CASES

DETERMINED BY THE

EXCHEQUER COURT OF CANADA

AT FIRST INSTANCE

AND

IN THE EXERCISE OF ITS APPELLATE JURISDICTION

HIS MAJESTY THE KING.....PLAINTIFF;

AND

1922
Nov. 7.

FRANK A. GILLIS COMPANY LIMITED..DEFENDANT.

Government Railways—Canadian Car Demurrage Rules—Conditions under which demurrage is recoverable.

Under the Canadian Car Demurrage Rules, authorized by the Board of Railway Commissioners for Canada, and approved by Order in Council of the 12th July, 1918, for use on Canadian Government Railways, where a railway has given notice to the consignee of the arrival of his car, the consignee has 24 hours free time within which to direct the placement of such car. Thereafter he is allowed 48 hours to take delivery of his goods, provided the car has been placed "in a reasonably accessible position for unloading" during such 48 hours. If the consignee fails to take delivery under such conditions within the 48 hours, demurrage begins to run whether or not the car is kept on a suitable delivery track after the 48 hours, or is thereafter placed on a storage track.

Quaere: Having in view the provisions of section 1 of 9-10 Geo. V, c. 13, does the Railway Act, 1919, become applicable to the Canadian National Railways before the appointment of directors is made in conformity with the enactment first mentioned?

INFORMATION by the Attorney General of Canada seeking to recover the sum of $5,011.00 for demurrage charges alleged to be due by the defendant by reason of his failure to unload goods consigned to him, within the statutory delays (1).

June the 21st and 22nd, 1922.

(1) Reporter's note: Railway demurrage was considered by the English Court of Appeal in the *Great Western Railway Company* v. *John Laing & Company,* (1922) 39 T.L.R. 93.

1922

THE KING
v.
F. A. GILLIS CO.

Case now heard before the Honourable Mr. Justice Audette, at Fredericton.

W. C. MacDonald, for plaintiff.

W. L. Hall, K.C., for defendant.

AUDETTE, J. now (November 7th, 1922) delivered judgment.

This is an information exhibited by the Attorney General of Canada, whereby it is sought to recover (by amendment) the sum of $5,011.00, for demurrage charges alleged to be due, by the defendant, for cars placed for unloading in Willow Park yard, in the city of Halifax, in the province of Nova Scotia, during the year 1920.

The defendant, who carries on, at Halifax, the business of builders' and contractors' supplies, was, in the year 1920, acting as agent for the Pictou County Construction Supply Co., selling and delivering sand and gravel shipped mostly from Seaforth beach. He was the consignee of such commodity in all cases.

Under the provisions of the Canadian Car Demurrage Rules, on the arrival of these cars at Rockingham yard, which is considered as a sorting terminus for the whole of Halifax, the railway company issued advice notes which were promptly delivered by messenger to the (defendant) consignee who gave receipt therefor and who had then 24 hours (Rule 3) to order his car to any point. In all cases, except in respect to five cars, he ordered them to be placed at what he termed Cotton Factory Siding.

"Car placed" or "placement" has a well understood meaning in railway vernacular, and it is defined in the demurrage rule as "a reasonably accessible position for loading or unloading."

After the car is placed the consignee is allowed 48 hours (2 days) free time for unloading.

These regulations are to be found in "The Canadian Car Demurrage Rules" authorized by the Board of Railway Commissioners for Canada and approved by an order in council, of the 12th July, 1918, for use on the Canadian Government Railways. See Exhibit No. 1.

The controversy in the present case arises from the charges made by the Canadian National Railways for demurrage after these 48 hours had elapsed.

The defendant contends that the cars in question were either placed on storage sidings or on sidings other than those assigned or named by him, or on sidings unfit to be used for unloading.

The Crown, on the other hand, contends that as the defendant had no place to take the sand and gravel and store it before delivering to a purchaser, it became of great advantage to him to keep it in the railway yard until he found a customer, and that he was negligent and dilatory in taking delivery when the sand and gravel was not wanted.

The consignee has no right to delay unduly taking delivery when the sand and gravel was not wanted.

The consignee has no right to delay unduly taking delivery of his cars with the object of serving his own purposes, at the expense of the carrier. Yet the carrier has no right to expect to be entitled to collect demurrage when he cannot give ready delivery

without delay and without furnishing adequate and suitable accommodation,

that is,

without placing the car in a reasonably accessible position for unloading.

Nor has the carrier any justification for delaying teams sent by the consignee for unloading, for a full morning, as was proved in this case, these teams being paid by the hour by the consignee.

Is there not an implied warranty that before demurrage can be charged that the carrier has in all respects the goods ready for delivery? And does not the law look with a jealous eye upon any effort of the carrier to lessen his contractional obligations, either express or implied? Yet the primary duty of a carrier is to carry; it is not his duty as such to furnish storage beyond a reasonable time necessary for unloading and removal. *Cleveland, Cincinnati, Chicago & St. Louis Ry. Co.* v. *Dettlebach* (1) *Southern Ry. Co.* v. *Prescott* (2) *American Paper and Pulp Association* v. *Baltimore & Ohio Ry. Co. et al* (3).

