Appellate Court, and thereupon an appeal was taken to the Supreme Court, and

the judgment again affirmed, after an elaborate argument.

It appears that the plaintiff had shipped two cars of coke to himself, and notice of their arrival was mailed to him by the station agent. Notice was given that if the cars were not unloaded within forty-eight hours, a charge of $1 per day would be made. Plaintiff paid the freight, and at the time of payment said to the agent that he could not get the cars unloaded within forty-eight hours. There was a delay in unloading so that car service charges accrued. The agent refused to allow the plaintiff to remove the contents of the car until the demurrage charges were paid, and thereupon the plaintiff sued out a writ of replevin. The car service rules provided that a charge of $1 per car, per day, would be made after the expiration of forty-eight hours, excluding Sundays and holidays.

A number of other points were considered by the Supreme Court, but so far as the question now under consideration is concerned, namely, the reasonableness of the rate, the court says:

> "Unless he (plaintiff) could show that the "limit of time was unreasonable, or the charge "excessive, it would seem appellee's (defend- "ant's) contention to charge as for storage "should be upheld."

The court further says:

> "The object of such a rule cannot be so much "for the recovery of a revenue as the enforcement "of a rule that is to the benefit of all the shippers, "and thereby a public benefit. The charge must "be said to be a little more than nominal, and yet "the evidence discloses that its imposition in such "cases has had a highly beneficial effect. No ques- "tion is made as to the reasonableness of the "charge, and if there were it could have no effect

"in the case at bar, for the reason that appellant "(plaintiff) absolutely denies the right of appel- "lee (defendant) to any charge of compensation "and made no tender of any portion of it."

In *C. P. & St. L. R. Co.* vs. *Dorsey Fuel Co.*, 112 Ill., App. 382, the railroad was sued in trover for refusing to deliver certain coal consigned to plaintiff because of the latter's refusal to pay demurrage thereon at the rate of one dollar per day. The court says that the case involved, among other things, the question of whether the rate charged was reasonable. Under the authority of the *Schumacher* case the court decided that the rate was reasonable.

Judgment for plaintiff was reversed, and "as the appellee has no right of action upon the facts claimed by it to exist in this case, the cause will not be remanded."

In . *C. C. & St. L. R. Co.* vs. *Propst Lumber Co.*, 114 Ill. App., 659, the railroad filed a special plea in an action of trover brought against it because of refusal to deliver until car service was paid. The plea set up that the rate was one dollar per day, and that the same was a reasonable charge.

Plaintiff's demurrer to this plea was overruled, under the authority of the Schumacher case.

In *New Orleans, etc., R. Co.* vs. *George*, 82 Miss., 710; 35 So., 193 a replevin suit was brought against the railroad to recover possession of the contents of certain cars detained by the railroad by reason of plaintiff's refusal to pay car service charges. A peremptory instruction for the railroad company was denied, and the jury found for plaintiff, whereupon an appeal was taken. The judgment was reversed for error in the charge with respect to the notice of arrival. In discussing the right to charge for car service, and the reasonableness thereof, the court says:

"It should be noticed that the purpose of car "service associations was not to make money; they "increase the revenue of the contracting carriers "only incidentally in that, by keeping every car in "active service, the earning capacity was con- "stantly exerted and the returns therefrom in- "creased; but the prime object of their formation "was to observe and promote the mutual interests "of the carriers and the public dealing with them, "by improving the service of the traffic depart- "ment and insuring the prompt handling and "speedy delivery of freight to the consignee.

"It is admitted that the amount charged under "the demurrage rules is reasonable, and it appears "to us that the rules in themselves are fair and "based upon the fundamental maxim of justice, " 'the greatest good to the greatest number.' The "carrier of freight is responsible in damages if it "unreasonably delays the transportation of "freight delivered to it and exact justice demand "equal diligence of the consignee.

"When freight has been transported to its des- "tination and the consignee legally notified of its "arrival, it then becomes the duty of the consignee "to promptly receive the same, so that the car may "again be placed in service. These rules work no "hardship to the consignee who displays proper "diligence in the handling of his freight—ample "time is granted him, but they prevent the dila- "tory dealers who seek to save storage or ware- "house charges from keeping the track blocked "with idle cars, thereby impeding the carriers in "the prompt handling of freight and depriving "other dealers of the use of necessary cars to "haul their freight or transport the product of the "country to market.

"Certainly no reason founded in justice can be "given why consignees should not pay for any un- "reasonable or unnecessary detention of cars. "Prompt handling of freight by both carrier and "consignee is for the best interest of both and of "the commercial world at large."

The rules in this last-mentioned case provided for a charge of $1 per car, per day, after forty-eight hours from arrival, not including Sundays or legal holidays, and the court said that the rules were "fair, just and enforceable."

This case was approved and followed by the same court in *Yazoo & Miss. Valley R. R.* vs. *Searles,* 85 Miss., 520, 37 So., 939, 68 L. R. A., 715, the court saying:

> "In almost identical terms, this rule, (referring "to a rule with reference to delivery of private "siding) was before this court for consideration, "in a case involving the right to collect demur- "rage, the reasonableness of the rules, and the "power to detain freight to enforce payment of "demurrage and car service charges. At that "time, after thorough investigation, upon full pre- "sentation of the question, this court announced "as its conclusion, that car service associations "were legal, their charges just and enforcible, "their rules valid and reasonable. *R. R. Co.* vs. "*George,* 82 Miss., p. 710. We see no reason to "withdraw from the position assumed in that "case, which has been strengthened and fortified "by several strong and well reasoned decisions in "other jurisdictions. Citing *R. R. Co.* vs. *Dorsey* "*Fuel Co.,* 112 Ill. App., 382; *R. R. Co.* vs. *Mid-* "*vale Steel Co.,* 201 Pa. St., 624; *Schumacher* vs. "*R. R. Co.,* 207 Ill., 199; *Miller's St. Assn.* vs. *P.* "*& R. Ry.,* 8 I. C. C. Repts., 530."

In *Miller* vs. *Mansfield,* 112 Mass., 260, plaintiff sued for conversion of certain flour, claiming that he had tendered to the defendant, as agent of a railroad company, more than sufficient to cover the freight charges; certain demurrage charges had accrued, at the rate of $2 per day, which the defendant refused to pay. The defendant asked the trial court to charge the jury as follows:

"To entitle the plaintiff to recover, they must
"be satisfied that the defendant refused to allow
"the plaintiff to take the flour after the plaintiff
"had tendered to the defendant all that the rail-
"road company could lawfully charge in reference
"to the flour, including freight and demurrage."

Held that it was error to refuse this instruction.

In *Swan* vs. *L. & N. R. R. Co.*, 106 Tenn., 229, 61 S. W., 57 20 A. & E. R. R. Cas. (N. S.), 446, a charge of $1 per day was held to be reasonable in a suit brought by the plaintiff against the railroad company for refusal to deliver certain goods, the refusal of the company being based upon the failure of the plaintiff to pay or tender the accrued car service charges.

In *Penn. R. R. Co.* vs. *Midvale Steel Co.*, 201 Pa. St., 624; 51 Atl., 313, the charge was at the rate of $1 per day, on every car not unloaded within 48 hours after arrival. The railroad sued to recover for accrued demurrage charges on some 14,000 cars. The defendant filed an affidavit of defense denying the right of the railroad to make the charge. Plaintiff took a rule to show cause why judgment should not be entered for want of a sufficient affidavit; the trial court discharged the rule on the ground that there was a sufficient denial of the facts to prevent an entry of a summary judgment, and thereupon the railroad appealed and the Appellate Court held that the decree discharging the rule should be reversed and the record remitted to enter judgment for plaintiff, unless other legal or equitable cause be shown why such judgment should not be entered. The Appellate Court in discussing the question, says:

"Where the rule (*i. e.* the rule providing for
"the charge of $1 per day) is manifestly a reason-
"able one, as this one is, both as to time and
"charge, the court will not take up time by in-
"structing a jury to find the fact, any more than

" it would instruct a jury on undisputed facts to "find that a collecting bank had protected a "negotiable note within a reasonable time after "non-payment. Although the question has not "been heretofore directly passed upon by this "court, it has been decided in several of the "states. Citing *Miller* vs. *Mansfield,* 112 Mass., "260; *Norfolk R. Co.* vs. *Adams,* 90 Va., 393; "*Ky Wagon Co.* vs. *Ohio R. Co.,* 98 Ky., 152."

This last mentioned case is quoted with approval, and followed in *B. & O. R. R. Co.* vs. *Grays Ferry Co.,* 27 Pa., Super. Ct., 511. In this case the charges were $1 per day—the same as in the Midvale Steel case, and the court says:

"That case is an authority that settles the right "of a carrier by rail to establish a rule fixing a "reasonable charge for the detention of cars, after "a sufficient period, for unloading, without speci- "fic notice to shippers or consignees; and in "this case, as in that, 'the rule is manifestly one, "both as to time and charge.' "

In *Thomas Phillips Co.* vs. *Erie R. R. Co.,* 27 Ohio Cir. Ct. Rep., 486, the charge was $1 per day, and one of the questions under consideration was whether certain rules of the Car Service Association (including this one) were reasonable, and it was held that they were.

Another case in Ohio is *Baltimore & Ohio R. Co.* vs. *Fisher,* (5 Oh. S. & C. P. Dec., 659), which holds that the rule requiring the consignee to pay one dollar per car per day after the expiration of the time allowed for unloading is valid and enforceable, provided that the car is kept in a suitable place for unloading for the full period allowed by the rule.

In *Darlington* vs. *Mo. Pas. R. Co.,* 99 Mo. App., 1, 72 S. W., 122 the rate of one dollar per day was conceded to be reasonable.

A full discussion of the principles as to car service regulations, will be found in *Pa. Miller's State Assn.* vs. *Phila. & Reading R. Co.*, 8 I. C. C. Rep., 531. The main question of the case was with reference to the *time* allowed for unloading cars. The question of the rate was not directly involved, for the reason that it was admitted by the complainants that a charge of $1 per day, was just and proper.

In *Cudahy Packing Co.* vs. *Chic. & N. W. R. Co.*, 12 I. C. C. Rep., 518, the rules provided for a charge or one dollar per day, and the question was raised as to whether the right to exact this charge could be enforced on cars which stood on a siding owned and operated by the railroad, when the cars were owned by the complainant. The Commission held that the defendant was entitled to collect the charges, saying:

> "The more serious question is whether the "Cudahy Company should be charged demur- "rage upon its own cars while standing upon "this track. The purpose of a demurrage charge, "as often said, is to compel the prompt unload- "ing and release of cars, and this is not only for "the purpose of securing the use of the equip- "ment, but also of relieving the track upon which "the equipment must stand. Indeed, the conges- "tion of the terminal is often a more serious "matter for the railway than the mere loss of "the use of the car. It would appear rea- "sonable, therefore, that railways should be al- "lowed to charge demurrage upon private cars "when standing upon the tracks of the railway, "and we so hold."

In *Galveston etc. R. Co.* vs. *Hunt*, 32 S. W., 549, (Tex.), suit was brought against the railroad to recover back certain demurrage charges which the railroad had compelled them to pay at the rate of $1 for each 24 hours. Judgment for plaintiff was reversed.

