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What is and What is Not Unlawful Discrimination by Common Carriers

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WHAT IS AND WHAT IS NOT

UNLAWFUL DISCRIMINATION BY COMMON CARRIERS.

A Thesis Presented to the School of Law,
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DEGREE OF MASTER OF LAWS.

by

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WHAT IS AND WHAT IS NOT

UNLAWFUL DISCRIMINATION BY COMMON CARRIERS.

Chapter I.

A common carrier is said to be "any man undertaking for hire to carry the goods of all persons indifferently" Gisbourn v Hurst 1 Salk. 249. Hutchinson on Carriers, sec. 47, defines a common carrier to be "one who undertakes as a business, for hire, to carry from one place to another the goods of all persons who may apply for such carriage, provided the goods be of the kind which he professes to carry, and the person so applying will agree to have them carried upon the lawful terms prescribed by the carrier; and who, if he refuses to carry such goods for those who are willing to comply with his terms becomes liable to an action by the aggrieved party for such refusal."
The duty of a common carrier then; is to serve the public; he is a quasi public agent; can treat no one individual or corporation in such a way as to prevent him from treating all individuals or corporations in a like way, providing each and all agree to the lawful terms made by him.

Appleton C.J. said in the case of the New England Express Co. v. Maine Central Railroad, 57 Maine 188, "Common carriers are bound to carry indifferently, within the usual range of their business, for a reasonable consideration all freight offered and all passengers who apply. For similar equal services they are entitled to the same compensation. All applying have an equal right to be transported or to have their freight transported, in the order of their application. They can not legally give undue and unjust preferences, nor make unequal and extravagant charges. Having the means of transportation they are liable to an action if they refuse to carry freight or passengers without just grounds for such refusal." "The very definition of a common carrier excludes the right to grant monopolies or to give special or unequal preferences, it implies indifference as to
whom they may serve, and an equal readiness to serve all
who may apply, and in the order of their application."

In connection with this brief suggestion as to what
the duties of a common carrier are it might be well to
observe the legislation on the subject both in this coun-
try and in England. Prior to 1854 preferences were giv-
en to certain individuals as to the time of forwarding
their goods by railroad companies in England. But this
practice became a grievance there and was stopped by the
Railroad and Canal Traffic Act in 1854.

The principal section of that act prohibited such
companies from making or giving any undue or unreasonable
preference or advantage to or in favor of any particular
person or company or any particular description of traf-
fic in any respect whatever; with a further provision for
a summary proceeding before the Court of Common Pleas or
any of its judges by motion or summons to restrain such
companies from the violation of this provision of the
act and to compel the compliance with it by writ of at-
tachment.

The question has also been made the subject of much
statutory regulation in the United States; it is called the Interstate Commerce Act passed by the Congress of the United States and approved February 4, 1887. Chapter 104, sec. 1, provides, "all charges for any service rendered in the transportation of passengers or property as aforesaid, or in connection therewith, or for the receiving, delivering, storage, or handling of such property, shall be reasonable and just; and every unjust and unreasonable charge for such service is prohibited and declared to be unlawful."

Section 2, "that if any common carrier subject to the provisions of this act shall, directly or indirectly, by any special rate, rebate, or drawback or other device, charge, demand, collect or receive from any person or persons a greater or less compensation for any service rendered or to be rendered in the transportation of passengers or property, subject to the provisions of this act, than it charges, demands, collects or receives, from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be
guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful."

Section 3, "that it shall be unlawful for any common carrier subject to the provisions of this act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm or locality; or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

The Interstate Commerce Act does not apply to the transportation of passengers or property wholly within one state nor to passengers or property shipped to or from a foreign country from or to any state or territory.

For this reason most of the states have legislated upon the question and it is of the same general character as the Interstate Commerce Act in all the states which have thus far acted. It is safe to say that in all of the states it is well settled that it is within the power of the state legislatures to prevent unjust and unreason-
able discrimination by the carriers operating within the state. Illinois Central Railroad Co. v. People, 121 Ill 304. Chicago etc. R.R. Co. v. People, 67 Ill. 11. State v. Railroad Co., 22 Neb. 313. Gulf etc. R.R. Co. v. Dwyer, 75 Texas 572.
Chapter II.

