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THE CANADIAN PACIFIC RAILWAY COMPANY AND THE GRAND TRUNK RAILWAY COMPANY ..... APPELLANTS;

*April 1, 2.
*June 4.

AND

THE CANADIAN OIL COMPANIES LIMITED ..... RESPONDENTS.

THE CANADIAN PACIFIC RAILWAY COMPANY ..... APPELLANTS;

AND

THE BRITISH AMERICAN OIL COMPANY ..... RESPONDENTS.

ON APPEAL FROM THE BOARD OF RAILWAY COMMISSIONERS FOR CANADA.

Joint tariff—Power to supersede—Declaratory decree—Jurisdiction.

In January, 1907, certain railway companies in the United States, in connection with the appellant companies, filed through freight tariffs ("joint tariffs") with the Board of Railway Commissioners for Canada fixing the rates of carriage for shipments of goods from the United States into Canada. The tariffs so filed for the first time established a fixed rate for the carriage of petroleum and its products. In October, 1907, and in May, 1908, supplementary tariffs were filed by the foreign companies and concurred in by the Canadian carriers, but they were not sanctioned by the Board. These substituted for the fixed rate on petroleum

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*PRESENT:—Davies, Idington, Duff, Anglin and Brodeur JJ.

[NOTE.—Leave to appeal to the Privy Council was granted, 13th December, 1912.]

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a variable rate made up of the sum of the local rates on each side of the border. The respondent companies, in 1910, applied to the Canadian Board for an order declaring that the appellants had overcharged them by exacting the variable rate for carriage of petroleum, and an order was made by the Board declaring that the rates chargeable were those fixed by the "joint tariff" of January, 1907. The Canadian carriers appealed from this order to the Supreme Court of Canada by leave of the Board on the question of law whether or not this order was right and by leave of a judge on a question of jurisdiction claiming that the Board could not make a declaratory order and grant no consequential relief, and that it could not declare in force a tariff which had ceased to exist.

Held, that sections 26 and 318 of the "Railway Act" authorized the Board to make an order merely declaratory.

Held, also, that the tariff of January, 1907, had not ceased to exist, but was still in force, never having been superseded.

Held, per Davies and Duff JJ., that if the initiating company, or the companies jointly, had power to supersede a joint tariff duly filed they had not in this case taken the proper steps to effect that purpose.

Per Idington and Anglin JJ., that such a tariff could only be superseded by the action, or with the sanction, of the Board.

The order appealed from was, therefore, affirmed.

APPEAL from an order of the Board of Railway Commissioners for Canada in favour of the respondents on an application complaining of an overcharge in rates for carrying petroleum from the United States into Canada.

The Board decided, on application of the oil companies, that the tariff filed in Jan., 1907, was still in force and made an order declaring that the legal rates chargeable on petroleum and its products, in carloads, from shipping points in Ohio and Pennsylvania to Toronto were the fifth-class joint through rates in effect at the time the shipments moved as shewn in the joint through tariffs published and filed with the Board. The railway companies were granted leave by the Board to appeal to the Supreme Court

of Canada on a question of law, namely, — Did the Board place the proper legal construction on the documents referred to in the judgment of the Chief Commissioner in this matter ? Mr. Justice Idington gave them leave to appeal also on a question of jurisdiction.

Chrysler K.C. and *Aimé Geoffrion K.C.* for the appellants.

W. N. Tilley for the respondents.

DAVIES J.—This is an appeal from an order of the Board of Railway Commissioners made on a complaint filed by the respondents whereby it was alleged that the appellants from and after the first of January, 1907, charged excessive tolls for the transportation of petroleum and its products when shipped from certain points in the United States to Toronto and other Canadian points.

The complaint was heard by the Railway Board on May 16th, 1911. The respondents contended and the appellants denied that from and after the date mentioned fifth-class rating applied to petroleum and its products in carloads. The appellants charged the sum of the local rates to and from the Canadian gateways.

The Board's reasons for judgment were given by the Chief Commissioner. The conclusion reached as stated in the last paragraph of the reasons was as follows:—

Official Classification No. 29 was used by the respondents without any order or direction of the Board, as provided by subsection 4 of section 321. It was, therefore, binding upon them; and the provisions of that classification would apply upon petroleum and its products to points in Canada, unless they have taken some steps within the provisions of the statute to prevent its application. We

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are compelled to conclude that they have not succeeded in so doing, and that petroleum and its products should have carried fifth-class rating at the time the shipments in question moved.

The Board accordingly made an order, dated the 16th of May, 1911, declaring:—

That the legal rates chargeable on petroleum and its products in carloads from the said shipping points in the States of Ohio and Pennsylvania to Toronto, Ontario, were the fifth-class joint through rates in effect at the time the said shipments moved as shewn in the joint through tariff published and filed with the Board, and in accordance with the Official Classification No. 29 and subsequent issues thereof.

