1937
June 28.
1938
April 14.

BETWEEN:

HIS MAJESTY THE KING, on the Information of the Attorney-General of Canada ..... PLAINTIFF;

AND

CANADIAN NATIONAL RAILWAYS ... DEFENDANT.

AND

HIS MAJESTY THE KING, on the Information of the Attorney-General of Canada ..... PLAINTIFF;

AND

CANADIAN PACIFIC RAILWAY COMPANY ..... DEFENDANT.

Revenue—Tax on seats, berths and other sleeping accommodation—Special War Revenue Act—Railway employees travelling in Pullman or parlour cars on business of employer—No liability for tax.

Held: That railway employees travelling in Pullman or parlour cars while on the business of the railway are not liable for the tax imposed by the Special War Revenue Act, R S C, 1927, c. 179, s. 32.

INFORMATIONS exhibited by the Attorney-General of Canada to recover from the defendants taxes on seats, berths and other sleeping accommodation alleged to be due the Crown under the provisions of the Special War Revenue Act, 1927, c. 179, and amendments thereto.

The actions were tried before the Honourable Mr. Justice Maclean, President of the Court, at Ottawa.

F. P. Varcoe, K.C. and *J. R. Tolmie* for plaintiff.

G. A. Walker, K.C. for the Canadian Pacific Railway Co.

I. C. Rand, K.C. for the Canadian National Railways.

The facts are stated in the reasons for judgment.

THE PRESIDENT, now (April 14, 1938) delivered the following judgment:

By agreement between counsel these two Informations involving precisely the same issue, were heard together, it being understood that any evidence in the one case would be evidence in the other. In point of fact the only evidence submitted is to be found in the form of written admissions made in each case, and the admissions are much to the same effect.

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In the material time, certain employees of each of the defendant railway companies who were required to travel to and from places at which they had duties to perform, would obtain from a ticket agent of the railway company with which they were employed, standard tickets for parlour car and sleeping car accommodation. Such tickets were obtained by such employees upon payment of the regular rates prescribed for such accommodation, and also a tax thereon which will shortly be explained. The defendants in all cases either furnished such employees with funds by means of an accountable advance for expenses to enable them to obtain the tickets, or subsequently reimbursed them the amounts so paid. The employees of the defendant railway companies so travelling are furnished with passes which authorize free transportation to them over the railway with which they are employed, but passes are not generally issued to cover parlour car and sleeping car accommodation. In the case of the Canadian Pacific Railway, passes to cover sleeping or parlour car accommodation are issued to its directors, and to a limited number of officers of its Sleeping Car Department whose duties require them to travel more or less constantly. In the case of the Canadian National Railways, inspecting officers of its Sleeping and Parlour Car Department, and officers of its Operating Department, are permitted to occupy parlour car seats, or sleeping space, while travelling on duty, without the payment of any money therefor. In the case where employees travel in private business cars equipped with sleeping and chair accommodation no tickets or permits are issued therefor. If railway employees travel on their own account they pay for their seating and sleeping accommodation just as do the public.

In procuring tickets, covering seating and sleeping accommodation, the railway employees would in practice pay, in addition to the prescribed rate, the tax imposed by s. 32 of The Special War Revenue Act. Sub-s. 1 and 2 of s. 32 of that Act are as follows:

1. Every purchaser of a seat in a Pullman or parlour car shall, in addition to the price paid for such seat, pay to the person selling such seat, for the Consolidated Revenue Fund, ten cents.

2. Every purchaser of a berth in a sleeping car or of other sleeping accommodation on a railway train shall pay to the person selling the berth or other sleeping accommodation for the Consolidated Revenue Fund in addition to the price paid therefor, a sum equal to ten per cent of the

said price, provided that in no case shall the tax imposed by this subsection be less than twenty-five cents.

The controversy here relates to these two taxes. The defendant railway companies have not accounted to the Minister of National Revenue for the tax paid by their employees in the circumstances described, as they do in the case of sales of similar tickets to the public, and they contend that they are not liable to the tax, and that the same was not intended to apply to the described transactions between themselves and their employees, when travelling on duty, and that is the question for decision.

