THE CANADIAN PACIFIC RAILWAY COMPANY AND THE CANADIAN NORTHERN RAILWAY COMPANY ..... APPELLANTS;

AND

THE BOARD OF TRADE OF THE CITY OF REGINA..... RESPONDENTS.

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*Oct. 6, 9.
*Dec. 6.

(REGINA RATES CASE.)

ON APPEAL FROM THE BOARD OF RAILWAY COMMISSIONERS FOR CANADA.

Railways—Construction of statute—"The Railway Act," R.S.C. (1906), *c.* 37, *ss.* 77, 315, 318(2), 323—(*D.* 1 *Edw. VII. c.* 53)—(*Man.*) 52 *V. c.* 2; 53 *V. c.* 17; 1 *Edw. VII. c.* 39—*Board of Railway Commissioners—Complaints—Evidence—Agreement for special rates—Unjust discrimination—Practice—Form of order on reference.*

In virtue of an agreement with the Government of Manitoba, validated by statutes of that province and of the Parliament of Canada, the Canadian Northern Railway Company established special rates for the carriage of freight, etc., to points in Manitoba, and the Canadian Pacific Railway Company reduced its rates, which had been in force prior to the agreement, in order to meet the competition resulting therefrom. The complaint made to the Board of Railway Commissioners for Canada by the respondents was, in effect, that as similar proportionate rates were not provided in respect of freight, etc., to points west of the Province of Manitoba there was unjust discrimination operating to the prejudice of shippers, etc., to and from the western points. On questions submitted for the consideration of the Supreme Court of Canada,

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*PRESENT: Sir Charles Fitzpatrick C.J. and Davies, Idington, Duff, Anglin and Brodeur JJ.

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Held, that the facts mentioned are circumstances and conditions, within the meaning of the "Railway Act" to be considered by the Board of Railway Commissioners in determining the question of unjust discrimination in regard to both railways; that such facts and circumstances are not, in law, conclusive of the question of unjust discrimination, but the effect, if any, to be given to them is a question of fact to be considered and decided by the Board in its discretion. (*Cf. The Montreal Park and Island Railway Co.* v. *The City of Montreal* (43 Can. S.C.R. 256).)

APPEAL, by leave of the board, under section 56(3) of "The Railway Act," from an order of the Board of Railway Commissioners for Canada, dated 10th December, 1910, by which the railway companies were directed to publish and file new tariffs removing the discrimination, declared to exist, in the tariffs then in force to points in the Provinces of Manitoba, Saskatchewan and Alberta from Fort William, Ont., Port Arthur, Ont., and points east thereof, in favour of Winnipeg, Man., and other points in the Province of Manitoba, by reducing the rates from Fort William, Port Arthur and points east thereof to Regina and Moose Jaw, in Saskatchewan, and other points west of the said favoured points.

The order of the Board of Railway Commissioners, granting leave for the appeal, was as follows:—

"It is ordered that the said railway companies be, and each of them is, hereby granted leave to appeal to the Supreme Court of Canada, from the said order, dated December 10th, 1910, upon the questions hereinafter stated, which, in the opinion of the board, are questions of law, subject to and upon the terms and conditions following:—

"1. That the applicant undertake to set the appeal down for and expedite the hearing thereof at the next sittings of the Supreme Court of Canada.

"2. That if the appeal be not argued at the said sit-

tings of the Supreme Court, for any reason for which the applicant may be to blame, then, the appeal shall not operate as a stay of the said order dated the 10th of December, 1910, unless this board shall otherwise order.

