THE GRAND TRUNK RAILWAY COMPANY OF CANADA..... } APPELLANTS;

AND

THE HEPWORTH SILICA PRESSED BRICK COMPANY... } RESPONDENTS.

1914
*Dec. 22.

1915
*Feb. 2.

ON APPEAL FROM THE BOARD OF RAILWAY COMMISSIONERS FOR CANADA.

Construction of statute—"Railway Act"—Spur line to industry—Rebate from tolls—R.S.C. [1906] *c.* 37, *s.* 226.

By section 226 of the "Railway Act" the Railway Board may, on application by the owner of an industry within six miles of a railway order the company to construct and operate a spur line from its railway to such industry, the applicant to provide for the cost of construction and be repaid by a rebate to be fixed by the Board "out of or in proportion to the tolls charged by the company in respect of the carriage of traffic for the applicant over the said spur or branch line."

Held, Anglin J. dissenting, that such rebate was not restricted to the tolls for carriage of goods over the said spur, but was applicable to the tolls for carriage of traffic over the company's main line to and from the said industry.

APPEAL by way of stated case from the ruling of the Board of Railway Commissioners for Canada in favour of the respondents.

The following case is stated by the Board of Railway Commissioners for Canada for the opinion of the Supreme Court of Canada:—

1. This was an application to the Board by the Hepworth Silica Pressed Brick Company under section 226 of the "Railway Act" for an order directing

*PRESENT:—Sir Charles Fitzpatrick C.J. and Davies, Idington, Duff and Anglin JJ.

1914

GRAND TRUNK RWAY. CO. v. HEPWORTH SILICA PRESSED BRICK CO.

the Grand Trunk Railway Company to construct a spur or branch line into the applicants' premises.

2. The point at which the spur leaves the main line of the railway is about 700 feet from the nearest station of the railway (Hepworth) and the length of the spur is 4,623 feet.

3. Upon the application which was made to the Board on the 19th day of May, 1914, the Board made the following order:—

"Order No. 21956.

"THE BOARD OF RAILWAY COMMISSIONERS FOR CANADA.

"Friday, the 22nd day of May, A.D. 1914.

"H. L. Drayton, K.C., *Chief Commissioner.* S. J. McLean, *Commissioner.*

"In the matter of the application of the Hepworth Silica Pressed Brick Company, Limited, of Hepworth, Ontario, hereinafter called the 'applicant company,' under sec. 226 of the 'Railway Act,' for an order directing the Grand Trunk Railway Company of Canada to construct, maintain and operate a spur to the premises of the applicant company at Hepworth, Ontario, and the complaint of the applicant company against the switching charge of $2 per car proposed to be charged by the railway company: File 21428.

"Upon the hearing of the application at the sittings of the Board held in Ottawa, May 19th, 1914, in the presence of counsel for the Grand Trunk Railway Company, the Canadian Manufacturers Association being represented at the hearing, and what was alleged—

"It is ordered—

"1. That the railway company be, and it is hereby directed to construct, maintain and operate a branch

line of railway or spur from a point on its railway to and into the premises of the applicant company at Hepworth, Ontario, as shewn on the plan on file with the Board under file No. 21428.

"2. That the applicant company deposit to the credit of the Board of Railway Commissioners for Canada, in some chartered bank at Hepworth, the sum of $8,884, to await further order, being the sum estimated as being necessary to defray all expenses of constructing and completing the said spur, as provided by section 226 of the 'Railway Act.'

"3. That if any dispute arise as to the construction or operation of the said spur, or as to the expense thereof, the same be referred to the Board.

"4. That in the event of the said work costing more or less than the above sum, such difference be adjusted by the Board.

"5. That the railway company repay or refund to the applicant company, its successors or assigns, by way of rebate, $1 per car from the tolls charged by the railway company in respect of the carriage of traffic for the applicant company over the said spur, until the said sum of $8,884 has been repaid by the railway company to the applicant company, its successors, or assigns.

"6. That the railway company construct and complete the said spur within three months from the date of this order.

"(Signed) D'ARCY SCOTT,

"Assistant Chief Commissioner,

"Board of Railway Commissioners for Canada."

1914

GRAND TRUNK RWAY. CO. v. HEPWORTH SILICA PRESSED BRICK CO.