The reversal, however, was put on the ground that the parties had stipulated in the bill of lading that their should be a demurrage charge of $1 per day.

In *Gulf City Construction Co.* vs. *Louisville & N. R. R.,* 121 Ala., 621; 25 So., 579, plaintiff sued to recover back money which it had paid to the railroad for car service, at the rate of $1 per car, per day, after the expiration of 48 hours after arrival. The defendant moved to strike out all the plaintiff's evidence, on the ground that it did not make out a case, for the reason that the railroad had a right to charge a reasonable amount for the use of its cars while detained by plaintiff. Motion was granted and the jury were directed to find a verdict for the defendant.

It will be observed that this case raised squarely the question of whether the amount of the charge was reasonable; in order to justify direction of verdict for the defendant, the court must have found that the rate was reasonable, as a matter of law.

This case is cited with approval in a subsequent case in the same court, of *Southern Ry. Co.* vs. *Lockwood Mfg. Co.,* 142 Ala., 322; 37 So., 667; 68 L. R. A., 227.

In the latter case the rate was also $1 per day and it was conceded that the rule fixing such rate was reasonable.

We also call the court's attention to the following unreported cases:

In *Pittsburg & Western R. Co.* vs. *Gilliland,* which was in the Court of Common Pleas of Butler County, Pennsylvania, September, 1892, suit was brought to enforce payment of twenty-five dollars demurrage. The rate was one dolar per day. Judgment was ordered for defendant for the full amount claimed in an opinion delivered by Judge Hazen on June 5, 1893, in the course of which he says:

"We can conceive of no more necessary and "reasonable regulation than the one we are asked "to enforce; the need of such a regulation is ap- "parent from the facts in this case. The rules "adopted in this district are reasonable and clear- "ly necessary and in no way detrimental to ship- "pers, but wholly in their interest."

In *George Campbell Co.* vs. *Baltimore & Ohio R. R. Co.,* in the Circuit Court of Jefferson County, West Virginia, (March 1893), the rate was one dollar per day. Suit was brought by the plaintiff, because of the refusal of the railroad company to deliver two cars consigned to plaintiff on which car service charges had accrued. Thereafter the railroad company sold the contents of the cars for freight and car service charges. Judgment was given for the railroad company.

In *Scott* vs. *D. L. & W. R. R. Co.,* in New York Supreme Court, Chenango County (March 1894), paintiff sued the railroad company for converting certain lumber because of its refusal to allow him to remove the same from its car after demurrage charges had accrued thereon. The rate was one dolar per day, and it was held by Justice Charles E. Parker, as a conclusion of law, that this was a reasonable charge, and the case was dismissed.

In the case of *Dawson, Blackmore & Co.* vs. *C. C. C. & St. L. R. R. Co.,* in the Court of Common Pleas, Hamilton County, Ohio (October 1894), the plaintiff sued the railroad company to recover the sum of eight dollars, which it claimed was extorted from it by reason of the enforcement of car service charges. We quote the following from the charge of Judge Howard B. Holister

"If you find from the testimony that the car "could have earned more to the railroad com-

"pany than a dollar a day, then the sum of one "dollar, I charge you, was not an unreasonable "sum to charge for that service."

In *Antrim & Sons* vs. *Richmond, etc. R. R. Co.,* in Law and Equity Court, Richmond, Va. (March 1895), paintiff sued the Railroad company for detaining a car which the company had refused to deliver until one dollar car service charge had been paid. The court charged the jury that the company had the right to decline to deliver the car until the dollar had been paid, and a verdict was rendered for the defendant.

In *Lafayette Lumber Co.* vs. *C. C. C. & St. L. R. R. Co.,* in Superior Court of Tippecanoe County, Indiana, (April 1895), plaintiff sued in replevin to obtain possession of a car which the railroad company refused to deliver until a bill for car service had been paid. The rate was one dollar per day, and it was decided by Judge Everitt that the charge was not excessive.

In *Evans and Haward Fire Brick Co. and others, constituting the Coal Dealers Protective Association of St. Louis,* vs. *St. Louis Car Service Association,* an elaborate hearing was had before the Railroad Warehouse Commissioners of the State of Missouri in April and May, 1895. The complaint was that the charge for demurrage, which was one dollar per day, was unjust and unreasonable. The Commission says:

"After a careful reading of the testimony and "full consideration of the arguments of attor- "neys, we are of the opinion that a charge of one "dollar a day for the detention of cars is just "and reasonable."

In *Wabash R. R. Co.* vs *Berry-Horn Coal Co.,* in Circuit Court of St. Louis, Mo. (June 1896), the railroad company brought suit to recover for demur-

rage charges at the rate of one dollar per day. Among the defenses set up was that the charge was unreasonable. The case was tried before John F. Dillon, Judge, without a jury, and on this point he held that the charge of one dollar a day for each car was "a reasonable and legal charge."

In *Herr* vs. *Baltimore & Potomac R. R. Co.,* in the Supreme Court, District of Columbia (June 1897), plaintiff sued the railroad company for conversion of certain goods, which the railroad company refused to deliver because the plaintiff refused to pay demurrage at the rate of one dollar per day. The case was tried before Mr. Justice C. C. Cole and a jury. The jury were directed to render a verdict for the defendant, the justice saying, among other things:

> "I have no doubt in the world about the valid-
> "ity of this regulation of the railroad company,
> "nor have I any doubt that it becomes a part of
> "the contract with any shipper who makes a con-
> "tract to have goods shipped knowing of its ex-
> "istence."

In *Meachran* vs. *Grand Trunk Ry. Co.,* Wayne County, Michigan (1896), plaintiff sued the railroad for withholding delivery of three cars of wood, because of plaintiff's refusal to pay demurrage. The rules were held to be reasonable and the jury were directed to find for the defendant.

In *Doyle* vs. *Louisville & N. R R Co.,* in Clark Quarterly Court, Winchester, Kentucky (1903), plaintiff brought replevin to obtain delivery of certain carloads of coal, claiming, among other things, that the rate of one dollar a day was unreasonable. The case was tried before a judge and jury and the jury were instructed to find a verdict for the defendant.

The rate of one dollar per day has been determined to be reasonable in every court where the question has come up. It has been thus decided in the courts of the following states: Alabama, Colorado ($2), Georgia, Illinois, Indiana, Kentucky, Massachusetts, Michigan, Mississippi, Missouri, New York, Ohio, Pennsylvania, Tennessee, Texas, Virginia, West Virginia, Wisconsin and in the District of Columbia.

The Legislature of this state, after a full hearing, passed an amendment at its recent session fixing the rate of one dollar as reasonable (Chap. 256, Laws of 1907, p. 648).

(c) *The right to charge car service was fixed by contract between the parties.*

1. *Contract in the bills of lading.*

As to the first car (No. 100,824), plaintiff was unable to obtain the bill of lading, so what is said under this point has no application to that one car.

The bills of lading of cars Nos. 70,183, 42,865, 1,108 and 32,537, provide, among the "uniform" conditions, as follows:

> "A carrier may make a reasonable charge, per "day, for the detention of any vessel or car, and "for use of tracks after the car has been held 48 "hours for loading or unloading, and may add "such charges to all other charges hereunder, and "hold said property subject to a lien therefor."

(Ex. P. 15, p. 84, of Exhibits, ll. 25-30; Ex. P. 20 of Exhibits, p. 94, l. 30; Ex. P. 25, p. 99, l. 15; Ex. P. 37, p. 109, l. 30).

The bill of lading of car 44,988 does not in terms include this condition, but it does provide that the goods are to be forwarded subject to the rules and conditions printed on the regular shipping bills then in use by the company issuing the receipt. (Ex. P. 31, p. 104, ll. 10-15.)

A common carrier may make a special contract for the carriage of goods, and such contract is binding on the consignee, except in so far as it attempts to limit liability for negligence. *Russell* vs. *Erie R. R.,* 70 N. J. L., 808.

Demurrage rules which are included in the conditions of the bill of lading are binding upon the consignee (6 Cyc., 408, 417).

In *Yazoo & Miss. Valley R. R. Co.* vs. *Searles,* 85 Miss., 520; 37 So., p. 939; 68 L. R. A., p. 715, the court says on this subject:

> "The bills of lading under which appellant han-
> "dled the cars giving rise to this litigation—'the
> " 'contract of shipment'—contained an expressed
> "provision that all car-load freight should be lia-
> "ble to charge for trackage and rental for deten-
> "tion, said charge to commence after the expira-
> "tion of 48 hours after its arrival at destination.
> "This was appellee's contract with appellant, and
> "the law imputes to him knowledge of its terms,
> "and he was legally bound thereby."

A recent authority says on the same subject:

> "If the customer of a railroad company, on the
> "delivery of goods for transportation, accepts a
> "receipt in which it is provided that where the
> "cars are not unloaded within a certain time, de-
> "murrage will be charged, and the sum named
> "and the time stated are reasonable, his accept-
> "ance will be held to create a binding contract be-
> "tween the parties." 2 *Hutchinson on Carriers* (3rd Ed.), p. 952, sec. 860.

A similar clause in the bill of lading was held binding on the consignee so as to make it liable for demurrage in the case of *N. Y. L. E. & M. R. R.* vs. *Seiberling,* 4 Ohio Cir. Ct Dec., 210.

See also: *York* vs. *Central R. R.,* 3 Wall (U. S.), 107.

Even if the provision for a demurrage charge is not included in the bills of lading, nevertheless the customer of the railroad is bound by the rule, if he has actual notice of it.

(See Point II., (c) 3.)

Although the bills of lading do not prescribe in so many words what is to be the amount of the reasonable charge, per day, for detention of car and use of track, yet it is obvious that this rate must be fixed by someone. In this case it was fixed by the railroad company, when it filed with the Interstate Commerce Commission a copy of the rules adopted by it with reference to car service charges.

See Point II (d).

2. *A contract to pay the charge was implied from usage.*

The defendant's Manager, after much dodging, admitted that he had heard of the car service rules before the controversy arose (p. 4, l. 20; p. 5, l. 25). He had, in fact, on several occasions paid car service charges before that time (p. 7, ll. 1-20). The defendant's President admitted that about two years before, his attention was called to the fact that the rate claimed was $1 a day (p. 12, l. 20; p. 13, l. 10); afterwards the defendant company paid certain of these charges (p. 13, ll. 10-20). The particular rules in question in this suit have been adopted for the Greenwood Lake Division of the plaintiff (p. 182, ll. 10-20).

In connection with this question of usage, an effort was made to prove payment of car service charges by another consignee, to wit, the Paper Company, but the question was overruled (p. 51, l. 30; p. 52, l. 20). In this was error. But even without the evidence of charges paid by other consignees, there is sufficient

evidence in the case to show that for several years at least, prior to the beginning of the controversy car service charges had been made and collected from the defendant at the rate of $1 per day. The rate was therefore fixed by this usage, aside from the question of the car service rules themselves; being so fixed, there was an implied promise on the part of the defendant to pay the same.