The Board granted leave to the appellants to prosecute an appeal on the question of law as follows:—

Did the Board place the proper legal construction on the documents referred to in the judgment of the Chief Commissioner in this matter?

Mr. Justice Idington also allowed an appeal on the question of jurisdiction.

The contention of the appellants as I understand it on the question of jurisdiction is that when the complaint was heard by the Railway Board on the 16th May, 1911, the Board had no jurisdiction because the wrong complained of had then been remedied and the order made was and could only be declaratory and could not give the applicant any relief.

The question of the Board's jurisdiction depends largely upon the construction placed upon section 338 of the "Railway Act." In the case of the *Grand Trunk Railway Co.* v. *British American Oil Co.*(1), this court held that joint tariffs filed by foreign railway companies for rates on through traffic originating in foreign territory to be carried by continuous routes to destinations in Canada are effective and binding upon

(1) 43 Can. S.C.R. 311.

Canadian companies participating in the transportation until either superseded or disallowed.

Such joint tariffs had been filed by the foreign companies initiating the carriage of the oil as to the tolls for the carriage of which the complaint was made. If the tariffs had been "superseded" under the 338th section of the Act as contended by the appellants by another tariff justifying the tolls charged that would be a good answer to the complaint.

Mr. Tilley, for the respondents, contended that once a joint tariff for a continuous route from a foreign country to a point in Canada was filed under the 336th section of the Act it remained in force until superseded or disallowed *by the Board,* and that admittedly there had not been any such action by the Board in this case, and further contended that assuming there was power in the company or companies by which the joint tariff was filed to supersede it nothing had been done which could be construed as supersession. The appellants contended that the superseding was something to be done by the foreign company which initiated the joint tariff and that there had been such supersession in the amendments to and alterations of that initial joint tariff subsequently filed by the companies.

Of course if section 338 vests in the Board alone as contended by respondents the power of superseding or disallowing an initial joint tariff then, admittedly that not having been done, no question could arise with respect to the Board's jurisdiction to make the order.

Assuming, however, that the appellants' contention is correct with respect to the company's power to supersede an initial joint tariff after it had been filed then I am of opinion that they had not done so up to the time the complaint was filed.

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On the question of jurisdiction I do not entertain any doubt. The Board (section 10) is made a court of record. Section 26 confers upon it power

> to inquire into, hear and determine any application by or on behalf of any party interested

complaining (*inter alia*)

> that any company or person has done or is doing any act, matter or thing contrary to or in violation of this Act, etc.

The Board has clearly the power to determine all disputes arising as to whether a shipper or a carrier has violated any of the provisions of the Act. It is not necessary for us to consider the extent of the relief the Board may grant in cases where it finds either shipper or carrier guilty of such violation. In the present case it finds in accordance with respondents' contention that the legal rate at the times of the shipments and carriage complained of was the fifth-class rate. Any charge above or beyond that was an overcharge. But the Board did not assume to direct any refund. It left the parties to their legal remedies if they decided to recover such overcharges.

The appellants contend that some limitation must be read into the 26th section of the Act, because if read literally it would confer power upon the Board to determine every complaint of any violation of the Act either of commission or omission and that we might have in cases of railway accidents in which passengers or others were injured the absurdity reached of the Board sitting to determine whether a bell had been rung at a crossing or a whistle blown at the times and places required by the Act.

I venture to think, however, that upon a proper construction of the section no such absurd results could happen. What Parliament conferred upon the Board

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was power to determine complaints of failure on the part of a company, *quâ* company, to discharge or obey some statutory duty or obligation either positive or negative imposed upon it *as such company,* not complaints that some subordinate or employee of the company had failed to discharge a duty which the company charged him with and for the neglect to discharge which the company might be liable to the party suffering. That is, in my judgment, the meaning of the language used in section 26, and when so read it carries out fully the underlying idea of the Act, namely, that with private ownership there should be public effective control. Construed as I construe section 26 there does not appear to be either justification or excuse for the courts to read any limitation into the section. The Board has jurisdiction to hear and determine any complaint from an interested party that a company has failed to discharge or obey some statutory duty or obligation binding upon it as a company or violated some prohibition of the Act or they might, under the 49th section, make an interim *ex parte* order as to such failure or violation of their own mere motion and without complaint. Such jurisdiction, however, does not extend to the failure on the part of an employee to discharge a duty with which he was charged by the company alike to it and to the public. It is true that the section speaks of a company or person, but that word person as used in the section does not embrace or include employees of the company who fail in the discharge of the duties with which they are charged by the company. Different considerations would apply where the "Railway Act" or the "special Act" or a regulation of the Board imposed directly upon an individual person or official, as