4. Upon the application the Grand Trunk Railway Company requested that the Board should allow it to impose a charge of $2 a car for the services to be performed by it in taking an empty car from its main line and placing the same on the spur in the premises of the applicant company and in hauling out to its main line the car when loaded. The Board, however, declined to make such an order. In the case, therefore, of traffic to and from the Hepworth Silica Pressed Brick Company's premises handled over the said spur, the Grand Trunk Railway Company will not be paid any additional sum beyond the regular freight rates chargeable under tariffs approved by the Board upon traffic to and from the Hepworth Station.

5. The Board in making the said order interpreted sub-section 3 of section 226 of the "Railway Act" to mean that the Board might direct a rebate to be made as ordered in paragraph 5 of the order even though no toll was collected for services performed in moving cars, loaded or empty, on the said spur.

6. The question which at the request of the Grand Trunk Railway Company is stated by the Board and submitted for determination by the Supreme Court of Canada is:—

Whether the words in sub-section 3 of section 226 of the "Railway Act," "the tolls charged by the company in respect of the carriage of traffic for the applicant over the said spur or branch line" mean the tolls charged for the transportation on the railway company's line of goods carried to or from the applicant company's premises or mean the tolls charged for the movement of such goods upon the said spur.

Ottawa, September 15th, A.D. 1914.

(Signed) D'ARCY SCOTT,
Assistant Chief Commissioner,
Board of Railway Commissioners for Canada.

The appeal was heard *ex parte.*

W. C. Chisholm K.C. appeared for the appellants.

THE CHIEF JUSTICE.—I am of opinion that the Chief Commissioner has put the proper construction upon the section in question (226 of the "Railway Act") and that the appeal should be dismissed.

DAVIES J.—The question stated by the Board of Railway Commissioners for our opinion as to the meaning of sub-section 3 of section 226 of the "Railway Act" is as follows:—

> Whether the words in sub-section 3 of section 226 of the "Railway Act" "the tolls charged by the company in respect of the carriage of traffic for the applicant over the said spur or branch line" mean the tolls charged for the transportation on the railway company's line of goods carried to and from the applicant company's premises, or mean the tolls charged for the movement of such goods upon the said spur.

If the language of this sub-section is only capable of one meaning it would, of course, be our duty so to declare, irrespective of whether the effect would be to defeat the object and purpose of the Act or not. Our duty is to construe legislation not to enact it.

If, however, the language used is not clear, but is ambiguous and capable of two meanings, one of which would obviously carry out the purpose and intent of the Act while the other would defeat it, I take it that it is our duty to put the construction upon the language which carries out the object and purpose of Parliament.

1915

GRAND TRUNK RWAY. CO. v. HEPWORTH SILICA PRESSED BRICK CO.

Davies J.

Section 226 vested in the Board power upon the application of the owner of any industry or business within six miles of the railway, to order the railway company to construct, maintain and operate a spur or branch from the railway line to the industry or business and to direct the applicant to deposit in some chartered bank such an amount as the Board might determine sufficient to construct and complete the spur, etc., which amount should be paid to the company from time to time as the work progressed.

The third sub-section now under consideration provided for the repayment by the company to the applicant of such cost "out of or in proportion to the tolls charged by the company in respect of the carriage of traffic over the spur."

The railway company contends that these tolls are such only as are chargeable for the carriage to and from its main line to the industry or business over the spur and has no relation to the carriage to and from the industry or business to the destination of the traffic.

In this view they applied to be allowed as stated in the case to impose a charge of $2 a car for the services to be performed by it in taking an empty car from its main line and placing it on the spur on the premises of the applicant and in hauling out to its main line the car when loaded.

The Board properly declined to make such an order. Its effect would obviously be to make the industry or business pay for the construction of the spur not in the first instance merely as the statute provided, but absolutely, and instead of encouraging and aiding such spur traffic would handicap it. The in-

tent of the legislation was to provide for the repayment of the cost of the spur out of the traffic originating or ending on it and while the language used is capable of being construed so as to sustain the contention of the railway company it is ambiguous and may fairly be construed as the Board has construed it.

I answer the question that the words of sub-section 3 of section 226 mean the tolls charged for the transportation on the railway company's line of goods carried to or from the applicant company's premises.

