THE NORTH-WEST LINE ELEVATORS ASSOCIATION AND UNITED GRAIN GROWERS, LIMITED .....APPELLANTS;

AND

CANADIAN PACIFIC RAILWAY COMPANY, CANADIAN NATIONAL RAILWAYS AND THE CANADIAN CAR DEMURRAGE BUREAU .....RESPONDENTS.

1958
*Nov 13
1959
Jan. 27

ON APPEAL FROM THE BOARD OF TRANSPORT COMMISSIONERS FOR CANADA

Railways—Demurrage charges—Whether Board of Transport Commissioners has power to refuse to allow demurrage charges—Whether charges contravene s. 328(6) of the Railway Act, R.S.C. 1952, c. 234.

The Board of Transport Commissioners having approved with modifications a tariff of demurrage charges on bulk grain consigned for unloading at public and semi-public terminal elevators at Fort William,

*PRESENT: Taschereau, Rand, Locke, Cartwright, Fauteux, Martland and Judson JJ.

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Port Arthur, Churchill and Pacific Coast ports, the appellants obtained leave to appeal to this Court on the following questions of law: (1) did the Board err in law in ruling that it had no power to refuse to allow any demurrage to be charged in respect of cars of grain? and (2) did the order of the Board contravene s. 328(6) of the *Railway Act*?

Held: The appeal should be dismissed; the Board had no power to refuse to allow any demurrage to be charged, and its order was not in conflict with s. 328(6) of the *Railway Act*.

APPEAL from a judgment of the Board of Transport Commissioners[1] approving a tariff of demurrage charges. Appeal dismissed.

H. Hansard, Q.C., for North-West Line Elevators Association, appellant.

G. R. Hunter, Q.C., for United Grain Growers, Limited, appellant.

H. A. V. Green, Q.C., and *K. D. M. Spence, Q.C.,* for Canadian Pacific Railway Company, respondent.

J. W. G. Macdougall, Q.C., for Canadian National Railways, respondent.

The judgment of the Court was delivered by

RAND J.:—This is an appeal on questions of law from a judgment of the Board of Transport Commissioners[1] by which the board approved with modification a tariff of demurrage charges on bulk grain consigned for unloading at public and semi-public terminal elevators at Fort William, Port Arthur, Churchill and Pacific coast ports.

The questions are:

1. Did the Board err in law in ruling that it had no power to refuse to allow any demurrage to be charged in respect of cars of grain?
2. Does the order of the Board contravene s. 328(6) of the Railway Act?

The considerations presented to us by Mr. Hansard and Mr. Hunter were in substance these: that the board was wrong in holding that where, as here, because of the absence of elevator space, it was physically impossible to unload the grain from the cars, it was without authority to disallow *in toto* the imposition of the demurrage charges; that it was wrong in holding that it could not disallow a tariff without substituting another for it; and finally that the charges violated s. 328(6) of the *Railway Act* which

[1] 77 C.R.T.C. 181.

continues the rates of grain and flour covered by the provisions of what is known as the Crow's Nest Pass Agreement of 1897.

The first two of these contentions are simply different aspects of the same issue and will be dealt with together. The primary function of the board is regulation. The Act assumes the continuing operations of dominion railways as in substance they were in 1903 both at common law and under existing statute law and vests in the board jurisdiction as an administrative body as well as a court of record to make such orders and declarations and to give such directions as it may deem proper to compelling observance by the railways subject to its control of the laws and regulations applicable to their construction, maintenance and operation. It is not a managing board nor does it normally initiate action. Reasonableness in all the circumstances in the public services is its guiding principle. Every such service is entitled to compensation and no one has as yet suggested the contrary. The different classes of rates and tolls with all their sub-classifications have long been differentiated in terms of those services, and they are indicated in the definition in s. 2(32):

"toll," or "rate," when used with reference to a railway, means any toll, rate, charge or allowance charged or made either by the company, or upon or in respect of a railway owned or operated by the company, or by any person on behalf or under authority or consent of the company, in connection with the carriage and transportation of passengers, or the carriage, shipment, transportation, care, handling or delivery of goods, or for any service incidental to the business of a carrier; and includes any toll, rate, charge or allowance so charged or made in connection with rolling stock, or the use thereof, or any instrumentality or facility of carriage, shipment or transportation, irrespective of ownership or of any contract, expressed or implied, with respect to the use thereof; and includes also any toll, rate, charge or allowance so charged or made for furnishing passengers with beds or berths upon sleeping cars, or for the collection, receipt, loading, unloading, stopping over, elevation, ventilation, refrigerating, icing, heating, switching, ferriage, cartage, storage, care, handling or delivery of, or in respect of, goods transported, or in transit, or to be transported; and includes also any toll, rate, charge or allowance so charged or made for the warehousing of goods, wharfage or demurrage, or the like, or so charged or made in connection with any one or more of the above-mentioned objects, separately or conjointly;

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Prior to c. 61 of the Statutes of Canada, 1908, demurrage charges were not expressly mentioned in that definition which as s. 2(30), R.S.C. 1906, c. 37, read:

> (30) "toll" or "rate" means and includes any toll, rate or charge made for the carriage of any traffic, or for the collection, loading, unloading or delivery of goods, or for warehousing or wharfage, or other services incidental to the business of a carrier;

But within the concluding words they were undoubtedly embraced. That they had been imposed long before that year is unquestionable. They were recognized as being in force by the board in its first order on car service charges made on January 25, 1906. This order, cancelling existing tariffs, prescribe the free time allowances for loading and unloading freight and fixed the charges for delay. It is of interest that by Rule 2(c) only 24 hours' free time was allowed for loading grain in those portions of Canada to which the *Manitoba Grain Act,* (1900) applied, that is, the province of Ontario lying west of and including the then district of Port Arthur, the province of Manitoba and the North-West Territories. It is unnecessary to trace their original use on railways in North America, but the principle of exaction for delay in loading and unloading in water transportation has been known and applied for centuries: Carver, 10th ed., Carriage of Goods by Sea, p. 901. Its appropriateness to railway carriage can be assumed to have been recognized and acted upon both in England and in North America certainly from the middle of the nineteenth century.

