A. L. PATCHETT & SONS LTD. (*Plaintiff*) ..... APPELLANT;

AND

PACIFIC GREAT EASTERN RAILWAY COMPANY (*Defendant*) ..... RESPONDENT.

1958
*May 14, 16
1959
Jan. 27

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Railways—Carriage of goods—Statutory duty of railway—Duty to supply cars and pull loaded cars from siding—Union picketing shipper's non-union plant—Refusal of railway's employees to cross picket line—Damages to shipper—Whether breach of statutory duty—Nature of duty—The Railway Act, R.S.B.C. 1948, c. 285, ss. 203, 222.

The plaintiff owned and operated a planing mill on lands adjoining the right of way of the main line of the defendant company at Quesnel, British Columbia. A spur line, the switch for which was on the main line, led onto the plaintiff's premises. The International Woodworkers of America, a union of loggers and mill workers, called a strike in the area and, although none of the plaintiff's employees were members of the union, placed pickets at or around the switch used for the spur line. The members of the railway unions were ordered by their officers not to cross the picket lines, and as a result the railway employees refused to spot cars and to pull loaded cars on the siding as required by the plaintiff. They also refused to accept or sign bills of lading for loaded cars.

The plaintiff sued the defendant company for damages alleging failure on the part of the defendant to perform its statutory duties as set forth in ss. 203 and 222 of the *Railway Act*. The action was maintained by the trial judge, who found that it was not fear of violence from the strikers but rather the orders given by the railway union officers that caused the railway employees to refuse to discharge their duties and those of the defendant company. The company had failed to discharge its statutory duty. This judgment was reversed by a majority in the Court of Appeal.

Held (Locke and Cartwright JJ. dissenting): The action must fail. No liability attached to the defendant railway company.

Per Rand J.: The duty imposed by s. 203(1)(*c*) of the *Railway Act* upon a carrier to furnish facilities and to accept goods, is not an absolute duty. That duty is qualified by a characteristic of reasonableness and depends upon all the circumstances. Furthermore, to the duty of the railway to furnish services there is a correlative obligation on the customer to furnish reasonable means of access to his premises.

In the light of all the circumstances, it could not be said that the Court of Appeal was clearly wrong in finding the defendant not liable for the damages claimed. The primary responsibility was on the plaintiff

*PRESENT: Rand, Locke, Cartwright, Abbott and Judson JJ.

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to free its premises of trespassers whose presence was, falsely, a sign of a labour clash and constituted a virtual nuisance *vis-a-vis* the defendant's employees. These trespassers, in fact, prevented reasonable access to the plaintiff's premises to which the defendant was entitled as a condition of furnishing its services. This obstruction could have been removed by the plaintiff with a minimum of delay and inconvenience. Within the few days of interruption no damage suffered by the plaintiff could be attributed to a breach of duty toward it by the defendant.

Per Abbott J.: The statutory duty imposed upon the defendant was not an absolute duty but was only a relative one to provide services so far as it was reasonably possible to do so. The defendant was under no obligation to ascertain whether the picketing was illegal or not. When an industrial plant is illegally picketed, the primary responsibility for taking legal action to have the pickets removed rests upon the owners of the plant whose operations are those primarily affected. By endeavouring by methods of persuasion to overcome the difficulties and to avoid resort to legal proceedings, the defendant acted reasonably.

Per Judson J.: Since the plaintiff's plant was the primary object of the attention of the pickets, the primary responsibility for the removal of the obstruction rested with the plaintiff. The statutory obligation under s. 203(1)(c) was not an absolute but a relative one.

Per Locke and Cartwright JJ., *dissenting*: The duty imposed upon the railway by ss. 203 and 222 of the *Railway Act* is absolute. The obligation to provide adequate and suitable accommodation is not qualified, and is enacted for the protection of the public requiring the services of these carriers.

On the evidence in this case, there was no defence to the action. The union officers ordered their members to disobey the lawful orders of their employer and to commit breaches of their duties under s. 295 of the *Railway Act*. They directed them to take part in actions which were criminal in their nature and contrary to s. 518 of the *Criminal Code;* this order was not dependent on their being prevented by violence or threats of violence from doing their duty, or whether or not there was a strike at the plant where cars were to be delivered. The conclusion reached by the trial judge that it was not fear but the order of the union officers which was the reason for the refusal to pass the so-called picket line was completely supported by the evidence and should not have been set aside in the Court of Appeal.

There was no evidence that the pickets trespassed on the plaintiff's property. According to the uncontradicted evidence, they trespassed on the main line of the railway at or near to the switch and there interferred with the railway operations.

The nature of the railway's statutory obligations was completely misconceived by the defendant's officers, who appeared to have thought that the company was helpless. It was upon the defendant that the statutory duty lay and upon its property that the so-called pickets trespassed and impeded or prevented the operations of the railway; it was, therefore, upon the defendant to take steps to prevent the interference with its operations. The plaintiff's right of action cannot be affected by its failure to commence an action to compel the

defendant to discharge its duty or to prosecute the pickets for trespass, or under s. 518 of the *Criminal Code*. *Groves v. Wimborne* (1898), 2 Q.B. 403.

It is not the law in British Columbia, and it never has been, that the employees of railway companies may decide for themselves whether, and under what circumstances, they will discharge their obligations under s. 295 of the *Railway Act* and under their contracts of employment. The statutory duty rests upon the company to provide the facilities and upon the employees to render the services necessary to comply with that duty.

There was no threat of a strike by the railway employees, and had there been, it would not have afforded any answer to the plaintiff's claim. *Hackney Borough Council v. Doré,* [1922] 1 K.B. 437. The defendant must accept responsibility for the conduct of its employees. *Lochgelly Iron and Coal Co. v. McMullan,* [1934] A.C. 1.

Even if the duty of the railway was merely to make reasonable efforts to furnish the facilities, the evidence disclosed a complete failure to make such efforts.

APPEAL from a judgment of the Court of Appeal for British Columbia[1], reversing a judgment of Manson J. Appeal dismissed, Locke and Cartwright JJ. dissenting.

A. W. Johnson, for the plaintiff, appellant:

J. A. Clark, Q.C., for the defendant, respondent.

RAND J:—The case made against the respondent is based on the sections of the provincial *Railway Act* dealing with facilities and the acceptance, carriage and delivery of goods: R.S.B.C. 1948, c. 285, ss. 203 and 222. The precise duty is declared by para. (c) of the former:

> (*c*) without delay, and with due care and diligence, receive, carry, and deliver all such traffic;

Mr. Johnson puts his argument in this fashion: the duty to furnish facilities, so far as conduct of employees may affect that, is absolute; and just as the employer is liable for the negligent act of his employee, positive or negative, as for a failure by the employer in his personal duty under the statute, so is he for a deliberate refusal to work by any of them. The question is whether that absoluteness can be attributed to the language of the statute and if not, what, if any, excuse is there when the performance of a public carrier breaks down through cessation or refusal of work by employees because of a labour dispute circumstance.

[1] (1958), 23 W.W.R. 147, 11 D.L.R. (2d) 52, 76 C.R.T.C. 27.

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In the case of a general strike of a group of essential employees, since that cessation, assuming appropriate conditions to be present, is a lawful act, it would be out of the question to interpret the Act as creating a liability for not doing what, in the nature of the situation, a carrier is, for the time being, unable to do, and no one has ever suggested it. Would the result be different if the cessation was illegal as in violation of law or in breach of contract?

Whether a strike, say of all trainmen, in sympathy with that of other employees, of the same employer or another, between whom there is no common interest beyond what is viewed as the general interest of workmen, would be within ss. 498 or 518 of the former *Criminal Code* is beyond our enquiry. Assuming it to be illegal, no civil remedy could effect directly a compulsion to work, and damages, if available, would take much time and involve many difficulties. The illegality could be declared and, in a proper case, criminal prosecution invoked; but that also would take time, during which to hold a railway bound to an absolute obligation would, for the reasons about to be stated, involve a regulation of public services by private agencies toward patrons which, in my opinion, our law does not permit. Under the present conceptions of social organization, apart from criminal law, the settlement of such a dispute must result from the pressure of the interests or necessities of the strikers or the employer or the force of public opinion. In this view I confine myself to the duty of a carrier to furnish facilities and to accept goods: where the carriage has actually begun other considerations may have to be taken into account with which we are not here concerned.

Apart from statute, undertaking a public carrier service as an economic enterprise by a private agency is done on the assumption that, with no fault on the agency's part, normal means will be available to the performance of its duty. That duty is permeated with reasonableness in all aspects of what is undertaken except the special responsibility, of historical origin, as an insurer of goods; and it is that duty which furnishes the background for the general language of the statute. The qualification of reasonableness is exhibited in one aspect of the matter of the present

complaint, the furnishing of facilities: a railway, for example, is not bound to furnish cars at all times sufficient to meet all demands; its financial necessities are of the first order of concern and play an essential part in its operation, bound up, as they are, with its obligation to give transportation for reasonable charges. Individuals have placed their capital at the risk of the operations; they cannot be compelled to bankrupt themselves by doing more than what they have embraced within their public profession, a reasonable service. Saving any express or special statutory obligation, that characteristic extends to the carrier's entire activity. Under that scope of duty a carrier subject to the Act is placed.

