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*Feb. 6.
*Oct. 6.

THE GOVERNMENT OF THE PROVINCE OF ALBERTA..... } APPELLANT;

AND

THE CANADIAN NATIONAL RAILWAYS AND THE CANADIAN PACIFIC RAILWAY COMPANY.. } RESPONDENTS.

ON APPEAL FROM THE BOARD OF RAILWAY COMMISSIONERS FOR CANADA

Railways—Rates on grain and flour—Order of Board of Railway Commissioners for Canada, No. 448, of August 26, 1927—Question whether rates complied with Order—Board's right to allow the rates complained of—Railway Act, 1919 (as amended, 1925, c. 52), s. 325, subs. 5, 6.

The Board of Railway Commissioners for Canada, by its General Order No. 448, dated August 26, 1927, ordered (*inter alia*) "that the rates on grain and flour from all points on Canadian Pacific branch lines west of Fort William to Fort William * * * be equalized to the present Canadian Pacific main line basis of rates of equivalent mileage groupings (the rates governed by the Crow's Nest Pass agreement not to be exceeded)" and "that all other railway companies adjust their rates" on grain and flour to the Canadian Pacific rates. The present appeal was by the Government of Alberta from the Board's acceptance, as being in compliance with its order, of the rates published by the Canadian National Rys.; the appellant asserting that certain of those rates contravened the order, and that, in any case, under s. 325 of the *Railway Act,* they could not be sanctioned or charged.

Held (1): What was required of the Canadian National Rys. under Order 448 was to adjust its rates in such a way that in territory competitive as between it and the Canadian Pacific Ry. Co. grain shippers in such territory would be placed on as equal a rate basis as possible, all things considered; and the Canadian National Rys., in adopting the mileage grouping in effect from the nearest point, parallel or contiguous, main or branch line station, on the Canadian Pacific, had complied with the order.

(2): The Board's order (construed as above) and the Board's allowance of the rates in question (fixed on above basis) were within its powers. As rightly interpreted by the Board, the effect of subs. 5 and 6 of s. 325 of the *Railway Act, 1919* (as amended, 1925, c. 52) was, not that in applying the Crow's Nest Pass agreement rates on grain and flour to all railways in the territory the proper standard was of a per mileage basis (the Crow's Nest Pass agreement, and c. 5 of 1897, pursuant to which it was made, discussed and explained in this connection), but, in the given territory, to establish a relationship between the rates on the Canadian Pacific governed by the Crow's Nest Pass Act and agreement and the rates on other railways, which would put on an equal footing all persons and localities situated under substantially

*PRESENT:—Duff, Newcombe, Rinfret, Lamont and Cannon JJ.

similar circumstances; in attempting to secure a fair and reasonable rate structure, account should be taken of the equivalent or competitive points as between the railways.

APPEAL by the Government of the Province of Alberta from the Order of the Board of Railway Commissioners for Canada, No. 45846, dated November 25, 1930, refusing the application of the appellant for an order directing that the Canadian National Railways should forthwith publish, file, and put into effect tariffs on grain and flour from certain points on its railway system to Fort William, Port Arthur, Westport and Armstrong, Ontario, and from certain points on its railway system to Vancouver, British Columbia, for export, at certain rates set out in statements annexed to the application.

The appellant had submitted in its application to the Board, that the rates between the said points, published by the Canadian National Railways, contravened the Board's General Order No. 448, dated August 26, 1927.

The Board granted leave of appeal to the Supreme Court of Canada upon the following questions of law, namely:

"(1) Whether as a matter of law the Canadian National Railways have any right to charge the rates in the said application complained of?

"(2) Whether as a matter of law the Board has any right to allow the Canadian National Railways to charge the rates in the application complained of?

"(3) Whether as a matter of law the rates complained of in the said application do not contravene the provisions of paragraphs 1 and 2 of General Order No. 448, dated 26th August, 1927?"

The said Order No. 448, and other matters leading to the present appeal or bearing on the questions now in issue, are sufficiently set out in the judgments now reported.