(1) [1915] 239 U.S. 588 (2) [1916] 240 U.S. 632.
(3) [1916] 41 I.C.C. 506 at p. 512.

1922

THE KING
v.
F. A. GILLIS CO.

Audette J.

Diligence is expected from both parties respectively.

In arriving at the determination of the present controversy we must bear in mind that no one has a right to unduly enrich himself at the expense of others. That is, on the one hand it would appear that the railway company could hardly ask demurrage upon a car which is not placed "in a reasonably accessible position for unloading", and on the other hand the defendant after his car has been duly placed on a proper siding for unloading during 48 hours, after the 24 hours following the advice notice, has no right to expect that the railway will keep his car indefinitely either on that siding or even on storage siding without making charges therefor, in the nature of demurrage. The defence set up at bar was, inter alia, that demurrage did not run unless the cars were continuously kept standing on "a reasonably accessible position for unloading",—or as more especially put by counsel, on the main line and on the long and short team tracks. This is a view with which I am unable to agree having due regard to the course and natural exigencies of the carrier's trade and business. Hence the cars after they have been kept accessible for unloading during 48 hours, after the 24 hours notice, need not be kept upon team tracks but may be kept on storage tracks, kept accessible for delivery within shortest practicable time, on demand by the dilatory consignee.

In other words I find a railway company is entitled to recover demurrage only after the car has been for these 48 hours, available for unloading by the consignee from a proper and reasonable team track. That it is not necessary thereafter for the railway company to keep the car on a team track to entitle it to claim demurrage and the consignee has no right to ask the railway to keep his car indefinitely upon a team track, thus paralyzing the business of the railway company. After the expiry of the 48 hours, the railway company may place the cars on storage tracks, charge demurrage or storage therefor and when the consignee thereafter comes to unload, the railway company is to be taken as if the cars had at all times been accessible on

team track for unloading, provided the carrier is always ready to deliver within shortest practical time. Once the carrier has placed the cars during 48 hours upon a reasonable position for unloading, on a team track, he can charge demurrage thereafter.

Counsel on behalf of the plaintiff cited at bar the case of *Miller & Co.* v. *The Georgia Railroad and Banking Co.* (1) and relied upon the same. Canadian courts, like the English courts, are accustomed to treat the decisions of the American courts with great respect, although they are in no manner bound by them. That case, however, must be distinguished from the present one in very many respects. Indeed the rules of demurrage had there been made by the carrier himself and it was a question whether they were reasonable or not and the most important point in that decision which comes within the range of appositeness is to be found at p. 576, under par. 5, wherein it appears that the point was there narrowed as to whether "the time required to place cars in position should not be included in computing demurrage."

That American case must be distinguished. The question submitted for determination in the present case is much wider and comes within the scope of rules that have the force of law and not rules made by the carrier itself. Indeed under our Canadian rules, it is provided by Rule 4 that

> (*c*) On cars held for unloading, time shall be computed from the first 7 a.m. following placement on public delivery tracks, * * *

There is no ambiguity. The time for reckoning or counting demurrage runs only from the placement on public delivery tracks. The rules direct that no demurrage can be reckoned before complying with this requirement.

Moreover, under sub-par. (*h*) of the same rule, there is a further general clause which embodies the principle of justice and rectitude with which such computation is to be made, by further stating that

> time lost to the consignor or consignee through switching cars or through any other cause for which the railway company is responsible, shall be added to the free time allowance.

See also *Hals.* 26, 120; *Robinson* v. *C.N.R.* (1).

(1) [1891] 88 Ga. R. 563.

1922

THE KING v. F. A. GILLIS CO.

Audette J.

This provision brings the controversy within the scope of what I said at the opening, and that is, in other words, that a person guilty of negligence or derelict in doing his full duty cannot afterwards avail himself of such conduct to assert and build up a claim thereon. And that applies correspondingly and equally well to the plaintiff and defendant in the present case.

The Canadian Rules further provide that a "placement" is made,—that is when the 48 hours of free time begin to run—

> when a car is placed in a reasonably accessible position for loading or unloading.

The plaintiff in the present case has assumed the burden of proof and has established where the cars were during the whole period for which demurrage is claimed, and both parties have adduced evidence in respect of what should be taken to be public team tracks.

However conflicting that evidence may be that brings us to the consideration of that very question.

It results from the evidence, as illustrated by plan exhibit No. 2, that there are 13 tracks at Willow Park used as storage and unloading tracks and I shall now have to determine which are unloading tracks within the intent, meaning and spirit of the regulations.

I may say as a prelude, it has been beyond peradventure established by overwhelming evidence that the use of the words or expression "Cotton Factory Siding" in the present case, means Willow Park. It is an old generic name which is a denomination comprehending all species of sidings at Willow Park. Before the establishment of the Round House, the whole district was known as Cotton Factory Siding. Most that can be said is that one line could be used to go to the Cotton Factory Siding proper. The cotton factory which had been destroyed at the time of the explosion is at some distance from the *locus in quo* in this case.