The examples of these extreme situations furnish guidance for the solution of partial cessations of work associated with labour controversy. The duty being one of reasonableness how each situation is to be met depends upon its total circumstances. The carrier must, in all respects, take reasonable steps to maintain its public function; and its liability to any person damaged by such a cessation or refusal of services must be determined by what the railway, in the light of its knowledge of the facts, as, in other words, they reasonably appear to it, has effectively done or can effectively do to meet and resolve the situation. In weighing the relevant considerations, time may be a controlling factor.

Here the failure commenced on October 28 and continued until the end of November 4, a period of eight days. Within that time what effective steps could the respondent have taken which would have avoided the damages claimed? Admittedly, no measures were taken against the recalcitrant employees; its directing officers, not distinguishing the particular circumstances from those of strikes generally, acting under a vague notion that this was a "strike" which meant marking time, acquiesced in the refusal of service even though the superintendent paid lip service to the demands of the appellant by repeated orders to the train crew to "switch the siding" which they as repeatedly ignored.

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It was urged that the railway should have applied for an injunction against its own employees; but whatever might be said for that, there was a preliminary question between the railway and the company with which I shall deal in a moment and the determination of which would have obviated any such step.

There was the threat of violence made to the conductor. It is easy to minimize the effect of this in the apparent light of what happened subsequently: but we know too well how vengeance can be wreaked on individuals by ruffians in a community from which a determined public attitude and adequate public protection are absent. To compel an employee so threatened to carry out orders on penalty of dismissal or suspension for refusal might, whether warrantedly or not, have aroused the brotherhood; and, in the circumstances, it would be asking the respondent unnecessarily to face a further real danger of disrupting its services throughout the district.

There is also the question of time. Time is frequently the arbiter of these collisions. Whatever legal action might have been taken, the ordinary course of the mill work including the siding services would have been interfered with and interrupted. As has been aptly remarked, a strike is not a tea-party and it may have consequential impacts on associated interests which cannot be met or disposed of overnight; and it is difficult if not impossible, with these doubtful issues raised, and the possibilities of further complications, to say when the situation would have been cleared up.

That the respondent was able to move against the pickets is doubtful; that they were not on railway property was assumed in the submission of Mr. Johnson; certainly there was no interference with operation on the main line; and if there was a picket line it was across the private siding, which, for the purposes of operation, was the property of the appellant. Even if there was a trespass on railway lands, the imaginary barrier was around the plant, and that brings me to what I consider the primary and decisive factor.

To the duty of the railway to furnish services there is a correlative obligation on the customer to furnish reasonable means of access to his premises. There was, in fact, no labour dispute between the I.W.A. and the appellant and the picketting was illegal. That fact was the appellant's, not the respondent's, and on it only the former could, with confidence, act. The appellant thus tolerated on or about its property a disruptive presence which it was known was exerting an obstructive effect on the employees of the railway and the siding operation. The obstacle presented by the pickets was to outbound shipments with inbound deliveries by highway permitted. In these circumstances the first and obvious step was to get rid of the intruders; but the appellant, rather than involve itself with the I.W.A. in litigation, in effect called upon the respondent to take steps against its own employees or the trespassers or both.

If the appellant had asserted its unquestioned rights, the root of the trouble would have been removed as it was by the immediate and voluntary withdrawal of the pickets when on November 4 an interim injunction against the respondent was obtained; a direct move against the pickets by the appellant could not have had less effect than that indirect action. Would the duty on the respondent to service the siding have given it a standing in law to move for an injunction against persons illegally encircling another's property with a symbolic barrier? If the appellant was content to suffer a picket line affecting its own premises, an illegal *de facto* interference with its rights in carrying on its business, would any court have acted to remove it at the request of another having no interest in the premises, and only a qualified duty in relation to them? At the highest it is extremely doubtful that it would do so; it is not the function of a Railway to clear away obstructions to operations on private premises when the owner acquiesces in them.

In all these circumstances, in the light of the controlling facts as they appeared to the respondent, I am unable to say that the Court of Appeal[1] was clearly wrong in finding

[1] (1958), 23 W.W.R. 147, 11 D.L.R. (2d) 52, 76 C.R.T.C. 27.

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the respondent not liable for the damage claimed. The primary responsibility lay with the appellant to free its premises of trespassers whose presence was, falsely, a sign of a labour clash, and constituted a virtual nuisance *vis-à-vis* the employees of the railway. They prevented, in fact, reasonable access to the appellant's premises to which the railway was entitled as a condition of furnishing its services, and the obstruction they presented could have been removed by the appellant with a minimum of delay and inconvenience. Rather than take that course the appellant sought to place on the respondent the entire burden of breaking up the impasse, entailing the uncertainties and risks of any course of action attempted. Whatever an indefinite continuance of the situation might have called for, within the eight days of interruption no damage suffered by the appellant can be attributed to a breach of duty toward it by the respondent. Had the picketting under the law of the Province been legal, a different situation would have been presented but with that we are not here concerned.

It should not be necessary, but to prevent any misconception of implication from these reasons, I add this: the only question dealt with is the duty of the railway toward the company in the precise situation presented. As between these parties, on whom did the responsibility lie to take the initiative against the *de facto* obstruction to the ordinary operation of the company's private siding? And my conclusion is as stated.

I would therefore dismiss the appeal with costs.

LOCKE J. (*dissenting*):—This is an appeal from a judgment of the Court of Appeal for British Columbia[1] which allowed the appeal of the present respondent, the defendant in the action, from the judgment delivered at the trial by Manson J. awarding damages to the present appellant. The appeal was heard by a Court of three members and of these Davey J.A. dissented and, while considering that the damages awarded should be reduced, would have otherwise dismissed the appeal.

[1] (1958), 23 W.W.R. 147, 11 D.L.R. (2d) 52, 76 C.R.T.C. 27.

The case raises questions which are of great importance not only to the communities through which the lines of the respondent company pass in British Columbia and industries operating there, but to shippers of freight, the transcontinental railways and to railway unions throughout Canada.

The action was brought to recover damages for the alleged failure of the respondent to comply with its statutory obligations under ss. 203 and 222 of the *Railway Act* of British Columbia, R.S.B.C. 1948, c. 285. The respondent was incorporated by a special Act of the Legislature of British Columbia, Statutes of 1912, c. 36, and its operations do not extend beyond the boundaries of the province.

Section 203 reads in part:

(1) The company shall, according to its powers:—

(*a*) Furnish, at the place of starting, and at the junction of the railway with other railways, and at all stopping-places established for such purpose, adequate and suitable accomodation for the receiving and loading of all traffic offered for carriage upon the railway:

(*b*) Furnish adequate and suitable accomodation for the carrying, unloading, and delivering of all such traffic:

(*c*) Without delay, and with due care and diligence, receive, carry, and deliver all such traffic; and

(*d*) Furnish and use all proper appliances, accomodation, and means necessary for receiving, loading, carrying, unloading, and delivering such traffic.

(2) Such adequate and suitable accomodation shall include reasonable facilities for the junction of private siding or private branch railways with any railway belonging to or worked by the company, and reasonable facilities for receiving, forwarding, and delivering traffic upon and from those sidings or private branch railways, together with the placing of cars and moving them upon and from such private sidings and private branch railways.

Subsection (7) of s. 203 declares that any person aggrieved by the neglect or refusal of the company to comply with the section shall have a right of action against it.

Section 222 which appears under the heading "Traffic Facilities" in part 29 of the *Railway Act* expresses the obligation though in slightly different terms. So far as it needs consideration, it reads:

(1) All companies shall, according to their respective powers, afford to all persons and companies all reasonable and proper facilities for the receiving, forwarding, and delivering of traffic upon and from their several railways, for the interchange of traffic between their respective railways, and for the return of rolling-stock.

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The difference between this and subs. (1) of s. 203 is to be noted. The former states the obligation to furnish adequate and suitable accomodation in absolute terms. Whether subs. (2) qualifies this absolute obligation is, in my opinion, a debatable question.

The action raises questions which have not heretofore been dealt with by the Courts of this country. My consideration of the evidence leads me to the conclusion that there is no defence to this action. With great respect, I disagree with the judgments delivered by the majority of the members of the Court of Appeal, both as to the facts which are disclosed by the evidence and as to the law applicable to the obligation of the respondent under the statute.

Most of the evidence given on behalf of the defendant at the trial directed to the issue of liability was, in my opinion, irrelevant. However, as a contrary view has been taken by the learned judges of the Court of Appeal, I propose to refer in detail to all of the evidence given at the trial.

The appellant company at the time in question owned and operated a planing mill on lands adjoining the right-of-way of the main line of the respondent at Quesnel. It was also the owner and operator of two lumber mills situated elsewhere and the lumber there produced and lumber purchased from other mills operating in the territory was planed and made ready for market at the planing mill in Quesnel. A spur line constructed by the respondent leading onto the appellant's said premises, for which an annual rental was paid, afforded means of access by rail from the planing mill to the respondent's main line. Cars were switched by the respondent from its main line onto the appellant's premises and, when loaded and ready for shipment, bills of lading were issued and the cars removed by the respondent and carried to their destination, either upon the respondent's railway lines or to transcontinental railway lines to the north at Prince George or to the south at Vancouver. Eighty per cent. of the total production of the mill was sold for export to the United States.