"3. That the questions for argument upon the said appeal arise out of the following facts:—

"1. (*a*) In the year 1888, an agreement was made between the Northern Pacific and Manitoba Railway Company and Her Majesty the Queen, represented by the Railway Commissioner for the Province of Manitoba, and was approved and ratified by the Legislature of Manitoba, by chapter 2 of the statutes passed during the second session of 1888. By that Act, the company was empowered to acquire and complete the Red River Valley Railway, located between the International Boundary and the City of Winnipeg, and certain other branches and extensions as therein set forth, and by the agreement, which is Schedule "A" to the Act, among other things, the Lieutenant-Governor in Council of the said province agreed to aid the construction of the railway, by guaranteeing the bonds of the company to the extent of $6,400 per mile of railway, and by giving to the company certain other benefits and advantages, as set forth in the said agreement, and in consideration of the benefits and advantages agreed to be granted to and conferred upon the company by the said agreement, it was agreed by the company that the Lieutenant-Governor in Council of the said province shall always have full power to fix, regulate and determine from time to time the freight rates and charges for transportation upon the said lines of railway, as by reference to the said Act and agreement will more fully appear.

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"(*b*) This agreement was modified by another agreement, made between the same parties in the following year, and approved by the Legislature of the Province of Manitoba, by chapter 17 of the statutes of 1899, as by reference to the said statute and agreement will more fully appear.

"By clause 8 of the amending agreement, it was provided:—

"That the power to regulate, fix and determine rates, conferred upon the Lieutenant-Governor in Council, by section 19 of said schedule, for railways of the Province of Manitoba, shall be limited so that the tolls, rates, and charges shall not be revised so long as the net earnings of the railway companies shall produce less than 10% per annum of the capital actually expended in the construction and equipment of the railway line, but no reduction shall be made unless the net income of the company shall be greater than 10% upon the capital so actually expended, exclusive of the aid given by the province.

"(*c*) At that time, the Canadian Northen Railway Company was not in existence, nor was there any line between Fort William and Winnipeg, except the line of the Canadian Pacific Railway Company. On the opening of the line of the Northern Pacific and Manitoba Railway, from Duluth to Winnipeg, by the direction of the Manitoba Government, rates were fixed by that company, which were lower than the rates of the Canadian Pacific Railway Company from Fort William to Winnipeg.

"(*d*) Between Port Arthur and Fort William and the undermentioned points, under Canadian Pacific Railway Company tariff No. 62, May 1st, 1887, the following rates had been in effect for some years:—

	1	2	3	4	5	6	7	8	9	10
Winnipeg, Emerson, Morris	133	112	92	69	63	49½	35	35½	39½	29
Portage la Prairie	141	118	84	71	64	54	38	27½	54	31½
Brandon	158	132	105	79	71	60½	42	41	60½	35½

"After the 'Northern Pacific and Manitoba Government' agreement was assented to, on the 4th of September, 1888, the following rates were printed by the Canadian Pacific Railway Company, in their tariff No. 118, October 25th, 1888:—

	1	2	3	4	5	6	7	8	9	10
Winnipeg, Emerson, Morris	116	98	80	66	57	47	35	35	35	27
Portage la Prairie	125	105	85	69	59	51½	38	37	39½	29½
Brandon	142	119	96	77	66	58	42	40½	46	33½

"But no reduction was made in the Regina rates by this tariff, which left those rates, as they had been for some years before, as follows:—

	1	2	3	4	5
Regina	197	164	131	99	89

"And the board has found, as a fact, that the above mentioned reductions in the Canadian Pacific Railway Company's rates in Manitoba, were caused by the action of the Northern Pacific and Manitoba Railway Company, in reducing its rates between Duluth and Winnipeg, which, in turn, was brought about by the said agreements with the Manitoba Government.

"(*e*) Afterwards, the Canadian Northern Railway Company was incorporated and acquired the lines of railway of the Northern Pacific and Manitoba Railway Company, in the Province of Manitoba, subject to the agreements with the Government of the Province of Manitoba above referred to.