A leading case on this point is *Miller* vs. *Mansfield*, 112 Mass., p. 260, in which it appeared that there was an existing usage of the railroad company to charge $2 per day for detention. The court said:

> "It being known to the plaintiff, (the consignee "in that case) it is to be presumed in the absence "of any evidence to the contrary, that the parties "contracted in reference to it. It enters into and "forms part of their contract, and the railroad "company is entitled to recover the amount fixed "by the usage, by virtue of the plaintiff's promise "to pay it."

3. *A contract to pay the charge was implied by reason of the fact that the consignee had actual notice of the rules.*

This notice to the consignee was given in three ways. First by the making of prior charges, as above set forth under 2. Second, by furnishing defendant's officers with a copy of the rules, and third by a statement on the postal card notice calling attention to the car service rules.

The defendant's President, Mr. Cabell, admitted, under protest, that he had seen what purported to be the rules, but he attempted to evade the question by saying he was not familiar with them; but finally said that he thought he was presented with a copy of the rules (p. 10, ll. 10-30). Fortunately, for the plaintiff, it did not have to rely upon Mr. Cabell's defective memory

in order to bring home to him notice of the rules. It was proved, beyond controversy, that Mr. Davis, an inspector employed by the Car Service Association, had several interviews with the officers of the defendant company, and in 1903 he met Mr. Cabell and called his attention to the rules. By reference to a memo. which he kept, he was able to fix the time as July 28th, 1903, on which day he presented Mr. Cabell with a copy of the rules, which was the same as the one offered in evidence (p. 56); his evidence was not impeached or contradicted.

It is not denied by the defendant, that it received one or more postal card notices as to each of the cars in suit. On plaintiff's demand it produced all of them except the first card dated April 4, relating to car 100824. Subsequent notices, however, were sent as to their car. All of these cards had printed thereon what is termed a "special notice" requiring the consignee to remove the property within 24 hours. The card then states: "Car service in accordance with rules of the Car Service Association will be applied" (Ex. P. 9, p. 78). If the defendant should claim that it did not know about car service rules until after the arrival of the first car in suit, certainly no such claim could be made as to the latter cars. The first card sent expressly called attention to the car service rules, and all the other cards did likewise. The defendant cannot dispute the fact that it, through its officers, had actual knowledge of the existence of the rules.

It has been decided that shipments which are made subsequent to the adoption of car service rules are subject to the reasonable provisions thereof, and the customer is bound thereby, although no notice is inserted in the receipt or bill of lading. (2 Hutch. on Carriers, (3rd Ed.) p. 953, sec. 860.) Probably the rule would be binding whether or not the customer had

actual notice of it, but it is not necessary to go so far as that in the case in hand, because it appears without dispute that the defendant did have notice of the rule before any of the charges in suit accrued.

4. *A contract to pay the charge was implied as to some of the cars by reason of the notice on the tariff sheets.*

This point applies only as to cars numbers 1,108 and 44,988.

As to both these cars the joint freight tariff filed by the plaintiff had the following notice:

> "Under this tariff, when freight is to be loaded "by consignor, or unloaded by consignee, one dol- "lar ($1) per car, per day, or fraction thereof, for "delay beyond 48 hours in loading or unloading, "will be added to the rates named herein, and con- "stitute a part of the total charges to be col- "lected by the carrier on the property; except, "however, when in conflict with Car Service As- "sociation or local regulations at shipping point "or destination, in which case such Car Service "Association or local regulations shall prevail."

(Ex. A., p. 57, ll. 1-15; Ex. B., p. 60, ll. 30-40.)

The offer of these exhibits was overruled. We think this, in itself, is sufficient error to justify the reversal of the judgment. Notice of the car service charge, including the rate per day, was given on the tariff sheets, and therefore the contract of shipment was made with reference thereto.

Under the case of *Texas & Pacific R. Co.* vs. *Abilene Cotton Oil Co.*, 204 U. S., 426, and other authorities cited under point (d), next following, the tariffs are proper evidence of the Company's rates and rules, and they are not merely proper evidence, but they are the only admissible evidence thereof, so that the result of this ruling was to exclude evidence that was

material and was the only proper evidence on the point involved.

(d) *The Interstate Commerce Act makes the rate of demurrage, as fixed by the filed tariff, conclusive, and it cannot be questioned in the state courts.*

The sixth section of this Act requires "rates and fares and charges" to be kept for public inspection, stating "the places on its railroad between which property and passengers will be carried;" also "the terminal charges, and any rules or regulations which in any wise determine any part of the aggregate of such rates, fares and charges." These rates shall be the only legal rates, and every carrier shall file with the commission copies of its rates, fares and charges, and also of its tariffs for joint rates, fares and charges. It will be seen that the rates for car service are among the terminal charges to be kept for inspection, and to be filed, and it has been so held. (*Blackman* vs. *Southern R. Co.*, 10 I. C. C. R., 352). The Interstate Commerce Commission has jurisdiction over these car service charges. (*Am. Warehousemen's Ass'n* vs. *Illinois Central R. R.*, 7 I. C. C. Rep., 556, 592; *Cudahy Packing Co.* vs. *Chicago & N. W. R. R.*, 12 I. C. C. Rep., (Oct., 1907); *Inter. Com. Com.* vs. *Detroit, etc., R. Co.*, 167 U. S., 633, 646; *Inter. Com. Com.* vs. *Chicago, etc., R. Co.*, 186 U. S. 320). It was proved that the car service rules which fix the demurrage charge at the rate of one dollar per day were filed with the Interstate Commerce Commission (p. 3, ll. 1 to 12); and that the plaintiff had adopted them (p. 182, ll. 10-20); also that a printed copy of the rules was given to the President of the defendant and that the defendant had on several former occasions paid charges for car service at the rate of one dollar per day (p. 56, l. 21; p. 7, ll. 1-10;

p. 12, l. 30). It is not necessary to prove posting in the station. (*Texas & Pac. R. R.* vs. *Cisco Oil Mill,* 204 U. S., 449.)

It has been settled by the U. S. Supreme Court that the charges thus kept for public inspection and filed must be treated as binding upon the shippers until corrected in the mode provided by the Interstate Commerce act, and therefore are binding on all state courts.

Texas & Pac. R. vs. *Abilene Cotton Oil Co.,* 204 U. S., 426, 440, 443 and cases cited.

In that case suit was brought by the oil company to recover for certain freight payments which it alleged had been charged by the railroad on the basis of an unjust and unreasonable rate. Judgment for plaintiff was reversed, the court holding that under the Interstate Commerce Commission act rates which have been established by the filing of tariffs, as required by the act, are the only lawful rates, until and unless set aside as unreasonable by the commission or modified by the carrier by issuing new tariffs, and that a shipper who seeks reparation precedent upon the unreasonableness of the established rate, must primarily invoke redress through the Interstate Commerce Commission.

That case is, therefore, an authority that the legality of the car service rules, so far as they affect interstate shipments, and the reasonableness thereof (including the reasonableness of the rate) cannot be questioned in an ordinary action at law, any more than the rate of freight fixed by the railroad could be thus questioned. If the defendant conceives that the rate is unreasonable, its remedy is to take proceedings before the Interstate Commerce Commission to modify it. Until that is done, the rate fixed by the filed tariff is

binding not only upon the railroad and its customers, but also on the juries and judges of the state courts.

All the shipments in the present case were interstate, and this decision is therefore controlling. The railroad company not only has the right to make a charge of one dollar per day for car service, but it is bound to do so. Under the Elkins act of 1903, the failure to strictly observe such tariff until changed according to law, is punishable by a fine of from $1,000 to $20,000.

In the present case, however, the jury were allowed to usurp the duties both of the directors of the Erie Railroad Company and of the Interstate Commerce Commission, by finding that a rate adopted by the former as one of the regulations for the management of the company's business, and filed with the latter as one of the company's charges under the Interstate Commerce act, was unreasonable.

(e) *The rate is reasonable because it corresponds to the custom throughout the United States.*

It appears by the undisputed evidence that the rate of one dollar ($1) prevails through the entire country, except one or two places where the rate is higher. Throughout this part of the country and in the middle west and in the south, it is always one dollar ($1) per day.

There are thirty-nine Car Service Associations throughout the United States. All the railroads of the country are practically covered by them. The rate charged by them is never less than $1 a day, and in one or two instances on the Pacific Coast, it is more than that. Through this part of the country and in the west and in the south, it is always a dollar a day (pp. 23 to 25).

The defendant made no effort to dispute this testimony, as indeed it could not be disputed, nevertheless the jury was permitted to find that a rate which prevails in thirty-nine Car Service Associations, and in every state, county, city and village in the United States, and in nearly all the railroads of the entire country, was too high.

(f) *The rate is reasonable because it is less than the average daily earnings of a freight car.*

It was proven that the average earnings of a freight car throughout the entire country, for the year 1905, was $2.34 per day. This was arrived at by taking the reports made to the Interstate Commerce Commission. The total freight revenue of all the railroads, covering over 200,000 miles, was taken as the dividend. The total number of freight cars multiplied by 365 was taken as the divisor, and the result was $2.34 per day. As explained by Mr. Curtis, this amount was really very much too low (pp. 19 to 23).

It is obvious that it would be a mathematical impossibility to ascertain the exact amount earned by any one car out of the millions that are in use in the United States. Every car is loaded with a variety of freight from day to day, some of them are in constant use, others lie idle for days or weeks and months; at times there is a great demand for them, and again the demand slackens; cars are of different kinds, some larger, some smaller, some coal cars, some freight cars; the rate of freight varies according to the class of the commodity which is being carried. The average arrived at gives the benefit of every doubt to the defendant, because it does not take into consideration the different sizes of the cars, or the time when they happen to be lying idle or are detained on sidings for loading and unloading or sent to the shop for re-

pairs. It assumes every car is in use every day. It was suggested in the charge that in considering whether the rate was reasonable, the jury might take into conisderation the original cost of the car, the value of the car as an investment, and cost of the track (p. 234, ll. 20 to 30). But there is no evidence in the case on this point and the jury should not have been allowed to speculate about it.

The defendant made no effort to show what was the original cost of the freight cars, and, in fact, produced no evidence whatever to prove that the charge was unreasonable, other than the fact that the railroad companies did not charge each other as much as $1 for the use of foreign cars.

We submit that the suggestion of the court was very damaging to the plaintiff, as it permitted them to find that the charge was reasonable or unreasonable on some evidence that was not in the case at all. The explanation of the reason why the railroads charge each other a certain per diem, was given by Mr. Curtis, Assistant Manager of the Association, who says that the charge used to be at the rate of two-thirds of a cent, per mile, while the car was running, and that after the car arrived at its destination, the charge stopped. This became so burdensome that the railroads finally agreed to abandon the mileage system and establish the per diem rate, and as an experiment, for a certain period they tried the rate of 20 cents. The charge has recently been increased to 50 cents, and higher rate advocated (p. 33, ll. 10-35).

