

In the Privy Council.

No. 48 of 1934.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

BETWEEN

CANADIAN NATIONAL RAILWAY COMPANY ... *Appellant,*

AND

CANADIAN PACIFIC RAILWAY COMPANY ... *Respondent.*

CASE FOR THE RESPONDENT.

1. This is an appeal by special leave from a judgment of the Supreme Court of Canada delivered on 6th March, 1934, allowing an appeal from a decision of the Board of Railway Commissioners given on 12th July, 1933. Record.

2. The appeal is on a question of law stated by the Board in the following terms :— p. 15, l. 33.

10 “ 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.”

3. The facts and circumstances under which the question arises are set out in the Board’s order granting leave. p. 15, l. 44

Record. 4. The Agreement between the Appellant and the Respondent of 29th January, 1929, was made for the joint acquisition and operation of certain railways in northern Alberta previously owned or controlled by the Provincial Government. This was to be accomplished through the medium of a new company whose capital was to be supplied in equal shares by the Appellant and the Respondent. Application was accordingly made to Parliament for an enabling act and for the incorporation of a new company under the name of "Northern Alberta Railways Company," and upon its passage (Chapter 48 of the Statutes of 1929) the railways were acquired and vested in the new company, and have since been operated by it. The Agreement is Schedule "C" to the Statute.

p. 74, l. 30.

p. 83, l. 10.

5. The chief traffic on the Northern Alberta Railways consists of grain shipped from northern Alberta for export from Canada through ports on the Pacific seaboard. Of these Vancouver and New Westminster are reached by the railways of the Appellant and by the railways of the Respondent. Prince Rupert is reached by the railways of the Appellant only, and Victoria by water carriage from Vancouver provided only by the Appellant.

p. 16, l. 12.

p. 16, l. 20.

6. Export rates and the terms and conditions of rail carriage are the same from stations on the Northern Alberta Railways to all these seaports, whether routed over the railways of the Appellant or the railways of the Respondent. Export rates are lower than the domestic rates. Ocean rates on grain are not uniform, but by force of competition tend to equality.

p. 18, l. 1.

p. 18, l. 18.

7. Before the Agreement this situation induced strong competition between the Appellant and the Respondent for traffic from the northern railways, and in turn each of them enjoyed a practical monopoly of it. From 1920 to 1926 the northern railways were managed for their owners by the Respondent, and from 1926 until the Agreement came into effect the owners exchanged traffic with the Appellant exclusively.

p. 16, l. 14.

p. 17, l. 11.

p. 17, l. 20.

8. The Agreement in question dealt with the routing of traffic in the following specific provision :— 30

p. 83, l. 46. " 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 afore-
 " said, 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 Record.
 “ for, Freight Traffic, Express Traffic and Telegraph Traffic shall be
 “ divided and dealt with separately.”

It also contained the following general provisions :—

“ 2. Each of the parties hereto shall assume the payment of and be p. 83, l. 21.
 “ 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
 10 “ Agreement shall be for their equal benefit and advantage.”

“ 6. Neither party shall directly or indirectly solicit the routing of p. 83, l. 43.
 “ outbound competitive traffic over their respective lines.”

“ 11. The parties agree to co-operate with fairness and candour p. 85, l. 4.
 “ 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.”

9. By Article 10 of the Agreement disputes arising under it as to any p. 84, l. 40.
 matter within the jurisdiction of the Board were to be referred to the Board.

20 10. In May, 1933, the Appellant asked an inquiry and determination p. 1, l. 20.
 by the Board as to whether the Northern Alberta Railways Company was
 violating the Agreement by including grain shipped to Prince Rupert or
 Victoria for export in the traffic to be pooled under Paragraph 7 of the
 Agreement. The Board of Railway Commissioners (Chief Commissioner
 Fullerton and Assistant Chief Commissioner McLean) for reasons delivered
 by the Chief Commissioner, decided that Prince Rupert is not a competitive
 point within Clause 7, and that until the Respondent filed a through tariff
 for export wheat to Victoria the latter point is not competitive within the
 Agreement. The Chief Commissioner was of the opinion that “ competitive ”
 30 as used in the Agreement must have reference to competition between the
 two railway companies and that they were only interested in securing the
 carriage of grain to a port, and were not in the least interested in what became
 of it afterwards. He thought that “ competitive traffic ” meant only traffic
 destined to a competitive point reached by the railways or their connecting
 carriers by rail.

11. The Supreme Court on the appeal allowed the appeal, answering the p. 40, l. 5.
 question submitted to it in the negative. The Chief Justice (with whom
 Smith J. and Hughes J. agreed) said there could be no doubt that the traffic
 the parties had in view consisted almost entirely of grain and its products
 40 shipped for export ; that giving the words of the Agreement their natural
 sense it makes no difference whether the ultimate destination was reached by
 land or water, and that Articles 6 and 7 of the Agreement apply to such
 traffic. Lamont J. gave reasons for the same conclusion. Crocket J.

dissented, being of opinion that the Agreement was essentially a railway agreement dealing entirely with railway administration and operation, railway traffic and railway revenue, and that Article 7 does not apply to export grain.

12. The Respondent contends that the judgment of the Supreme Court is right and should be affirmed for the following

REASONS.

1. Because the words in Article 7—"traffic destined
"to competitive points on or beyond the lines of the
"parties," in their natural meaning include grain shipped 10
to Prince Rupert or to Victoria for export, and exported to
the United Kingdom.
2. Because the Agreement as a whole is consistent only with
that construction.
3. Because nothing in the Agreement or in the surrounding
circumstances requires a more limited meaning.
4. Because if there is ambiguity a construction is to be pre-
ferred that gives each of the parties an equal share of the
benefits of the joint undertaking.
5. Because the Judgments of the majority in the Supreme 20
Court of Canada are right for the reasons therein stated.

W. N. TILLEY.

W. H. CURLE.

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BLAKE & REDDEN,
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