What is Unlawful Discrimination.

Discrimination is the legal term now used to describe a breach of the carrier's common law or statutory duty to treat all customers alike. The term is technically applied to freight charges. And when there is a discrimination between consignors it is more properly called a preference or advantage.

In treating the subject of what is unlawful discrimination I will, therefore, divide it into two classes, first, as to consignors or persons, second as to rates charged different shippers.

In England the Canal Traffic Act has regulated preferences given consignors by carriers.

The principal examples of the English decisions of undue preferences are as follow:
In Baxendale v. Bristol etc. R.R. Co., 11 Common Bench "N.S." 787 it was held where a railroad company permitted a carrier, who acted as superintendent of the goods' traffic to hold himself out as their agent for the receipt of goods to be carried on their line, and his office as the receiving office of the company, and goods were received by him at that place without requiring the sender to sign conditions which the company required all other carriers who brought goods to their station to sign that amounted to undue preference.

In Garton v. Bristol etc. R.R. Co. 30 Law Journal, Queens Bench, 273, it was held where a company closed their offices at a certain hour and refused to receive goods tendered to them after, with the proper amount of carriage, while at the same time they continued to receive goods of the same class, prepared in the same manner, from a particular individual, that this amounted to undue preference.

In Palmer v. London etc, R.R. 40 Law Journal Common Pleas, 133, it was held where a company admitted into their stations their own vans, with goods to be forwarded that night at a later hour than they admitted those of
other persons, that this amounted to undue preference.

In Diphways v. the F.R. Co. Railroad cases 2 N. and M. 73. A railroad company with the object of discouraging the construction of a competing line, carried slate for certain quarry owners who agreed to send all their slate over the railroad company's line for a fixed number of years at a less rate than they charged for the same service to the complainant, quarry owners, who were offered, but refused to bind themselves by such an agreement. Held, that this was an undue preference within the meaning of the Canal Traffic Act. See other cases there cited.

This decision was not followed by the New York court in the case of Lough v. Outerbridge, 143 N.Y. 271 which I will take up at more length in Chapter III.

In the United States the most important decisions are as follows: In the New England Express Company v. the Maine Central R.R., 108. The railroad company had entered into a contract with one express company, to give to it for a period of years certain exclusive accommodations and privileges in the passenger trains of the road for carrying of express freight, which it had subsequently
denied to the plaintiff, another express company, upon its application for the same privileges. Upon being denied the rights asked for, plaintiff seeks redress. Held that there was an undue preference and the company were liable to plaintiff. See cases cited and also International Express Co. v. Ryle, 81 Me. 92.

In McDuffee v. the P. & R. R.R. 52 N.H. 430, it was held that a railroad company must furnish all parties similar accommodation and can show no preferences. There are other cases in the various states holding practically the same as those above, but to which I would only refer by the way of citations.

Great Western R.R. Co. v. Burns, 60 Ill. 284.
Kenney v. R.R., 47 N.Y. 525.
Wibert v. R.R., 12 N.Y. 245.
And cases there cited.
Second Class: As to rates charged different shippers.

Discrimination in freight traffic by railroad companies means to charge shippers unequal sums for carrying the same quantity of goods equal distances.

Hines v. R.R. Co. 95 N.C. 434. And in that case the court said; that if A shipped ten, and B five, bales of cotton, A must for five of his ten be charged the same as B, and as to his remaining bales, a like rate to maintain equality.

In each particular case there shall be charged a reasonable compensation and no more.


The question of what is reasonable depends upon the circumstances of each particular case, and this ordinarily is a question of facts for the jury. Root v. R.R. Co. 114 N.Y. 300.

A reasonable compensation in each case does not, however, necessarily mean absolute uniformity of rates in all cases.

Cleveland etc. R.R. Co. v. Cosser, 126 Ind. 384.