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distinct from the company he represented, a duty or obligation to do or abstain from doing some act or thing. Beyond that the Act does not profess to go. Nor do I attach any weight to the contention that the order complained of does not profess to give any relief and that the Board had no power to give relief under the circumstances. In my opinion the determination of the facts as to the legal tariff in operation during the period the order covers is one peculiarly fitting for the Board. The mere fact of the company desisting from the violation complained of before the hearing of the complaint does not oust the Board's jurisdiction. Whether they could have supplemented their order with another directing a refund I am not called upon to determine. That question would probably have called for a wider inquiry and a great deal of evidence as to the overcharges paid by different individuals more suitable for the ordinary courts of the land to hear and decide. But that this Board, experienced men on the subject before it, advised by trained experts and possessing in its records at first hand all the evidence necessary to determine the subject-matter of this complaint as to whether in the first place there had been a joint tariff established for the carriage of this oil from the United States to Canada, and secondly, whether that tariff had been superseded by another at the time the complaint was filed, or was then still in force, and lastly, whether the complaint in whole or in part as to overcharges on the oil was well founded, was the proper tribunal to make such determination I have no doubt.

With the results which may follow their finding and order I am not at present concerned. Whether their finding on the facts as expressed in their order

will be binding and conclusive on the ordinary courts of the land in the event of suits being brought to recover the overcharges it would not be proper for me to express any opinion now.

It is sufficient for me to say that in my judgment the Board had jurisdiction to make the order appealed from.

As to the question of law whether the Board placed the proper legal construction on the documents referred to in the reasons for judgment of the Chief Commissioner I can only say that I think it did.

The joint tariff filed by the foreign company gave the Board jurisdiction as determined by us in the *Stoy Case*(1). Whether it was superseded or not by the amended tariffs filed by the foreign company is a question of law, and has been referred in this appeal to us. In my opinion this question of law was properly determined by the Board and therefore having jurisdiction on the subject-matter and having properly determined it the appeal fails.

It is not necessary for us to determine whether the Board has the sole jurisdiction to supersede any such joint tariff so filed or whether the company filing it can supersede it.

If the Board alone had the power to supersede such joint tariff such supersession has admittedly not taken place. If the company has the power it has not expressed it properly and the joint tariff remained in force when the complaint was laid.

I cannot put the argument as to the supplementary tariffs filed and their effect as superseding the joint tariffs more clearly or concisely than it is put by the Chief Commissioner in the following remarks:—

(1) 43 Can. S.C.R. 311.

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We do not see how a tariff, changeable as to tolls, at the will of either, without reference to the other, can be said to be a joint tariff. This must mean a tariff that all participating carriers are interested in jointly; not interested jointly in part only, but in the entire tariff; including not only the through or continuous route, but also the through rate or toll. In the case in hand the attempt is not to destroy the entire joint tariff; the continuous route, through billing, accounting, etc., are preserved, but the partnership is attempted to be, in part, dissolved by saying all our other arrangements regarding the carriage of this traffic shall remain, but hereafter each carrier shall fix its own local, and the through rate shall be the sum, or combination of those locals that may be in effect when and as shipments move.

It seems to me that this is just what section 338 was designed to prevent, and this is particularly so with reference to traffic falling under section 336, where Parliament has said such a tariff shall be filed, but has no means of compelling the foreign carrier to comply with its direction. That carrier complying, it seems reasonable to say, unless the Board disallows that joint tariff those shall be the tolls to be charged until you file another joint tariff shewing other or different tolls; when, unless disallowed, those latter shall be the only lawful tolls until again superseded by another joint tariff.

I agree that the appeal should be dismissed with costs.

IDINGTON J.—The question raised by the appeal herein relative to the jurisdiction of the Board of Railway Commissioners for Canada, seems to me after it has been thoroughly argued out to be without foundation.

The respondents' complaint having been lodged against the appellants whilst they persisted in maintaining a rate of tolls found by the Board to have been unjustifiable, the Board would have been derelict in duty if it had refused to continue the hearing simply because the appellants had abandoned the unfounded claims to rates. Not only had the Board the admitted power to have adjudged costs of the inquiry if it had found it just to award same, but also the

power and duty to make a ruling that would guide such like parties in a future dispute of the like kind and enable them to avoid such positions as the Board could not justify. Appellants no doubt felt this, when they appeared before the Board and, without protest, contested the matter on its merits.

It is not necessary to deal with long arguments founded on the hopes or fears of such uses as may or may not be made of the ruling in future or pending litigation, further than to say I think that we cannot here properly pass upon the questions of whether the ruling is or is not a declaration within section 318. I have no opinion thereon.

A question of law which the Board submitted is stated as follows:—

> Did the Board place the proper legal construction on the documents referred to in the judgment of the Chief Commissioner in this matter?

The complaints lodged by respondents against each appellant were identical, were heard together and the judgment of the Chief Commissioner deals with both as founded on the like conditions of fact.