The length of time that these facilities had been enjoyed by the appellant does not appear. It is, however, common ground that at the relevant times the delivery of cars upon the spur track and the removal of cars therefrom after they were loaded were reasonable facilities to which the appellant was entitled under the sections of the *Railway Act* to which reference has been made.

At some time around October 1, 1953, there were strikes called in certain lumber mills operating at Stoner and Red Rock by the International Woodworkers of America, hereinafter referred to as the I.W.A., and, I would infer from the evidence, at Prince George. These places are served by the respondent railway and lie respectively 60,67 and 81 miles north of Quesnel. There were 12 mills manufacturing lumber or lumber products operating at the time at Quesnel. On or about October 26 the I.W.A. called strikes in 2 or 3 of these plants.

None of the employees of the appellant were members of the union and, according to the evidence of W.A. Stewart, the superintendent of the respondent, there was no strike at the mills of 9 or 10 other lumber companies at Quesnel.

On October 8, D.L. Irvine, a conductor employed by the defendant, was in charge of a train and had received instructions to move certain cars from lumber mills at Stoner and Red Rock. He gave evidence that, when they attempted to move certain cars at Stoner, six pickets posted by the striking union armed with clubs made threatening gestures towards the crew, whereupon the train was withdrawn. Later on that day they had the same experience at a mill at Red Rock.

On October 16, 1953, Donald F. Robinson, a locomotive engineer employed by the respondent who described himself as the general chairman of the Brotherhood of Locomotive Firemen and Enginemen, was working on the run between Lillooet and Williams Lake. Early in October he said that he had received complaints from men under his jurisdiction working on the subdivision between Williams Lake and Prince George regarding trouble with pickets of the striking mill employees and that they had asked him for instructions as to what they were to do. They apparently referred to what had happened at Stoner and

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Red Rock. On that date he issued what he described as a general circular which was sent to all firemen on the subdivision and which read:

Lillooet, B.C.
Oct. 16th, 53

To all Firemen Prince George Sub.

Article 16, section 2, Clause F, page 216 of the Brotherhood of Locomotive Firemen and Enginemen's constitution states,

> Where a picket line is established by any nationally recognized organization our members will not be required to pass through such picket lines.

The I.W.A. is a nationally recognized organization and their pickets will be respected.

Yours fraternally
"D. F. Robinson"
G.C.B.L.F. & E.P.G.E. Rly.

Copy to J. Morris
Pres. I.W.A.
W. A. Stewart Supt.
Pacific Great Eastern Railway

On October 19, 1953, G. E. Harris, the general chairman of the Brotherhood of Railway Trainmen, circulated a message among the members of his union employed by the railway and sent to the superintendent the following message:

Squamish, B.C.
October 19, 1953

Dear Sir and Brothers:

Please find enclosed copy of telegram from L. C. Malone, Vice-President.

"WHERE A LEGAL STRIKE OF ANY NATIONALLY RECOGNIZED LABOR ORGANIZATION IS IN EFFECT AND PICKET LINES ESTABLISHED, CONSTITUTING A SUBSTANTIAL PRESENT OR POTENTIAL THREAT OF DANGER TO OUR MEMBERS OR THEIR FAMILIES OUR MEMBERS ARE WITHIN THEIR RIGHTS IN DECLINING TO ENTER THE TERRITORY DIRECTLY EFFECTED."

SIGNED
L. C. MALONE

Great care should be taken that picket lines should not be crossed, and that picket lines are established in the proper place.

Pickets picketing cars on Company property, such as team tracks, should not be recognized, it is up to the strikers in this case to prevent the loading of cars, once the car is loaded the Railway is required to accept the billing, and the Railway will in turn require our trainmen to handle loaded cars.

I am going to Vancouver today and will have further instructions for you. I will contact the I.W.A., also General Chairman on C.N.R.

Fraternally yours,
"G. E. Harris"
G. E. Harris,
General Chairman

On or about October 21 Robinson went to Vancouver and interviewed Anthony Egan, the acting general manager of the road, and Stewart, the superintendent. According to him, the company's officials claimed that the pickets were not properly established and that the railway employees did not have to recognize them. Robinson disagreed with this and told them that the union adhered to the stand expressed in the message of October 16 and that the men would refuse to pass the picket lines and said that he was satisfied that, if they did so, they would suffer harm after they went off duty. While the evidence is not clear, it appears that the railway officials said that if the men refused they would have to lay them off or dismiss them, to which he replied that if they did they would exhaust the supply of available men, all of whom would refuse. Referring to the trainmen who were members of the union, the headquarters of which are in Cleveland, Ohio, he said that the men had asked him to make a ruling as to what they should do and that that ruling was to be found in its constitution and he considered himself to be bound by it. Robinson did not concern himself as to what the law of British Columbia was and said that no one pointed out to him that the article of the constitution was in conflict with the law. In answer to a question reading:

As soon as it was established that the IWA was nationally recognized, then no trainman—no, excuse me—firemen or enginemen would be permited to cross the picket lines?

Robinson said:

As far as the engineers—you see, we have two organizations, and all I could legislate for or instruct were the firemen; the engineers had a separate constitution.

While some engineers were members of his union, he said he could not give instructions to them.

On October 23 Robinson went to Quesnel. At that time it appears that there was no strike in any of the plants at that place. From there he proceeded on the day following

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to Prince George and, on October 25, went to the mill at Stoner where the strike was in progress. While no attempt was made by the railway to move cars from the plant while he was there, he said that he saw 15 or 20 men who had clubs or rocks in their hands outside the plant and he thought that these were pickets of the I.W.A. Later that day he went to Red Rock, where the mill was shut down. Whether the place was picketed at that time, the witness did not say. He then went to Prince George where he met one of the train crews and says that, as a result of his discussion with them, he decided it would be very unsafe for the men to "go up against the pickets or pass through the picket line". On that day or the day following, he returned to Quesnel where he met Egan but what transpired between them is not stated.

Egan, who had formerly been employed for a long period of years with the Canadian National Railway, was acting as general manager of the respondent company from September to December 1953. He had been employed earlier in a temporary capacity to look after the accounting for the road and was merely filling in as general manager, following the retirement of the former occupier of that office and until the appointment of his successor. Following his meeting with Robinson in Vancouver, he went to Stoner, Red Rock and Prince George to endeavour to arrange the resumption of railway service for the mills where the men were on strike. He had seen Robinson's message of October 16 and that from Harris of October 19. At Stoner he found about 40 pickets at the plant where the strike was in progress, which he referred to as that of White Brothers. There, he said, there were about 40 pickets on the edge of the right-of-way outside the plant, who appeared to be armed with clubs and rocks. He said that the appearance of the pickets convinced him that if he had pressed the matter any further with the railway employees, the only thing he could have done was to lay off the crews that refused to cross the picket line. From there he had gone to Red Rock where he found a situation similar to that at Stoner outside the premises of the Scott Sash and Door Company. He then went on to Prince George where he interviewed two officials of the I.W.A. and tried to get

them to release certain cars of material tied up at Stoner and Red Rock. Later, on the same day, he said that another official of the I.W.A. agreed to remove the pickets from the plants at these two places until the following Tuesday, so that the loaded cars which were there could be removed. What Egan did not say but what was disclosed by Stewart when he gave evidence was that, in consideration of this, Egan had agreed that the respondent company would not "spot" any more empty cars in the "affected area" and gave instructions to this effect. None of the unions whose members operated the trains of the respondent threatened to strike and none were laid off as a result of their refusal to pass the picket lines at Stoner and Red Rock.

The property in question lies between the main line of the respondent and a highway to the east of it running approximately north and south. There are two entrances from the highway into the property and, on the morning of October 28, two motor cars appeared, one of which was stationed opposite each of the entrances. Each contained two men. One of the cars bore a sign which read "I.W.A. This plant on strike". The statement was untrue, a fact which was made known promptly to these men who have been referred to in the evidence as pickets.

On that day, two railway cars loaded with lumber from the appellant's mill were standing on the siding, together with some other railway cars which the respondent had theretofore supplied. On that afternoon, a train crew of the respondent in charge of E. L. McNamee went with an engine along the main line adjoining the appellant's property, intending to remove the loaded cars. Immediately to the south of the appellant's planing mill there is a roadway which leads from the highway to a crossing over the respondent's main line and which affords access to the farm of one Johnson, whose property lies west of the railway line. To obtain entrance to the private siding of the appellant from the main line, it is necessary to operate a switch which is upon the right-of-way of the main line a few feet to the north of the said railway crossing. According to McNamee, and his is the only evidence on the point, when the engine reached the vicinity, two pickets were at the switch and told the crew that they were not to throw

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the switch. These men were trespassers upon the railway premises. The engine crew made no effort to use the switch or enter the siding and took the engine away.

