THE NIAGARA, ST. CATHARINES AND TORONTO RAILWAY CO. APPELLANTS;

AND

JAMES DAVY ..... RESPONDENT.

1910
*Feb. 15, 16.
*March 11.

ON APPEAL FROM THE BOARD OF RAILWAY COMMISSIONERS FOR CANADA.

Railways—Carriers—International through traffic—Reduction of joint rate—Jurisdiction of Board of Railway Commissioners—Practice—Parties—Costs.

On a complaint in respect to a joint tariff, between the appellant company and The Michigan Central Railroad Company, under which a rate of three cents per hundred pounds was charged on pulpwood in car-lots for carriage from Thorold, in Ontario, to Suspension Bridge, in the State of New York, the Board of Railway Commissioners for Canada decided that the rate should be reduced and ordered the appellants to restore a joint rate which had previously existed of two cents per hundred pounds for carriage of such goods between the points mentioned. The Michigan Central Railroad Company, over whose railway the goods had to be carried from the point where the appellants' railway made connection with it at the international boundary to the foreign destination, was not made a party to the proceedings before the Board. On appeal by leave of a judge to the Supreme Court of Canada,

Held, per Fitzpatrick C.J. and Idington and Duff JJ., that the Board had no jurisdiction to make the order.

Per Girouard, Davies and Anglin JJ.—As the Michigan Central Railroad Company was not a party to the proceedings, it was not competent for the Board to make the order.

The appeal was allowed without costs.

APPEAL, by leave of the Chief Justice of the Supreme Court of Canada, from that portion of an order

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

1910

NIAGARA, ST. CATHARINES & TORONTO RY. CO. v. DAVY.

of the Board of Railway Commissioners for Canada, dated 2nd December, 1909(1), which directed that a joint rate of two cents per hundred pounds of wood-pulp, in carloads, from Thorold, in Ontario, to Suspension Bridge, in the State of New York (which had previously existed and been superseded), via the appellants' railway and the Michigan Central Railroad, should be restored.

The appellants are a railway company declared by the Parliament of Canada to be a work for the general advantage of Canada, and have power to construct and operate certain lines of railway in Canada, but not outside of the Dominion. The respondent is a manufacturer and shipper of wood-pulp carrying on business at Thorold, in Ontario, and the traffic in question was the carriage of wood-pulp in carloads from Thorold to Suspension Bridge, in the State of New York, one of the United States of America.

Such freight is carried by the appellants from Thorold over a line owned and operated by them under their charter powers to Niagara Falls, in Ontario, where their tracks join the tracks of the Michigan Central Railroad Company. Between Niagara Falls, in Ontario, and Suspension Bridge, in New York, the appellant company does not and is not authorized to operate any line of railway nor have they any other line of railway by which they can or do operate to Suspension Bridge, New York. Suspension Bridge is a station a short distance east of the Niagara River in the State of New York, on a line of railway operated by the Michigan Central Railroad Company, a company incorporated outside of the Dominion of Canada, but having the right to operate a railway in certain

(1) 9 Can. Rway. Cas. 493.

parts of Canada, as provided for by the statute 4 Edw. VII. ch. 55, and the freight in question, from Niagara Falls, Ont. (where the appellants' tracks connect with tracks operated by the Michigan Central Railroad Company), is carried by the Michigan Central Railroad Company over lines operated by the latter company to Suspension Bridge in the State of New York.

For some time prior and up to 1st February, 1908, there was in effect a tariff providing for a through rate of two cents per hundred pounds on such traffic from Thorold to Suspension Bridge, such traffic having been made effective by concurrence therein by the appellants and the Michigan Central Railroad Company. On 1st February, 1908, by a tariff concurred in by these companies, the rate was changed to three cents per hundred pounds, but a reduction was made again to two cents per hundred pounds from 25th April, 1908, to 14th November, 1908. On 15th November, 1908, a tariff came into effect by concurrence of the companies fixing the rate on such traffic at three cents per hundred pounds, and cancelling the former tariff which provided a rate of two cents per hundred pounds. Shortly after the last mentioned tariff came into effect the respondent applied to the Board of Railway Commissioners for Canada for an order for a refund of one cent per hundred pounds on freight shipped under the three-cent-rate and for an order directing the appellants to restore the rate of two cents per hundred pounds on such freight. The Michigan Central Railroad Company was not made a party in the proceedings.

