JOHN HAYS & CO. *v.* THE PENNSYLVANIA CO.‡

Circuit Court, N. D. Ohio. June, 1882.

1. RAILROADS—DISCRIMINATIONS IN RATES BASED ON AMOUNT OF FREIGHT SHIPPED.

Discriminations in the rates of freight charged by a railroad company to shippers, based solely on the amount of freight shipped, without reference to any conditions tending to decrease the cost of transportation, are discriminations in favor of capital, are contrary to sound public policy, violative of that equality of rights guarantied to every citizen, and a wrong to the disfavored party, for which he is entitled to recover from the railroad company the amount of freight paid by him in excess of the rates accorded by it to his most favored competitor, with interest on such sum.

Nicholson v. *G. W. R. Co. 5 C. B. (N. S.) 436,* distinguished.

2. SAME—CASE STATED.

The plaintiffs were engaged in mining coal at Salineville, Ohio, for sale in the Cleverland market. They were wholly dependent on the defendant for transportation.

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The regular tariff between those points was $1. 60 per ton, with a rebate of from 30 to 70 cents per ton to persons shipping over 5,000 tons during a year; the amount of rebate being graduated according to the quantity shipped. Under this schedule plaintiffs were required to pay higher rates on the coal shipped by them than were exacted from other and rival parties, who shipped larger quantities. The defendant claimed that the discriminations were made in good faith, to stimulate production and increase its tonnage, and were within the discretion confided by law to every common carrier. In an action to recover back the excess of tariff paid by plaintiffs, *held,* that such discriminations were illegal, and that plaintiffs were entitled to recover the amount paid by them in excess of the rate accorded to their most favored competitor, with interest thereon.

Motion for New Trial. The facts appear in the opinion.

BAXTER, C. J. The plaintiffs were, for several years next before the commencement of this suit,

engaged in mining coal at Salineville, and near defendant's road, for sale in the Cleveland market. They were wholly dependent on the defendant for transportation. Their complaint is that the defendant discriminated against them, and in favor of their competitors in business, in the rates charged for carrying coal from Salineville to Cleveland. But the defendant traversed this allegation. The issue thus made was tried at the last term of the court, when it appeared in evidence that defendant's regular price for carrying coal between the points mentioned, in 1876, was $1.60 per ton, with a rebate of from 30 to 70 cents per ton to all persons or companies shipping 5,000 tons or more during the year,—the amount of rebate being graduated by the quantity of freight furnished by each shipper. Under this schedule the plaintiffs were required to pay higher rates on the coal shipped by them than were exacted from other and rival parties who shipped larger quantities. But the defendant contended, if the discrimination was made in good faith, and for the purpose of stimulating production and increasing its tonnage, it was both reasonable and just, and within the discretion confided by law to every common carrier. The court, however, entertained the contrary opinion, and instructed the jury that the discrimination complained of and proven, as above stated, was contrary to law, and a wrong to plaintiffs, for which they were entitled to recover the damages resulting to them therefrom, to-wit, the amount paid by the plaintiffs to the defendant for the transportation of their coal from Salineville to Cleveland (with interest thereon) in excess of the rates accorded by defendant to their most favored competitors. The jury, under these instructions, found for the plaintiffs, and assessed their damages at $4,585. The defendant thereupon moved for a new trial, on the ground that the instructions given were erroneous, and this is 311 the question we are now called on to decide. If the

instructions are correct the defendant's motion must be overruled; otherwise a new trial ought to be granted.

A reference to recognized elementary principles will aid in a correct solution of the problem. The defendant is a common carrier by rail. Its road, though owned by the corporation, was nevertheless constructed for public uses, and is, in a qualified sense, a public highway. Hence everybody constituting a part of the public, for whose benefit it was authorized, is entitled to an equal and impartial participation in the use of the facilities it is capable of affording. Its ownership by the corporation is in trust as well for the public as for the shareholders; but its first and primary obligation is to the public. We need not recount all these obligations. It is enough for present purposes to say that the defendant has no right to make unreasonable and unjust discriminations. But what are such discriminations? No rule can be formulated with sufficient flexibility to apply to every case that may arise. It may, however, be said that it is only when the discrimination enures to the undue advantage of one man, in consequence of some injustice inflicted on another, that the law intervenes for the protection of the latter. Harmless discrimination may be indulged in. For instance, the carrying of one person, who is unable to pay fare, free, is no injustice to other passengers who may be required to pay the reasonable and regular rates fixed by the company. Nor would the carrying of supplies at nominal rates to communities scourged by disease, or rendered destitute by floods or other casualty, entitle other communities to have their supplies carried at the same rate. It is the custom, we be lieve, for railroad companies to carry fertilizers and machinery for mining and manufacturing purposes to be employed along the lines of their respective roads to develop the country and stimulate productions, as a means of insuring a permanent increase of their business, at lower rates than are charged on other