"On the 11th of February, 1901, an agreement was made between the Government of the Province of Manitoba and the Canadian Northern Railway Com-

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pany, confirmed by the Legislature of that province, by chapter 39 of the statutes of 1901. By the terms of the last mentioned agreement, the Government of the Province of Manitoba agreed to guarantee the bonds of the Canadian Northern Railway Company, to the amount and upon the terms mentioned in the agreement, and to grant and confer upon the said company certain valuable franchises, benefits and advantages as in the agreement and statute is more fully set forth, and as the consideration therefor the Canadian Northern Railway Company agreed to make a reduction amounting to about fifteen per cent. of the tariff rates then in force, for the carriage of all freight (other than grain), from and to points in Manitoba, and from and to points in Manitoba from and to Fort William and Port Arthur. By the same agreement, the Canadian Northern Railway Company was empowered to lease from the Government of Manitoba and to acquire and operate the Northern Pacific and Manitoba Railway line.

"(*f*) The Canadian Northern Railway was completed in February, 1902, from Port Arthur to Winnipeg, and in the company's tariff, April 21st, 1902, the following rates to Manitoba points were established.

	1	2	3	4	5	6	7	8	9	10
Fort William to Winnipeg.....	89	75	60	45	40	34	25	25		20
Portage la Prairie 105		88	70	53	48	40	28	29		23
Brandon 120		100	80	60	54	46	32	32		27

"(*g*) These are the rates in effect at the present time, and owing to the competition existing between the two railway companies were adopted by the Canadian Pacific Railway Company, in its tariff, dated May 10th, 1902.

"(*h*) The Canadian Pacific Railway Company was

not a party to any of the agreements above mentioned, and was not legally bound to make the reductions it did, in the Province of Manitoba, but in order to hold its business, as a result of competition, it did, in fact, reduce its rates.

"(*i*) Subsequently, the Canadian Northern Railway Company, having obtained authority from the Parliament of Canada, extended its lines beyond the confines of the Province of Manitoba, and constructed lines of railway in the Province of Saskatchewan, which entered into competition there with the lines of the Canadian Pacific Railway Company in that province, at many points, the City of Regina being one of the points common to both lines.

"(*j*) In the present case, the City of Regina has complained that the rates to Regina, from Fort William, are higher in proportion than the rates from Fort William to Winnipeg and are, therefore, unjustly discriminatory as between localities.

"The said rates are, in fact, higher in proportion.

"The board has held that it was not the intention of Parliament, in passing section 315 of the 'Railway Act,' to permit railway companies to create different circumstances and conditions by entering into a contract with some one and so defeat the intention of the section, and that the circumstances and conditions which, if not substantially similar, may justify different treatment of different localities, must be traffic circumstances or traffic conditions, not circumstances and conditions which may be artificially created by contract.

"The board has also held that it has been proved that the Special Class Freight Tariffs of the Canadian Northern Railway Company and the Canadian

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Pacific Railway Company between Port Arthur and Fort William and points west thereof, unjustly discriminate in favour of Winnipeg and other points in the Province of Manitoba, to the prejudice and disadvantage of Regina and Moose Jaw, and other points west of that province, and that the companies should be required to reduce their rates so as to remove this discrimination by publishing and filing new tariffs.

"The questions for the consideration of the Supreme Court of Canada are: Were the facts set out above and more fully referred to in the record herein, circumstances and conditions within the meaning of the 'Railway Act,' which justify the existence of lower rates from Fort William to Winnipeg than to Regina: (*a*) With regard to the Canadian Northern Railway Company; (*b*) with regard to the Canadian Pacific Railway Company ?"

The issues raised on the appeal are stated in the judgments now reported.

Chrysler K.C. for the appellants, the Canadian Pacific Railway Co.

Ewart K.C. and *George F. Macdonnell* for the appellants, the Canadian Northern Railway Co.

Wallace Nesbitt K.C. and *Orde K.C.* for the respondents.

THE CHIEF JUSTICE.—The Board of Railway Commissioners has found as a fact, which is not open for argument, on this appeal, that the special class freight tariffs of the appellants in question unjustly discriminate in favour of Winnipeg and other points

in Manitoba to the prejudice and disadvantage of Regina, Moose Jaw and cities or towns, generally, west of Manitoba.