Scofield v. R.R. Co., 43 Ohio State 571.
It is obvious that whether the common carrier acts impartially or not depends, upon the circumstances of each particular case, for regard must be had to such circumstances as quantity, distance, and kindred considerations. The hinge of the question is not found in the single fact of discrimination, for discrimination without partiality is inoffensive, and partiality exists only in cases where advantages are equal, and one party is unduly favored at the expense of another who stands upon equal footing. Commercial agents have free power of making contracts essential for the purpose of making commercial profit. Railway companies have that power as free as any merchants, subject only to the duty of acting impartially with respect to persons, and this duty is performed when the offer to contract is made to all who wish to adopt it. Large contracts may be beyond the means of small capitalists, contracts for long distances may be beyond the needs of some whose traffic is confined to a home district; but the power of the railroad company to contract is not restricted by these considerations. So, I think, by the English and American cases cited the conclusion is reached, that mere inequality in
charges does not amount to an unjust discrimination, and that to make a contract void because of unjust discrimination, there must be a discrimination in the rates charged for transportation of the goods of the same class, of different shippers, under like circumstances and conditions.

R.R. Co. v. Gage, 12 Gray (Mass.) 393.
Killiner v. R.R. Co., 100 N.Y. 395.

A discrimination made merely upon the amount of freight furnished and which results in giving to the large shipper an advantage over the smaller is not reasonable.

Neither is a discrimination having practically the same results giving to a shipper transporting oil, in his own car, a preference in rates over one who ships in barrel.

State v. R.R. Co., 47 Ohio St. 130.

A certain rebate allowed to certain shippers is an
unjust discrimination against others shipping like goods under the same circumstances.


A common carrier may contract to ship goods at a lower rate than the established tariff; but he cannot contract to deny the same reduced rate to other shippers. Christie v. Missouri R.R. Co., 32 Am. and Eng. R.R. Cases 413.

It is an unsettled question whether a carrier is guilty of discrimination who follows the system of allowing raw goods to be transported to the place of manufacture, and thence beyond after manufacture, at the same rate of freight charged for goods carried without stop.

In the case of In Re Iowa Barb Steel Wire Co., 1 Interstate Commerce Rep. 17 a petition was presented by a manufacturing corporation which recited in substance that railroad companies had been accustomed to permit it as it did other like manufactures to procure its raw material at a distance, manufacture its goods therefrom and then ship the goods to a market at the same aggregate rate for transportation of both raw material and manufactured goods as would be charged had there been no stoppage in
transit, and no manufacture, that this privilege of manufacturing in transit was valuable to the corporation and to the community in which its business was located, and wronged no one; and petitioner prayed that it might be sanctioned by the commission. But no authority to that effect having been conferred upon the commission the petition was dismissed.

A contract for discrimination can not be upheld simply because the favored shipper may furnish for shipment during the year a larger quantity of goods in the aggregate than any other shipper, or more than all others combined. While the carrier's interests are to receive some regard; yet a discrimination contract will not be upheld simply because it is largely profitable to the carrier. A discrimination is not justified by an agreement with the favored shipper to give all the traffic to the railroad, and not to divert it to other routes, there being no agreement to send any definite quantity in any specified time; nor to prevent threatened competition where none exists. A railroad company can not support a discount, based on the quantity of freight received by any one shipper on the principles which are applied among
merchants whereby they give better prices in wholesale than in retail dealing. The cases are not at all analogous. In Providence Coal Co. v. P.&W. R.R. Co., 1 Interstate Commerce Rep. 107, Cooley said; "Quantity, merely as quantity indicated nothing as to the relative cost of carriage. Of course, the carrier saves something in cost and in labor by having the coal carried by it received in large quantities by single consignees. We admit that its service for large dealers is somewhat less in proportion to the quantity of freight transported than is the like service performed for small dealers. We also admit that the carrier may therefore seem to have an interest in restricting its dealings so far as possible to large dealers. But this is an interest that can only be consulted and acted upon in strict subordination to the rules of law; and one of the most important of those rules is that, in any discrimination between dealers, justice, if not a paramount consideration shall at least be kept in view. The carrier can not regard his own interests exclusively; if it could it might at pleasure by methods easily available, drive all small dealers off its line and center the whole trade in a few hands. The
state of things that would result might be altogether for its interest and convenience, since it would then have fewer customers to deal with and fewer transactions for the same aggregate trade; but the wrong would be flagrant."