As pointed out on behalf of the appellant, the questions of law Nos. 1 and 2 raised the matter of the right of the Railway Company, having regard to the provisions of s. 325 of the *Railway Act, 1919* (as amended, 1925, c. 52), to charge the rates complained of, and the jurisdiction of the Board to allow the Company to do so.

Leave was granted to the Canadian Pacific Railway Company to intervene as a respondent.

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By the judgment of this Court, now reported, questions 1 and 2 were answered in the affirmative, and question 3 in the negative, and the appeal was dismissed with costs.

S. B. Woods, K.C., for the Government of the Province of Alberta.

W. N. Tilley, K.C., for the Canadian Pacific Railway Company and the Canadian National Railways (with him, *E. P. Flintoft, K.C.*, for the Canadian Pacific Railway Company, and *Alistair Fraser, K.C.*, for the Canadian National Railways).

DUFF, J.—I concur with the conclusions of Mr. Justice Rinfret.

The appeal involves the construction of subsections 5 and 6 of section 325 of the *Railway Act*. The subsections are as follows:

5. Notwithstanding the provisions of section three of this Act the powers given to the Board under this Act to fix, determine and enforce just and reasonable rates, and to change and alter rates as changing conditions or cost of transportation may from time to time require, shall not be limited or in any manner affected by the provisions of any Act of the Parliament of Canada, or by any agreement made or entered into pursuant thereto, whether general in application or special and relating only to any specific railway or railways, and the Board shall not excuse any charge of unjust discrimination, whether practised against shippers, consignees, or localities, or of undue or unreasonable preference, on the ground that such discrimination or preference is justified or required by any agreement made or entered into by the company: Provided that, notwithstanding anything in this subsection contained, rates on grain and flour shall, on and from the twenty-seventh day of June, one thousand nine hundred and twenty-five, be governed by the provisions of the agreement made pursuant to chapter five of the Statutes of Canada, 1897, but such rates shall apply to all such traffic moving from all points on all lines of railway west of Fort William to Fort William or Port Arthur over all lines now or hereafter constructed by any company subject to the jurisdiction of Parliament.

6. The Board shall not excuse any charge of unjust discrimination, whether practised against shippers, consignees, or localities or of undue or unreasonable preference, respecting rates on grain and flour, governed by the provisions of chapter five of the Statutes of Canada, 1897, and by the agreement made or entered into pursuant thereto within the territory in the immediately preceding subsection referred to, on the ground that such discrimination or preference is justified or required by the said Act or by the agreement made or entered into pursuant thereto.

The agreement referred to in subsection 5, which is to govern the rates mentioned, affected only rates in force at its date. It did not apply to tariffs of rates thereafter made payable for transport from stations not at that date

in existence. Moreover, it applied only to the tariffs of the Canadian Pacific Railway. The effect of the word "govern" is, I think, to require that the tariffs prescribed by the agreement are to be the basis for determining the rates for the carriage of grain and flour throughout the territory described; but subsection 6 deals with the territory as a whole (west of Fort William), and makes it clear that in the determination of rates, the provisions of the statute as to unjust discrimination and undue and unreasonable preference are to guide the Board in deciding any question as to such rates, and it is, I think, impossible to hold that the function of the Board is limited to mere arithmetical calculation. The intention is, I think, that subject to and consistently with the fundamental conditions just stated, the Board is to act conformably with the general principles controlling the constitution of tariffs of rates.

Some questions as to the construction of these subsections need not be discussed; we need not, for example, consider whether under them the Board has authority to eliminate a rate actually fixed by the statute and agreement of 1897, upon the ground that, *vis-à-vis* other rates actually fixed thereby, it is unjustly discriminating. The railway companies deny this power, which the Board has held is vested in it; but the point is not material for the purposes of this appeal, and I express no opinion upon it.