It was contended by the railway companies that this discrimination was justified by certain agreements between one of the railway companies and the Manitoba Government. The question submitted on this appeal is:—Are those agreements "circumstances and conditions" within the meaning of those words as used in section 315 of the "Railway Act" to be taken into consideration by the Railway Commissioners upon a complaint of unjust discrimination made by the Board of Trade of Regina, that city being a shipping point affected by those freight tariffs? That those agreements are "circumstances and conditions" to be taken into consideration by the Board of Railway Commissioners, in considering the question of unjust discrimination, cannot, it seems to me, be doubted; but it is for that board to decide what effect is to be given to them in the circumstances and I am entirely at a loss to understand what is the question of law involved. It is for the Board of Railway Commissioners to say, having taken the agreements into consideration as relevant facts, if they will give any and what weight to them.

The statute ((D.) 1 Edw. VII. ch. 53, sec. 3) confirming the agreement specially says that it shall not be construed so as to create discrimination:—

> Nothing in this Act or in the indentures contained in the schedules hereto, or done in pursuance of this Act or of the said indentures, shall
>
> (*c*) authorize the Canadian Northern Railway Company, contrary to the meaning of *"The Railway Act,"* to charge or demand any discriminating rate for the carriage of freight or passengers, or to allow or make any secret or special tolls, rebate, drawbacks or concession, or any higher rates for the carriage of freight or passengers

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than those heretofore or hereafter fixed under the authority of existing or future legislation of the Parliament of Canada, by the Governor in Council, or by the Railway Committee of the Privy Council, or by any commission or other authority.

I would dismiss with costs.

DAVIES J.—I agree in the opinion stated by Duff J.

IDINGTON J.—In answer to the questions submitted herein I am of opinion that the facts set out in the case stated by the assistant commissioner of the Board of Railway Commissioners for Canada do not constitute and are not "circumstances and conditions within the meaning of the "Railway Act," which, of imperative legal necessity, justify the existence of lower rates from Fort William to Winnipeg than to Regina, either by (or "with regard to") the Canadian Northern Railway Co. or the Canadian Pacific Railway Co.

I cannot read the questions submitted as counsel for the railway companies contend they must be read; and, therefore, try to make my meaning clear by the interposition of the words "of imperative legal necessity." In any other sense than that I thus adopt I do not consider any question of law, such as can be submitted to this court is involved. In other words, notwithstanding the facts set out, the Board of Railway Commissioners is not as a matter of law (such as may be submitted in appeal to us as provided by the statute) required to permit the continuation of such discrimination.

The appeal should be dismissed with costs.

DUFF J.—The question whether in the circumstances presented in this case there has been unjust

discrimination is, in my opinion, committed to the Board of Railway Commissioners for decision as a question of fact by section 318 of the "Railway Act." That board, in deciding such a question, is, of course, to act judicially and, consequently, to have regard to all relevant facts. Since the decision of this court in *Montreal Park and Island Railway Co.* v. *City of Montreal*(1), it is, I think, not open to dispute here that the "circumstances and conditions" referred to in the question submitted are facts relevant to the point in issue. It is impossible, therefore, either to affirm or to deny as a proposition of law that those "circumstances and conditions * * * justify" (in the language of the question) "the existence of lower rates from Fort William to Winnipeg than to Regina." Whether that is so or not is a question of fact; and the Board of Railway Commissioners is the tribunal appointed by law to pass upon it.