McNamee was aware that the employees of the appellant were not members of the I.W.A. and that there was no strike at their plant. He said that one of the so-called pickets was a man whose name he did not know but who had warned him in Quesnel on October 26, when he was off duty, not to cross the picket line or they would damage his home. He said that this had frightened him and that he was alarmed for the safety of his family living in Quesnel. Neither the engineer or fireman in charge of the engine were called to give evidence but they were under the direction of McNamee and withdrew, apparently on his instructions.

It had been the practice in dealings between the appellant and the respondent to have bills of lading for cars furnished by the respondent prepared at the appellant's office and taken for signature to the railway office at Quesnel. On October 29, Leif Rye, the yard foreman of the appellant, went with a bill of lading so prepared to the station and requested the station agent, Sidsworth, to issue it. The document related to one of the loaded cars then standing on the siding, but Sidsworth refused to sign it, saying that he had orders not to do so. Rye left the bill of lading with him. A written request was made for two empty cars to be placed on the siding on October 30 and it was shown that it was usually the case that cars were placed on the siding the day following such a request. None were delivered on the siding until November 5.

On October 29 McNamee went up with a train crew for the purpose of removing loaded cars and says that, while they had no conversation with the pickets, two of them were at the crossing near the switch.

John Zamluk, an accountant employed by the appellant, went on the same day to one Lehman, apparently the organizer in the area of the I.W.A., to protest the picketing. Lehman replied that the I.W.A. was an international union and allowed to picket anywhere. Later in the day,

apparently McNamee and Sidsworth went to the strike committee of the I.W.A. at Quesnel and obtained a document addressed to "I.W.A. pickets" which said that:

> The bearer P.G.E. yard crew has the permission of the local Strike Committee to cross the picket line. Please arrange to pass him through the picket line on above date only.

The permit stated that it was granted for the purpose of removing Canadian Pacific Railway car no. 248675 and C. & O. 3717. These cars were removed on October 30 and the damage suffered mitigated to some extent.

While the evidence does not deal with the matter in any detail, it appears that an injunction restraining the action of the pickets at the mill of the White Company at Stoner had been obtained some time shortly prior to October 29. On that day, Robinson sent the following message to F. R. Gibson, the assistant superintendent of the respondent at Squamish:

> Marguerite
> Oct 29th/53
>
> F. R. Gibson,
> Asst. Supt.
> Squamish, B.C.
>
> All mills within strike area Prince George to Quesnel have been declared hot pending settlement by IWA and are classed as such by all its affiliates. If men under my jurisdiction were to service these mills serious consequences could occur while on duty and off the job. The copy of injunction received does not guarantee the safety of the men. It only orders the IWA to refrain from preventing movement of cars. This does not take in the hot heads that may come under jurisdiction of the IWA and unless the PGE Rly can personally guarantee the safety of the men and are prepared to look after their families in the event they get hurt in any accident off duty that could be caused by strikers I cannot consider ordering men under my jurisdiction to service these mills pickets or no pickets. All firemen to be governed by rule 108 of the uniform code of operating rules.
>
> D. Robinson.

The expression "declared hot" is a familiar one in labour disputes and, in the present case, meant simply that the members of Robinson's union would not handle any traffic to or from any of the mills at Quesnel until the owners of the mills at the points to the north and at Quesnel, where the men were on strike, reached an agreement with the I.W.A. There is no evidence as to the identity of the two or three mills at Quesnel where the employees were on strike.

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This unwise message and the equally unwise messages circulated by Robinson and Harris to the members of their union on October 16 and 19 were directly responsible for the refusal of McNamee and the train crews under his charge to handle the cars to and from the appellant's plant. It is to be regretted that these men, who presumably thought that the actions which they advised were lawful under the laws of the Province, did not take legal advice as to their position, the position of their unions and that of the men refusing to comply with the lawful instructions of the railway company. It is equally unfortunate that the respondent, whose interests were vitally affected and whose employees were directly and personally concerned, did not inform them that their actions were contrary to the law and that the action of the pickets in obstructing the operations of the railway was criminal.

As the evidence showed, McNamee was not only willing but anxious to hide behind the instructions received by the train crews from the officers of their unions. On one occasion, which was apparently November 2, T. P. Jennison, an employee of the appellant, overheard a conversation between McNamee and the pickets who apparently had not been visible as the engine approached the switch, when McNamee said:

> You fellows had better be out here where we can see you.

On November 2, a meeting of the members of the Brotherhood of Railway Trainmen, the Brotherhood of Locomotive Engineers and the Brotherhood of Locomotive Firemen and Enginemen was held at Squamish. Following this, the three general chairmen of these unions sent the following letter to the general manager of the railway company:

> Squamish, B.C.
> 2nd Nov. 53.
>
> Mr. A. C. Egan,
> General Manager,
> Pacific Great Eastern Railway,
> Pender at Abbott,
> Vancouver, B.C.
> Dear Sir:
>
> We the undersigned representing Engineers, Firemen & Trainmen, who have been threatened on and off the job to the extent of bodily harm and as long as these threats exist to our members we will be obliged not to pick up or set out cars in the restricted area.

Copy of injunction received does not guarantee the safety of the men.

This does not take into consideration the fanatics that may come within the jurisdiction of the striking union unless the Pacific Great Eastern Railway Company can guarantee the safety of the men and are prepared to look after their families in the event that they do get hurt in any accident off duty that could be caused by strikers we cannot consider ordering men under our jurisdiction to service the mills. Picket or no pickets.

This letter is for the safety and protection of our members.

Yours truly

G. E. Harris
Gen. Chmn. B.R.T.

S. F. Laycock
Gen. Chmn. B.L.E.

D. F. Robinson
Gen. Chmn. B. L. F. & E.

According to Stewart, the railway management made no answer to the messages from the union officers of October 16, 19, 29 and November 2. Speaking generally, he said that every day they had instructed their train crews to render service as required by the various mills. Asked as to the attitude adopted by the employees, he said that the stand taken by them appeared to him to be reasonable, but this appears to have referred to the crews who had been stopped at Stoner and Red Rock by the pickets of the striking mill workers.

Egan apparently did not distinguish between the position of plants where the employees were on strike and those such as that of the appellant where there was no strike and the pickets merely law breakers, as the following passages from his evidence indicate:

Q. You knew before you went on this northern trip, from the communications you had received from the Unions, what their position was?

A. That's right.

Q. That is your Railway Unions I am talking about.

A. Yes.

Q. And you knew that all Unions you had to deal with would refuse to cross any picket lines established?

A. That's right.

Q. Whether the picket lines were lawfully or unlawfully established, your Unions would not cross them?

A. According to the exhibits put in I knew that we couldn't force them to move these cars over picket lines.

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The exhibits referred to were the letters from Robinson and Harris of October 16 and 19 above quoted.

THE COURT: Q. Well, Mr. Egan what about plants that were not legally picketed?

A. Our instructions were to lift any cars ordered and I don't think there was any plants that weren't picketed.

Q. Patchett's wasn't a union plant. They had no business in the world to picket it.

A. It wasn't a question of a union plant. It was a question of it being picketed whether they were union or not.

Q. You were prepared to permit your employees to refuse to cross an illegal picket line. Is that the position that you, as General Manager, took?

A. Well, my position was my employees' actions (sic) which I couldn't force any further.

The refusal of the respondent to furnish facilities to the appellant continued until November 5, 1953. On the day previous, the writ in the present action was issued and an interim mandatory order made by Clyne J. at Vancouver. The relevant portions of this order read:

THIS COURT DOTH ORDER that the Defendant, its officers, servants and agents do forthwith according to the Defendant's powers without delay and with due care and diligence receive, carry and deliver all traffic, including manufactured lumber, offered by the Plaintiff for carriage upon the Defendant's railway;

AND THIS COURT DOTH FURTHER ORDER that the Defendant do forthwith according to its powers afford to the Plaintiff all reasonable and proper facilities for the receiving, forwarding and delivering of traffic, including the Plaintiff's manufactured lumber, upon and from the Defendant's railway;

AND THIS COURT DOTH FURTHER ORDER that the Defendant, its officers, servants and agents and anyone on its behalf be restrained from making a difference in treatment in the receiving, loading, forwarding, unloading or delivery of goods of similar character against the Plaintiff.

It will be observed that the order did nothing more than to order the railway company to perform its statutory duty under ss. 203 and 222 of the *Railway Act*. Promptly on the order being made, the crews of the respondent carried out their duty, removing the cars from the siding, and thereafter facilities were furnished as they had been theretofore. The so-called pickets had disappeared and were not thereafter seen.

In their present form, ss. 203 and 222 of the *Railway Act* first appeared in British Columbia as ss. 201 and 221 of the Revised Statutes of 1911. Similar provisions in a slightly different form first appeared in the *Railway Act* of

Canada as s. 253 of c. 58 of the Statutes of 1903. Both sections appear to have their origin in s. 2 of the *Railway and Canal Traffic Act of 1854,* 17-18 Vict., c. 31 (Imp.).

In *Robinson v. Canadian Northern Railway*[1], damages were awarded against a railway company for depriving a shipper of reasonable and proper facilities under the section of the Act of 1903. The judgment against the railway company was affirmed in this Court[2] and in the Judicial Committee[3]. In that case the facilities of which the Robinson company had been deprived had been found by the Board of Railway Commissioners to be reasonable and proper facilities within the meaning of the section in the Act of 1903.