The Board's Order (No. 448) is in these terms:

1. That the rates on grain and flour from all points on Canadian Pacific branch lines west of Fort William to Fort William, Port Arthur and Westport be equalized to the present Canadian Pacific main line basis of rates of equivalent mileage groupings (the rates governed by the Crow's Nest Pass agreement not to be exceeded): that the Canadian Pacific Railway Company publish rates in accordance with the above direction, and that all other railway companies adjust their rates on grain and flour to Fort William, Port Arthur, Westport and Armstrong to the rates so put into effect by the Canadian Pacific Railway Company, such changes to become effective on the twelfth day of September, 1927.

2. That the rates on grain and flour from prairie points to Vancouver and Prince Rupert for export shall be on the same basis as the rates to Fort William, but in computing such rates, the distance from Calgary to Vancouver via the Canadian Pacific Railway shall be assumed to be the same as from Edmonton to Vancouver via the Canadian National Railway, namely, 766 miles.

I do not understand that the appellant—the Province of Alberta—disputes the jurisdiction of the Board to pronounce this order. The province's contention is that, properly understood, the order is a valid one; but that,

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construed and applied as the Board has construed and applied it, it would not be competent in view of the enactments of section 325.

Mr. Woods directed the weight of his argument in support of the proposition that the tariffs in dispute are not in compliance with the order. On that topic, I expressed my views during the argument, at the close of which, I think, we were all agreed that in so far forth as the question relating to it is a question of law, it must be answered in the negative. The reasons for this conclusion are now clearly and fully expressed in the judgment of my brother Rinfret.

By question 2, we are asked to direct the Board upon the point, whether, in contemplation of law, the tariffs attacked could be sanctioned by the Board in exercise of its powers under Section 325. I am not sure that I have correctly penetrated the sense of the Province's contention. As I interpret it, the view advanced is that in applying the standard laid down by the Board, which is the standard for which the Province has, from the beginning, contended, mileage is the exclusive determining factor. That standard is the system of mileage group rates for the Canadian Pacific Railway's main line in force at the date of Order No. 448. In applying that standard to the Canadian National Railway, the Board is to observe the directions of the statute. The rates mentioned are to "govern" the Canadian National Railway rates, subject to the rule in subsection 6, that no otherwise unjust discrimination or undue or unreasonable preference is to be permitted upon the plea that such discrimination or preference is required by the statute and agreement of 1897.

The language of the proviso of subsection 5 is very general. It is, of course, contemplated that it shall be worked out (under the condition prescribed by subsection 6) by the Board. And, while I agree that subsection 6 applies to the Canadian National Railway—I think the language of the subsection is in that respect imperative—I think we are not compelled by the general words of subsection 5 to infer an intention that the Board shall, in working out that subsection, obliterate from their minds the fact that there are two systems of railways which are, and which for the purposes of rate making have always

been treated as, competitive systems. I think that is a circumstance which the Board is entitled to take into account.

Accordingly, it seems to me that the Board did not depart from the intent of the statute in giving effect to the view that the Canadian National Railway was adjusting its rates in conformity with the statutory standard, in adopting for its datum in such cases, the rate for "the mileage grouping in effect from the nearest parallel or contiguous main or branch line station on the Canadian Pacific Railway."

The answer to question one is dictated by the answers to questions 2 and 3.

Questions 1 and 2 should be answered in the affirmative; question 3 in the negative.

The appeal should be dismissed with costs.

The judgment of Newcombe, Rinfret, Lamont and Cannon JJ. was delivered by

RINFRET, J.—The circumstances out of which the present appeal arises are the following:

On the 14th of October, 1924, a majority of the Board of Railway Commissioners for Canada held that the railway rates stipulated in the *Act to authorize a Subsidy for a Railway through the Crow's Nest Pass* (c. 5 of the Statutes of Canada, 60-61 Vict., 1897) and in the agreement made thereunder between the Government of Canada and the Canadian Pacific Railway Company should no longer be regarded as imposed by statute, but became subject to the control of the Board of Railway Commissioners created by the *Railway Act, 1903*, as a result of the wide powers conferred on the new Board for carrying out the scheme of rate control there adopted.