ANGLIN J.—The Board of Railway Commissioners has, under sub-section 3 of section 56 of the "Railway Act," given to the Canadian Pacific Railway Company and the Canadian Northern Railway Company leave to appeal to this court from its decision requiring these two companies to remove

> the discrimination at present existing in the tariffs to points in the Provinces of Manitoba, Saskatchewan and Alberta, from Fort William, Port Arthur, and points east thereof, in favour of Winnipeg, and other points in the Province of Manitoba, and against points west thereof by reducing the rates from Fort William, Port Arthur, and points east thereof, to Regina, and Moose Jaw, and other points west of the said favoured points,

upon the following question, stated by the Board of

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Railway Commissioners as being, in its opinion, a question of law:—

Were the facts set out above, and more fully referred to in the record herein, circumstances and conditions within the meaning of the "Railway Act," which justify the existence of lower rates from Fort William to Winnipeg than to Regina: (*a*) With regard to the Canadian Northern Railway Company; (*b*) with regard to the Canadian Pacific Railway Company?

Section 315 of the "Railway Act" is, in part, as follows:—

315. All such tolls shall always, under substantially similar circumstances and conditions, in respect of all traffic of the same description, and carried in or upon the like kind of cars, passing over the same portion of the line of railway, be charged equally to all persons and at the same rate, whether by weight, mileage or otherwise.

4. No toll shall be charged which unjustly discriminates between different localities.

5. The Board shall not approve or allow any toll, which for the like description of goods, or for passengers carried under substantially similar circumstances and conditions in the same direction over the same line, is greater for a shorter than for a longer distance, within which such shorter distance is included, unless the board is satisfied that owing to competition, it is expedient to allow such toll.

6. The Board may declare that any places are competitive points within the meaning of this Act.

Although Winnipeg is admittedly a competitive point, that feature of the situation, it is conceded, is not now material to the question with which we are asked to deal.

Unfortunately, as too frequently happens in these cases, counsel are unable to agree upon the scope and purview of the question submitted.

Are the words, "which justify," to be taken to mean, "which *may* justify," "which *do* justify," or "which *conclusively* justify"? The first or the third form would raise a question of law; the second would raise a question of fact, and on that ground must be rejected, if any other interpretation is admissible.

For the appellant railway companies it is contended that we are asked to determine whether the "facts" referred to in the question submitted are or are not "circumstances and conditions" which may justify a discrimination in rates and which the Board of Railway Commissioners should, therefore, receive in evidence and take into account in deciding, as a question of fact ("Railway Act," sec. 318), whether "the circumstances and conditions" under which traffic is carried to the several points mentioned in its order are or are not "substantially similar." Counsel for the company stated that the Board of Railway Commissioners treated the "facts" referred to as irrelevant and practically inadmissible.

A passage in the notes of the assistant chief commissioner certainly lends colour to the contention of the appellants as to the meaning of the question submitted. He said, at pages 183-4:—

> The board has held that it was not the intention of Parliament, in passing section 315 of the "Railway Act" to permit railway companies to create different circumstances and conditions by entering into a contract with some one and so defeat the intention of the section, and that the circumstances and conditions which, if not substantially similar, may justify different treatment of different localities, must be traffic circumstances or traffic conditions, not circumstances and conditions which may be artificially created by contract.

Apart from the statutory provision, to which I shall presently refer, and which, apparently, was not brought to the attention of the Board of Railway Commissioners, the question, as interpreted by counsel for the companies, is the same as that dealt with by this court in *Montreal Park and Island Railway Co.* v. *City of Montreal*(1). Because unwilling to assume

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that, with this very recent judgment before it, the Board of Railway Commissioners would again propound to us the very question there answered, I think the interpretation put upon the question by the appellants cannot be in accordance with the intention of the board. If, however, that be its meaning, clause (*c*) of section 3 of chapter 53, of the Dominion statutes, 1 Edw. VII., would probably prevent the companies from relying upon the agreements ratified by that Act in justification of any discrimination in rates. But, holding the view that the question submitted should not receive the interpretation put upon it by counsel for the appellants, I find it unnecessary now to decide the question as to the scope and effect of the statutory provision referred to.

For the respondent it was submitted that the Board of Railway Commissioners meant to ask this court whether the "facts" referred to (which counsel maintained had been received by the board in evidence and had been duly considered by it, but in determining the question of similarity of circumstances and conditions had been deemed by the board insufficient to warrant a finding of such dissimilarity as would justify a discrimination in rates) *necessarily justify* a discrimination and compel the board, as a matter of law, to hold that they establish a case of dissimilarity in "circumstances and conditions" which would justify some discrimination.