In the present case, there has been no such finding but the fact that the siding had been built into the appellant's premises and leased to it, and traffic received and delivered for some period of time there, puts it beyond question that the facilities were such as the appellant was entitled to be afforded under ss. 203 and 222 of the *Railway Act,* and no question is raised as to this.

The only other reported case in Canada, based upon the section of the Dominion Act which corresponds to s. 203 of the British Columbia *Railway Act* is *Bright v. C.N.R.*[4]. In that case the railway company refused to undertake the carriage of a shipment of lobster from Pictou, N.S. to Chicago, Ill. or issue a bill of lading, in the absence of a Pure Food Certificate which was required by the Customs Regulations of the United States to permit entry of the shipment into that country. The proposed shipper failed to produce such a certificate and the goods remained in the railway company's warehouse where they were destroyed by fire. The whole point in the case was whether the company held the goods *qua* carrier or *qua* bailee. It was held that its liability was that of a bailee only and, in the absence of evidence of any negligence, the action failed. It was never the case at common law that a common carrier was liable for refusing to undertake a contract of

[1] (1909), 19 Man. R. 300.
[2] (1910), 43 S.C.R. 387, 11 C.R.C. 304.
[3] [1911] A.C. 739, 13 C.R.C. 412, 31 W.L.R. 624.
[4] (1949), 63 C.R.C. 279, 1 D.L.R. 713.

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carriage which was impossible of fulfilment and it was held that no such liability arose under s. 312 of the *Railway Act* upon the above stated facts.

The respondent contends that in some way this decision assists its position. In my opinion it does not touch the question to be decided.

There are no reported cases, other than the present one, in which a claim for refusal to furnish facilities based upon s. 203 has been advanced.

In Leslie's Law of Transport by Railway, 2nd ed., p. 558, dealing with the origin of the legislation in England, it is said that the railway companies, numbers of which had been incorporated by special Acts prior to 1854, had well nigh driven their competitors by road out of business and had obtained a monopoly without corresponding duties being imposed upon them by their statutes of incorporation. Parliament, therefore, by the Act of 1854, laid upon them the general duty of affording reasonable facilities for the receiving, forwarding and delivering of traffic. The decision as to what is reasonable has never since 1873 been left to the Courts of law, though between 1854 and 1873 jurisdiction was given to the Court of Common Pleas. The railway commissioners appointed by the Act of 1873 were succeeded by the Railway and Canal Commission created by the *Railway and Canal Traffic Act, 1888.*

It is to be remembered that cases dealing with the liability of a railway company to safely deliver goods entrusted to it for transport have nothing to do with the matter to be decided here. The respondent in the present case refused to accept merchandise for transport or to furnish the facilities by which the material could be moved. Cases such as *Taylor v. Great Northern Railway Company*[1], where the question was as to the liability of the railway company under an implied contract of carriage for delay in the delivery of goods caused by an obstruction to its line, are, in my opinion, aside from the point.

The respondent relies further on *Hick v. Raymond*[2] and *Sims v. Midland Railway*[3]. Both of these cases deal with the question as to what matters may be considered in

[1] (1866), L.R. 1 C.P. 385. [2] [1893] A.C. 22.
[3] [1913] 1 K.B. 103.

determining what is a reasonable time for delivery of goods by a carrier when the contract of carriage is silent as to the time for such delivery. In *Hick's* case delay was caused in discharging a cargo due to a strike of dock labourers not employed by the defendant. In *Sim's* case, delivery was delayed by a general strike of the railway's employees. In both cases it was held that the fact of such strikes was a matter to be considered in determining what was a reasonable time. But these questions related to liability under contracts of carriage and not to that resulting from the breach of a statutory duty. Neither case touches the question to be decided in determining this case, in my opinion.

We have not been referred to, and I have not discovered any, reported case under the Act of 1854 which deals with a refusal to afford reasonable facilities under circumstances resembling those in the present case.

Both ss. 203 and 222 in the British Columbia Act declare that the company shall, "according to its powers," furnish reasonable and proper facilities. These words appear in s. 2 of the Act of 1854 and have been interpreted in England as referring to the powers granted to the company by statute. *Rishton Local Board v. Lancashire and Yorkshire Railway*[1]. It has been held that the facilities which a company may be required to furnish are confined within the limits of the rights and duties of a company under its private Act. *Tharsis Sulphur Co. v. L. & N.W. Ry.*[2]

It is to misconceive the nature of the statutory duty to say that a company is required merely to make reasonable efforts to furnish the required facilities. That is not the language of either of the sections. The obligation to provide adequate and suitable accommodation is not qualified. In subs. (2) of that section and in subs. (1) of s. 222 the word "reasonable" precedes and qualifies the word "facilities". It is the facilities that are to be afforded that must be reasonable facilities.

The cases under the English Act go no farther than to say that they are such as can reasonably be required of the railway company after making due allowance for the

[1] (1893), 7 Ry. & Can. Tr. Cas. 74 at 80.
[2] (1881), 3 Ry. & Can. Tr. Cas. 455, 458.

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degree in which the company has made provision for the accommodation of the goods traffic of the place, taken as a whole, and must be such as it is within the power of the company to grant. *Newry Navigation Co. v. Great Northern Railway Co.*[1]; Lipsett and Atkinson on Carriage by Railway, p. 56. The question as to the liability of a railway company, where it is prevented from affording such facilities by forces entirely beyond its control, has not been considered in any case in England which I have found.

It is unnecessary to decide questions such as this in the present matter, where nothing of this nature affects the question. The disobedience or negligence of employees has never afforded an employer an answer to a claim for the breach of a statutory duty.

In *Groves v. Wimborne*[2], the action was by a worker in a factory for damages for injuries suffered by him, due to the failure of his employer to comply with a section of the *Factory and Workshop Act, 1891,* which required all dangerous parts of machinery to be securely fenced. It was contended for the defendant that the statute did not give a right of action to the plaintiff but merely subjected the employer to a fine, and a further defence raised was that the injury had resulted from the negligence of a fellow servant and the doctrine of common employment was sought to be invoked. Rigby L.J. said in part (p. 411):

> Where a duty of this kind is cast upon a person, he cannot be heard to say that he has delegated the performance of it to some other person, and that the failure to perform it arose through the negligence of that other person.

In the judgment of A. L. Smith L.J. it was pointed out that there being an unqualified statutory obligation imposed upon the defendant it was no answer to an action for breach of that duty to say that it was caused by his servant's negligence, the defendant being unable to shift his responsibility for the performance of a statutory duty to another person.

That a person upon whom a statutory duty is imposed cannot escape liability by saying that he had employed another competent person to discharge it, is shown by such

[1] (1889), 7 Ry. & Can. Tr. Cas. 176.
[2] [1898] 2 Q.B. 402, 67 L.J. Q.B. 862, 79 L.T. 284.

cases as *Hole v. Sittinghourne and Sheerness Ry. Co.*[1], *per* Pollock C.B.; *Hardaker v. Idle District Council*[2]; *Watkins v. Naval Colliery Co.*[3] and *Lochgelly Iron and Coal Co. v. McMullan*[4].

In the latter case, damages were claimed in respect of the death of a miner, through the failure of his employer to comply with certain requirements of the *Coal Mines Act* designed to insure the safety of such workmen. It was held by the House of Lords that the failure of the employer to comply with the Act disclosed a case of personal negligence of the employer, so that the remedy was not confined to the provisions of the *Workmen's Compensation Act* and Lord Atkin said (p. 8):

> in an action founded on a breach of such a duty the doctrine of common employment has no application, for the duty is imposed upon the employer, and it is irrelevant whether his servants had disregarded his instructions or whether he knew or not of the breach.

Lord Wright said in part (p. 23):

> In such a case as the present the liability is something which goes beyond and is on a different plane from the liability for breach of a duty under the ordinary law apart from the statute, because not only is the duty one which cannot be delegated but, whereas at the ordinary law the standard of duty must be fixed by the verdict of a jury, the statutory duty is conclusively fixed by the statute.

At the time of these events, s. 518 of the *Criminal Code* read:

> Every one is guilty of an indictable offence and liable to two years' imprisonment who, by any act or wilful omission, obstructs or interrupts, or causes to be obstructed or interrupted, the construction, maintenance or free use of any railway or any part thereof, or any matter or thing appertaining thereto or connected therewith.

The so-called pickets were also guilty of a succession of trespasses on the right-of-way of the railway company and liable to prosecution and punishment under the terms of s. 4 of the *Trespass Act,* R.S.B.C. 1948, c. 343.

Section 295 of the *Railway Act* declares that any person acting for or employed by a railway company who does, causes or permits anything to be done, or omits to do any

[1] (1861), 6 H. & N. 488 at 497, 30 L.J. Ex. 81, 3 L.T. 750.
[2] (1896), 1 Q.B. 335, 65 L.J.Q.B. 363, 74 L.T. 69.
[3] [1912] A.C. 693.
[4] [1934] A.C. 1.