Upon appeal, this Court held that the said statute and agreement were binding on the Board, which had therefore no power to change the rates thereby fixed; but that the rates so fixed applied exclusively to the designated traffic between points which were on the Canadian Pacific Railway Company's lines in 1897 (*The Governments of Alberta, Saskatchewan and Manitoba* v. *The Canadian Pacific Railway Company* (1)). The history of the legislation and of

(1) [1925] Can. S.C.R. 155.

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the judicial pronouncements leading up to the decision of this Court just referred to is fully set out in the judgment and need not be repeated here.

Subsequent to the year 1897, the Canadian Northern Railway and the Grand Trunk Pacific Railway Company (now forming part of the Canadian National Railways) constructed extensive lines of railway between eastern and western Canada; and, as their lines were from time to time opened for carriage of traffic, they charged, between all competitive points, and irrespective of mileage, the same rates on grain and flour as were in force on the Canadian Pacific Railway Company's lines.

The Crow's Nest Pass Act and agreement, although not applying to the Canadian National Railways, of necessity had the effect of indirectly controlling their rates on all competitive lines.

The judgment of this Court on the Crow's Nest rates (1) was delivered on the 26th of February, 1925.

Up to that year, the rates on grain and flour from all points which were on the Canadian Pacific Railway lines in 1897 were governed by the following section of the Act (also covenanted in the agreement):

(*e*) That 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: One and one-half cent per one hundred pounds on or before the first day of September, one thousand eight hundred and ninety-eight, and an additional one and one-half cent per one hundred pounds on or before the first day of September, one thousand eight hundred and ninety-nine; 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.

In 1925, section 325 of the *Railway Act, 1919,* was amended by adding thereto subsections 5 and 6 and was made to read as follows:

325. The Board may disallow any tariff or any portion thereof which it considers to be unjust or unreasonable, or contrary to any of the provisions of this Act, and may require the company, within a prescribed time, to substitute a tariff satisfactory to the Board in lieu thereof, or may prescribe other tolls in lieu of the tolls so disallowed.

2. The Board may designate the date at which any tariff shall come into force, and either on application or of its own motion may, pending investigation or for any reason, postpone the effective date of, or either before or after it comes into effect, suspend any tariff or any portion thereof.

(1) [1925] Can. S.C.R. 155.

3. Except as otherwise provided, any tariff in force, except standard tariffs hereinafter mentioned, may, subject to disallowance or change by the Board, be amended or supplemented by the company by new tariffs, in accordance with the provisions of this Act.

4. When any tariff has been amended or supplemented, or is proposed to be amended or supplemented, the Board may order that a consolidation and reissue of such tariff be made by the company.

5. Notwithstanding the provisions of section three of this Act the powers given to the Board under this Act to fix, determine and enforce just and reasonable rates, and to change and alter rates as changing conditions or cost of transportation may from time to time require, shall not be limited or in any manner affected by the provisions of any Act of the Parliament of Canada, or by any agreement made or entered into pursuant thereto, whether general in application or special and relating only to any specific railway or railways, and the Board shall not excuse any charge of unjust discrimination, whether practised against shippers, consignees, or localities, or of undue or unreasonable preference, on the ground that such discrimination or preference is justified or required by any agreement made or entered into by the company: Provided that, notwithstanding anything in this subsection contained, rates on grain and flour shall, on and from the twenty-seventh day of June, one thousand nine hundred and twenty-five, be governed by the provisions of the agreement made pursuant to chapter five of the Statutes of Canada 1897, but such rates shall apply to all such traffic moving from all points on all lines of railway west of Fort William to Fort William or Port Arthur over all lines now or hereafter constructed by any company subject to the jurisdiction of Parliament.

6. The Board shall not excuse any charge of unjust discrimination, whether practised against shippers, consignees, or localities or of undue or unreasonable preference, respecting rates on grain and flour, governed by the provisions of chapter five of the Statutes of Canada 1897, and by the agreement made or entered into pursuant thereto within the territory in the immediately preceding subsection referred to, on the ground that such discrimination or preference is justified or required by the said Act or by the agreement made or entered into pursuant thereto.