In taking up the cases that decide what is unlawful discrimination I have not referred to all of the cases reported, but have taken them only in a brief way; and while I think I have touched upon nearly every case that takes up a different branch of unlawful discrimination infreight and as to consignors, I have left the cases cited, in the reports to which I have referred in this chapter for the reader to look up, as it saves space, and is but little trouble for him, since I have found the one case in each instance where they are collected.
Chapter III.

What is not Unlawful Discrimination.

In determining this question it would be extremely difficult to lay down any fixed and fast definition or rules that would cover every case that might arise, so I propose to take up those cases in which it has been held that certain discriminations are not unlawful. In so doing I shall divide the subject as in chapter II into two classes, first as to consignors or shippers, second, as to rates charged different shippers.

In 1885 a number of cases came to the Supreme Court of the United States on appeal from the Circuit Court. They are known as the Express Cases and are reported in 117 U.S. 1.

Certain express companies had entered into an agreement with the defendant railways whereby the railroad companies agreed to carry all the express business of the plaintiff, express companies, up to a certain number of pounds each day for a certain price per day, the contracts
were to run a year and if not determined upon thirty days notice by either party, to continue for another year, and so on. The railroad company had decided to conduct an express business on its own account, gave the plaintiffs thirty days notice, and offered to carry their express business for reasonable rates. Whereupon the plaintiffs bring this action for temporary injunction compelling the company to receive their express until a permanent injunction could be obtained. Having succeeded in the lower court the defendant appeals to this court.

The exact question in the case then, is whether these express companies can now demand as a right what they have heretofore had only as a permission. That depends on, whether all railroad companies are now by law charged with the duty of carrying all express companies, in the way that express carriers when taken are usually carried, just as they are with the duty of carrying all passengers and freights when offered in the way that passengers and freights are carried.

Since the Constitution and the state laws do not require any railroad company to carry all the express companies in the way, that, under some circumstances they
may be able without inconvenience to carry one company. And as there is no usage which demands that all express companies shall be carried on any railroad to which it may apply, unless specially contracted for. And as the public are amply provided with express facilities by the railroad itself, it is truly hard to see how courts have any right to make contracts for express companies which it was their business to make for themselves. If the public actually demand that for their interests it is best that all railroads should carry any and all express companies who may apply for carriage then it is in the province of the legislature and Congress to give the remedy.

But of course there is a chance for argument and such learned judges as Miller and Field who dissented to the prevailing opinion in these cases thought that it was necessary for railroads to carry all express companies, as in so doing it would best provide the public with proper express carriage; and that the courts could determine as in Quantum Merit what was reasonable charges by railroad companies in case of disagreements between the express companies and the railroad.
Aside from the cases just decided the very important case of Lough v. Outerbridge, 143 N.Y. 271 is about the only other case of importance along this line in the United States. In that case the defendant was engaged in business as a common carrier transporting freight between New York and certain islands, among them Barbados. Its steamers sailed from New York at intervals of about ten days. Another steamer, which was engaged in the South American trade, and sailed from New York at intervals of about six weeks, took freight for Barbados when it had any space left after taking on freight which was to be carried to South America. Said companies' regular rates were fifty cents a dry barrel. It and the other defendants, its agents, offered special reduced rates of twenty-five cents per dry barrel to all merchants and business men in New York, who would agree to ship by their line exclusively, during the week said outside steamer was there engaged in obtaining freight, and taking on cargo. Plaintiff's firm who were shipping by that steamer, demanded of defendants that they receive certain barrels of freight and transport the same from New York to Barbados at the special rate of twenty-five cents. This defend-
ant offered to do if said firm would agree to give their shipments for that week exclusively to their line, and also offered to carry plaintiff's freight at all times without conditions for forty cents. This offer the firm declined, and defendant refused to receive the freight. The same rates, terms and conditions, were offered all shippers. In an action to compel the defendants to receive and transport the plaintiff's freight at the special reduced rates, without conditions, the court found that the rate of forty cents was a reasonable one, and the reduced rate of twenty-five cents was not profitable.