It is obvious that there is great difference between a car service charge and a per diem charge for use of a foreign car. For example, per diem covers the use of nothing but the car, and is simply an arbitrary rate fixed for the hire of the car. The car service

charge includes the use of the switch engine, and also the use of a part of the track—often to the exclusion of the cars of other consignees. The use of the track is sometimes of much more importance than the car itself. The car service charge also includes the use of the car as a storehouse, and makes the railroad a warehouseman. It remains liable for the goods while in its custody, and is entitled to some compensation for this risk.

The method adopted in the present case of obtaining a minimum average of the earning value of a freight car, has received judicial approval in the case of *Schumacher* vs. *Chic. & No. West. R. R.*, 207 Ill., 199; 69 N. E., 825. In that case evidence was offered to show that the average earnings of freight cars of twenty-nine railroads running into the city of Chicago was $2.42, and that the average of defendant's railroad was 2.15. In the present case the plaintiff might fairly have taken the average earnings of freight cars in the vicinity of New York, which, in view of the immense freight traffic, would no doubt result in a larger average earning than by taking the country as a whole. But in order to give the defendant the benefit of any possible doubt we took the average throughout the entire country, including the deserts of Nevada and Arizona, and the mountains of Colorado and California, as well as the prairies of Kansas and Nebraska.

III.

THE TRIAL JUDGE ERRED IN THE CHARGE WITH REGARD TO THE RIGHT OF THE RAILROAD COMPANY TO EXACT A RECEIPT BEFORE DELIVERY OF THE CAR.

The court left it to the jury to determine whether the requirement that a receipt should be signed under the circumstances was reasonable (p. 231, l. 30 to 40), and went on to argue that defendant ought to have an opportunity for previous inspection of the contents (p. 232).

This charge was certainly erroneous as to some of the cars, and, we think, as to all, where the question arises. It does not arise at all as to cars 100824 or 70183.

In the case of car 42865, defendant unloaded the lumber from the car by force, and thus had the fullest opportunity for inspection of the lumber. But it never offered to give a receipt, and refused to do so, even after the lumber had been removed from the car. The freight was paid on this car, but that fact cannot alter the right of defendant to charge car service; otherwise a consignee could pay the freight and receipt for the car, and, then hold it as long as he pleased.

Car 1108 was an open car, placed in plain view upon a public siding, so that the defendant's agent could inspect it, before unloading, if he chose.

As to car 32537, the defendant broke in and partly unloaded it, and was then stopped, but he thus had ample opportunity to inspect.

The point of lack of chance to inspect, therefore, arises as to one car only, namely, 44988, and the judge should not have submitted the question as to the other cars, and erred in directing the jury to find

that the defendant could in those cases refuse to give a receipt for the car, because no inspection could be had.

We by no means, however, admit that any such right of inspection of the contents of the car, as is stated by the court, exists, and we submit that where goods are shipped in car-load lots, by the consignor, to be unloaded by the consignee, the only previous inspection which the consignee can demand is of the car itself, and not of its contents.

In such cases, the consignor and consignee have agreed that the former shall engage a car, and shall himself load it, and the consignee asks the company that the car shall be put into his hands to unload. A receipt in advance for the car is properly demanded. Where the consignee bargains for goods in lots, to be loaded by the railroad company into the cars at the beginning of the transit, and unloaded by the railroad company at the end of transit, the consignee may properly demand a right to inspect the goods to see whether the railroad company is delivering what was delivered to them; but, when he bargains that the consignor shall load, and that the consignee shall unload the car, then all that the railroad company undertakes is to deliver the car with such contents as the consignor has seen fit to put into it. When the consignee finds the car which has been unloaded by his order at its destination with the seals unbroken, and is ready to be placed at his disposal, he has received from the railroad company all the service which it has agreed to render. If he finds upon opening the car that his consignor has not given him goods of the quality or quantity he ordered, he must resort to his remedy on his contract with his consignor; he cannot draw the railroad company into that contro-

versy. By bargaining for a car-load lot, to be unloaded by himself, he lets the railroad company out of disputes over the contents of the car, and is bound to receipt to them when the car is ready to be turned over to him, before he takes charge of it.

There may be cases in the law of sale, where he may reject the goods on inspection, after having receipted for the car, in which cases the railroad company falls back upon the consignor and upon its lien upon the goods, and in such cases, the fact that the consignee has given a receipt for the car in no manner prejudices him.

General rules of business cannot be framed to fit the exceptional cases where the consignee rejects the goods for lack of compliance with his contract with his consignor; not one case in a thousand arises where the consignee refuses the goods because not satisfactory.

Of course, the notion of defendant that he could take the goods away, without receipting until he had taken them, is untenable. The case is not that of a debtor liable to pay his debt without obtaining a receipt, but of a trustee accountable to the consignor and entitled to a voucher in advance of delivery, as evidence to the consignor and to the other connecting railroads who have taken part in the shipment.

Elliott on Railroads, sec. 1532.

Morris & Essex R. R. Co. vs. *Ayers,* 5 Dutch, 393.

5 A. & E. Ency. of Law, p. 231 (2nd Ed.).

Defendant could not object to giving the receipt because of lack of knowledge of the arrival of the car, as he admits he knew it was there (p. 215, l. 25). The court further erred in this connection in charging the jury that the railroad company could not

require a receipt containing an admission that the goods were in good order. (p. 231, ll. 20 to 30.)

There was no evidence that the railroad company had demanded any such admission. The defendant refused to receipt at all before taking away the goods, and did not base its refusal upon any objection to its terms, and the jury should not have been left to surmise that improper terms were contained in the receipt.

Practically, the judge intimated to them that the receipt did contain such improper term, and they would naturally take his word for it.

IV.

THE TRIAL JUDGE ERRED IN LEAVING TO THE JURY THE QUESTION WHETHER THE RAILROAD COMPANY WAS BOUND TO DELIVER CARS UPON THE PRIVATE SIDING.

For convenience, we append the following table, showing the directions for delivery of the several cars, as indicated on the waybill and the bill of lading.

No. of Car.	Direction on Bill of Lading.	Direction on Way Bill.
100824	(No bill of lading produced)	Wanaque Lbr. Co. W. via N. Y. & G. L.
70183	(See note below).	Wanaque Lumber Co., Wanaque, N. J.
42865	Alcott & Company, Wanaque, N. J.	Alcott & Co., Wanaque-Midvale, N. J.
1108	Alcott & Co., Paper Mill & Lbr. Yd., Switch, Wanaque, N. J.	Alcott & Co., Paper Mill & Lbr. Yd. Switch, Wanaque, N. J.
44988	Alcott & Co. Wanaque, N. J. At Paper Mill and Lbr. Yard Siding.	Alcott & Co., at Paper Mill & Lumber Yd Siding, Do.
32537	Alcott & Co., Paper Mill & Lbr. Yard Switch, Wanaque, N. J.	Alcott & Co., Paper Mill & Lumber Co. Yard Switch, Wanaque, N. J.

NOTE:—As to car 70183, bill of lading from Engels, Va., to Jersey City reads: "F. E. Morse Co., Jersey

City, care Erie R. R., N. J." Order from Morse Co. reads: Forward to "Wanaque Lumber Co., Wanaque, N. J."

The trial judge was requested to charge as to the last three cars that the plaintiff was not bound to make or tender delivery at the Paper Mill siding (p. 244, ll. 10-20). He refused so to charge and left it to the jury to determine the plaintiff's obligation to deliver on the switch, and thereby we submit erred in a most vital point (pp. 229, 230).

(a) *The private siding was not the usual place of delivery.*

Of course, the directions of the way bills are of no special importance, as they do not fix the terms of the contract between the carrier and the consignee, and are no part of such contract. They are merely instructions from one carrier to another, or from the carrier to its own employees. They were offered in evidence, however, as part of the history of each shipment.

As to the directions on the bills of lading, it will be observed that only the last three cars were specifically consigned to the Paper Mill siding.

It is not disputed that the railroad had no contract with the defendant to deliver cars on this siding. It did have such a contract with the Paper Company, but not with the defendant. Such deliveries had often been made there to the defendant, and, occasionally, to other parties, with the consent of the Paper Company. It was merely as a matter of convenience to the defendant, and not of obligation on the part of the railroad company. The Lumber Company did not own the siding or any part thereof, and had no rights in it as against the Railroad Company.

The court correctly charged that where cars were merely consigned to "Wanaque", the company could deliver at the usual place of delivery (p. 229, lines 1 to 5); but, after the controversy arose between the parties, three cars shipped from points on other railroads, to wit, cars 44,988, 32,537 and 1,108, were specifically addressed in the bill of lading "Paper Mill and Lumber Yard Switch" (Ex. P. 31, p. 104, l. 16; p. 37, p. 109, l. 4; Ex. P. 25, p. 99, l. 3).

The court told the jury that the company was bound to deliver these cars on that switch, if it was one of their usual unloading places for cars (case, p. 230, ll. 1 to 13). This charge was clearly erroneous. A railroad company must have the right to put cars for unloading on any one of its tracks meant, and customarily used, for unloading at any station.

The consignor could not determine in advance which siding the company must use, in the absence of any contract by the company to give the consignee the use of a particular track. The Railroad Company had such a contract with the Paper Company, which owned the private track in question, but had none with the Lumber Company. The most that can be said is that if the Railroad Company has two freight stations, the consignor could address to either, and that the jury might find that the private siding here was a station; but the evidence negatives that theory. The private switch is upon land of the Paper Company, and the Railroad Company could not control its cars if placed there, and would lose its lien for freight and demurrage by so doing.

The Railroad Company had placed cars there formerly as a favor to defendant, but when defendant abused the privilege by breaking open a car so placed and refusing to pay car service charges, it put all cars after that upon the regular delivery switch, where they

could be protected and its lien preserved. Under the statute of 1903 the railroad had a lien upon the property, or so much thereof as had not been taken, but if the railroad did not retain possession, its lien would be gone. (*Lembeck* vs *Jarvis Co.*, 63 Atl., 257.)

We would also again call attention to the undisputed fact that the previous deliveries that had been made on the Paper Mill siding were all made on that part of the siding which was to the east of the highway, except in one or two cases where deliveries were made to the west thereof, by special request of the consignee. The utmost that the defendant could claim would be for delivery to the east of the highway, but in no case did it make such claim. *It insisted that deliveries be made to its lumber yard,* which was to the west of the highway. But no one claims that that part of the paper mill siding had ever been regarded as a public track. In order to impose upon the railroad a duty to deliver at some customary place other than its regular station, the custom must be general and uniform. 4 *Elliott on Railroads,* sec. 1522.

We further submit that no such switch as a Paper Mill and Lumber Yard Switch was ever heard of before this controversy arose. The private siding was always known to the public, and is invariably referred to by the witnesses as "Paper Mill Siding." No one, except the defendant, ever designated it as "Lumber Yard Switch."

(b) *The agents of the connecting carriers had no authority to issue bills of lading for delivery on the private sidings:*

The special ground upon which the defendant claimed a delivery on the private switch was that the agent of that railroad company, in Virginia or Pennsylvania, which received the goods, was also the agent of the Erie to agree as to the delivery siding, and that

the plaintiff was bound to deliver according to that agent's agreement. This made it material to ascertain what the authority of the agent of other railroads in those stations was to bind the Erie as to the delivery track, and the plaintiff undertook to show precisely what that authority was.