The questions raised therein must turn on the construction to be given sections 336 and 338 of the "Railway Act" supported or illuminated by sections 314, 321, sub-section 4, and other sections of the Act.

As pointed out in the case of *The Grand Trunk Railway Co.* v. *The British American Oil Co.*(1), the "Railway Act" does not profess to confer any jurisdiction over foreign railway companies, but recognizes that relations may exist between those companies and the Canadian railway companies which so far as the latter are concerned may, as regards shippers over

(1) 43 Can. S.C.R. 311.

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their roads, become the subject of administrative or judicial control in Canada.

The foreign companies, within a recognized area, associate together for the purpose of determining, amongst other things, their dealing with the subject of freight rates, classifications of freight, and through routes and rates; and the appellants have representatives in this association or relations therewith, relative to such subjects, so far as a common purpose may require.

These foreign companies, or the association on behalf of them, had filed joint tariffs with the Board, and then in the month of January, 1907, filed also an official classification, No. 29, which placed the commodities now in question in the fifth class and thereby constituted a common through route and joint tariff and continuous through routes and joint tariffs within the meaning of section 336 of the Act, which reads as follows:—

> 336. As respects all traffic which shall be carried from any point in a foreign country into Canada, or from a foreign country through Canada into a foreign country by any continuous route owned or operated by any two or more companies, whether Canadian or foreign, a joint tariff for such continuous route shall be duly filed with the Board.

These several through routes seem to have been continued and operated, over the period in question, by the foreign railway company and the respondents respectively. Neither of the appellants, however, whilst availing themselves thereof adhered to the joint tariff thus constituted in January, 1907, but it is said later on charged the respondent higher tolls than could have been legally collected under such joint tariff or joint tariffs as settled by the filing of No. 29, Official Classification.

They allege in justification that any joint tariff so constituted was subject to variations to be made therein by the foreign companies, or any of them, by means of supplements to the Official Classification.

On the other hand it is urged and has been ruled by the Board that such an official classification coupled with the through rate then existent constituted a joint tariff, or joint tariffs, relative to the commodities in question that could not within the "Railway Act" be departed from by the Canadian companies in such an irregular manner. In other words, the Board holds that the latter cannot abandon the joint tariff and yet continue the through route.

Section 338 of the "Railway Act" is the only means it gives for terminating a joint tariff. It is as follows:

338. Joint tariffs shall, as to the filing and publication thereof, be subject to the same provisions in this Act as are applicable to the filing and publication of local tariffs of a similar description; and upon any such joint tariff being so duly filed with the Board the company or companies shall, until such tariff is superseded or disallowed by the Board, charge the toll or tolls as specified therein: Provided that the Board may except from the provisions of this section the filing and publication of any or all passenger tariffs of foreign railway companies.

2. The Board may require to be informed by the company of the proportion of toll or tolls, in any joint tariff filed, which it or any other company, whether Canadian or foreign, is to receive or has received.

One interpretation of this section contended for is that the plain grammatical meaning thereof is just what the words "superseded or disallowed by the Board" imply, and that, therefore, no departure from a joint tariff can be made by a Canadian company without the sanction of the Board.

It is urged, however, that other sections dealing with the subject of joint tariffs indicate that such is not the intention.

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There are three other joint tariffs dealt with by the Act — one the passenger specially excepted from the section 338 if the Board says so — another the joint tariff for freight originating in Canada and going to a foreign country, and a third for exclusively Canadian routes, and indirectly, as it were, a fourth which I need not refer to.

The joint tariff for exclusively Canadian routes is in its formation liable to be either the product of the action of the companies or to be imposed by the Board. It is, however, whether directly or indirectly, apt to be so much the creation of the Board that I do not see how the provisions relative thereto or to the ordinary tariff charges on wholly Canadian roads, can help us much to interpret section 338.

There certainly is a degree of liberty given all companies relative to changes of their own tariffs that does not seem in terms extended to the joint tariffs which any of them may take a part in forming. To my mind that fact itself is more instructive than anything which may be drawn from similarity of expression relative to the superseding or of the disallowance by the Board, as, for example, in section 328, sub-section 4, so much dwelt upon. The apparent liberty to change a tariff does not apply to a changing of route such as is the foundation of a joint tariff. In Canada the Board can make or unmake this foundation.

One thing is quite clear in this Act and that is that it was the intention of the legislature to give the Board as effective control as it possibly could over the tolls.

And even if the word "superseded" in section 338 is to imply that the companies concerned may have some liberty of action or some say relative to the

changing of a joint tariff, it does not seem to me consistent with such purpose of control by the Board that the Canadian companies were ever intended to be parties to any scheme that in fact was not, or did not include in it, the actual creation of a joint tariff in any substitution intended to supersede a joint tariff which must be presumed to have received its sanction by the act of filing with, and fact of non-rejection by, the Board. In that way and sense the words of section 338 now in question can each be given effect to.