On the 5th of June, 1925, Order in Council No. 886 was issued directing the Board to make a full and complete investigation into the rate structure of railways and railway companies subject to the jurisdiction of the Board,

with a view to the establishment of a fair and reasonable rate structure which will in substantially similar circumstances and conditions be equal in its application to all persons and localities, etc.

Pursuant to the directions in the order in council contained, extensive hearings took place throughout the whole of Canada. After argument, the Board gave a judgment following which General Order No. 448, dated the 26th day of August, 1927, was issued, which, *inter alia,* ordered as follows:

1. That the rates on grain and flour from all points on Canadian Pacific branch lines west of Fort William to Fort William, Port Arthur and Westport be equalized to the present Canadian Pacific main line

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basis of rates of equivalent mileage groupings (the rates governed by the Crow's Nest Pass agreement not to be exceeded): that the Canadian Pacific Railway Company publish rates in accordance with the above direction, and that all other railway companies adjust their rates on grain and flour to Fort William, Port Arthur, Westport and Armstrong to the rates so put into effect by the Canadian Pacific Railway Company, such changes to become effective on the twelfth day of September, 1927.

2. That the rates on grain and flour from prairie points to Vancouver and Prince Rupert for export shall be on the same basis as the rates to Fort William, but in computing such rates, the distance from Calgary to Vancouver via the Canadian Pacific Railway shall be assumed to be the same as from Edmonton to Vancouver via the Canadian National Railway, namely, 766 miles.

For the purpose of complying with this Order (No. 448), the Canadian Pacific Railway Company and the Canadian National Railways published and filed new tariffs.

The Government of the Province of Alberta thereupon complained that the tariffs filed by the Canadian National Railways contravened General Order No. 448, in that some of the rates and tolls prescribed in those tariffs were "in excess of the rates for similar mileages according to the Canadian Pacific main line basis of rates, the rates governed by the Crow's Nest Pass agreement not being exceeded."

Application was therefore made to the Board, praying for the disallowance of the tariffs in question as being "contrary to the terms of the said General Order and therefore contrary to law."

It was made clear that the application was not "directed to any Canadian Pacific Railway rates, that railway company having, in the applicant's view, put into effect the proper rates under General Order No. 448", save in two instances not material here.

It was further understood, it was in fact stated in the application, that there was no dispute as to the facts and that what was involved was simply a question of law.

Prior to the application, the Board, having received a letter from Mr. Chard, the Province's Freight and Traffic Supervisor, directed its Secretary to reply that the Board had accepted the rates published in the Canadian Pacific Railway and the Canadian National Railways tariffs "as complying with the provisions of General Order No. 448". The reply added:

> The rates are published in groups as in the past and the Western boundary or extreme mileage of these groups for the Canadian Pacific Railway main line, are as follows:

(Instances were then given stating the names of the railway stations, the respective mileage and rates).

That in the grouping of branch line rates as required by the Order, the Canadian Pacific Railway have followed the usual and proper practice of applying rates for the mileage contained in the main line groups as above. Under the proposal contained in your letter, the mileage groups for branch lines would be greater than that for main lines.

That by the Order the Canadian National Railways were required to adjust their rates to those of the Canadian Pacific Railway. The Board is of the opinion that this has been done in the tariff above referred to as the Company has adopted the mileage grouping in effect from the nearest point parallel or contiguous main or branch line station on the Canadian Pacific Railway.

* * * * *

That both the Canadian Pacific and Canadian National Railways have published rates to Vancouver for export in accordance with General Order No. 448.

In the application, reference was made to that correspondence, and the position of the Province of Alberta was condensed in the following sentence:

The matter rests entirely upon whether the opinion expressed by the Board as stated in the letter of the Board's Secretary of February 6, 1928, (i.e., the letter above quoted in part) is correct or erroneous as herein claimed.