The order made by the Board was as follows:—

"It is ordered that that part of the application directing the Niagara, St. Catharines and Toronto

1910

NIAGARA, ST. CATHARINES & TORONTO RY. CO. v. DAVY.

Railway Company to refund to the applicant the said sum of $219.83, being the additional one cent per 100 pounds paid on forty-two carloads shipped from November 15th, 1908, when the three-cent-rate went permanently into effect, to September 29th, 1909, the date of this application, be, and it is hereby, dismissed.

"And it is further ordered that the joint-rate of three cents per 100 pounds at present in force on wood-pulp in carloads, from Thorold, Ontario., to Suspension Bridge, New York, via the Niagara, St. Catharines and Toronto Railway and the Michigan Central Railroad, be, and it is hereby, disallowed, and the Niagara, St. Catharines and Toronto Railway Company is hereby required, by the 15th day of January, 1910, to restore the joint-rate of two cents per 100 pounds which was in effect on the said traffic prior to February 1st, 1908, and November 15th, 1908."

Chrysler K.C. and *George F. Macdonell* for the appellants.

Strachan Johnston for the respondent.

THE CHIEF JUSTICE.—The appeal should be allowed. The Railway Commissioners are without jurisdiction to make the order complained of.

GIROUARD J.—The appellants complain that the Railway Board had no jurisdiction to make an order directing the appellants to restore a joint-rate of two cents per hundred pounds on wood-pulp in carloads from Thorold, in the Province of Ontario, to Suspension Bridge, in the State of New York, via The Niagara, St. Catharines and Toronto Railway and the Michigan Central Railroad, an American railway oper-

1910

NIAGARA, ST. CATHARINES & TORONTO RY. CO. v. DAVY.

Girouard J.

ating in this country. The Michigan Central Railroad is not in the case and I cannot see how the said order could have been made. When the proper parties are before us it will be time to decide the question for our decision, but, in my humble opinion, not before that time.

The appeal should be allowed.

DAVIES J.—The order of the Board of Railway Commissioners in this matter, so far as this appeal is concerned, directed

> that the joint-rate of three cents per hundred pounds at present in force on wood-pulp in carloads from Thorold, Ontario, to Suspension Bridge, New York, via the Niagara, St. Catharines and Toronto Railway and the Michigan Central Railroad be disallowed,

and that the former railway company (appellants), by a certain date, should restore the old rate of two cents.

The Michigan Central Railroad Company, a foreign corporation, rates over whose road the Board's order thus assumed and exercised jurisdiction, were not cited before the Board or in any way made parties to the proceedings.

Very interesting and important questions arising out of the proper construction of sections 335 and 336 of "The Railway Act," purporting to confer powers on the Board for the regulation of international joint-traffic, were discussed at length and ably by the counsel for the parties to the appeal before us.

I cannot understand how it was that the Michigan Central Railroad Company, whose interests were so directly involved in the order under review, were not made parties to the proceedings.

It is clear to my mind that the omission to make them parties is fatal to the validity of the order as

1910

NIAGARA, ST. CATHARINES & TORONTO RY. CO. v. DAVY.

Davies J.

made and I, therefore, feel myself compelled to concur in the allowance of the appeal *on that ground* alone. Under the circumstances, I do not think that costs should be allowed.

IDINGTON J.—This is an appeal from an order of the Board of Railway Commissioners for Canada, directing, amongst other things, the appellants to restore a joint-rate for carriage of freight from Thorold, in Ontario, to Suspension Bridge, in the State of New York, via the railway of the appellants and the Michigan Central Railroad.