It does not appear quite clear, on the material before us, how the obvious purpose of the Act, that each change should have the Board's approval, is supposed to have been in any case brought about.

It may arise from regulations that are not in the case or from practice.

It nowhere appears that a change of through route is permissible to the companies without being accompanied by a joint tariff.

The Canadian companies seem bound to have a joint tariff corresponding to each through route over a combination of roads, or parts of roads, and their own, and that of either joining with the foreign companies to constitute it. I have no doubt the objects of section 318 can best be attained by thus holding a check over such combinations.

And even if it be implied that those furnishing a through route may change or supersede the tariff, it must be by means of a joint tariff. The departures herein were not joint tariffs. So the Board has found, and I think, correctly. We must assume, I think, that the freight classification (such as No. 29) in the United States referred to in sub-section 4 of section 321, was the basis of all the Board had impliedly

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sanctioned, and that partial departures therefrom were not within their recognition.

The possible hardship of having to account for tolls collected by the respective appellants in cases not conforming with the preceding principles and accounted for to the foreign companies, is no argument. The Canadian companies must in all such cases conform to Canadian law, and clearly when making a through route be sure they have a corresponding joint tariff, or ask the Board for relief.

Hence this appeal should be dismissed with costs and the question of law submitted be answered in the affirmative.

Canadian Pacific Railway Co. v. *British American Oil Co.*—The question of the jurisdiction of the Board herein raised is somewhat more arguable than in the case of the joint appeal of this appellant and the Grand Trunk Railway Company against the Canadian Oil Companies heard just before this.

It seems clear that a formal complaint, such as I presume the rules of the Board require, was not made until the continuation of the offences in question had been abandoned.

There was, however, a clear complaint in writing to the Board before the appellant abandoned what was objected to and there was, so far as I can see, nothing to prevent the Board acting thereon and for the time being to waive its own regulation I have presumed to exist. The jurisdiction exists, therefore, for reasons I gave in the other case.

The ground respondent's counsel takes under section 318 may be good, but I do not desire to pass upon

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that section till I have to. Nor yet do I desire to cast any doubt upon what support it may or may not give and which respondent may need elsewhere. I have no opinion.

The question of law herein submitted by the Board seems pretty much what I had supposed was disposed of in the case *The Grand Trunk Railway Co.* v. *The British American Oil Co.*(1).

What I said in that case, and have said in the other case above mentioned, will furnish my reasons herein and I need not repeat them here. The consequence thereof seems to me to be that the supplements, which are said not to have been dealt with therein and are shewn more fully herein, cannot affect the rights of the parties. The answer to the question submitted ought to be that the filing of the supplements had no legal effect on the joint through rate established 25th of January, 1907, and the appeal ought to be dismissed with costs.

DUFF J.—By the order out of which these appeals arise, (dated the 16th of May, 1911,) the Board of Railway Commissioners for Canada declared that the "legal rates chargeable upon petroleum and its products, in carloads," in respect of certain shipments from certain "shipping points in Pennsylvania and Ohio to Toronto were the fifth-class joint through rates, etc., thereof." From this order both of the railway companies appeal by leave of the Board upon a question of law and upon a question of jurisdiction, by leave under an order made by Mr. Justice Idington.

The question of law, (with which I shall first deal,) is stated in these terms:—

(1) 43 Can. S.C.R. 311.

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Duff J.

Did the Board place the proper legal construction on the documents referred to in the judgment of the Chief Commissioner in this matter?

It was agreed on both sides that the point which it was intended to refer was that which was the real point in controversy before the Board, namely, whether the legal effect of the documents mentioned was correctly stated in the declaration I have just quoted.

The complaint of the respondents, the Canadian Oil Co., was that the railway companies had unjustly discriminated against certain shipments of crude oil, (from the shipping points mentioned to Toronto,) by refusing to carry that commodity at the rates prescribed in the tariffs filed. The shipments in question were made between the first of January, 1907, and the thirty-first of December, 1910, and the contention of the applicants, which the Board upheld, was that during the whole of that period the rates legally chargeable on such shipments were the rates referred to in the order of the Board, the rates, that is to say, which were legally chargeable at the dates of the shipments as "joint through rates" for commodities of the fifth class according to the classification mentioned and according to the "joint through tariffs" published and filed with the Board.

For the purposes of the argument on this appeal it was admitted that in consequence of the filing of "Official Classification No. 29," by which "petroleum and its products" were for the first time classified as commodities of the fifth class, the "joint through" rate for commodities of that class must be taken to have become applicable to crude oil, on January 1st,

1907. That point was determined adversely to the railway companies by the judgment of this court in *The Grand Trunk Railway Company* v. *The British American Oil Company* (1), confirming a ruling of the Board.