By Order No. 45846, upon reading the said application and the statements and the correspondence therein referred to, together with the reply to the said application of the Canadian National Railways, the Board refused the application of the Province of Alberta; but, at the request of the latter, in a subsequent order, the Board granted leave to appeal to the Supreme Court of Canada upon questions formulated as follows:

(1) Whether as a matter of law the Canadian National Railways have any right to charge the rates in the said application complained of?

(2) Whether as a matter of law the Board has any right to allow the Canadian National Railways to charge the rates in the application complained of?

(3) Whether as a matter of law the rates complained of in the said application do not contravene the provisions of paragraphs 1 and 2 of General Order No. 448, dated 26th August, 1927?

The first question is really subsidiary to the other two, and the answer to it must result from the answer to be given to questions Nos. 2 and 3.

It will be more convenient to deal first with question No. 3.

The answer to that question depends, of course, upon the interpretation to be put upon General Order No. 448.

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The argument of the appellant on that point is not precisely that the tariffs filed are contrary to the formal terms of the Order; but he quotes certain portions of the reasons for judgment, he submits that the passages quoted correctly reflect the views of the Board, and they show, he claims, that "the exclusive governing consideration in the determination of what the proper rate under the order should be, from any given point in the territory affected, is the rate from a point in the corresponding mileage group according to the Crow's Nest Pass agreement main line C.P.R. rate basis".

According to the appellant, the tariffs now complained of were not made upon that basis and therefore fail to carry out the Order.

We are not prepared to admit that the passages in the reasons for judgment relied on by the appellant bear the construction just mentioned, in view of the context from which they are detached and in view also of the issue to which, at the moment, the members of the Board address the particular language they use. The question then in discussion was the equalization of rates as between the main line and the branch lines of the Canadian Pacific Railway, not the determination of a rate basis in its application to the other railway companies. We would add that, if the effect of the General Order were to be determined from the reasons delivered by the members of the Board, the whole of these reasons, and not solely the passages referred to, would have to be considered. But, for the purpose of ascertaining the intention of the Order, this Court must take primarily the Order itself. The order is the criterion. It embodies the meaning which the Board gave to its own words in the judgment delivered by it.

Now, the Order reads:

> That the rates * * * on Canadian Pacific branch lines * * * (shall) be *equalized* to the present Canadian Pacific main line basis of rates of equivalent mileage groupings * * * and that all other railway companies (shall) *adjust* their rates * * * to the rates so put into effect by the Canadian Pacific Railway Company * * *.

If the Order meant to equalize on a mileage basis all rates on all railways, as the appellant's theory would have it, it would have been very easy to say so; and the same language would then have been used in reference both to the Canadian Pacific Company and to the other railway companies. Yet, when dealing with Canadian Pacific main

and branch lines rates, the Order says they should be *equalized;* and when speaking of the other railways' rates it says they should be *adjusted.* It must be taken that the Board intended a different meaning to be ascribed to the two distinct words deliberately adopted in the Order.

The Canadian National Railways contend that the obvious meaning of the direction was to adjust (their) rates in such a way that in territory competitive as between both the Canadian Pacific and Canadian National, the rate adjustment should place grain shippers in such territory on as equal a rate basis as possible, all things considered.

Accordingly, in the tariffs it has published, the company adopted the mileage grouping in effect from the nearest point parallel or contiguous main or branch line station on the Canadian Pacific Railway.

The Board accepted the tariffs so filed, as complying with the provisions of General Order No. 448.

While we think that the question of whether an Order of the Board has been complied with is peculiarly one to be dealt with by the Board itself, we have no hesitation in stating that, in our view, the interpretation put forward by the Canadian National Railways is strictly in accordance with the letter and the spirit of the Order and that the principle adopted in adjusting the rates correctly carries out the terms of the Board's judgment.

It is satisfactory to point out further, that Order No. 448, so interpreted and carried into effect, accords with the main object of Order in Council P.C. 886, namely: "to secure a fair and reasonable rate structure, which, under substantially similar circumstances and conditions, would be equal in its application to all persons and localities".

The answer to question No. 3 should therefore be in the negative.