The agreement between those railroads is found in their joint freight tariffs, signed by them all, and filed with the Interstate Commerce Commission, which designates their stations, and mentions "Wanaque-Midvale" on two of them and "Wanaque" on the third. None of them mentions the Paper Company's siding.

The trial judge ruled out these joint tariffs, and we contend, erred in so doing. (Testimony, pp. 37 to 42). They were certainly material, if not conclusive evidence on the authority given by the Erie to agents of other railroads.

Neither the railroad nor its agents can lawfully contract to transport interstate commerce for less than the published schedule of rates and charges. *Texas & Pac. R. Co.* vs.*Mugg,* 202 N. S., 242; *Railroad Co.* vs. *Hefley,* 158 N. S., 98.

As a part of the joint tariff agreement referring to car No. 32537, we find this provision: "Agents are cautioned not to sign bills of lading calling for delivery at destination via any line or at any particular station, unless tariff information provides that such deliveries can be made." (Testimony, p. 46 l. 25 to p. 47, ll. 1 to 20; Ex. C. p. 65, l. 13). These directions plainly excluded the Paper Mill siding as a delivery point, because the tariff did not designate it as such. But the instructions were not allowed to go in evidence, although immediately before the question was put the trial judge announced that plaintiff could show its instructions if it wished to do so (p. 47, l. 10).

We confess we are at a loss to surmise on what theory this evidence was overruled. We know of no better way to show instructions to agents than by reference to the printed orders sent out from headquarters.

But, further, the plaintiff was not even allowed to show what authority, if any, agents of connecting carriers had to issue bills of lading calling for delivery on the private siding. The plaintiff attempted to show their authority by the joint freight tariffs. See: Ex. A, p. 55 of Exhibits re car 1108.

Ex. B, p. 59 " " re car 44988.
Ex. C, p. 64 " " re car 32537.

By reference to these exhibits, which were marked for identification, we note the following.

Ex. A. directs shipments to be made to "Wanaque-Midvale." No billing point appears as "Wanaque," or "Midvale" or "Paper Mill and Lumber Yard Switch" (or siding) (p. 58, l. 20 of Exhibits).

Ex. B. (which includes two documents known respectively as "joint freight tariff" and "billing instructions" has a precisely similar direction (p. 61, l. 25; p. 63 ll. 10-20 of Exhibits).

Ex. C. lists the station in question as "Wanaque." It also fails to designate the Paper Mill siding as a delivery point (p. 66, ll. 1-15).

The trial judge ruled out these exhibits on the theory that there was nothing to prohibit an agent from shipping to another point (p. 37, ll. 1-10). This was putting the cart before the horse. The question is what these agents were authorized to do, not what they were prohibited from doing. That authority was indicated by these tariffs and billing instructions. These constitute the sole authority of the agents of one railroad to make contracts for delivery on the line of another company, and it was error to exclude them,

and then leave the jury to speculate what was the authority given by the Erie to these foreign agents. In the charge, the court aggrevated the error by telling the jury what the authority of the agent of another company is when acting for the Erie, and that such agent could ship to the places for the reception of freight on the other line (Case, p. 228, ll. 20 to 37).

We submit that such foreign agent has no authority to contract for the Erie, except the authority which the Erie expressly gives him.

Railroad companies need not have joint tariffs at all, and, when they have none, an agent of one company can merely ship to the end of his own road, and leave the contract for forwarding to be made in each case with the agent of the next road, upon receipt of the car (4 Elliott on Railroads section 1406). The power of these foreign agents must be held strictly within the limits of their written authority, or otherwise the joint tariff business, which is so useful to shippers, would be too dangerous to the railroads. In *St. L. & S. F. R. Co.* vs. *Ostrander,* (52 S. W., 435, Ark.) the agent of one of defendant's connecting lines granted an emigrant rate on goods not within that classification in the joint tariff. Held, that defendant was not bound by the agent's act, and could collect the full rate, as the agent had no authority to change the published rate.

Also see *Texas & Pac. R.* vs. *Mugg, supra.* We may also note a further reason for the admission of these tariffs in evidence, namely, they were filed with the Interstate Commerce Commission, and were posted for inspection (p. 36, ll. 1-30). Until changed by the action of the Company or the Commission, they were binding on all parties. See authorities cited under Point II, (d). Until thus changed, according to law,

not even the Railroad Company could alter them for the convenience of any particular shipper, and a *fortiori* neither the railroad's own agents or the agents of connecting carriers could do so.

(c) *The burden of proof was on the defendant to show that the agents of the connecting carriers had authority to issue bills of lading calling for delivery at some other than the usual place.*

The trial judge was requested to charge this point, and refused to do so (p. 244, l. 30).

We submit that, even if we leave out of consideration the specific directions on the tariffs and billing instructions, yet the evidence shows clearly that the Paper Mill siding was not the usual place for delivery of shipments consigned to Wanaque-Midvale. If the defendant chose to rely on the point that it was entitled to deliver on the private siding, opposite its lumber shed, instead of on the public delivery track, we submit that the burden was on it to show the authority of the agents of the connecting carrier to issue bills of lading calling on their face for such delivery.

An agent who attempts to contract for transportation over a connecting line exceeds his ordinary authority as agent of the receiving carrier (6 Cyc. p. 432).

Where a contract made by an agent was to receive goods at a place on the company's road other than a regular station, it was for the shipper to show that the agent had authority to make such shipment. *Newport News, etc. R. Co.* vs. *Reed,* (10 Ky. L. Rep., 1020, cited in 6 Cyc., 431).

(d) *The bills of lading which called for delivery on the private siding, even if authorized were subject to the railroad's regulations for delivery.*

If the agents of connecting carriers did have authority to issue bills of lading for delivery on a siding not named in the tariff, nevertheless such bills must be subject to the railroad's regulations for delivery, among them the rule that further deliveries would not be made on the private siding until the railroad was reasonably assured that car service charges would be recognized. We submit that the refusal of the railroad to place cars on the private siding, after defendant's refusal to pay charges on the first car (100824) was justified, and its action in that regard was a reasonable regulation of its business, to which the later shipments were subject. See cases cited under sub-division (e) next followig.

(e) *If the defendant ever had a legal right, by custom or otherwise, to demand delivery on the private siding of the paper mill, the plaintiff was justified in refusing to continue such delivery because of defendant's refusal to pay demurrage.*

The trial judge charged plaintiff's ninth request, reading as follows:

> "If the defendant has any such right to insist "upon delivery at the siding known as Wanaque "or the paper company's siding, the plaintiff was "legally justified in refusing to deliver on such "siding as soon as it became reasonably assured "that the defendant would refuse to recognize or "pay charges that might accrue for car service on "cars so delivered."
>
> (p. 230, ll. 15 to 25; p. 237, ll. 11 to 35.)

This request was based upon the following decisions:

McNeil vs. *Southern R. Co.*, 202 U. S., 543.

Ky. Wagon Co. vs. *O. & M. R. R.*, 98 Ky., 152.

Swan vs. *L. & N.*, 106 Tenn., 229.

Darlington vs. *Mo. Pac. R. Co.*, 99 Mo. App., 1.

Phillips Co. vs. *Erie R. R.,* 27 Ohio Cit. Ct. Rep., 486.

Yazoo R. Co. vs. *Searles,* 85 Miss., 520.

In the last mentioned case, the consignee refused to recognize the Car Service Association, or to comply with its rules, or to pay demurrage, and announced his intention of ignoring the action of the association on the ground that the demurrage charges were illegal. The railroad company thereupon refused to make further deliveries upon the consignee's private siding. In the course of its opinion, the court says on this point:

> "In the face of this expressed determination "by appellee (consignee), the Louisiana Car Ser- "vice Association and the Yazoo & Mississippi "Valley Railroad were forced to choose one for "two courses; either to continue to switch and "place cars for appellee without collecting de- "murrage, and thus allow him an unconscionable "advantage over his competitors, and also sub- "ject themselves to the penalties provided for dis- "obedience to the mandates of the railroad com- "mission, or invoke the rule which permitted "them to refuse to further switch cars for an "uncompromisingly recalcitrant consignee. Con- "fronted by this condition, brought about by the "persistent refusal of appellee, appellant and the "car service association chose the latter horn of "the dilemma, and in so doing, in our opinion, "they were clearly in the right."

In this connection, plaintiff also submitted the following request:

> "The fact that after delivery had been made "on a private siding the railroad loses its lien "for freight and demurrage, justified the railroad "company in refusing to make delivery on the "siding known as the Wanaque or Paper Com- "pany's siding at the place demanded by the de- "fendant."

(P. 237, l. 38; p. 238, l. 5.)

This request was modified by the trial judge by the addition of a proviso. After charging the jury in the language of this request, he continued:

> "Provided you find it was a private siding, and "not a siding used generally by the company for "the unloading or reception of freight."

(P. 230, ll. 20 to 30.)

In thus modifying the request, there was material error. As we have already shown, the place of delivery "demanded by the defendant" was opposite its lumber shed, which was to the west of the highway and on the private property of the Paper Mill. There was no evidence whatever to justify a finding that that particular part of the private siding was used "generally" for the unloading or reception of freight. There were only one or two such cases proved, and those were at the special request of the consignee, and solely as a matter of favor, not of obligation. If, therefore, delivery was made on that part of the siding, the car would no longer be in the possession of the railroad, and its lien, both for the freight, and for the car service (which accrued from day to day) would be lost. The proviso spoiled the whole purport of the request, and permitted the jury to speculate as to matters concerning which there was no proof.

V.

IT WAS ERROR FOR THE TRIAL JUDGE TO LEAVE TO THE JURY THE QUESTION OF THE LIABILITY OF THE DEFENDANT FOR THE FREIGHT CHARGES ON CARS 1,108 AND 44,988.

By the stipulation of the attorneys (Exhibit P. 2, p. 51), it was agreed that the *amount* of the freight charges should not be disputed as to any of the cars, but as to cars 1,108 and 44,988, the defendant raised the further point that it was not liable for the freight on these cars, but that some other person would be liable if they had been properly delivered.

The plaintiff requested the judge to charge that the defendant was liable for the freight on all the cars, including these two (p. 246, lines 1 to 10). He refused this request, and left it to the jury to determine whether the defendant was liable for the freight on these cars (p. 225, line 30, to p. 226, line 5). It appeared, without dispute, however, that the agreement between Alcott & Co., the original consignee, and the defendant was that the defendant was to pay the freight and deducted it in settling with Alcott (pp. 86, 87, 95, l. 35). Even aside from this agreement, we submit that the facts show that the defendant was liable for the freight on these cars, and it was error to leave such question to the jury for the reason that as a matter of law the defendant was liable (6 Cyc., 501, and cases cited).

It may be shown by point that it was understood between the parties that the freight would be paid by the consignee.

Union Freight R. Co. vs. *Winkley,* 159 Mass., 133.
Old Colony R. Co. vs. *Wilder,* 137 Mass., 536.