The appeal is made on the ground that, inasmuch as part of the latter road needed to effect the service in question runs through a part of New York State, and the company which owns or operates it is not a Canadian creation and only subject to the jurisdiction of Parliament in respect of that part of its road within Canada, the Board had not the power to make the order.

I have no doubt that the road in the United States is absolutely beyond the jurisdiction of the Board and that the company operating it is, in respect of the part within the United States, also as completely beyond the jurisdiction of the Board.

I am also clear that this is not one of those cases in which, by specified indirect means, the sanction of a foreign company was intended by the Act to be indirectly coerced into submission to the order of the Board.

It is equally clear that the part of that company's road in Canada and its operation therein are subject to the Board as other roads over which it is given jurisdiction.

It has been rightly conceded by submitting to the

1910

NIAGARA, ST. CATHARINES & TORONTO RY. CO. v. DAVY.

Idington J.

part of the order disallowing the joint-tariff that had been for a time in force that the Board had power to so disallow that joint-tariff.

If the order had expressly on its face made its enforcement of the part objected to conditional upon the other company, which is not a party to the proceedings, filing upon request or notice a joint-tariff or a tariff of its own, that would have clearly enabled the appellants to carry freight on the terms indicated could such a conditional direction have been said to be beyond the jurisdiction of the Board ? Is that form of conditional direction not implied in the order as it stands ? We should bear the history of the tariff in mind and should not run away too readily with the idea that the whole case lies in the bald statement that the foreign road is supposed against its will to do something the Board has not power to compel.

No such power is now pretended. And it is conceded on both sides that this is not a case where the old order of things revives *ipso facto* upon the new being abolished.

However, having fully considered, as well as many others, these suggestions which I have stated in order that it cannot be assumed they were overlooked, I fear the express terms of the order are too explicit to admit clearly of the implications which I have suggested as possible. The order probably took the form it appears in through inadvertence.

It does not appear whether anything was done to suggest this to the Board.

I think we should not encourage mere captious objections which might be overcome by an application to the Board to vary what may only have been, as I suggest, inadvertence.

I would, therefore, allow the appeal without costs.

1910

NIAGARA, ST. CATHARINES & TORONTO RY. CO. v. DAVY.

Anglin J.

DUFF J.—I agree that the appeal should be allowed for the reasons given by Mr. Justice Idington.

ANGLIN J.—The Niagara, St. Catharines and Toronto Railway Company, a corporation subject to the legislative authority of the Parliament of Canada, operates a line of railway between the Town of Thorold, Ont., and the Town of Niagara Falls, Ont. At the latter town it connects with the Michigan Central Railroad Company's system. This company operates a line of railway a portion of which lies between Niagara Falls, Ont., and the Town of Suspension Bridge, in the State of New York.

Prior to the first of February, 1908, there was in force a joint-tariff under which these two railways carried products of the respondent from Thorold, Ont., to Suspension Bridge, N.Y., at the rate of 2 cents per 100 pounds. On February 1st, 1908, the two railways raised this rate to 3 cents; they again reduced it to 2 cents on the 25th April, 1908; but on the 15th November, 1908, they again advanced it to 3 cents. The application before the Railway Board was for the disallowance of the 3 cent rate and the restoration of the 2 cent rate; and also for an order that the appellant railway company should refund to the respondent the sum of $219.83, the extra amount paid by him between November 15th, 1908, and September 29th, 1909, by reason of the increase in rates. He was refused the relief of a refund because in the opinion of the Board the 3 cent rate was legally in force from November 15th, 1908.

The Board however ordered

that the joint-rate of three cents per 100 pounds at present in force on wood-pulp in carloads, from Thorold, Ontario, to Suspension Bridge, New York, via the Niagara, St. Catharines and Toronto Railway and

1910

NIAGARA, ST. CATHARINES & TORONTO RY. CO. v. DAVY.