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matter or thing required to be done on the part of the company shall be guilty of an offence against the Act. Section 296 declares that any such refusal or failure shall be held to be an offence committed by the company. Penalties may be imposed for such breaches of the statute.

When McNamee and the engineer and fireman approached the switch on the afternoon of October 28, they already had their instructions from the chairman of the unions of which they were members. They had been told by the messages of October 16 and 19 that they were not required to pass and were not to pass through any picket line established by the I.W.A. and Harris' message had told them that:

> Great care should be taken that picket lines should not be crossed and that picket lines are established in the proper place.

These were orders to the men from their union officers. On October 29, Robinson had sent the message to the superintendent at Squamish and which, it may properly be assumed, was communicated to the members of his union that all mills in Quesnel had been "declared hot". This included the appellant's and the other 8 or 9 mills at Quesnel, where there was no strike. All that McNamee and the train crew did was to establish the fact that there were men sent there by the I.W.A. as pickets, and then, in pursuance to their instructions, they retired. There is no evidence that there was any violence at Quesnel at any time.

The messages sent on October 16 and 19 by the chairman of the two unions instructed their members to commit acts which were in breach of the provisions of s. 295 of the *Railway Act*. These instructions were given in reference to the situation existing at Stoner and Red Rock, as there was no strike at Quesnel when they were sent, but they were understood and acted upon as applying to Quesnel. Robinson's message of October 29 went farther.

In view of the long established reputation in Canada of the international unions representing the running trades for fidelity to their contracts and obedience to the law, it must be assumed that these officers thought that the portion of the constitution quoted by Robinson was not contrary to the law of Canada. This may be accounted for by the fact that the headquarters of that particular

union are in Cleveland, Ohio, and, as is shown by the judgment of Van Oosterhout J. in the case of *Meier and Pohlmann Furniture Co. v. Gibbons et al*[1], there is a provision in the *Labour Management Relations Act* of the United States which specifically recognizes the right of an employee to refuse to cross a picket line legally established against an employer other than his own, where his contract of employment so provides. That is not the law of Canada in the case of employees of railways employed in the operation of trains. There is no evidence as to the terms of the employment agreements between the respondent company and these unions which were in effect at the time but, as any agreement by the railway company which would purport to limit in any way its statutory obligations under ss. 203 and 222 of the *Railway* Act would be invalid, Wills Jr. in *Rishton v. Lancashire, supra,* it may safely be assumed that there was none.

I would add further that it should be assumed in favour of Robinson and Harris that they were not aware that the action of the so-called pickets in interfering with railway operations was a criminal offence for which the offenders might be sent to the penitentiary.

I have said that most of the evidence tendered for the respondent in this case was, in my opinion, irrelevant. The situation would have been different had the respondent company, as it might have been advised to do, taken third party proceedigs against McNamee and the crew who refused to do their duty, the I.W.A. pickets, Robinson and Harris who directed and counseled McNamee and the train crew to disregard their obligations to their employers under their contracts of employment and under s. 295 of the *Railway Act,* the unions concerned if they were legal entities and, if they were not, after obtaining an order for representation under Order 16, Rule 9, against those persons who were members of the union at the time of these events, for indemnity against any damages and costs awarded against the respondent, and for any costs incurred

[1] (1956), 233 Fed. 296 at 301.

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by reason of the action. An order of this nature was made against members of a trade union in *Cotter v. Osborne*[1] and in *Tunney v. Orchard*[2].

But there is no such claim. The only matter with which the case is concerned is the occurrences at Quesnel between October 28 and November 5, and the evidence as to what occurred at Stoner and Red Rock merely obscures the issue. The only relevance of the evidence as to threatened violence at these places 60 miles and more distant and at an earlier date was to explain the actions of the union officers in issuing these ill-advised instructions to the members of their unions. To the issues in this action it was completely irrelevant, in my opinion.

I have reviewed all of the evidence, both relevant and irrelevant, in much greater detail than has been done in the reasons delivered in the Court of Appeal, so that the exact nature of the issues to be determined may be made abundantly clear.

The obligations imposed upon railways in British Columbia by ss. 203 and 222 of the provincial *Railway Act* and upon the transcontinental railways by s. 312 of the *Railway Act* of Canada were enacted for the protection of the interests of the general public who require the services of these carriers. They were not enacted for the benefit of the railway companies or their employees. This fact seems to have been ignored in the present matter by the respondent, as well as by the officers of the unions concerned.

All of the shares of the respondent company are owned by the Crown in the right of the Province, and its directors are the nominees of the provincial Government. I would assume that the serious situation which existed at Quesnel was not referred to or considered by the directors. The matter was apparently left in the hands of Egan. One would think, to read the evidence, that there had been a general breakdown in the administration of justice in the Cariboo country in October 1953. Nothing could be further from the truth.

1 (1909), 18 Man. R. 471.
2 (1953), 9 W.W.R. (N.S.) 625, 631.

Thus, we find Egan asking the officers of the I.W.A. for their permission to enable the respondent to discharge its statutory duty to the mills at Stoner and Red Rock and agreeing that, if their pickets would cease to commit the criminal offence defined by s. 518 of the *Criminal Code* "until Tuesday", the railway company would refuse to deliver cars to the mills at those places.

Speaking of this arrangement, Coady J.A. said:

> It is true that having observed these conditions he negotiated with the I.W.A. for the removal of certain cars of loaded lumber from one mill, but this cannot be considered as a surrender but rather the prudent and common sense thing to do in the circumstances.

I am unable, with respect, to agree with this statement. It appears to me to be clear that in making it the learned judge had not considered the effect of s. 518 of the *Criminal Code*.

As I have pointed out, Egan failed to disclose in his evidence the fact that he had agreed with the I.W.A. that, if they would cease to obstruct the railway operations at the mills in Stoner and Red Rock for a short period, the railway would thereafter cease to spot empty cars there. Consequently, full details of that arrangement are lacking. It was Stewart, the superintendent, who gave evidence later in the case, who disclosed that such an agreement had been made.

If it was either an express term of the arrangement or if it was one that should be implied that, in consideration of the union pickets ceasing their unlawful activities for a time, the company would not prosecute them for the criminal offences that they had committed earlier, the agreement was one to compound a felony—in 1953 a criminal offence at common law. *R. v. Burgess*[1]. The offence is now made criminal by s. 121 of the new Code. If there was no such agreement to refrain from prosecuting, either express or implied, at the very least the arrangement constituted a very grave dereliction of duty on the part of the acting general manager.

The question does not affect any issue in the present case and anything said as to it, either in the Court of Appeal or in this Court, is *obiter*. However, lest some

[1] (1885), 16 Q.B.D. 141, 55 L.J.M.C. 97, 53 L.T. 918.

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railway official in the future might think that it is the law of Canada that offences of this nature may be compounded, I have thought well to state what the law is.

The evidence as to what occurred at these places, while otherwise irrelevant, at least serves to demonstrate how completely this senior officer of the railway company misconceived the nature of its statutory obligations. He appears to have thought that the company was helpless when by the messages of October 16 and 19 Robinson and Harris ordered the employees to disobey the lawful orders of the company and to commit breaches of their duties under s. 295 of the *Railway Act*. The orders given to the men were to refuse to cross any picket line established by a nationally recognized union. This was not dependent on their being prevented by violence or threats of violence from doing their duty or whether or not there was a strike at the plant where cars were to be delivered. When Robinson by his message of October 29 "declared hot" all of the mills in Quesnel as well as elsewhere in the area, Egan did nothing, though he knew that no strike existed at 8 or 9 of the plants in Quesnel. We are not really concerned with his actions at Stoner and Red Rock, but he apparently failed to consider the situation at Quesnel apart from the occurrences 60 miles and more distant.

As to the actions taken by the union officers, the effect of the messages of October 16, 19 and 29 was not merely to advise but to order their members to disobey the orders of their employer and to ignore their duty under the *Railway Act*. Harris' message of October 19 not merely gave this order but instructed the men to see that "picket lines are established in their proper places", which in this case was at the switch on the main line of the Pacific Great Eastern Railway Company. This was directing them to take part in actions which were criminal in their nature and contrary to s. 518 of the *Criminal Code*. As the message of October 16 sent by Robinson discloses on its face, a copy of it was sent to the president of the I.W.A. and as the message from Harris of October 19 shows, he intended to advise the I.W.A. what they were doing, thus informing the union, which was responsible for the unlawful acts

committed at Quesnel a few days thereafter, that the railway employees intended to support them in the strike. The three chairmen who signed the message of November 2 sent to Egan, informed the respondent that, even though the injunction granted, presumably to the White company at Stoner, enjoined the picketing of the plant, the men would not discharge their duty. Evidently, there was a change of heart as to this as they did so, promptly, three days later when the *mandamus* was made in this action by Clyne J. As to McNamee, he not only obeyed the instructions of the union officers not to pass what he apparently thought was a picket line, but collaborated with the so-called pickets in seeing that they were in their "proper position" on the right-of-way of the main line of the respondent company. No doubt McNamee thought, in view of his instructions from the union officers, that these were lawful actions, but he was mistaken.