IDINGTON J.—Section 226 of the "Railway Act" enabled, by its enactment in 1903, the Board to order the construction by a railway company of a branch line to connect any industry or business established, or intended to be established with the railway and provide for the applicant for such connection depositing, under the direction of the Board, of a sum or sums sufficient to cover the cost of such construction.

Sub-section 3 of said section is as follows:—

3. The aggregate amount so paid by the applicant in the construction and completion of the said spur or branch line shall be repaid or refunded to the applicant by the company by way of rebate, to be determined and fixed by the Board, out of or in proportion to the tolls charged by the company in respect of the carriage of traffic for the applicant over the said spur or branch line.

The Board submits for our opinion a question involving the interpretation of the phrase:—

In proportion to the tolls charged by the company in respect of the carriage of traffic for the applicant over the said spur or branch line.

It is argued by the appellant that the tolls referred to must be those in respect only of the shunting or moving of the cars over the branch line itself.

No doubt the language used is capable of such a

1915

GRAND TRUNK RWAY. CO. v. HEPWORTH SILICA PRESSED BRICK CO.

Idington J.

construction. But this like every other enactment must be, if possible, so read as not to produce an absurdity in its results. And when the language is ambiguous we must look to the history preceding it and the condition of things existent at the time of the enactment.

So viewed and having regard to what the Chief Commissioner in his judgment sets forth, I think he has interpreted and construed the section aright,

The question submitted should be answered that the tolls in question mean the tolls charged for the transportation on the company's line of goods carried to and from the applicant company's premises.

The appeal should be dismissed but without costs. Respondent filed no factum. Only counsel for appellant appeared, and he, whilst urging all that could be said for appellant, presented the case fairly and properly.

DUFF J.—I have very little to add to the reasons of the learned Chairman of the Board of Railway Commissioners, in which the Assistant Chief Commissioner and Mr. Commissioner McLean concurred. The words of sub-section 3, section 226, are as follows:—

> The aggregate amount so paid by the applicant in the construction and completion of the said spur or branch line shall be repaid or refunded to the applicant by the company by way of rebate, to be determined and fixed by the Board, out of or in proportion to the tolls charged by the company in respect of the carriage or traffic for the applicant over the said spur or branch line.

I think it is permissible to read the phrase "over the said spur or branch line" as an adjectival phrase qualifying the word "traffic," and intended to be descriptive of the "traffic" the earnings of whose "car-

riage" are to be rebatable for refunding the outlay of the shipper. I will not dwell upon this point of verbal construction, but merely note that the words "for the applicant" add nothing to the sense — the idea conveyed by them being necessarily implied in the words "by way of rebate." If this is the right construction, the difficulty disappears; the question is — are there adequate reasons judicially admissible for its adoption ?

One is not concerned to deny that looking to the words alone Mr. Chisholm's is the better reading. That is a consideration which tells with no little force against the conclusion I have reached. But other considerations outweigh it.

This sub-section cannot be read alone. It must be read with the main provisions of the Act relating to facilities as well as with the provisions on the subject of rates. The judgment of the Chief Commissioner seems to shew that the construction now advanced, if put into practice must, at least in a large number of cases, result in discriminations opposed to the spirit of the enactments of the Act on both these subjects, one leading general aim of which is the suppression of reasonably avoidable discriminations; in other words, that the reading proposed is not compatible with the objects of these enactments of the "Railway Act," which are *in pari materiâ* with the provision to be construed — that, indeed, such a reading is calculated to defeat one of the principal of those objects. The uniform administrative interpretation of the sub-section in another sense (by the Board of Railway Commissioners), and the acquiescence in that interpretation

1915

GRAND TRUNK RWAY. CO. v. HEPWORTH SILICA PRESSED BRICK CO.

Duff J.

by the interests chiefly concerned tend to confirm this view.

I should say that, when I speak of the "objects" of these enactments, I mean, of course, objects that are expressed with sufficient definiteness by the enactments themselves.

If these conclusions are sound, as I think they are, then it is legitimate to reject the proposed construction and to adopt that which I have indicated above.