This was a very important case as it touched commerce and more especially the duties and obligations of common carriers to the public, at many points. The learned counsel for the plaintiffs made a desperate and gallant fight to get the decision of the General Term, which vacated the order in telling the defendants to carry their freight reversed. At the argument before the Court of Appeals only five judges were present, namely, O'Brien, Finch, Gray, Bartlett, and Peckham. Finch, Gray and Bartlett concurred with O'Brien in his opinion, but Peckham dissented. The counsel made a motion for a rehear-
ing before a full court and it was granted. But upon a
reargument the former decision was allowed to stand, but
Peckham dissented and Chief Judge Andrews who was absent
at the former argument was inclined to hold with Peck-
ham.

The principal point in the argument of plaintiff,
aside from the prevailing point that the whole transac-
tion was an unlawful discrimination, was that, the condi-
tion imposed that the reduced rate should be granted on-
ly to such merchants as stipulated to give their entire
business, while terms imposed upon the public generally
was in fact aimed at the plaintiff's alone. The evidence
on this point was disputed; but assuming that such was
the case how could it affect the result? The counsel
argued that it conclusively showed the purpose of the de-
fendants to compel the plaintiffs to withdraw their patro-
nage from the other line, to suppress competition in the
business, and to retain a monopoly for their own bene-
fit. While it did tend to do all this, what unlawful
element was there about it? If I, being a merchant,
wish to drive my next door neighbor out of the same kind
of business, and by trying to do it, I offer special in-
ducements to customers who will deal exclusively with me; in other words I undersell my neighbor, and at a loss to myself. The public are not injured by reason of this. If my neighbor wishes to stay in the business let him drop down to my prices. If he cannot afford to do that let him do the next best thing. I have done nothing unlawful so long as I treat all customers alike. So in this case, the mere fact that the defendants would be the only transporters between the two points in question would not create what is commonly called a monopoly, where only one person or corporation has control of the whole business of a certain kind in the community. For the reason that the forty cent rate is reasonable and no company could afford to carry any less than that, and the defendants agreed to carry for that and could not ask any more.

In Mogul Steamship Co. v. McGregor, Law Rep. 21 Queens Bench div. 545, Lord Coleridge said: "The defendants are traders with enormous sums of money embarked in their adventure, and naturally and allowably desire to reap a profit from their trade. They have a right to push their lawful trades by all lawful means. They
have a right to endeavor, by lawful means, to keep their trade in their own hands, and by the same means to exclude others from its benefits, if they can. Amongst lawful means is certainly included the inducing by profitable offers customers to deal with them rather than with their rivals. It follows that they may if they see fit endeavor to induce customers to deal with them exclusively by giving notice that only to exclusive customers will they give the advantage of their profitable offers."

The plaintiff's rely on the case of Menach v. Ward, 27 Fed. Rep. 529, but it is distinguished from this case, the facts being entirely different. In that case the court recognized the same general principles in regard to the duties of common carriers as is expressed in the case under discussion. It said: "Unquestionably a common carrier is always entitled to a reasonable compensation for his services. Hence it follows that he is not required, to treat all those who patronize with absolute equality. It is his privilege to charge less than a fair compensation to one person, or to a class of persons, and others cannot justly complain so long as he
carries on reasonable terms for them. Respecting preferences in rates of compensation, his obligation is to charge no more than a fair return in each particular transaction, and, accept, as thus restricted, he is free to discriminate at pleasure. This is the equal justice to all which the law exacts from the common carrier in his relations to the public." I will collect some of the cases reported sustaining some of the views as expressed heretofore. Fitchburg R.R. Co. v. Gage, 12 Gray Mass. 393. Sarget v. B. & L. R.R., 115 Mass. 422. Evershed v. L.& N.W. R.R., Law Rep. 3 Queens Bench Div. 135.

Second proposition: As to rates charged different shippers.

Discrimination in rates, if fair and reasonable upon grounds consistent with public policy, will be permitted. Hersch v. Northern etc. R.R. Co., 74 Pa. St. 181. Ragan v. Aiken, 9 Lea (Tenn.) 684. In that case the fair and reasonable interests of the carrier are regarded and it has been held that advantages might be secured to individuals where it is made clearly to appear, that in entering into such agreements the company have the interests
of the proprietors and the legitimate increase of the profits of the railway in view, and the consideration given to the company in return for the advantages is adequate, and the company are willing to offer the same facilities to all others upon the same terms.