The law is settled that the consignee is *prima facie* liable for the freight. There was no evidence offered by the defendant to overcome this *prima facie* liability. In fact, the evidence is clear that the arrangement between Alcott & Co. and the defendant was that the latter should pay the freight. The defendant did not attempt to dispute this agreement and did not deny that the lumber belonged to it. The defendant accepted the lumber in that it did not deny its liability to pay Alcott therefor and the evidence shows that it did in fact pay Alcott the price of the lumber, and that in the settlement between them the defendant was given credit for the amount of the freight (p. 99, l. 40; p. 88, l. 28).

We may also note in this connection the further error of the court in overruling the offer of the plaintiff of the invoices relating to these two cars, which showed that the agreement between the defendant and Alcott & Co. was that the defendant should pay the freight (pp. 90, 91, 102, 103). These invoices were certainly material as tending to prove that the defendant had agreed to pay the freight but even aside from the invoices the evidence shows clearly that the consignee was liable for the freight on these cars, as a matter of law. See *Hutch. on Carriers*, (3rd Ed.) Secs. 807 to 810.

VI.

IT WAS ERROR FOR THE TRIAL JUDGE TO OVERRULE THE OFFER OF THE TARIFF SHEETS AND BILLING INSTRUCTIONS.

This point has already been discussed under various phases. We submit that the tariffs and instructions were material for the following reasons:

(a) Because the notices therein with respect to demurrage charges tended to prove a contract on the part of the defendant to pay the same.

(See Point II, c 4.)

(b) Because they were conclusive as to the right of the agents of connecting carriers to issue bills of lading calling for delivery on the private siding, and proved that the agents had no such right.

(See Point d, and IV, b).

VII.

IT WAS ERROR FOR THE TRIAL JUDGE TO LEAVE TO THE JURY THE QUESTION OF DEFENDANT'S LIABILITY FOR FREIGHT AND CAR SERVICE CHARGES DUE ON CAR 100824.

The plaintiff requested special instructions as to this car, regardless as to the findings of the jury as to the other cars in suit (page 246, lines 2 to 20). The trial judge refused the request, and left it to the jury to say that *if* they found that it was placed by the railroad company at the point designated by the defendant it was the duty of the defendant to receive it, and, if required, to sign a receipt and pay the freight and unload it, and if they did not do that, then defendant would be liable for car service after forty-eight hours, and *if* they found that to be the case, car service should be charged (p. 235, lines 30 to 40). The vice in this charge is that there was no disputed question of fact as to the placing of this car. It was

not denied that this car was placed on the private siding at the request of the defendant company, and it stayed there for several months. See summary of facts. The case should be reversed on this point if on no other, because there can be no doubt that, whatever the court may think as to the other cars, the plaintiff had fully performed its contract of carriage as to this car, and was entitled to recover the charges thereon, both for freight and demurrage.

We further submit, however, that: ,

VIII.

VERDICT SHOULD HAVE BEEN DIRECTED FOR THE PLAINTIFF FOR THE FULL AMOUNT CLAIMED.

As shown under the last preceding point, the plaintiff was at least entitled to a direction in its favor for the amount of freight and car service due on car 100824.

But the only other questions as to the remaining five cars are as to the right of the plaintiff to exact a receipt before delivery and the right of the defendant to insist upon delivery on the private siding, besides the question (discussed under Pt. V.) of the defendant's liability to pay the freight on two of the cars. We have shown that these questions should be decided in favor of the plaintiff as a matter of law, and as there are no questions of fact involved, plaintiff's motion for a direction of verdict in its favor should have been granted.

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CHARLES L. CORBIN,
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APPENDIX.

TABLE OF CASES CITED ON SUBJECT OF CAR SERVICE.

Alabama.

Gulf City Cons. Co. *vs.* Louisville & N. R. R., 121 Ala., 621, 25 So. 579.

Southern Ry. Co. *vs.* Lockwood Mfg. Co., 142 Ala., 322, 37 So. 67, 68, L. R. A., 227.

Colorado.

Union Pacific R. Co. *vs.* Cooke, 50 A. & E. R. R., Cas., 89.

District of Columbia.

Herr. *vs.* Baltimore & P. R. I. (unreported).

Georgia.

Miller *vs.* Georgia R. R. Co., 88 Ga., 563, 15 S. E., 316, 18 L. R. A., 323.

Illinois.

C. & N. W. R. R. *vs.* Jenkins, 103 Ill., 588.

C. C. C. & St. L. R. R. *vs.* Lamm, 73 Ill., App., 592.

C. C. C. & St. L. R. R. *vs.* Holden, 73 Ill., App., 582.

Schumacher *vs.* C. & N. W. R. R., 108 Ill. App., 520; *Affirmed* 207 Ill., 199, 69 N. E., 825.

C. P. & St. L. R. Co. *vs.* Dorsey Fuel Co., 112 Ill. App., 382.

C. C. C. & St. L. R. Co. *vs. Propst Lumber Co.,* 114 Ill. App., 659.

Indiana.

Lafayette Lumber Co. *vs.* C. C. C. & St. L. R. Co., (unreported).

Kentucky.

Kentucky Wagon Co. *vs.* Ohio etc. R. Co., 98 Ky., 152, 32 S. W., 595, 36 L. R. A., 850.

Doyle *vs.* Louisville & N. R. Co., (unreported).

Massachusetts.

Miller *vs. Mansfield,* 112 Mass., 260.

Michigan.

Meachran *vs.* Grand Trunk Ry. Co., (unreported).

Mississippi.

New Orleans etc. R. R. Co. *vs.* George, 82 Miss., 710, 35 So., 193.

Yazoo & M. Valley R. R. *vs. Searles,* 85 Miss., 520, 37 So., 939, 68 L. R. A., 715.

Missouri.

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Darlington *vs.* Mo. Pac. R. Co., 99 Mo. App., 72 S. W., 122.

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Nebraska.

Burlington & M. R. R. Co. *vs.* Chicago Lumber Co., 15 Neb., 390.

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Ohio.

Thomas Phillips Co. *vs.* Erie R. R. Co., 27 Ohio Cir. Ct. Rep., 486.

Baltimore & O. R. Co. *vs.* Fisher, 5 Ohio S. & C. P. Dec., 659.

Dawson Blackmore & Co. *vs.* C. C. C. & St. L. R. Co., (unreported).

Pennsylvania.

Pittsburg & Western R. R. *vs.* Gililand, (unreported).

Penn. R. R. Co. *vs.* Midvale Steel Co., 201 Pa., 624, 51 Atl., 313.

B. & O. R. R. *vs.* Grays Ferry Co., 27 Pa. Super Ct., 511.

Nicollette Lumber Co. *vs.* People's Coal Co., 213 Pa., 379, 62 Atl., 1060, 37 L. R. A. (N. S.), 327.

Wallace *vs.* B. & O. R. R., 65 Atl., 665.

Tennessee.

Swan *vs.* Louisville & N. R. R., 106 Tenn., 229, 61 S. W., 57, 20 A. & E. R. R. Cas. (N. S.), 446.

Texas.

Galveston, etc., R. Co. *vs.* Hunt, 32 S. W., 549.

Virginia.

Norfolk & Western R. Co. *vs.* Adams & Co., 90 Va., 393, 18 S. E., 516, 22 L. R. A., 530, 56 A. & E. R. R. Cas., 330.

Antrim & Sons *vs.* Richmond, etc., R. Co. (unreported).

West Virginia.

George Campbell Co. *vs.* Baltimore & O. R. R. (unreported).

Wisconsin.

Milwaukee, etc., R. Co. *vs.* Lynch, 22 L. R. A., 532.

United States.

Pa. Miller State Assn. *vs.* Reading R. Co., 8 I. C. C. Rep., 531.

Cudahy Packing Co. *vs.* Chic. & N. W. R. Co., 12 I. C. C. Rep., 518.

New Jersey Court of Errors and Appeals.

ERIE RAILROAD COMPANY, Plaintiff in Error, vs. WANAQUE LUMBER COMPANY, Defendant in Error.	On Error to Supreme Court.

BRIEF OF DEFENDANT IN ERROR.

Plaintiff, Erie R. R. Co., operates a branch extending from Jersey City to Greenwood Lake, whereon for a number of years it had maintained among its stations, one at Wanaque, N. J., and a short distance north another at Midvale; there was a siding for the loading and unloading of freight cars at each place. The place of business of defendant, Wanaque Lumber Co., was on the main highway immediately opposite the Wanaque station. A switch, the Wanaque delivery switch, extended through its lumber yard and down to a paper mill.

Two or three years before the difficulty out of which this action arises, one station building thereafter known officially as Wanaque-Midvale was erected between the two old ones and these old buildings removed. Northward of the new station building in Midvale was erected a small freight house, and some switches were laid extending from the old Midvale delivery switch, where they joined the main track, southward to the new station, but deliveries of freight in car-load lots were made,

some on this old Midvale switch with its recent extensions and some, to all desiring it, on the Wanaque switch and on its extension through the lumber yard and paper mill yard to defendant lumber company and to the paper company and, defendant alleges, and these much undisputed testimony supporting the allegation, that on this extension at the lumber yard all who desired received freight (pp. 60 to 75, p. 193) and that plaintiff used this extension as its operating and delivery switch and maintained it (pp 49, 50). This spur at Wanaque at its easterly beginning is on lands of plaintiff given to plaintiff by the paper company for use as a station (pp. 49, 62, 63) as far as the highway, and from there on westerly is on lands of the paper company; adjacent to the switch close to the highway are the sheds occupied by defendant under a lease from said paper company carrying with it a right, as far as the lessor is concerned, to the use of this switch (p. 50).

There is much testimony to show that the siding at Midvale, or what is called by the railroad agent Wanaque-Midvale delivery switch, was not a proper or safe place for the public to resort to for the unloading of cars (pp. 66, 68, 72). The villages of Wanaque and Midvale lie west of the railroad and all who resorted to this place of delivery were compelled to drive across the main track, across the siding which was used for the passing and drilling of trains, across the track used for the storage of cars, then across the switch on which cars were placed for loading or unloading, so as to approach such delivery track on the east. The crossing of these tracks was rendered difficult by failure of plaintiff to properly fill a roadway across these four tracks and dangerous by moving trains and shifting cars.

This statement of conditions is that of plaintiff's own witnesses, as is most of the testimony in the case.

Things were in this situation late in March and early in April, 1905, when a number of cars were brought in by plaintiff containing goods for defendant; these were from time to time, besides fresh arrivals, placed on the switch at Wanaque at the yard of the defendant, and there unloaded by defendant, all except one, the first in dispute, Erie car No. 100824, which remained up near the Wanaque-Midvale station on the storage switch at a place from which it was absolutely impossible for defendant to unload it.