The contention of the railway companies is that by a series of tariffs filed subsequent to that date "petroleum and its products" were taken out of the category of commodities of the fifth class so far as regards shipments into Canada from the shipping points in question. By these various tariffs the railway companies concerned endeavoured to abrogate the "joint through rate" in force for these commodities in respect of such shipments and to substitute therefor a rate which should be made up of the sum of the local rates (1) from the point of origin to the Canadian gateway, and (2) from the Canadian gateway to the point of destination, which should be in force when the shipment should move. The question referred by the Board is, in substance, the question whether the railway companies have succeeded in accomplishing this. The tariffs upon which the appellants rely are very numerous, but it will be found on examination, (as pointed out in the appellants' factum,) that the methods adopted by the carriers to attain the object they had in view may be classified as follows:—

(1) By a supplement to a joint tariff concurred in by the carriers, providing that the rates to points in Canada shall be the local rates to the frontier plus the local rate beyond.

(2) By providing by joint freight tariffs, containing so-called exceptions to the Official Classification that the Official Classification basis shall not apply to

(1) 43 Can. S.C.R. 311.

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points in Canada, but that these rates shall be made on the sum of the totals.

(3) By providing by joint freight tariffs or supplements thereto, that the through rates to points in Canada shall not apply.

(4) By providing by such supplements that no through rates are in effect.

All these methods, if effective, would result in the same thing, namely: — the rate for shipments of the commodities affected from the shipping points in question into Canada would be a variable rate made up of the sum of the local rates in force from time to time, first, from the point of shipment to the Canadian gateway, and secondly, from the Canadian gateway to the terminus of the route. These tariffs were concurred in by all the carriers concerned, but none of them had the sanction of the Board.

The Board has held that these methods were ineffective for the purpose the railway companies had in view. I concur in that opinion and I agree, moreover, with the reasons which were given in support of it by the distinguished and lamented judge who then filled the office of Chief Commissioner.

Each of the shipments in question, it is, of course, admitted, passed over a "continuous route" in part "operated" by one of the appellant companies. In such a case, by section 336 of the "Railway Act," a *"joint tariff for such continuous route"* must be filed, (according to the decision in the case already mentioned,) and the "company or companies" operating the route are required, by section 338, to charge the toll or tolls specified therein "until such tariff is superseded or disallowed by the Board." There has been in this case no action by the Board. It is not strictly

necessary to pass upon the point, but the view I am disposed to take is that the language of the section does not require us to hold that every "joint tariff" is only subject to alteration by the action of the Board; I think there is no satisfactory ground for drawing such a sharp distinction between a "joint tariff" and other freight tariffs. It would not, of course, necessarily follow that every "joint tariff" would be subject to alteration at the will of the parties. It may be, for example, that on the true construction of section 334 a "joint tariff" framed pursuant to an order of the Board under that section remains in force until displaced by the Board itself.

However that may be, the Act plainly contemplates that for a "continuous route" to which section 336 applies there shall be a "joint tariff." That being so, then, (assuming the companies operating such route to have in some cases the power to "supersede" by their own action a "joint tariff" once established without invoking the sanction of the Board,) it must be taken, conformably to the principle declared by section 336, that such supersession necessarily involves the establishment of another tariff which itself falls within the category of "joint tariff," within the meaning of that phrase as used in the sections referred to. I agree with the late Chief Commissioner that a tariff of rates made up of variable local rates does not fulfil that condition.

The question of jurisdiction remains. I confess I can entertain no doubt that each of the several orders of the Board of the 16th of May, 1911, records and was intended to record an adjudication by the Board in its judicial capacity upon an issue between the complainants and the company or companies respectively

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against which the complaints were lodged; and I have come to the conclusion that the Board had, under section 26, jurisdiction to make the declarations contained in those orders.

The contention on behalf of the appellants is that the jurisdiction of the Board to adjudicate *inter partes* upon questions of law or of fact is confined to cases in which the Board has jurisdiction to give some consequential relief. The answer to the contention appears to be that sub-section (*a*) of section 26 confers the broadest jurisdiction to decide upon complaints with respect to past offences of omission or commission and the form of the sub-sections (*a*) and (*b*) suggests that the jurisdiction to pass upon such complaints is intended to be exercisable independently of the jurisdiction under sub-section (*b*). There are, obviously, many reasons of good sense and policy why such a jurisdiction should be exercisable by the Board; and I think there is no ground upon which the restriction contended for can be sustained.

ANGLIN J.—The Board of Railway Commissioners, on the application of the Canadian Oil Companies, Limited, made an order in which, following an introductory recital of facts,

> it is declared that the legal rates chargeable on petroleum and its products, in carloads, from the said shipping points in the States of Ohio and Pennsylvania to Toronto, Ontario, were the fifth-class joint through rates in effect at the time the said shipments moved, as shewn in the joint through tariffs published and filed with the Board, and in accordance with the Official Classification No. 29, and subsequent issues thereof.