No doubt, in rejecting a construction, which from the point of view of verbal interpretation alone is clearly the better one, on the ground that it is not consistent with the objects of the legislation considered as a whole, one runs the risk of slipping from proper legal interpretation into a region where notions of policy collected from or founded upon extra-judicial considerations hold the field and into methods of interpretation inadmissible in a court of law. In the present case I agree that we do approach the limits of proper legal interpretation; but I am fully convinced that we are, nevertheless, within those limits, because, first, I am satisfied that the sub-section is not incapable of the construction above indicated, and, secondly, I think the reasons given by the Chief Commissioner justify the conclusion that the construction proposed by the railway company cannot be put into general operation consistently with the full maintenance of the governing principle of non-discrimination embodied in the cognate provisions touching the subject of rates and facilities.

ANGLIN J. (dissenting).—By an authorized tariff the Grand Trunk Railway Company is allowed to

charge certain tolls for the carriage of freight to and from its station at Hepworth. It has recently been required by the Railway Board to construct a spur or branch line from Hepworth Station to the respondent company's premises under the provision of section 226 of the "Railway Act." The Board has refused to authorize the railway company to charge any additional tolls for the carriage of freight over such spur or branch line between Hepworth Station and the respondents' premises. They pay for the carriage of freight from their premises the same rates and tolls as are charged to other customers of the railway for the carriage of similar freight from Hepworth Station. It is, therefore, I think, indisputable that the railway company does not, and is not permitted to, charge any tolls,

in respect of the carriage of traffic for the (respondents) over the said branch or spur line.

Nevertheless it has been ordered by the Board under sub-section 3 of section 226, to

repay or refund to the applicant company, its successors or assigns, by way of rebate, $1 per car from the tolls charged by the railway company in respect of the carriage or traffic for the applicant company over the said spur, etc.

In a memorandum of the reasons on which this order was based, the Chief Commissioner states that in his opinion the right to order a rebate under sub-section 3 is not

limited to cases where a toll is charged for the movement on the spur,

but

that the effect of the statute is only to limit rebates to freight charges due on cars which have passed over the spur in question, with the right to the Board to order rebates either in proportion to the amount of the tolls charged or by fixed charge per car.

1915

GRAND TRUNK RWAY. CO. v. HEPWORTH SILICA PRESSED BRICK CO.

Anglin J.

With respect, I am of the opinion that the language of the statute is too plain and explicit to admit of that construction. The rebate is payable only

out of, or in proportion to, the tolls charged by the company in respect of the carriage of traffic for the applicant over the said spur or branch line.

I cannot understand how it can be maintained that a toll which is completely earned by carriage on the main line to or from Hepworth Station is

charged in respect of the carriage of traffic over the spur or branch line,

or how such a toll can be said to be

in respect of the carriage of traffic over the spur or branch line,

merely because the cars carrying the freight upon which it is payable have passed over the spur, the company being required to haul them over it gratuitously. For that additional haul the railway company receives no direct remuneration — it is not permitted to charge a toll. There are no tolls in respect of the carriage of traffic over the spur "out of" which the rebate can come. The words "in proportion to" were introduced into sub-section 3, obviously not to extend the right to rebate to cases in which no toll is charged for carriage over the spur, but to make it clear that it was not intended that the railway company should be obliged to segregate tolls so charged from their general revenue and to ear-mark them as a specific fund out of which alone the rebate must be taken.

It is urged that the Board has this matter so entirely in its own hands that it is useless and unnecessary to pass upon the question of law which it has submitted — that it can readily accomplish the result aimed at by reducing the tolls for carriage on the main line to and from Hepworth Station by amounts

which it may then authorize the railway company to charge as tolls for carriage over the spur. But the anti-discrimination provisions of the statute would probably present a serious obstacle to the adoption of this somewhat ingenious suggestion. For the present it is sufficient that no attempt has been made to meet the difficulty in this way. While the tolls out of which the statute allows a rebate to be claimed do not exist, the rebate in my opinion cannot be ordered.

I would for these reasons answer the question submitted by the Board as follows:—

"The tolls charged by the company in respect of the carriage of traffic for the applicant over the said spur or branch line mean * * * the tolls charged for the movement of such (traffic) upon the said spur."

Appeal dismissed with costs.

Solicitor for the appellants: *W. C. Biggar.*