classes of freight, because such discrimination, while it tends to advance the interest of all, works no injustice to any one. Freight carried over long distances may also be carried at a reasonably less rate per mile than freight transported for shorter distances, simply because it costs less to perform the service. For the same reason passengers may be divided into different classes, and the price regulated in accordance with the accommodations furnished to each, because it costs less to carry an emigrant, with the accommodations furnished to that class, than it does to carry an occupant of a palace car. And for a like reason an 312 inferior class of freight may be carried at a less rate than first-class merchandise of greater value and requiring more labor, care, and responsibility in the handling. It has been held that 20 separate parcels done up in one package, and consigned to the same person, may be carried at a less rate per parcel than 20 parcels of the same character consigned to as many different persons at the same destination, because it is supposed that it costs less to receive and deliver one package containing 20 parcels to one man, than it does to receive and deliver 20 different parcels to as many different consignees.

Such are some of the numerous illustrations of the rule that might be given. But neither of them is exactly like the case before us, either in its facts or principles involved. The case of *Nicholson* v. *G. W. R. Co.* 4 C. B. (N. S.) 366, is in its facts more nearly like the case under consideration than any other case that we have been able to find. This was an application, under the railway and traffic act, for an injunction to restrain the railroad company from giving lower rates to the Ruabon Coal Company than were given to the complainant in that case, in the shipment of coal, in which it appeared that there was a contract between the railroad company and the Ruabon Coal Company, whereby the coal company undertook to ship, for a

period of 10 years, as much coal for a distance of at least 100 miles over defendant's road as would produce an annual gross revenue of £40,000 to the railroad company, in fully-loaded trains, at the rate of seven trains per week. In passing on these facts the court said that in considering the question of undue preference the fair interest of the railroad company ought to be taken into the account; that the preference or prejudice, referred to by the statute, must be undue or unreasonable to be within the prohibition; and that, although it was manifest that the coal company had many and important advantages in carrying their coal on the railroad as against the complainant and other coal owners, still the question remained, were they undue or unreasonable advantages? And this, the court said, mainly depended on the adequacy of the consideration given by the coal company to the railroad company for the advantages afforded by the latter to the coal company. And because it appeared that the cost of carrying coal in fully-loaded trains, regularly furnished at the rate of seven trains per week, was less per ton to the railway company than coal delivered in the usual way, and at irregular intervals, and in unequal quantities, in connection with the coal company's undertaking to ship annually coal enough over defendant's road, for at least a distance of 100 miles, to produce a gross revenue to the 313 railroad of £40,000, the court held that the discrimination complained of in the case was neither undue nor unreasonable, and therefore denied the application.

This case seems to have been well considered, and we have no disposition to question its authority. Future experience may possibly call for some modification of the principle therein announced. But *this case* calls for no such modification, inasmuch as the facts of that case are very different, when closely analyzed, from the facts proven in this one. In the former the company, in whose favor the discrimination was made, gave, in the

judgment of the court, an adequate consideration for the advantages conceded to it under and in virtue of its contract. It undertook to guaranty £40,000 worth of tonnage per year for 10 years to the railroad company, and to tender the same for shipment in fully-loaded trains, at the rate of seven trains per week. It was in consideration of these obligations—which, in the judgment of the court, enabled the railroad company to perform the service at less expense—the court held that the advantages secured by the contract to the coal company were neither undue nor unreasonable. But there are no such facts to be found in this case. There was in this case no undertaking by any one to furnish any specific quantity of freight at stated periods; nor was any one bound to tender coal for shipment in fully-loaded trains. In these particulars the plaintiffs occupied common ground with the parties who obtained lower rates. Each tendered coal for transportation in the same condition and at such times as suited his or their convenience. The discrimination complained of rested exclusively on the amount of freight supplied by the respective shippers during the year. Ought a discrimination resting exclusively on such a basis to be sustained? If so, then the business of the country is, in some degree, subject to the will of railroad officials; for, if one man engaged in mining coal, and dependent on the same railroad for transportation to the same market, can obtain transportation thereof at from 25 to 50 cents per ton less than another competing with him in business, solely on the ground that he is able to furnish and does furnish the larger quantity for shipment, the small operator will sooner or later be forced to abandon the unequal contest and surrender to his more opulent rival. If the principle is sound in its application to rival parties engaged in mining coal, it is equally applicable to merchants, manufacturers, millers, dealers in lumber and grain, and to everybody else interested in any

business requiring any considerable amount of transportation by rail; and it follows that the success of all such 314 enterprises would depend as much on the favor of railroad officials as upon the energies and capacities of the parties prosecuting the same.

