Privy Council Appeal No. 48 *of* 1934.

The Canadian National Railway Company - - - - *Appellant*

v.

The Canadian Pacific Railway Company - - - - - *Respondent*

FROM

THE SUPREME COURT OF CANADA.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 25TH JUNE, 1935

Present at the Hearing:

LORD BLANESBURGH.

LORD THANKERTON.

LORD RUSSELL OF KILLOWEN.

LORD MACMILLAN.

[*Delivered by* LORD THANKERTON.]

The issue in this appeal is expressed in the question of law, upon which the Board of Railway Commissioners for Canada gave the present respondent leave to appeal to the Supreme Court of Canada from an order of the Board dated the 12th July 1933, and which is as follows:—

> "Whether upon the agreement made between the Canadian National Railway Company and the Canadian Pacific Railway Company on the 29th day of January 1929 and the facts and circumstances hereinafter set forth, grain shipped from stations on the Northern Alberta Railways to Prince Rupert or to Victoria for export, and exported from either of those ports to say the United Kingdom, is to be excluded from the comparison of freight traffic for the purpose of the equal division to be made under Article 7 of the agreement as not being 'outbound freight traffic destined to competitive points on or beyond the lines of the parties' as the expression is used in said Article?"

By its said order the Board had decided in favour of the present appellant's contention that these shipments of grain fall to be excluded from the comparison of freight traffic, but, on appeal, the Supreme Court reversed this decision and answered the question in the negative. This appeal is taken from the judgment of the Supreme Court, which was delivered on the 6th March 1934.

The facts and circumstances referred to in the question of law are set forth in the order of the Board allowing the appeal to the Supreme Court.

The Northern Alberta Railways are owned and operated by a company which was incorporated in 1929 and whose capital is equally supplied by the appellant and the respondent. They were previously owned or controlled by the Provincial Government of Alberta, but were jointly acquired by the appellant and respondent and vested in the Northern Alberta Railways Company, which was formed for the purpose, under the terms of the agreement between the appellant and the respondent dated the 29th January 1929. This agreement, *inter alia*, contained certain provisions for the operation of traffic originating on the Northern Alberta Railways, and passing on to the railways of the appellant or the respondent, consisting chiefly of grain shipped for export from Canada through ports on the Pacific seaboard. Of these, Vancouver and New Westminster are reached by the railways of both parties, Prince Rupert is reached only by the railways of the appellant, and the appellant alone supplies the water carriage necessary to reach Victoria from Vancouver. The present question relates only to grain shipments carried by the appellant to Prince Rupert and Victoria.

Article 7 of the agreement of the 29th January 1929 is as follows :—

> " 7. The new company shall be required to route outbound freight traffic (including grain milled or stored in transit) originating on the lines of the new company and destined via Edmonton or Morinville to competitive points on or beyond the lines of the parties, in such a way that each of the parties shall receive on a revenue basis one-half the outbound freight traffic originating and destined as aforesaid, including such freight traffic routed by the shipper as well as such freight traffic unrouted by the shipper. Comparisons on a revenue basis of the traffic so received by each of the parties shall be made monthly, and any inequality of division in any month shall be rectified in succeeding months. The foregoing provisions in respect to freight traffic shall apply also to outbound express traffic and telegraph traffic respectively, originating on the lines of the new company and destined to competitive points on or beyond the lines of the parties. For the purpose of the division of traffic in this paragraph provided for, freight traffic, express traffic and telegraph traffic shall be divided and dealt with separately."

The following articles should also be referred to, vizt. :—

> " 2. Each of the parties hereto shall assume the payment of and be liable for one-half of the purchase price payable (with interest), and one-half of the obligations to be assumed by the purchasers under the said agreement, and shall be entitled to one-half of the benefits to be derived therefrom, it being the intention of the parties that the said agreement shall be for their equal benefit and advantage.
>
> 6. Neither party shall directly or indirectly solicit the routing of outbound competitive traffic over their respective lines.
>
> 11. The parties agree to co-operate with fairness and candour toward each other, and to give effect to this agreement in the most liberal and reasonable manner to the intent that each of them shall receive its full and equal share of the benefits of the joint undertaking, subject to the provisions of clause 4 hereof."

Article 4, referred to in article 11, provides for the proper and economical conduct of the undertaking of the new company.

Prior to the conclusion of the agreement of 1929, the appellant and the respondent had been in active competition for the export grain traffic from the railways which under the agreement became the Northern Alberta Railways. The history of the rates on grain shipped for export at the Pacific ports from stations on these railways is stated by the Board of Railway Commissioners in their order and shows the effect of the competition in equalisation of rates. The appellant, whose railways from Edmonton to Vancouver had a mileage of 765 miles, made the rate from Edmonton to Prince Rupert—a distance of 957 miles by its railways,—the same as that to Vancouver; and the respondent, whose railways from Edmonton to Vancouver had a mileage of 836 miles, accepted the same rate as the appellant received for its shorter mileage to Vancouver.

Since the agreement of 1929, the rates for grain shipped for export to any of the four Pacific ports from any Northern Alberta Railways station, and the terms and conditions of rail carriage are the same, whether routed via the railways of the appellant or the railways of the respondent. Export rates are lower than the domestic rates. It is further stated that ocean rates on grain are not uniform, but that, by force of competition, they tend to equality.