The General Railway Act, 1919, 9-10 Geo. V, ch. 68, sec. 312, dealing with questions of accommodation for traffic,

(1) [1910] 19 Man. R. 300.

provides, among other things, that the railway company shall furnish adequate and suitable accommodation for unloading such traffic, without delay, and with due care and diligence deliver all such traffic.

Does the General Railway Act apply to the C.N.Ry. as provided by 9-10 Geo. V, ch. 13, before the appointment of the directors as enacted by sec. 1 of the Act? This is a question that came before the courts in the case of *Mount Royal Tunnel Terminal Company and Canadian Railway Company* v. *Rosa* (1) and upon which a formal decision was not given notwithstanding the views expressed by some of the judges.

But whether the Act applies to the Government Railways or not, that railway system cannot rid itself of the duty cast upon all carriers by rail to afford suitable and reasonable facilities for delivery of goods carried to the consignees and to use due care and diligence in making such delivery. It may be that the provisions of the general Railway Act above cited are simply declaratory of the common law duty and no more.

In construing and applying these Rules and Regulations reference must be had to the general body of the Rules, and bear in mind the fundamental obligations of the carriers.

I shall now have to determine which out of the 13 tracks mentioned at trial and shewn on plan exhibit No. 2, were in the spring of 1920, on the one hand, "unloading tracks" and on the other, mere "storage tracks". This has become a very difficult task owing to the especially conflicting evidence upon this point and the further difficulty of making a finding upon the actual state of these tracks, not at the date of the trial or during trial, but dating back two years ago, that is during the months of April, May, June, July and August, 1920, with the then prevailing conditions involving the congestion at Willow Park for the well known reasons mentioned in the evidence.

The thirteen tracks at Willow Park, in question in this case are:—

(1) [1922] Q.R. 32 K.B. 458.

1922

THE KING v. F. A. GILLIS CO.

Audette J.

1, Main line; 2, Short team track; 3, Long team track; 4, No. 3; 5, No. 4; 6, No. 4½; 7, No. 5; 8, No. 5½; 9, A; 10, B; 11, C; 12, Hennessy siding, and 13, City field.

The first track, the main line, can be used for unloading at intervals, when not otherwise used, for shunting, etc., as its very name clearly indicates.

The three tracks over which I experience most difficulty in arriving at a conclusion are tracks A, 4½ and 5, and I confess I have with great hesitation classified them as storage in 1920. They appear to have been in a bad state in the spring. They might have been fit to be used in an emergency under temporarily favourable weather conditions. Yet the fact that it was possible to use them in an emergency when the yard was congested, does not necessarily bring these tracks within the definition of the rules and with what is contemplated by the statute. Moreover, the fact, as established by the evidence, that only half a load, or part of a load, could be hauled or drawn from such tracks, would not be a compliance with or satisfaction of the statute and the regulations—especially when the consignee pays the teams by the time—which in the result would, through the railway's negligence, cost him double the amount for delivery.

Track A is, properly speaking, a car-repair track, leading to the shops—as indicated upon the plan exhibit No. 2, and as put by the yard-master Lovet part of it has been used in an emergency.

With respect to tracks 4½ and 5 there is a deal of conflicting evidence, and it is almost impossible to arrive at satisfactory conclusion upon the same.

Witness McLeod took delivery at tracks 4½, 5 and A, but had trouble at A—too high. Witness Wright considers 4½ as hauling. Witness Bishop hauled from it and declares it is not fit for trucks and it is a question of the size of the load. It was difficult to get out with ½ a load. Witness Craig says one could not take a full load from it at the time, as it was not in good condition. And witness McDonald contends it could be used for unloading provided there would be no running train; but he does not consider 4½ and 5 as unloading tracks. They are storage. It is a fill which

they were grading at the time, both on 4½ and 5. And witness McCann testifies it was not in good condition that season. Witness Bigelow states they are both storage tracks. Witnesses Wright and Craig would consider them as hauling sidings, while witnesses Bigelow, McDonald and Seaforth consider them as storage.

These sidings A, 4½ and 5 were not in 1920 properly speaking, except perhaps in an emergency, fit for unloading, while they have been improved since and could now be considered as unloading sidings.

Having regard to the expression and qualification found both in the regulations and in the statute (which seems to embody the common law in that respect) I find that the 13 sidings above recited must be classified as follows during the months of April, May, June, July and August, 1920, namely:

UNLOADING	STORAGE
1. Main line	No. 3
2. Short team track	No. 4
	No. 5½
3. Long team track	A
4. Hennessy siding	
5. City field	
	4½
	5

Therefore, there will be judgment ordering and adjudging that the plaintiff do recover from the defendant all demurrage charges for the days after which a car has been placed during 48 hours (following the 24 hours notice of arrival) upon a fit and proper siding and in a "reasonably accessible position for unloading", namely, upon sidings or tracks known as: The Main line; Short team track; Long team track; Hennessy siding and City field. The whole with costs in favour of the plaintiff.

If the parties fail to agree in adjusting the amount of demurrage recoverable, leave is hereby given to either of them to apply to the court, upon notice, for further direction in respect of the same.

Judgment accordingly.