As a consequence, subject to what we will have to say with regard to question No. 2, the answer to the first question must be in the affirmative. For, if the rates complained of do not contravene the provisions of General Order No. 448, the Canadian National Railways have the right to charge those rates so long as the Board does not otherwise order, unless as a matter of law the Board was lacking in power to authorize the rates. This brings us to the discussion of the second question which, in effect, asks: Whether General Order No. 448 is contrary to the provisions of subsections 5 and 6 of section 325 of the *Railway Act.*

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The appellant clearly contends "that it is not open to the Canadian National Railways under the *Railway Act* to charge the rates complained of with or without the consent of the Board."

To decide that point, consideration of the scope and effect of the amendment of 1925 to the *Railway Act* is necessary. By that amendment, subsection 5 of section 325 of the *Railway Act, 1919,* was repealed and the new subsections 5 and 6 (reproduced at the beginning of this judgment) were added. It is common ground that the amendment was adopted to meet the points determined in the judgment of this Court on the Crow's Nest Pass rates (1). As already mentioned, one of these points was that the rates were statutory and binding on the Board of Railway Commissioners. The other point was that the rates so fixed applied only to carriage of the designated commodities between the stations which were on the Canadian Pacific Railway Company's lines in 1897; and that, against such restricted application, the anti-discrimination provisions of the *Railway Act* could not be invoked.

The enactment of 1925 begins by conferring on the Board powers of the most sweeping character

to fix, determine and enforce just and reasonable rates, and to change and alter rates as changing conditions or cost of transportation may from time to time require,

notwithstanding the provisions of section 3 of the *Railway Act,* that is: notwithstanding the over-riding provisions of any Special Act passed by the Parliament of Canada relating to the same subject-matter. The powers are not to be

limited or in any manner affected by the provisions of any Act of the Parliament of Canada, or by any agreement made or entered into pursuant thereto, whether general in application or special and relating only to any specific railway or railways.

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shall not excuse any charge of unjust discrimination, whether practised against shippers, consignees, or localities, or of undue or unreasonable preference, on the ground that such discrimination or preference is justified or required by any agreement made or entered into by the company.

Then comes the proviso concerning rates on grain and flour:

Provided that, notwithstanding anything in this subsection contained, rates on grain and flour shall, on and from the date of the passing of this Act, be governed by the provisions of the agreement made pursuant to chapter five of the Statutes of Canada, 1897, but such rates shall apply to

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all such traffic moving from all points on all lines of railway west of Fort William to Fort William or Port Arthur over all lines now or hereafter constructed by any company subject to the jurisdiction of Parliament.

Chapter five of the Statutes of Canada, 1897, is the Crow's Nest Pass Act, and the obvious effect of the proviso is that, as to grain and flour, the rates provided for in the Crow's Nest Pass agreement are to remain in force, that they are hereafter to apply to all points west of Fort William to Fort William or Port Arthur, whether they were or were not on the Canadian Pacific Railway Company's lines in 1897, and in fact whether they are on the Canadian Pacific lines or on any other line of railway now or hereafter constructed by any company subject to the jurisdiction of the Parliament of Canada. By force of subsection 6, within the territory referred to, no charge of unjust discrimination or preference respecting rates on grain and flour is to be excused on the ground that it is justified or required by the Crow's Nest Pass Act or agreement.

We fail, however, to agree with the appellant that the effect of the proviso was to compel equalization on a mileage basis of all rates on grain and flour for all railways in the territory. If it were so, the result would be that, as a consequence of the enactment, the fixing of those rates became a mere mathematical operation to be governed exclusively by length of haulage and withdrawn, for all practical purposes, from the control of the Board. If nothing else, the removal in subsection 6 of any excuse for unjust discrimination or preference would show the contrary intention.

But the difficulty which stands uppermost in the way of the appellant's contention is that the Crow's Nest rates have not been built upon mileage, and such was the finding of the Board upon the facts.

The Crow's Nest Pass agreement did not purport to establish any basis for rates on grain and flour, nor did the Act pursuant to which the agreement was made. The Act and the agreement contain no actual unit of measurement. They provide merely for certain specified reductions to be made gradually on the rates existing in 1897.