Quesnel is a town of some 1,500 inhabitants and there is a local registry of the Supreme Court of British Columbia at that place where process may be issued. Had an action been commenced by the railway company to restrain the illegal interference with its operations on October 28, an application could readily have been made in Vancouver on that day or, at the latest, the day following, for an *interim* order. The area is policed by the Royal Canadian Mounted Police. The arrest of the pickets upon a charge under s. 518 of the *Criminal Code* would have immediately stopped the interference with the respondent's operations. When the appellant obtained a *mandamus* on November 5, directing the respondent to carry out its statutory duties, the pickets disappeared. There are competent lawyers practising in Quesnel who could have advised the railway officers immediately on October 28 of the unlawful nature of the actions of the I.W.A. pickets. All these facilities were available but the respondents' officers folded their hands and did nothing.

In the reasons for judgment delivered by Coady J.A. the following appears:

> Counsel for the respondent has urged that there was no reasonable effort made in the present case to give the service. He submits that it was the duty of the railway company to have taken proceedings for an injunction against these picketers who were preventing the appellant from

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rendering the service which the statute imposed. I think it can be said with much greater force and much greater cogency that a greater duty fell upon the respondent to obtain such an injunction. It was the respondent's positive right that was being interfered with; the right to ship its products over the appellant's lines. The appellant's right to an injunction may be very doubtful. The picketing was on the spur line on the respondent's property, and the appellant could only apply for an injunction on the ground that these pickets were preventing the appellant from rendering a service which the statute imposed.

With great respect, the statement that the picketing was on the spur line on the respondent's property is directly contrary to the evidence. A photograph, exhibit 1, filed at the hearing, was marked by the witness Zamluk to show the location of the switch where the spur line, part of which was on the appellant's property, jointed the main line of the respondent's railway. Of necessity, this switch was at the point on the main line right-of-way where this junction was made and the spur line ran from this point along the right-of-way on to the appellant's property where the planing mill stood, and continued for a short distance past that mill. McNamee, who was the only witness for the respondent that gave evidence on the point, said that when on October 28 he and the train crew proposed to take the engine into Patchett's property the two pickets were at the switch. In answer to a question by the trial judge, he said that on October 31 they were "at the switch, near the switch" and that on November 2 the pickets were standing near the crossing, right near the switch. On cross-examination, he said that he first recognized the men as being pickets when they walked over to the switch and that always, when with an engine they came from the south towards Quesnel, these pickets would be standing waiting for the train at the switch. The witness Rye said that he saw the pickets crossing over to the railway crossing nearly every day, usually when there was a train or a switching engine going by. Jennison said that on November 4 they were at a point 20 feet from the track south of the switch. Evidence was given that on one occasion the crew of the planing mill went over to speak to these pickets, apparently to protest against their presence, and met them at the railway crossing, There is no evidence to support the statement that the pickets stationed themselves on the appellant's property at any time.

In the passage I have quoted, the learned judge, considering that the pickets had stationed themselves on the respondent's property, said that the appellant's right to an injunction might be doubtful. While this is *obiter* and deals with a situation that did not exist, I respectfully express my dissent from this statement. On the contrary, had the pickets stood on that portion of the spur line situate on the appellant's property and impeded the operation of the engine, the railway company's right to an injunction would be, in my opinion, unquestionable.

It has been said in argument before us that, for some reason, it was for the appellant to take steps to enjoin the interference with its operations. It was, however, upon the respondent that the statutory obligation lay and it was upon its property that the so-called pickets trespassed and impeded or prevented the operation of the engine. It is the respondent that is charged with breaches of its statutory duty and to say that the right of action of the appellant is affected by its failure for a week to commence an action to compel the respondent to discharge its duty or to prosecute the pickets for the trespass on the right-of-way or under s. 518 of the *Criminal Code* is the equivalent of saying that the action of *Groves against Lord Wimborne* should have failed because the former had not brought an action to compel his employer to install the guard required by the provisions of the *Factory Act,* and that, for the like reason, the action of *McMullan against the Lochgelly Iron and Coal Company* should have failed because the employee had not taken steps to compel the employer to comply with the safety provisions of the *Mines Act.* If, as apparently was thought in the Court below, the pickets had been trespasing on the Patchett property, the argument that it was for the appellant to restrain that trespass might have had some validity, apart from the criminal aspect of the matter. But when the facts are proven to be as above stated, that these unlawful acts took place upon the right-of-way of the main line of the railway, the contention is not arguable, in my opinion. It, at least, has the distinction of being unique as no such argument has ever been advanced in any reported case in Canada or England that I have been able to discover.

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Upon this evidence the learned trial judge made the following findings of fact:

> The defendant takes the position that it instructed its crew to spot empties at the plant of the plaintiff and pull loaded cars therefrom but that its crew refused to obey instructions and that it anticipated that if it dismissed its crew for disobedience it would have had to dismiss the replacing crew for similar disobedience, and that, in the end, it would have had a general strike of the Running Brotherhoods on its hands. The clear fact is that it never put the matter to the test. The disobedient employees were not dismissed. The evidence does not warrant the conclusion that the railway crew were in real fear or that anything was done by the crew or any one on behalf of the defendant to dissuade the I.W.A. from doing that which it had no right to do. There was no general strike by the I.W.A. They did not picket all the plants in the relevant area. The Court is not concerned with evidence of violence or threatened violence at plants fifty or sixty miles to the North.
>
> In my view the evidence does not justify the conclusion that the Quesnel railway crew was motivated by fear of violence at the plant of the plaintiff on the part of the I.W.A. pickets nor does the evidence justify the conclusion that the Chairman of the Running Brotherhoods were in fear of violence to members of the railway crew at Quesnel. The real truth of the matter is that the railway men wanted to give support to another "nationally recognised organization", see Ex. 2. In other words, the Railway Brotherhoods went on a sympathetic strike, that is a local or partial one.
>
> The defendant did not take any steps to obtain an injunction to restrain intimidation or violence of which there was some at plants some sixty miles to the North which might have interfered with the fulfilment by the defendant of its statutory duties, nor did the mill operators. The attitude of the defendant and of the operators was a lamb-like one, except for the plaintiff who did take proceedings. The fact that the law was being broken was seemingly of no importance to the defendant.
>
> Robinson's letter of October 16 (Ex. 2), after quoting Article 16, Section 2, clause F of the Constitution of the Brotherhood of Locomotive Firemen and Enginemen which does not purport to be limited in its operation to cases where firemen are in fear of violence, contains the clear cut declaration that the I.W.A. is a nationally recognized organization and that their pickets will be respected. A copy of that letter was sent to the president of the I.W.A. That very fact is significant. In effect it was an intimation to the I.W.A. that in respect of the mills the firemen would strike in sympathy with the I.W.A.
>
> Malone was inviting the trainmen to desist from servicing the mills despite the orders of their employer on the assumption that there would be a breach of the law. On the same assumption Harris instructed that picket lines should not be crossed if pickets were in the "proper place". The phrase "proper place" was said to mean in a place sufficiently close to enable recognition of them as pickets. He recognizes the duty of trainmen to move loaded cars which have been billed by the railway company and warns that it is up, to the strikers to prevent the loading of the cars. Nothing could be clearer than that it was no real fear of

violence that was motivating the railway brotherhoods. The real motive was to give active cooperation to the I.W.A. in the conduct of its strike, "Pickets or no picket" (vide Exs. 4 & 31A).

The defendant employer must accept responsibility for the conduct of its employees. It was not for the defendant to hoist the white flag and surrender at the behest of its employees. As pointed out above it never made any pretence of testing out the situation. It confined itself to issuing instructions which the railwaymen simply ignored.

The defendant did not according to its powers and within a reasonable time spot empties and pull loaded cars of the plaintiff. It evaded giving bills of lading within a reasonable time on loaded cars. Furthermore, in spotting empties and pulling loaded cars of Western Plywood Co. Ltd. while it failed to do so for the plaintiff it was guilty of discriminatory conduct. Althogether, it failed to discharge its clear statutory duties as set forth in the sections of the Railway Act above quoted.

Davey J.A., quoting from the reasons delivered by the trial judge finding that it was not fear of violence that induced the Quesnel railway crew to disobey their orders and that the real truth of the matter was that the railway men wanted to give support to another nationally recognized organization, and further, that "nothing could be clearer than that it was not fear of violence that was motivating the railway brotherhoods", was of the opinion that these findings should not be disturbed.

Neither of the learned judges who considered that the appeal from the judgment at the trial should be allowed referred to the orders given by Robinson and Harris to the members of their unions or to the fact that the actions of the so-called pickets were criminal in their nature and punishable under s. 518 of the *Criminal Code*. Coady J.A., who considered that these pickets had been conducting their operations on the appellant's property, was of the opinion that, if there was a duty to take action to enjoin the activities of the pickets, that duty lay upon the present appellant, and said that the railway company's right to an injunction might be very doubtful. But this opinion was expressed on the footing that, contrary to the evidence, the pickets were not actively trespassing on the main line of the railway at the switch and at the crossing at the Johnson Road, as proven by the evidence of McNamee and Zamluck. Sheppard J.A., who did not deal with the evidence in detail, said:

On the facts the plaintiff has not established that the defendant railway has failed to act reasonably or within a reasonable time under the circumstances.