To the question so interpreted the answer should, in my opinion, be "no." The "facts" referred to do not *per se* and as a matter of law conclusively establish such a case of dissimilarity in circumstances and conditions as necessarily justifies the maintenance of some discrimination in rates.

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It follows from the decision in the *Montreal Park and Island Railway Co.* v. *City of Montreal*(1), that, unless excluded by the statutory provision above adverted to, the "facts" referred to in the question submitted are relevant to the inquiry which the statute contemplates the Board of Railway Commissioners shall make, and that they are, therefore, admissible in evidence and should be duly taken into account. But the weight to which they would be entitled, if any, must be determined by the board itself and is, in my opinion, the very kind of thing which Parliament intended that body to decide finally as a question of fact.

Because satisfied that the interpretation put upon the question submitted by counsel for the respondent was that intended by the Board of Railway Commissioners, I would dismiss this appeal with costs.

BRODEUR J.—A contract by a railway company with a province cannot interfere with the duty of the Board of Railway Commissioners to prevent any discrimination in freight rates affecting a city in another province.

If a province or a locality chooses to give to the railway companies some bonuses or favours for the purpose of securing some reduction in their charges it should be done in conformity with the provisions of the "Railway Act," and these companies could certainly not rely on such contracts to justify a discrimination against some other localities.

In this case, where the railway company made the contract in question with the Province of Manitoba, it

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was then under the legislative authority of that province.

Later on it became a federal company under the control of the "Railway Act."

When application was made to Parliament for the purpose of confirming that contract concerning freight rates a special declaration was made in the statute of 1901 (1 Edw. VII. ch. 53, sec. 3), that the Canadian Northern Railway Company, which was assuming that contract, would not be authorized to charge any discriminatory rate.

An agreement between a railway company under federal charter and an individual or a group of individuals giving to any persons or to any locality a preferential rate constitutes discrimination under the "Railway Act."

The "circumstances and conditions" which, if not substantially similar, may justify different treatment to different points, and which are enunciated in section 315 of the "Railway Act," must be traffic circumstances or traffic conditions, not circumstances and conditions that may be created by contract.

The Board of Railway Commissioners has found that the rates from eastern points to Winnipeg and to Regina were discriminatory in favour of the former city. But it was urged that these rates had to be given to Winnipeg under the above contract and that the Board of Railway Commissioners was bound to give effect to such a covenant. Of course, the question was considered by the Board of Railway Commissioners; but it was not bound to sanction a discrimination which Parliament itself had declared would not be confirmed.

This appeal should be dismissed. There is no rea-

son for interfering with the discretion of the Board of Railway Commissioners.

Appeal dismissed with costs.

On the 22 December, 1911—

Chrysler K.C., on behalf of the Canadian Pacific Railway Co., moved for a direction as to the settlement of the minutes.

Geo. F. Macdonnell, for the Canadian Northern Railway Co., appeared in the same interest.

Orde K.C. contra.

The court, after consideration, pronounced judgment on the motion, as follows:—

"The registrar shall certify on behalf of the court to the Board of Railway Commissioners in answer to the question submitted that in the opinion of this court the facts therein set out are circumstances and conditions within the meaning of the "Railway Act" to be considered in determining the question of unjust discrimination with respect to both railways; such facts and circumstances are not in law conclusive of the question of unjust discrimination, but the effect, if any, to be given to them is a question of fact to be considered and decided by the Board in its discretion."

Solicitors for the appellants, The Canadian Pacific Railway Co.: *Chrysler, Bethune & Larmouth.*

Solicitor for the appellants, The Canadian Northern Railway Co.: *George F. Macdonnell.*

Solicitors for the respondent: *Gormully, Orde & Powell.*