Anglin J.

the Michigan Central Railroad, be, and it is hereby, disallowed, and the Niagara, St. Catharines and Toronto Railway Company is hereby required, by the 15th day of January, 1910, to restore the joint-rate of two cents per 100 pounds, which was in effect on the said traffic prior to February 1st, 1908, and November 15th, 1908.

From the first part of this order which disallows the 3 cent tariff there is no appeal. By leave of the Chief Justice of this court an appeal has been permitted in respect of that portion of the order which requires the defendants to restore the joint-rate of 2 cents per 100 pounds in force prior to November 15th, 1908.

The Michigan Central Railroad Company were not parties to the application before the Railway Board and are not before this court. The appellants rely upon this fact as an objection to the order in appeal; and they also maintain that, had the Michigan Central Railroad Company been before the Railway Board and had the order been made against both companies, it would nevertheless be beyond the jurisdiction conferred on the Board by the "Dominion Railway Act," inasmuch as the Board thereby assumed to prescribe a tariff or rate for traffic carried beyond the international boundary to a point in a foreign country.

If the order exceeds the jurisdiction of the Board because the Michigan Central Railroad Company was not before it, it is unnecessary and it would probably be unwise to pass upon the larger question raised by the appellants.

The order requires the respondent company alone "to restore" the *joint* rate or *joint* tariff existing before the 15th November, 1908. This tariff had ceased to be effective by reason of its having been legally superseded by a later joint-tariff which the Board itself has found to have been legal and effective. (See

1910

NIAGARA, ST. CATHARINES & TORONTO RY. CO. v. DAVY.

Anglin J.

section 328(4).) The order for restoration, therefore is, in reality, an order requiring the company to make and file a new joint-tariff. This, in my opinion, it cannot do without the concurrence of the Michigan Central Railroad Company; and there is, and upon the present record there could be, no order of the Board requiring the Michigan Central Railroad Company to concur in the making of such a tariff. Section 333, applicable to Canadian companies, indicates that where a joint-tariff is to be made by the companies themselves both must agree and the only action which the initiating company is enabled to take without the concurrence of the other company is the filing of the joint-tariff after it has been so agreed upon. Although there is no express provision in section 335 regarding agreement of the companies, it is obvious from the very nature of a joint-tariff that there must be such an agreement if the tariff is to be the act of the companies and not of the Railway Board. I am therefore of opinion that the order as drawn requires the appellant company to perform what may be an impossibility and it is for that reason, in my opinion, in its present form beyond the jurisdiction of the Board.

An order might probably have been drawn prohibiting the appellants from taking the traffic in question for continuous carriage from Thorold, Ont., to Suspension Bridge, N.Y., at a rate exceeding that which the Board thought proper, which would not have been open to this objection. If the effect of disallowance of a joint-international-tariff is — under the operation of the "filing" sections made applicable by section 338 — that, until a new tariff is filed or a new toll prescribed, the railways affected cannot charge any tolls for the traffic covered by the disallowed tariff

1910

NIAGARA, ST. CATHARINES & TORONTO RY. CO. v. DAVY.

Anglin J.

— *i.e.*, in the case of joint-tariff traffic by the continuous route, I see no reason why such an order as that indicated might not be made. But such an order would not accomplish what the present order, if valid, would have effected.

Mr. Johnston stated that the Board, in his opinion, did not intend to make an order having any greater effect than such a prohibitive order. But it is, I think, not possible to place upon the order actually before us such a limited construction.

I am not to be understood as expressing any view upon the powers of the Board to make such an order as that in appeal were the Michigan Central Railroad Company before it as well as the present appellants.

Because it purports to impose upon the appellant company unconditionally an obligation which it can only fulfil with the concurrence of another railway company, which it may not be able to obtain, I think the present order transcends the jurisdiction of the Board and that for this reason this appeal should be allowed.

In the peculiar circumstances of this case there should, in my opinion, be no costs of this appeal.

Appeal allowed without costs.

Solicitor for the appellants: *George F. Macdonell.*

Solicitors for the respondent: *Thomson, Tilley & Johnston.*