By leave of the Board the railway companies appeal from this order on a question of law formulated by it in this form:—

Did the Board place the proper legal construction on the documents referred to in the judgment of the Chief Commissioner in this matter?

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By leave of my brother Idington they also appeal on the ground that in making the above order the Board acted without jurisdiction. On this branch of the appeal two points are urged:—

(1) That before the Board heard the application the use of the combined local rates complained of had been discontinued and the joint tariff demanded by the applicants had been restored, or brought into force, and the Board was, therefore, not called upon and was not in a position to afford any relief, and should not have proceeded to pronounce a merely declaratory order.

(2) That the order purports to declare illegal rates charged by the United States railways from the points of shipment to the Canadian border.

The substantial grievance of the appellants is that they anticipate that in prospective actions by the Canadian oil companies to recover from them the sums paid for freight on shipments of petroleum from the United States shipping points to Toronto (the freight charges for the entire continuous routes were collected by the Canadian railway companies on delivery to the consignees) in excess of the joint tariff rates which the order of the Board declares to have been in force, that order will, under section 54 of the "Railway Act," be used to establish conclusively their liability to refund.

I shall deal first with the questions of jurisdiction.

By the "Railway Act," notably by sections 26 and 318, the Board is empowered to "inquire, hear and determine" and to "determine" (which involves inquiry, if not hearing) complaints in respect of any-

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thing which a railway company "has done or is doing" in contravention of that statute, etc. While ordinarily such an inquiry and determination will be had for the purpose of deciding the right of an applicant to some relief and will, in proper cases, result in an order affording such relief, there may arise many cases in which, although the particular practice complained of has ceased, it may be desirable to institute, or to pursue, an investigation and to reach and formulate a determination for the future guidance of the railway company against which complaint has been made and of other railway companies and of the general public in regard to matters kindred to that which forms the subject of inquiry. What the Board may do under section 26 at the instance of a complainant, it may do under section 28 "of its own motion." While I more than gravely doubt that it was the intention of Parliament to constitute the Railway Board a tribunal for the determination of facts in cases of alleged contraventions of the "Railway Act" or of regulations made under that statute or of orders of the Board, etc., merely as a step towards, and to facilitate the prosecution of civil actions brought or to be brought against railway companies by aggrieved persons to obtain relief in damages or otherwise, I entertain no doubt that for the other purposes above indicated the Board possesses the jurisdiction which it has exercised in the present case. There is nothing before us to suggest that its object in making the order appealed from was to enable the respondents to use it under section 54 as a foundation for proceedings in the civil courts. If this order may be so used that is merely an incidental consequence which does not displace the jurisdiction of the Board

to make it and is a phase of the matter with which we are not presently concerned.

The order as drawn affects only the Canadian railways which were before the Board. It does not purport to declare illegal any charges made by the foreign railways which operated those parts of the continuous routes beyond the Canadian gateways. It necessarily deals with the joint tariff which the Board (rightly, having regard to the decision of this court in the *Stoy Case*(1)) holds had been established for the continuous routes operated by the Canadian and foreign railways. It merely declares that, because that joint tariff had not been "superseded or disallowed" in accordance with the provisions of the "Railway Act," it is still binding on the Canadian railways for the entire continuous routes. Whether the effect of this order will be to enable the respondents to recover from the appellant companies the whole amount paid them in excess of the joint tariff rates for the entire continuous routes is a question not now before us. I cannot see in an order which does nothing more than declare that as to the Canadian railways which were before the Board the joint tariff to which they became parties continues to bind them, anything in excess of the jurisdiction conferred by Parliament on the Railway Board.

On the question of law submitted to us I am also of the opinion that the appeal fails. The respondents maintain that if it were competent for the railway companies by their own joint act to "supersede" the joint tariff which became effective on the 1st of January, 1907, under the application of Official Classifica-

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tion No. 29, adopted pursuant to sub-section 4 of section 321 of the "Railway Act," they did not take effective steps for that purpose. I find it difficult to understand why, having regard to the terms of the consents filed by the Canadian railway companies, (especially that of the Canadian Pacific Railway Company,) in virtue of which the tariffs filed only by the American railway companies have been held to be joint tariffs (1), the filing by the same companies of supplements or amendments to such joint tariffs should not be deemed joint acts of the American and Canadian companies, and, if railway companies had the power of superseding joint tariffs, should not be effective for that purpose. (See section 323, sub-section 3.) But if the railway companies had the power of supersession in regard to a joint tariff I incline to the view that it would properly be exercised only by an amendment or supplementing of the tariff itself and not by filing an exception to a freight classification used under the authority of section 321, sub-section 4. It is, in my opinion, not competent for a railway company operating the Canadian section of a continuous route to or from a point in the United States to use a freight classification in use in the United States subject to a special exception in regard to goods to be carried to or from Canada. The "freight classification in use in the United States," of which the use is authorized by sub-section 4 of section 321, means a freight classification in general use in that country under which goods of the same kind will be treated as in the same class when shipped for carriage to or from Canada as when shipped for local carriage in the United States. I am, therefore, of the