Now why this car remained at Midvale on the storage track is one of the first questions in this case and it is one of fact, and, entering as it does as an elemeut of most of the other questions to be determined, it alone would have sent the whole case to the jury. Plaintiff's station agent says the car was not placed because defendant failed to ask for it and that he held the car on the storage switch awaiting orders from defendant as to the place where defendant desired to receive the goods. Defendant's manager, on the contrary, says that when a number of cars had arrived in the yard together, among them No. 100824, Mr. Edsal, an assistant superintendent of plaintiff, requested that cars soould be unloaded not in the order of arrival but in such order that foreign cars, cars of other roads, should be released first and that those delayed should be Erie cars (p. 214), the idea here being that Mr. Edsal considered his road at fault in the bringing of the cars in group to Midvale and so would not expect defendant to receive and unload all at once; that defendant, accordingly. unloaded other cars of the group and some arriving after-

ward, before calling for delivery of this Erie car No. 100824, but that on April 20 witness requested that this car be placed (meaning at defendant's place of business on switch at Wanaque), again spoke of it on the 22nd, and again on the 28th, saying "When are you going to get that car in?" (p.209); that the agent promised to send the car in and on none of these occasions suggested that demurrage was due. The station agent says he gave the usual notice of arrival of this car on a postal dated April 4th and posted on the 5th; defendant's manager produced a postal notice dated April 27th postmarked April 28; there is, too, of the same date a letter from the station agent stating that $17 was due for car service on this car; this letter defendant's manager says he had not yet received when he, for the third time, ordered the car placed (p. 209). This letter seems to have been the first intimation that car service would be charged before the placing of cars in position for unloading and to have marked the formal opening of hostilities (p.153, p. 169). When the car was placed at defendant's yard a week later the amount of car-service demanded had, curiously enough, not been increased (pp. 153, 154), indicating that, at the time of placing the car, the station agent intended to admit that the car had been ordered in on the 28th of April. Defeedant's foreman, too, says that he had frequently during the month of April ordered the car placed (p. 195, 136, p. 202). On May 5, late in the afternoon, having until this time remained on an inaccessible storage switch, this car was placed at defendant's usual place for receiving freight on the switch by its sheds at Wanaque, but with the doors padlocked and an explanation that these locks would not be removed until seventeen dollars car service was paid; the freight was tendered but refused (pp. 209, 128.)

The five other cars in dispute were billed to Wanaque and were placed on what is known as the delivery track north of the Wanaque-Midvale station, the plaintiff basing its refusal to deliver at defendant's yard on the switch at Wanaque, the accustomed place, upon the assumption that the delivery switch above the Wanaque-Midvale station was delivery at Wanaque, and the assumption and contention that, defendant having refused to pay car-service due on No. 100824, its lien for demurrage that might thereafter accrue on other cars would be lost by delivery at the Wanaque switch, a position, in the aspect most favorable to plaintiff, so involved in disputed facts that the court could not charge in favor of plaintiff, but must leave to the jury.

The affair is further complicated by the fact that three of the cars so placed at Midvale were specifically directed in the way-bills, besides to "Wanaque, N. J.," to the "Paper Mill and Lbr. Yd. Switch," which ran through defendant's yard, on which plaintiff had theretofore delivered to defendant without question or interruption and where there is evidence to show plaintiff commonly delivered to others, and about the place so designated there can be no shadow of a doubt.

Plaintiff refusing to deliver to defendant at Wanaque, either at the lumber yard or on the railroad land east of the highway where the evidence shows deliveries were commonly made by the plaintiff to the general public, defendant offered the freight charges on several of the cars and requested that it be permitted to unload its goods from the cars where they stood in the railroad yard at Midvale above the Wanaque-Midvale station. Plaintiff refused to so deliver unless defendant should first sign a receipt at the Wanaque-Midvale station, the

goods not being before the parties nor even the cars containing them or supposed to contain them being in their view.

Plaintiff does not produce the form of receipt it demanded of the defendant on these occasions, but it is to be inferred that its usual form of receipt was used containing an admission that the freight was in good condition. Actually it is difficult for the court to say that plaintiff's demand that a certain paper be signed as a condition precedent to delivery was a reasonable demand, when that paper is not before it. It is for the carrier to establish the propriety of every demand made of the owner of freight as a condition precedent to the delivery of such freight.

With this general statement and argument we can pass to the items of plaintiff assignment of error (brief of plaintiff in error not being at hand).

1.— General. Many questions of disputed facts involved.

2.— These car service rules were admitted (p. 58), so defendant does not here argue. But defendant itself violated these rules (p. 173, l. 30, pp. 174, 175).

3.— This joint tariff simply a schedule of rates, and, as the amount of the freight charge is agreed upon, it contained nothing material or relevant. Further, there is neither proof of distribution nor of posting (p. 36). This is defendant's answer also to the 7th and 12th items.

4.— It does not appear that witness knew custom. The tariff is silent and that tariff is the only instruction.

5.— The question calls for a conclusion and the tariff, the only instruction, contains none.

6.— See 5th above.

7.— See 3rd above.

8.— Irrelevant and immaterial; the fact that law

required posting does not prove the fact of posting (p. 46) as substantially the same questions were just before (p. 45) admitted, plaintiff, if there is error here, is not prejudiced

9.— Calls for conclusion, as do all these questions, based, too, upon the contents of a paper not itself evidence.

10.— The subject of this item calls the attention of the witness but asks no question, calls for no reply. See 9th above.

11.— See 9th above.

12.— See 3rd above.

The tariff sheets and billing instructions referred to above were not identified as to authenticity of copy offered, nor was there any proof of publication or of forwarding to the agents at particular stations where the shipments here in qnestion originated.

The billing instructions referred to from the 7th exception to the 12th relate to routeing and directions to be put in the way-bills; this way-bill accompanies the freight over the entire route, which is therein specified, always in possession of the carrier which at the time is in possession of the goods; the owner of the goods does not see it; it is made out for the information of the carriers' agents, and, when a car is delivered by one road to a connecting line, this way-bill furnishes all necessary information—the history of the shipment, its route and its destination. This way-bill has some bearing on question of authority of agent of road where shipment originated; for when a car is turned over to a connecting carrier the way-bill informs such carrier of route and destination and, if for any reason such carrier is unable or declines to deliver at such destination, it should refuse to receive under such way-bill and not, by accepting the goods so destined,

appear to ratify the act of originating railroad in so agreeing that it, the delivering carrier, will deliver at a particular place. As soon as a car accompanied by a way-bill made out by one carrier reaches another, this second carrier has notice of all matters set forth in such way-bill, and, if in so billing originating road exceeded its authority to contract for such second carrier. the objection should then and there be made at the point of connection. This second carrier has no right to claim compensation for transportation under the agreement which it refuses itself to fulfill, and of the terms of which it was by the way-bill fully apprised : it might easily be that some other carrier would be employed to deliver such goods, or even that the shipment might be diverted, if the delivery desired and agreed upon could not be had. So that, if originating road had not authority to contract for delivery at particular place specified in bill of lading (the bill of lading is the receipt delivered to shipper), if such destination is also named in the way-bill accompanying the shipment, the acceptance of such shipment for further transportation for hire, is an acceptance, too, of the contract to deliver at the way-billed destination.

13.- Irrelevant and immaterial: Defendant might show whether others had or had not paid demurrage charges, but not plaintiff.

14.- Value of goods not in question. Alcott's deposition introduced by plaintiff shows agreement between him and defendant that delivery was to be made on switch at lumber yard at Wanaque and until so made or if not so made, defendant to pay nothing; Alcott being consignee, if liability to the plaintiff attached sooner it was Alcott's liability. It is plain from this deposition that except as Alcott's agent defendant had neither right nor liability, that

defendant did not become owner of these goods until their arrival on the switch at defendant's lumber yard; and it seems that plaintiff had recognized that fact by asking Alcott, the consiguee, to ship elsewhere (p. 96; p. 100). Alcott's testimony on behalf of the plaintiff being clear on that point and uncontradicted, the invoices passing between him and defendant, Lumber Co., immaterial. The question was, not what was the value of the goods, but what was the value of the cars detained, if they were unjustly detained by defendant.

15.— See 14th above.

16.— See 14th above.

17.— Irrelevant: Witnesses mental process not evidence on direct examination. Plaintiff was permitted to inquire about instructions but witness had none (p. 111).

18.— The documents and testimony relate to such a switch at Wanaque, not at Wanaque-Midvale. Not in rebuttal of anything elicited on cross examination and about matter upon which this witness testified on direct examination. Substantially the same question, however, in a less objectionable form, was asked of the next of plaintiff's witnesses, the division freight agent, and answered, as far as such a question could be answered, favorably to plaintiff (p. 181).

19.— Motion to direct properly denied; many questions of fact involved.

20.— See 19th above. Further in most instances the notices bear postmarks proving their posting at a time later than the respective dates borne by them and from which the charge is calculated.

21.— Book of Rules of N. Y. & N. J. Car Service Association put in evidence by plaintiff contains many provisions, many of them clearly not concerning defendant and not binding upon defendant.

However, (pp. 227 and 228) a general charge that carrier could make and enforce reasonable rules covers the request as far as practicable without taking from the jury questions of disputed fact.

22.— See 21st above. As to this defendant, plaintiff itself refused to comply with these rules (pp. 173, 1 30, 174, 175).

23.— To have so charged without a condition that the goods must be transported to their destination and the owner notified of their arrival and afforded a reasonable opportunity to unload would have been palpable error. Now in this case the goods were not conveyed to the place to which billed, "Wanaque, N. J.," nor to switch whereon plaintiff had to that time uniformly delivered to defendant and where three of the cars were specifically billed.

The learned trial judge, however, charged that "forty-eight hours is a reasonable time" (p. 234), so defendant will not consider that feature of this request. Defendant contends that, in addition to the other objections against this request to charge, the reasonableness or unreasonableness of the rate of one dollar a day or fraction thereof is one of disputed fact determinable in favor of its reasonableness, certainly, only by a jury.

Mr. Curtis, manager of the car service association of which plaintiff is a member, testifies that the average car earns more than two dollars daily. This estimate is made upon the gross earnings (p. 26 and 27), that is, is earned by the car together with train crew and locomotive and all those expensive auxiliaries incident to the hauling of freight; what the profit or what the earning of the car itself is purely a matter of speculation. It is also proved that, at the time to which this suit relates, railroads charged each other for use of cars twenty cents a day and that, more recently (a car

shortage having arisen a year or so afterward), this charge among themselves was raised by the associated railroads to fifty cents a day, and that, at the time in question, when twenty cents was the rate between railroads, plaintiff preferred, when cars were to be detained on tracks, to keep its own cars idle and to return foreign cars rather than pay this twenty cents a day for their use, indicating its belief that the use of a car was not worth to plaintiff twenty cents a day (p. 173, p. 136, p. 214).

That cars vary in size and in value and in earning capacity is patent and the testimony in this case shows it, and it is also apparent that freight cars deteriorate with age and reach a period in their history when to repair would no longer be economical, and without such repairs they are unfit for use; when, in short, they are no longer of any value. It was in the power of plaintiff to prove the cost, condition and general value of each of the cars for the alleged detention of which it sues, but plaintiff refrained from doing so (pp 27, 28)

When goods are improperly detained from consignee by the carrier, the measure of damages, it is settled, is, in the absence of an interim fall in market value, the rate of six per cent. per annum upon the fair value of the goods detained, no proof of probable profits lost through the detention being permitted, such proof of probable loss being held too remote (5 A. & E. 384 and cases there cited). A charge at the rate of six per cent. a year upon the value of each car of the use of which a railroad is deprived, together with an allowance for wear and tear, if any, would be a proper allowance for unreasonable detention of cars by owners of goods. Defendant submits that the court might with propriety have determined as a matter of law that a rate of demurrage charge exceeding that just above

suggested was unreasonable, but that any request, in view of the testimony, involving a determination by the court that one dollar a day was a reasonable charge for detention of any car was properly denied.