Where the reasonableness of charges is in question, the principle is not what profit it may be reasonable for a company to make, but what is a reasonable charge to the person who is charged. Hence the court will dissect the reports and accounts, so as to see whether a company which constructed its works at the risk attendant upon all such outlays, and which is still subject to natural risks, is receiving in its income yielding an alleged profit of fifteen percent an unreasonable amount, but will only consider the reasonableness of the charge to the patron. Canada Southern R.R. Co. v. International Bridge Co., Law Rep. 8 Appeal Cases 723.

The fact that a company is receiving a greater dividend from its receipts than its charter allows, can not be set up in a bill to restrain etc., filed by a complainant who suffered no greater injury than did the gen-

The carrier's obligation to treat all shippers alike does not forbid contracts for transportation at a less rate in special cases where, under the circumstances, the discrimination appears to be reasonable. The jury should judge under the evidence, whether the preference given was a fair and reasonable one.

Houston and Texas Central R.R. Co. v. Rust, 58 Tex. 98.

A difference in cost to the carrier makes a difference in circumstances. It has been held that, to entitle one to recover for discrimination in rates for the carriage of goods it must appear that the discrimination was made for a like service and under like conditions in all material respects; and the burden of proof is upon the plaintiff claiming damages under such statutes for such that discrimination, to show the conditions of the shipments were like. Paxton v. Illinois etc. R.R. Co., 6 Am. and Eng. R.R. Cases 591.

The carrier's charges may vary with the difference in size, weight, and value of the goods consigned. It is customary to regulate this difference by a classification of goods and the fixing of the same freight for
all goods of the same class.

Lotspeich v. R.B. Co. of Georgia, 73 Ala. 306.


Farror v. East Tenn. etc. R.R. Co., 1 Interstate Com. Rep (Off) 480.

Barkholder v. Union Trust Co., 82 No. 572.


A railroad company is not bound to carry large and small quantities of the same kind of merchandise between the same points for the same price.

Concord &. Portsmouth R.R. Co. v. Forsyth, 59 N.H. 122

Transportation in large and in small quantities does not cause the same amount of trouble and expense; thus full train loads on large trucks warrant a reduction in rates below those for light loads on small trucks.
Richardson v. Midland R.R. Co., 4 Nev. and Mac. 7.

The charge of a railroad company for transporting packed parcels of the full sum which would be payable in the aggregate if they were not packed and were charged for separately, can not be rightfully imposed upon the public generally, or upon express companies or other middlemen.


It is not a ground of complaint against the railroad company that it equalizes its rates as between small and large towns, even though the effect may be prejudicial to the large town, which before had been specially favored.

Crew v. the Richmond etc. R.R. Co., 32 Am. and Eng. R.R. Cases, 596.

The relative reasonableness of rates between localities can not be determined by any standard of comparison, but all the circumstances and conditions that affect the traffic must be considered; such as the length and character of the haul, the cost of the service, the volume of business, the conditions of competition, the storage capacity, and the geographical situation at the different terminal points, and numerous other matters.
It is a custom of carriers originating perhaps in their own convenience, to group the towns of a considerable district, and to charge the same rate to all within the district. This custom has been commended, and it has been held that it does not necessarily constitute discrimination.


The fact that the rates of the railroad company are not established on a mileage basis does not necessarily make out illegality or injustice.

Discrimination may be practiced in refusing to a consignor an opportunity to ship a full car load of mixed goods.


It would appear that an increase of speed and accommodations would justify an increase of charge.


The fact that the cars used in traffic to a certain
locality are assured of a return load may justify an increase of freight.


As may also perhaps, the fact that the cars are of a peculiar construction and only available for live stock Burton Stock Car Co. v. Chicago etc. R.R., 1 Interstate Com. Rep. (Off) 132.

But the carrier cannot justify higher rates for hauling improved stock cars because more valuable live stock is transported.

See same case.

The End.