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opinion that if railway companies had the right by their own action to supersede joint tariffs, they could not do so in the case of a joint tariff for a continuous route, partly in Canada and partly in the United States, by specially excepting from a classification in use in the United States, either when adopting it or afterwards, all goods, or any particular kind of goods destined for or shipped from Canadian points. If a railway company sees fit to adopt for such a route a freight classification in use in the United States which contains such an exception, it will, I think, be bound by the classification without the exception. But in the view which I take it is not necessary to dwell further upon, or to definitely determine these questions.

In my opinion upon the proper construction of section 338 of the "Railway Act," it is not competent for two railway companies, one foreign and the other Canadian, which have filed or concurred in the filing of a joint tariff, themselves to "supersede" it. It can be "superseded or disallowed (only) by the Board." Section 338 does not itself confer powers of supersession and disallowance. These powers are given to the Board by section 323, and to the powers so conferred section 338 refers. Domestic "special" tariffs may be superseded within defined limits (section 323, sub-section 3; section 328, sub-section 3; section 328, sub-section 4; section 332, sub-section 3) by the railway company itself filing a new "special" tariff. But section 338 appears to preclude the supersession of joint tariffs, whether purely domestic or partly domestic and partly foreign, by the railway companies, inasmuch as it enacts that such tariffs when duly filed shall bind them until "superseded or disallowed by the Board."

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In section 328, sub-section 4, and again in section 332, sub-section 3, the supersession of domestic special tariffs by the filing of new special tariffs is provided for. The language used is:—

> Upon any such (special freight) tariff being so (duly) filed, the company shall, until such tariff is superseded, or *is* disallowed by the Board, charge the toll or tolls as specified therein; *and such (special freight) tariff shall supersede any preceding tariff or tariffs or any portion or portions thereof, so far as it reduces or advances the tolls therein.*

In sub-section 3, of section 332, the comma, found after the word "superseded" in sub-section 4, of section 328, is omitted; and for the semi-colon after the word "therein," where it first occurs, a comma is substituted. These differences I regard as purely accidental. But in section 338 the word "is" is dropped before the word "disallowed," and the clause which I have italicized, found in sections 328 and 332, is wholly omitted. These changes were, in my opinion, deliberate. The important clause in section 338 reads:—

> And upon any such joint tariff being so duly filed with the Board, the company or companies shall, until such tariff is superseded or disallowed by the Board, charge the toll or tolls specified therein.

Grammatically, the words "by the Board" apply equally to the two verbs "is superseded or disallowed." Not only do I find no ground for discarding the grammatical construction, but there appear to be several reasons for adhering to it. Comparison with sections 328 and 332 makes it reasonably clear that the departure from the language of those sections was intentional. Under section 323 the Board has a power of supersession in the sense of replacing. "Remplacé" is the translation of "superseded" in the French version of section 338.

The Board's jurisdiction probably does not extend to requiring a foreign company and a domestic company to unite in filing a joint tariff under section 336. (Compare section 335 and note the difference in form.) It apparently has not the power, if a joint tariff once filed has been disallowed or has been withdrawn with its approval, subsequently to require the filing of another joint tariff to take its place. The only means by which it can deal with such cases appears to be to prevent Canadian companies from participating in the operation of continuous international routes until satisfactory joint tariffs are duly filed. But it seems to be the scheme of the Act to enable the Board to retain control once acquired by providing that if a joint tariff has been filed it shall remain operative and binding at least upon Canadian companies interested until the Board sees fit to supersede or disallow it, and by denying to the railway companies in respect of joint tariffs the power, which is given in respect of special domestic tariffs, of superseding or abrogating them by merely filing new special tariffs to replace them.

For these reasons, bowing to the decision of this court in the *Stoy Case* (1), while respectfully adhering to the dissenting opinion which I there expressed, I am of opinion that this appeal should be dismissed with costs.

Canadian Pacific Railway Co. v. *British American Oil Co.* What I have said in regard to the *Canadian Oil Companies Case* applies to this appeal, which should likewise be dismissed with costs.

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BRODEUR J.—I am of opinion that the appeal in each case should be dismissed.

Appeals dismissed with costs.

Solicitor for the appellants, The Canadian Pacific Railway Company: *E. W. Beatty.*

Solicitor for the appellants, The Grand Trunk Railway Co.: *W. H. Biggar.*

Solicitors for the respondents: *Thompson, Tilley & Johnston.*