A carrier is entitled to compensation for unreasonable detention of cars, but may not impose penalties. At the circuit plaintiff argued as to the reasonableness of this charge as a matter of law from several authorities, the most respectable of which is P. R. R. vs. Midvale Steel Co. (201 Pa. p. 624, 51 Atl. 313). The question there rose on the pleadings on motion for entry of judgment by default; and the court there says:

"A rule on its face may apparently be reasonable either as to time allowed for unloading or as to the extent of the penalty by which it is sought to enforce a reasonable time limit, or the reasonableness of the rule may be doubtful, in either of which cases the evidence would be for the jury. But no such question arises here for the affidavit does not deny the reasonableness of this rule * * * "

In the other cases, too, there was no evidence which would have supported a finding that the rate was unreasonable; here there is.

24.— The court substantially so charged, saying (p. 226) "mailing of a written notice in the regular course of business is the only notice required. It is unnecessary for the defendant here to argue whether time to unload begins to run from the posting of the notice or after a reasonable interval within which to receive it.

25.— The first and general request here made is complied with in the charge (p. 235, line 20) and this would be sufficient even in the absence of impropriety in the specific instances added to the request. And there was such impropriety. Notice of arrival of car 42865 is dated Aug. 10, 1905, and it is from this date that plaintiff begins to calculate its forty-

eight hours of free time for unloadiug before beginning to charge demurrage. This postal was placed in the post office at Wanaque, N. J., on Aug. 11. On the same day, after requesting that the car be placed at defendant's yard, or on the switch at Wanaque, and after offering the amount of freight charges which would be due upon proper delivery, and after requesting permission to unload at Midvale where the car then stood and being refused such permission unless defendant would first sign a paper then and there within the railroad station, defendant's manager went out, found the car, opened it and caused its contents to be taken from the car and placed in the field close by to the east of the tracks. This was on Aug. 11th, the day of the posting of notice of arrival and the first day of the forty-eight hours free time plaintiff says would be allowed for unloading before beginning to charge demurrage, and plaintiff's station agent says (p. 140, p. 165) none was due (pp. 140, 165, 198, 210). On the same day plaintiff accepted payment of the freight charges. Plaintiff then had all the money it claimed and had its car freed of defendant's goods, and defendant might for the purposes of this phase of the argument be said to have its goods in the place it had elected temporarily to place them. Next day, before defendant could carry its goods away from the field, plaintiff forcibly seized them and placed them in one of its cars (p. 199) and it is for detention of only this car, as far as this particular lot of lumber is affected, that demurrage is claimed. To have charged, then, in effect, that the transfer of the goods into the second car under these circumstances did not affect plaintiff's right to recover would have misled the jury and the request was properly denied.

26 — The court charged (p. 234, line 20) substantially

this as to all the cars without any qualification. So defendant refrains from argument, but suggests this is questionable.

27.— See 23rd above. A question of fact determinable only from evidence, some of which fairly supports the contention that the rate of one dollar a day or fraction thereof is unreasonable.

28.— See 12th above. Question of fact.

All these cars were billed to Wanaque, N. J. There is much evidence that the public delivery known as Wanaque was the siding extending from the main track near the old station building of that name westward to defendant's lumber yard, through it, and beyond to a paper factory, particularly, for the public at large, that part between the main track and the highway, for the lumber company defendant that part immediately west of the highway, and for the paper company the end west of the lumber yard (pp. 61 et seq., 72, 73 et seq).

Some of the cars, three, were shipped under bills of lading and accompanied by way-bills designating not only Wanaque, N. J., but the "Paper Mill & Lbr. Yard Switch," as the destination. There seems to be no doubt in the mind of any witness about the identity of the switch thus described; even Campbell, plaintiff's station agent, partisan and disingenuous as his testimony appears, shows without hesitation, under cross examination, that he has none (pp. 174, 175, 176). To be sure, Division Freight Agent Smith says he knows no switch so designated (p. 181), but he says just before that he knows the siding referred to in the case as the Paper Mill Siding, and he admits (p. 183, lines 30-40) that he knows the siding that runs through the lumber yard and paper mill property: he is evidently quibbling.

Not only is the subject of this request dependent

upon evidence, but practically all the proofs support the right an instruction denying which plaintiff asked.

Further, if the carrier refuses to make the special track delivery requested, even if entitled to refuse such track delivery, it must fulfill then its ordinary duty of unloading and depositing in a proper place (Ayres vs. M. E. R. R., 29 N. J. L. 393 , 5 A. E. E. 191, 192, 193).

29.— The court so charged verbatim (p. 230) adding, however, "provided it was a private siding," so defendant does not argue what is not now to be pressed by plaintiff as error.

The part of the Wanaque siding east of the highway where the public generally received freight is on lands of the plaintiff given to put a station on (p. 49, line 20, pp 60, 61, 62).

The fact that plaintiff removed the first car in dispute, No. 100824, from the part of the Wanaque switch within the lumber yard indicates that plaintiff considered no part of this siding private nor that it would lose its lien for charges by placing a car there. See also 12th and 28th above.

30.— See 28th above. Question of fact and a mere quibble. It had been customary to deliver to defendant there (p. 118, l. 30), and to deliver to the public on at least part of it (p 62 et seq., p. 172 et seq., p. 191. l. 30, p. 193, 196, 197).

31.— See 12th, 28th, 29th and 30th above.

All these cars billed to Wanaque where testimony shows there was at the time only one switch, except a small branch of it known as Drew's switch. Delivery could not be made at Wanaque elsewhere than on some part of this spur so fully described in the testimony

32.— Question of fact with strong proof to the contrary. See 12th, 28th, 30th above.

33.— Question of fact. See 12th, 28th and 30th above.

34.— It was substantially so charged (p. 230, l. 16).

35.— The court charged that carrier could properly demand a receipt but left it to jury under the circumstances to determine the propriety of this demand. It had not been the custom of defendant to sign receipts until after the unloading of their goods (p. 140, l. 20), there is no proof that others were required to sign before delivery or before unloading, even, and no proof of any rule of the plaintiff company requiring any receipt at all. In the Ayres case (5 Dutch, 393), there was proof of the adoption and general enforcement of a rule requiring a receipt for goods simultaneously with delivery, and the court supported its reasonableness, the goods having been unloaded by the carrier and the owner afforded an opportunity to inspect them.

In the case now before us there was further no opportunity to inspect, for the goods were in sealed cars out in a railroad yard while the demand for the signing of a paper referred to as a receipt and as a release was made within a building some distance south and west from the track whereon the cars stood. There is in short, nothing indicating a present readiness to deliver the goods; the two acts were not to be simultaneous, but the defendant was to sign first and trust that plaintiff could and would give defendant possession of the goods afterward; there was no opportunity to ascertain what plaintiff could deliver and no indication of actual readiness to deliver anything in any state.

Then the question of fact as to the place of delivery must here enter (see 28th, etc., above).

The paper defendant was asked to sign is in possession of plaintiff but was not offered in evidence or otherwise shown in court, but it may be

inferred to have been an admission of receipt of the goods therein mentioned in good order.

The Ayres case above referred to (5 Dutch. 393) holds that the carrier must remove the freight from the car and deposit it safely, and this defendant contends is the true rule in the absence of a request for track delivery and a compliance by carrier with such request (5 A. & E. 191). Further, there is proof (pp. 212, 213) that, having on another occasion obtained from defendant a release for a small lot of freight (there seems from this to have been some receipting for small packages deposited by carrier at the freight-honse) which plaintiff was unable afterward to deliver in good order, plaintiff took advantage of such release or receipt and refused to consider any claim for such goods, a sufficient reason, alone, for refusing to receipt without an opportunity to inspect.

Though where there is proof of a general rule of a carrier requiring consignee to receipt for goods and a practice in conformity with such rule, such carrier may properly require of consignee a receipt for goods simultaneously with their delivery, a demand made within the railroad office for a receipt for goods contained in a car on tracks out in a railroad yard, without showing consignee the car or breaking the seals and showing him the goods is an unreasonable demand, and a refusal of the carrier to deliver except after the execution by consignee of such a receipt under such circumstances is an unlawful refusal; but, as in this case there is no proof of any rule requiring consignee to sign a receipt for goods and there is proof that such was not the practice of this carrier, the demand of this carrier for a receipt from this consignee, even had it been made simultaneously with an actual physical tender of goods, then in their view, would

have been an improper demand, and one under other facts shown in this case plainly discriminatory against this particular consignee.

36.– It was so charged "except two cars from Virginia," etc. (p. 225, pp. 233, 234). The evidenco shows defendant had no interest, as principal in these two cars until and unless they were delivered at the designated switch at Wanaque, N. J., (see 14th above).

37.– This involves many questions of disputed fact. When the car was placed on the switch in defendant's yard its doors were fastened with padlocks and plaintiff said he would unlock the doors only after payment of seventeen dollars demanded for car service, the car having been up to this time on an inaccessible storage track at the yard described as the Midvale yard and also as the Wanaque Midvale yard (see testimony of Campbell, of Thrift and of Pellington). The facts are more fully summarized in the statement at the head of this brief.

So that while it might be determined as a matter of law that under the undisputed facts relating to car No. 100824, no charge can be made for demurrage for time when the carrier detains a car on a storage track inaccessible for unloading, and also that demurrage could not be properly charged until after the car had been conveyed to its destination (in this case, as with all these cars, Wanaque, not Wanaque-Midvale) and the owner had been afforded a reasonable time and opportunity to unload; the view most favorable to defendant it is possible to take is that whether or not the demand for car service on this first car was a proper demand or not is a question of disputed fact to be determined by the jury. Of course, if this demand for seventeen dollars more than the freight was improper, there was no tender of delivery, so the request to charge was properly denied.

38 to 44.— These matters are intended to be covered in the foregoing.

45.— Plaintiff's ground of error seems to be in the main, that the jury was permitted to determine certain questions upon which the evidence was doubtful, one of them the reasonableness of a corporate regulation (rate of $1 a day for demurrage), two others (exacting a receipt in advance or rather requiring a paper to be signed before delivery of goods, and exercising a right to discriminate between its patrons) the reasonableness of a corporate action. In the absence of any general reasoning in the recent case of Daniel vs. N. J. Street R'way Co. (25 Vr. 603), defendant suggests as a fair rule applicable to the case at bar:

> Where a corporate regulation does not bear on its face sufficient matter for the determination of its reasonableness or unreasonableness, but other evidence must be resorted to for that determination and there is evidence fairly supporting each conclusion, the question is for the jury.

Defendant submits that there is no error in the record prejudicial to plaintiff.

W. CARRINGTON CABELL,
for Defendant in Error,
Wanaque Lumber Co.