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When all of the facts proven in evidence are, as I have attempted to do, stated in detail, they appear to me to demonstrate the accuracy of the findings of fact made by the learned trial judge. Indeed, when the evidence is analyzed, the defence is reduced to this: that because McNamee said that he was frightened in consequence of a remark made to him upon the streets of Quesnel by an unindentified person who subsequently appeared as one of those contravening s. 518 of the *Criminal Code* on the morning of October 29, and remained presumably in a state of fear, the respondent was excused from the performance of its statutory duty. As pointed out by Sankey J. in *Hackney Borough Council v. Doré*[1], fear is a term relative to the courage or embarrassment of the person who experiences it. We are not told what caused the engineer and fireman to retire from the appellant's premises on the morning of October 28 or, if they were afraid, what they were afraid of. Presumably McNamee, who was the yard foreman, instructed them to take the engine away. The learned trial judge has found that it was not fear but the orders from the respective chairman of the unions, including the message of October 29 sent by Robinson, that was the reason for the refusal of the train crew to pass this so-called picket line. Far from finding anything in this record to raise any doubt as to the accuracy of that conclusion, it is completely supported by the evidence. Once McNamee ascertained that the men were I.W.A. pickets, he at once withdrew and, when the pickets were not in their proper position to impede the operation of the railway, he chided them for their failure to be there.

It is well, in my opinion, that this case should have been brought before this Court so that the law, as it affects railway companies, their employees and trade unions of which the employees are members, in circumstances such as these should be declared. It is not the law of British Columbia, and it never has been, that the employees of railway companies may decide for themselves whether and under what circumstances they will discharge their obligations under s. 295 of the *Railway Act* and under their contracts of employment. Trade unions in which

[1] [1922] 1 K.B. 431 at 437, 91 L.J.K.B. 109, 126 L.T. 375.

such employees are organized may not decide that their members will not move railway equipment necessary for the fulfilment by their employers of the obligation to furnish reasonable facilities through picket lines established around premises where a strike is in progress. The statutory duty rests upon the company to provide such facilities and upon the employees to render the services necessary to comply with that duty. The right of the public to insist upon such facilities is not to be limited or taken away either by any action of the employees or by the lack of resolution of the officers directing the railway companies' operations. The obligation is imposed upon both by the legislature of the province and it is only that body that can change the law.

It is said that, if the respondent had insisted upon the men doing their duty, there would have been a strike called by the unions, but there is nothing in the record to support this. There was no threat of a strike. Had there been such a threat, it would not have afforded any answer to the appellant's claim. It was held in *Hackney Borough Council v. Doré, supra,* that the threat of a strike or the apprehension of a strike did not excuse the council for a failure to supply electricity where the order imposing liability excused performance when prevented by *force majeure.* Is it to be said that such a threat—if there had been one—or such apprehension—if such existed—excused the failure to discharge a statutory duty? The conduct of the men in this case was of the same character as that found to be "wilful misconduct" within the meaning of that expression in the Standard Terms and Conditions of Carriage 1927 in *Young v. British Transport Commission*[1]. Since when has the wilful misconduct of employees in disobeying lawful orders afforded an excuse to an employer for failure to discharge a statutory duty? If it does, Lord Atkins erred in his statement of the law in the *Lochgelly Iron* case which I have quoted.

Even were the obligation imposed upon the railway merely to make reasonable efforts to afford the facilities—which is not the language of the statute—the evidence discloses a complete failure to make such efforts, in my opinion.

[1] [1955] 2 Q.B. 177, 2 All E.R. 98.

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I would allow this appeal with costs in this Court and in the Court of Appeal and direct that judgment be entered against the respondent for damages in the amount suggested by Davey J.A.

CARTWRIGHT J. (*dissenting*):—I agree with the reasons and conclusion of my brother Locke and have little to add.

If, contrary to my view, the duty of the respondent under the relevant sections of the *Railway Act* of British Columbia were only to make reasonable efforts to furnish the facilities required by the appellant and consequently the test of liability were, as put by Coady J.A., "whether or not every reasonable effort was made to supply the service in the circumstances", I would none the less, for the reasons given by my brother Locke and those given by Davey J.A., reject the respondent's defence, on the ground that the evidence shows that it did not make reasonable efforts in the circumstances.

In this regard, I wish to stress particularly the failure of the respondent's responsible officers to make it plain to Robinson that in issuing the circulars of October 16 and October 19, quoted in the reasons of my brother Locke, he was counselling the members of his union to commit, and was himself committing, breaches of s. 295 of the *Railway Act* of British Columbia and of s. 518 of the *Criminal Code*. There is, as is pointed out by Lord Atkin in *Evans v. Bartlam*[1], no presumption that everyone knows the law, and the evidence of Robinson is that he was not aware that the instructions he had given counselled a breach of these sections. The Court cannot presume that Robinson would have persisted in the course he followed if he had realized its illegality. I think it probable that had his attention been directed to the statutory provisions mentioned above he would have consulted the legal advisers of the union and have desisted from directing breaches of the law. It is conceivable that such an attempt to persuade Robinson to observe the law would have been without result; but I do not think that the respondent can be heard to say that it "made every reasonable effort" when its responsible officers did not even make the attempt suggested.

[1] [1937] A.C. 473 at 479.

The argument that the appellant cannot succeed because it had it in its power to remove the obstruction to the giving of the service and failed to take appropriate action, should, in my opinion, be rejected for the reasons given by my brother Locke and particularly on the ground that such obstruction as did exist was neither in fact nor in law a sufficient cause for the respondent's failure to "spot" the cars as requested, even on the assumption that its duty was limited to making every reasonable effort to do so. Indeed the argument comes close to being reduced to an absurdity when it is observed that the only action which was eventually taken by the appellant, and which proved immediately effective, was to apply to the Court for an order requiring the respondent to perform its statutory duty. Other considerations might well arise if in fact there had existed an obstruction to the giving of service, insurmountable so long as it continued, which it was in the power of either or both of the parties to remove.

I would dispose of the appeal as proposed by my brother Locke.

ABBOTT J.:—The facts and the relevant statutory provisions are set out in the reasons to be delivered by other members of the Court and I need not repeat them.

I am in agreement with the views expressed by Coady and Sheppard JJ.A. in the Court below[1] and by my brother Rand that the statutory duty imposed upon the respondent is not an absolute duty but is only a relative one to provide service so far as it is reasonably possible to do so.

The evidence makes it abundantly clear that in the autumn of 1953 a very disturbed labour relations situation existed in central British Columbia affecting the lumber operators situated on the line of the respondent railway company running south from Prince George to Quesnel. Many concerns in that area were strike bound—although some were not affected—and it is also clear that the union concerned, the I.W.A., and its sympathizers were engaging in illegal picketing, intimidation and other objectionable and illegal practices.

[1] (1958), 23 W.W.R. 147, 11 D.L.R. (2d) 52, 76 C.R.T.C. 27.

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The officers of the railway company were aware of the situation, had been keeping in constant touch with developments and had also been in contact with the officers of the railway brotherhoods of which its employees were members.

The picketing operations at the appellant's plant unquestionably interfered with the discharge by the respondent of its statutory duty to provide cars to appellant for the transportation of its products and it may be that the circumstances were such that the respondent railway company, as well as the appellant, would have been entitled to invoke the assistance of the law to prevent these illegal practices. In my opinion, however, the respondent was under no obligation to ascertain whether or not picketing against a particular firm was or was not illegal. When an industrial plant is picketed in an illegal manner, I agree with the view expressed by Coady J.A. and by my brother Rand that the primary responsibility for taking such legal action as may be necessary to have the pickets removed rests upon the owners of the plant whose operations are those primarily affected.

The evidence makes it clear to me that during the seven or eight days that the appellant's plant was picketed, the officers of the railway company endeavoured by methods of persuasion to overcome the difficulties and to avoid resort to legal proceedings. In my opinion they were acting reasonably in so doing. Had appellant felt that a comparatively short delay in effecting the shipment of its products was injurious to its interests, it was on the spot, in possession of all the relevant facts and, as I have said, had a primary responsibility to take such legal proceedings as might be necessary to enforce its rights.

I would dismiss the appeal with costs throughout.

JUDSON J.:—I agree with the conclusions of my brothers Rand and Abbott that this appeal should be dismissed. While it is obvious that there was interference with the switching operations into the appellant's plant by the mere presence of the pickets at or around the switch, coupled with union instructions to the railway employees not to pass them, nevertheless it was the appellant's plant that was the primary object of the attention of the pickets and,

in the circumstances, I think that the primary responsibility for the removal of the obstruction must rest with the appellant. It is also my opinion that the railway's statutory obligation under s. 203(1)(*c*) is not an absolute but a relative one, as defined in the reasons of my brother Rand.

I would dismiss the appeal with costs.

Appeal dismissed with costs, Locke *and* Cartwright JJ. *dissenting.*

Solicitor for the plaintiff, appellant: A. W. Johnson, Vancouver.

Solicitors for the defendant, respondent: Clark, Wilson & Co., Vancouver.