Delay in loading or unloading cars of freight violates the implied understanding when equipment is placed at the disposal of shipper or consignee that no more than reasonable time shall be taken for either purpose. The profitable and efficient use of equipment is an important item of the costs reflected in the freight rates charged and is an essential in good railway management. That a railway is to supply expensive equipment in order to furnish, gratis, a storage means for shippers and consignees, reveals, on its mere statement, its own absurdity.

Under the Act the board has no jurisdiction in effect to compel a railway to give a service or suffer an economic detriment of such a nature without appropriate compensation; and although that tribunal may cancel tariffs of rates

and tolls, it does so only on the ground that they are unreasonable, either too high or too low, or are unjustly discriminatory; and if it does not substitute rates of its own the carrier is entitled to submit other rates and have them passed upon until the unreasonableness or unjust discrimination is found to be eliminated.

The Chief Commissioner was therefore right in assuming that the board had no such power and the suggestion that the board did not consider the charges shown by the tariff in question to be just and reasonable is unwarranted.

It is urged that it was wrong to hold the consignee liable who cannot, because of lack of physical capacity in the elevators, take delivery. The demurrage charge attaches against the person responsible for the delay; if the consignee is in the position described, all he need do is to reject the shipment or forbid the shipper in advance to consign to him. If the shipper is to blame, the question between him and the consignee is not one in which the railway is particularly interested. The mere fact that for years the railways have not collected demurrage on the grain traffic is irrelevant; so long as there was no unjust discrimination and no suggestion that the omission produced an unreasonable factor in the total freight rate body, the action by the railways was unassailable. But that detracted not a whit from their right, in appropriate circumstances, to impose the charges and enforce their collection.

Then it is contended that the allowance is in conflict with s. 328(6). The *Crow's Nest Pass Act,* c. 5, Statutes of Canada, 1897, provides a subsidy to the Canadian Pacific Railway on certain conditions. One was that an agreement between the Dominion government and the company should be entered into containing, among others, two covenants: first, "that a reduction shall be made in the general rates and tolls of the Company as now charged" upon certain classes of merchanise carried westbound from and including Fort William to all points west on the company's main line or to those points from any railway in Canada owned or operated on the account of the company and whether shipped by all rail or by lake and rail. These classes included fruits, reduced 33⅓ per cent., coal oil, 20 per cent., cordage and binder twine, agricultural implements, iron of all kinds,

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wire, window glass, paper for building or roofing, felt for roofing, paints, oils, livestock, wooden ware and household furniture, the reduction on which was 10 per cent. The second covenant was that on eastbound grain and flour,

> . . . there shall be a reduction in the Company's present rates and tolls on grain and flour from all points on its main line, branches, or connections, west of Fort William to Fort William and Port Arthur and all points east, of three cents per one hundred pounds, to take effect in the following manner:— . . .; and that no higher rates than such reduced rates or tolls shall be charged after the dates mentioned on such merchandise from the points aforesaid;

The purpose behind these two provisions is obvious; it was to extend to the army of settlers then beginning to people the west under a policy of broad dimensions a measure of assistance in reducing the transportation costs of commodities in the nature of necessities to the settlers and of what was expected to be their primary production.

An examination of this language shows unequivocally that what were in mind were the rates payable for transportation strictly, "general rates and tolls", rates which were expressed in terms of cents "per 100 pounds". These were the normal charges for the carriage of commodities between points. In the ordinary and uncomplicated case no other charges arise. They have nothing to do with incidental charges to meet circumstances not normal for which special terms are provided; they refer to charges payable when the basic service is furnished along with the correlative observance of the reasonable requirements laid upon the shippers and consignees. They do not include demurrage charges; these are not related to the weight of the commodity; they are concerned with the unreasonable detention of railway equipment.

The language of s. 328(6) that "rates on grain and flour shall be governed by the provisions of the Crow's Nest Pass Act" uses the words in the same sense, the anomalies resulting from any other interpretation of which are too obvious to be considered. The present definition of "toll" or "rate" in the *Railway Act* appears to be comprehensive enough to extend to charges for every service or accommodation that can be furnished in respect of freight and passenger carriage. But in particular applications the scope of either word will depend upon the sense indicated by the

context. This is the case whenever we are dealing with broad and general definitions enumerative of a number of differing applications of the same word or words.

I would, therefore, answer the questions as follows:

Question No. 1:

Construing the question to be limited to the power of banning the imposition by the railways of any demurrage whatever, regardless of reasonableness or any other considerations, my answer is, No;

Question No. 2:

No.

I would, therefore, dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for North-West Line Elevators Association, appellant: Common, Howard, Cate, Ogilvy, Bishop, Cope, Porteous & Hansard, Montreal.

Solicitors for United Grain Growers, Limited, appellant: Pitblado, Hoskin, Bennest, Drummond-Hay, Pitblado, McEwen, Alsaker, Hunter & Sweatman, Winnipeg.

Solicitor for Canadian Pacific Railway Company and The Canadian Car Demurrage Bureau, respondent: K. D. M. Spence, Montreal.

Solicitor for Canadian National Railways and The Canadian Car Demurrage Bureau, respondents: J.W.G. Macdougall, Moncton.