It is not difficult, with such a ruling, to forecast the consequences. The men who control railroads would be quick to appreciate the power with which such a holding would invest them, and, it may be, not slow to make the most of their opportunities, and perhaps tempted to favor their friends to the detriment of their personal or political opponents; or demand a division of the profits realized from such collateral pursuits as could be favored or depressed by discriminations for or against them; or else, seeing the augmented power of capital, organize into overshadowing combinations and extinguish all petty competition, monopolize business, and dictate the price of coal and every other commodity to consumers. We say these results *might* follow the exercise of such a right as is claimed for railroads in this case. But we think no such power exists in them; they have been authorized for the common benefit of every one, and cannot be lawfully manipulated for the advantage of any class at the expense of any other. Capital needs no such extraneous aid. It possesses inherent advantages, which cannot be taken from it. But it has no just claim, by reason of its accumulated strength, to demand the use of the public highways of the country, constructed for the common benefit of all, on more favorable terms than are accorded to the humblest of the land; and a discrimination in favor of parties furnishing the largest quantity of freight, and solely on that ground, is a discrimination in favor of capital, and is contrary to a sound public policy, violative of that equality of right guarantied to every citizen, and a wrong to the disfavored party, for which the courts are competent to give redress.

The motion, therefore, for a new trial will be denied, and a judgment entered on the verdict for the damages assessed and the costs of the suit.

WELKER, D. J., concurred.

NOTE. It is not a legitimate ground for giving a preference to one of the customers of a railway company that he engages to employ other lines of the company for the carriage of traffic distinct from, and unconnected with, the goods in question; and it is undue and unreasonable to charge more or less for the same service, according as the customer of the railway thinks proper, or not to bind himself to employ the company in other and totally distinct business, the advantage of carrying goods to other points not affecting the cost of carriage between the particular points, {London and Bristol.} *Baxendale* v. *G. W. Ry. Co.* 5 C. B. (N. S.) *309. For a recent construction of the English 315 statutes prohibiting unreasonable discriminations in railroad rates, see *G. W. Ry. Co.* v. *Sutton,* L. R. 4 Eng. & Irish App. 226, in which all the earlier cases are collected. A contract by a railroad company to deliver all grain shipped in bulk over its road to a particular warehouse, is void as against persons not parties to it. *C. & N. W. Ry. Co.* v. *People,* 56 Ill. 365. Where grain had been shipped to Chicago, the company will not be permitted to charge one rate to one warehouse and a different rate to another in that city. *Vincent* v. *C. & A. R. Co.* 49 Ill. 33. An agreement by a railroad company to carry goods for certain persons at a cheaper rate than they will carry under the same conditions for others, is void as creating an illegal preference. *Messenger* v. *Penn. Co.* 36 N. J. Law, 407.

The express company cases, recently decided at St. Louis by Justice Miller, have perhaps gone as far as any cases yet decided in compelling railroad companies to afford all persons the equal use of their facilities. There it was held that a railroad company was not

only bound to carry the goods, but was bound to furnish special cars for that purpose, to permit an express messenger to accompany and have charge of the goods, and that in case of dispute as to rates it was for the court to determine what was a reasonable rate. *Southern Express Co.* v. *St. L., etc., Ry. Co.* 10 FED. REP. 210, 869. For other cases to the effect that railroad companies must afford all persons or companies engaged in the express business equal and impartial facilities, see *Texas Exp. Co.* v. *Tex. & Pac. Ry. Co.* 6 FED. REP. 426; *Southern Exp. Co.* v. *Memphis, etc., R. R.,* 13 Cent. Law. J. 68; 12 Rep. 193; 8 FED. REP. 799; *Sandford* v. *Railroad Co.* 24 Pa. St. 378; *N. Eng. Exp. Co.* v. *Me. Cent. R. Co.* 57 Me. 188; *McDuffee* v. *Portland & Roch. R. Co.* 52 N. H. 430.—{REP.

† Reported by J. C. Harper, Esq., of the Cincinnati bar.