The rates on grain and flour existing in 1897 were higher on certain branch lines than they were on the main line. As a result of the agreement, the stipulated reductions having been made, the difference in rates, as between main and

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branch lines, continued to exist in the same proportion as before; and these rates, notwithstanding they were discriminatory under the general law, were nevertheless statutory Crow's Nest rates by force of the over-riding provisions of the Special Act. This was noticed by this Court in the *Crow's Nest* case (1) and again by the Board in the judgment appealed from.

There being no uniform scale, no fixed basis (except no doubt a final fixing of certain maximum rates), whereby it should be governed and, on the other hand, having to remove all cases of unjust discrimination, the Board, in its judgment, decided to equalize all Canadian Pacific Railway rates on the basis of the main line rates. This meant that the higher branch line rates were to come down to the level of the main line rates. The Board further directed that in no case should the rates governed by the Crow's Nest Pass agreement be exceeded.

Having thus provided for the Canadian Pacific Railway Company's rates, the judgment *a quo* ordered that other railways in the territory should so adjust their grain and flour rates as to meet the rates adopted for the Canadian Pacific Railway. In so doing, the Board interpreted the statute to mean that in applying the Crow's Nest rates to other railways, the standard to be reckoned with was not of a per mileage basis, since such a basis never existed,—but the intention of Parliament, as expressed in the enactment, was, in the given territory, to establish a relationship between the rates on the Canadian Pacific Railway governed by the Crow's Nest Pass Act and agreement and the rates on the other railways, which would put on an equal footing all persons and localities situated under substantially similar circumstances. That view is further supported by the removal of all limitation to the application of the discriminatory provisions of the *Railway Act*. It is consistent with the spirit of those provisions, as well as with the usual and proper railway practice, that in attempting to secure a fair and reasonable rate structure, account should be taken of the equivalent or competitive points as between the several railways.

In our opinion, the view taken by the Board is in conformity with the enactment of 1925.

(1) [1925] Can. S.C.R. 155.

A further consideration, suggested by counsel for the respondent, and not without considerable weight, is that, if effect were given to the contentions of the appellant, it would mean that in many instances the rates from Canadian National points in competitive territory would be reduced below the level of rates from competing stations of the Canadian Pacific Railway. The result would be that, in order to retain the business from such competitive points, the Canadian Pacific Railway Company would be compelled to lower its rates further, a result not contemplated by the existing legislation.

In carrying out General Order No. 448, the Canadian National Railways, in the tariffs complained of, adopted the mileage grouping in effect from the nearest point, parallel or contiguous, main or branch line station, on the Canadian Pacific Railway. This was considered by the Board not to be contrary to the Order and the Board refused to disallow it. It cannot be said, as a matter of law, that the Board had no right to allow the Canadian National Railways to charge the rates thus approved; and we answer the second question in the affirmative.

As to rates from points west of Fort William to Vancouver and Prince Rupert, we do not interpret the questions submitted as intending to cover them. Those rates do not come within the proviso of the Statute of 1925. Any objection to them must be based on grounds of unjust discrimination or preference, the determination of which are eminently within the Board's province.

Our conclusion is that the Board of Railway Commissioners of Canada was competent to issue General Order No. 448 and that the tariffs filed thereunder did not contravene the Order.

The questions submitted should be answered as follows:

(1) Whether as a matter of law the Canadian National Railways have any right to charge the rates in the said application complained of? YES;

(2) Whether as a matter of law the Board has any right to allow the Canadian National Railways to charge the rates in the application complained of? YES;

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(3) Whether as a matter of law the rates complained of in the said application do not contravene the provisions of paragraphs 1 and 2 of General Order No. 448, dated 26th August, 1927? NO;

and the appeal should be dismissed with costs.

Questions answered as above, and appeal dismissed with costs.

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Solicitor for the respondent, Canadian National Railways: *Alistair Fraser.*

Solicitor for the respondent, Canadian Pacific Railway Company: *E. P. Flintoft.*