The defendants assert that instead of issuing to employees passes or permits—which they might do—which would entitle employees to occupy chair and sleeping space while travelling on their employer's trains without any payment of money therefor, they prefer, largely as a matter of convenience and for accounting purposes, to direct that their employees procure a ticket or tickets in the usual way, from cash advances made to them, or by paying for the same themselves and including the expenditure in their next rendered expense account. The tickets purchased have in all cases a perforated section which is intended as a voucher for the expenditure, and this voucher would be attached to the expense account of the employee; the auditing officers of the railway company could readily ascertain for what purpose the expenditure was made, and whether or not it should have been made. The defendants contend that this procedure simplifies the accounting and supervision incident to such expenditures by employees. It is claimed that by this internal procedure the selling ticket agent is relieved of inquiring and determining whether the employee is travelling on the business of the railway, or on his own account. If ticket agents were instructed not to collect the tax where the employee was travelling on the railway's business they would have to determine in each case whether the employee was about to travel on the railway business, or on his own account, which obviously would be altogether impractical.

A railway company is for some purposes a public corporation, that is, it is subject to the provisions of the Railway Act, and as a common carrier it is under certain legal obligations to the public. And for some purposes it is a private corporation. It can lawfully give travelling

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privileges on its own trains to its own employees while in the course of discharging their duties, and it can even extend those privileges to the families of its employees; it may employ its own railway facilities for its own purposes so long as this does not encroach upon its obligations to the public. It was urged that when an employee of a railway enters a train, to travel from one point to another point in performance of his duty, he is not a passenger in the ordinary sense but he is there under his contract of service, and not as one whom the railway has contracted to carry from one place to another. It was contended also that the relations between a railway company and its employees, while the latter are travelling on the trains of the former in performance of their duties, is to be distinguished from the relationship existing between a railway company and its passengers gathered from the general public; and in exemplification of this it was pointed out that all employees of a railway are treated as fellow servants, and that a railway company would not be liable to an employee for any injury to the latter while travelling on its trains in performance of his contract of service, in the absence of any specific understanding to the contrary.

The cases under consideration do not permit of any extended discussion. There can be no doubt but that each defendant could issue passes or permits to their employees covering the particular railway accommodation with which we are here concerned. The railway companies think that it is a preferable business practice to have employees purchase the train accommodations they require in the usual way, by money advanced to them, and if the employee makes the purchase from his own funds then the same would be included in his expense account, and he would thus be promptly reimbursed. It is very probable that there is advantage and convenience in this procedure, though some other procedure might easily be adopted which would obviate the necessity of purchasing tickets. While the employee has to go through the motions of purchasing a ticket yet it is the substance of the transaction that is to be looked at always, and not the form, and, I think, the substance of the transaction is that the railway company gives to the employee a pass or permit to occupy the desired car space. Having purchased a ticket, the em-

ployee is not in the same position as the ordinary member of the public would be. The employing railway company could say to the employee that he would have to postpone his travel because the public demands for space had not been satisfied, or on some other ground they could deny him the right to use the privileges which the ticket purports to give him. The employee by the purchase of the ticket has not, I think, a contract to provide train accommodation which he could enforce against his employer, or for failure of which he would be entitled to damages, as, I think, a member of the public might be, and the employee would not likely look at it in that way; in reality he did not use his own money to buy the ticket, and he was about to travel not on his own business but on that of the railway company which employed him. I do not think that in the true sense it can be said that the employee "purchased" a ticket, or that he was a "passenger" who acquired enforceable rights by his purchase of the ticket. I cannot think the taxing statute was intended to apply in the case of the transactions in question. It was the travelling public, not employees of railway while on duty, which was to be taxed on each seating or sleeping accommodation represented by the purchase of a ticket. I hardly think the legislature intended that the tax was to be applied to any internal arrangements of the railways whereby they furnished train accommodation to their own employees, while engaged in the performance of their duties.

The taxes in question first came into force in 1915; they were abandoned for a few years and later revived, and it was not till 1936 that payment of the tax was demanded of the defendants for the ticket purchases in question. When one finds the vigilant officers of the Minister of National Revenue overlooking this revenue reservoir, or being in doubt about the applicability of the statute to the transactions in question, it rather fortifies me in reaching the conclusion that the tax was not intended to apply here, or, at least, that the taxing statute does not make it clear that the defendants were to be taxed, and always the taxpayer is entitled to the benefit of any doubt.

The Informations are therefore dismissed and with costs.

Judgment accordingly.