An important fact is that grain so shipped does not retain its identity after it reaches the port, because it is discharged by the railway into elevators at the port and is there stored with grain of the same grade, and is no longer earmarked as grain of that shipment. When the shipper desires to export his grain, an equivalent amount of grain of the same grade is subject to his order. The same practice is followed in all cases where grain is milled or stored in transit.

Lastly, it is stated that the bulk of the grain carried by each railway to these Pacific ports is taken to and exported from Vancouver.

Turning then to the construction of article 7 of the agreement of 1929, discussion mainly centres round the words " destined . . . . to competitive points on or beyond the lines of the parties ". It is to be noted that the purpose of article 7, as regards freight traffic, is to secure equality of division of the outbound freight traffic referred to, including both the traffic routed by the shipper and the traffic not so routed, and that the only method prescribed by the article for securing that end is a direction to the new company to route such traffic as is unrouted by the shipper in such a way as best to secure that end. It seems clear to their Lordships that the officials of the new company must be guided by the destination stated in the contract of carriage, in determining whether any particular shipment falls within

the provisions of article 7. According to the existing methods of handling grain shipped to Prince Rupert or to Victoria for export, it also seems clear that these ports respectively are the destination of the shipments under the contract of carriage, although, in order to get the favourable rates, they are labelled for export. It follows that the question is whether these ports are competitive points within the meaning of article 7.

The Board of Railway Commissioners held that neither of these ports is a competitive point, on the grounds expressed by the Chief Commissioner, who stated :—

> "I have always understood 'competitive points' in railway parlance to mean points in respect to which two or more lines compete for traffic. In other words, a point at which two or more railways have facilities and are prepared to handle traffic at equal rates. Reading the words in the ordinary way, I think there can be no doubt that 'competitive points on or beyond the lines of the parties' means points on the lines of the parties or their connecting carriers, and have no reference to any point other than one on a railway. . . . . The word 'competitive' as used in the agreement must have reference to competition between railways. The parties were only interested in securing the carriage of grain to a port. What becomes of it afterwards did not in the least interest them."

The majority of the learned Judges of the Supreme Court based their reversal of the decision of the Board of Railway Commissioners mainly on the explicit injunction of article 11 as to interpretation of the agreement, and on the view that the words "beyond the lines of the parties" in article 7 ought not to be limited to railway connections, but must be taken to include ocean connections. They would appear to have held that an undefined ultimate destination in Africa, Asia, Australia, Central America or Europe might constitute a competitive point within the meaning of article 7. They accordingly held that the parlance of railway men in reference to a railway system only was not apt for the construction of article 7.

As already indicated, their Lordships take the view that the destination referred to in article 7 is the destination fixed by the contract of carriage, and therefore that the destination of the shipments referred to in the question of law under consideration is either Prince Rupert or Victoria. The answer to the question must accordingly depend on whether grain shipped from stations on the Northern Alberta Railways to either of these ports for export is destined to competitive points on or beyond the lines of the parties.

In their Lordships' opinion, articles 6 and 11, on which the majority of the Supreme Court rightly laid stress, are of importance in considering whether Prince Rupert and Victoria are competitive points. It is common ground that grain shipped from the Northern Alberta Railways to Prince Rupert or Victoria for export is traffic competing with grain similarly shipped to Vancouver within the meaning of

article 6, and in their Lordships' opinion there can be little doubt that it was the benefits accruing from the export grain traffic as a whole from the Northern Alberta Railways that were intended to be the subject of equal division under article 11. Nothing could be more indicative of the existence of railway competition among the four Pacific ports for outward bound export traffic than the fact already mentioned that the rates to each are the same irrespective of the differences in distance. It is noteworthy that the appellant publishes what it describes as a " special and competitive local and joint export freight tariff " on grain from stations on the Northern Alberta Railways to New Westminster, Vancouver, North Vancouver, Victoria and Prince Rupert, thus treating export freight traffic in grain to all these ports of destination as traffic competitive with the respondent's traffic. Nor it is without significance that before any dispute arose the officials of the Northern Alberta Railways, themselves presumably conversant with the language and practice of railway men, interpreted article 6 in practice as including traffic destined to Prince Rupert and Victoria and thus gave rise to the appellant's application to the Railway Board.

Accordingly, their Lordships are of opinion that on a sound construction of article 7 the four Pacific ports are competitive points *inter se* for export grain shipments from stations on the Northern Alberta Railways.

As regards the form of the question of law, their Lordships would observe that, in the view they take, the words " and exported from either of those ports to say the United Kingdom " seem to be unnecessary. It may be that a shipment of grain originally for export may be withdrawn from the export category and subjected to the domestic rate, but unless and until that is done, there seems to be no reason for excluding it from the comparison of traffic under article 7. Subject to this observation, their Lordships are of opinion that the question of law should be answered in the negative, and that the appeal should be dismissed with costs and the judgment of the Supreme Court of the 6th March 1934 affirmed, and their Lordships will humbly advise His Majesty accordingly.

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In the Privy Council.

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THE CANADIAN PACIFIC RAILWAY COMPANY

DELIVERD BY LORD THANKERTON.

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