

18, 1945

APPELLANTS' CASE

In the Privy Council.

No. 18 of 1944.

ON APPEAL FROM THE SUPREME COURT  
OF CANADA.

UNIVERSITY OF LONDON  
M.C. 1  
23 OCT 1956  
INSTITUTE OF FINANCED  
LEGAL STUDIES

IN THE MATTER of a Reference by the Board of Transport  
Commissioners for Canada for the opinion of the Supreme Court of  
Canada

14710

AND

IN THE MATTER of the Transport Act, 1938 (2 Geo. VI, Chapter 53).

BETWEEN

CANADIAN NATIONAL RAILWAYS and  
CANADIAN PACIFIC RAILWAY COMPANY ... *Appellants*

AND

CANADA STEAMSHIP LINES LIMITED and  
NORTHERN NAVIGATION COMPANY and  
NORTH-WESTERN STEAMSHIPS LIMITED ... *Respondents.*

APPELLANT'S CASE.

RECORD

1.—This is an appeal by special leave from a judgment and Order of  
the Supreme Court of Canada, given on the 4th May, 1943, answering in  
the negative by a majority of three to two a question of law submitted for  
the opinion of the Court by the Board of Transport Commissioners for  
Canada (hereinafter called the Board), pursuant to the provisions of  
Section 43 of the Railway Act of Canada (R.S.C. 1927, Chap. 170) and  
Section 4 of the Transport Act, 1938 (2 Geo. VI, Chap. 53, Dom.).

2.—Stated very shortly, the point involved in this appeal is whether  
on the construction of certain Dominion statutes the Board, when deciding  
10 on an application for the approval of "agreed charges" negotiated between  
railway companies and shippers (consignors) of goods to be carried wholly  
by rail, ought to take into consideration the effect of the making of the

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—  
agreed charges not merely on the business of the railway companies or of other railway companies and of the shippers or of other shippers, but on the businesses of carriers of goods by water who have no interest in the matter beyond their hope, if the “agreed charges” are not approved, of securing or retaining some of the traffic for themselves.

3.—The point cannot of course be understood without a fuller narrative of the facts and an explanation of the statutes, but the actual question formulated by the Board may be stated at once. It runs thus :—

p. 8, ll. 6-10      “ On an application to the Board under Section 35 of the Transport Act, 1938, for the approval of an agreed charge between a shipper and competing carriers by rail, is the Board precluded from regarding relevant considerations the effects which the making of the agreed charge is likely to have on the business and revenues of other carriers ? ” 10

p. 2, l. 38, to  
p. 3, l. 5      4.—Prior to the enactment of the Transport Act, 1938, the Board was known as the Board of Railway Commissioners for Canada, and had power to regulate tolls or charges for the carriage of goods by rail only. By the Transport Act, which supplemented but did not supersede the Railway Act, the functions of the Board were extended to include powers to regulate charges for the carriage of goods by water and air in certain cases, and its name was altered to its present form. Even after the passing of the Transport Act, a large part of the business of water transport and the whole business of transport of goods by road (“ Highway trucking ”) remained free of any such regulation by the Board. 20

5.—By the Transport Act, 1938, instead of all rates for the carriage of goods being governed by the equality provisions of the Railway Act, Section 314, as theretofore, carriers of goods by rail were given by the opening words of Section 35 (1) of the Act the freedom of negotiating “agreed charges” with shippers, subject to the approval of such charges by the Board. Although the section is more fully set out in paragraph 9 below, it is useful to quote these opening words at once. They run :— 30

p. 25, ll. 12-  
16      “ Notwithstanding anything in the Railway Act, or in this Act, a carrier may make such charge or charges for the transport of the goods of any shipper or for the transport of any part of his goods as may be agreed between the carrier and that shipper.”

6.—The position resulting from the passing of the Transport Act, is, it is submitted, accurately stated by Rinfret, J., in the course of his judgment (one of the two dissenting judgments) in the Supreme Court :—

p. 48, ll. 27-  
44      “ It is common ground that prior to the enactment of the Transport Act, in 1938, the ‘ agreed charge ’ was unknown as an instrument of rate-making under the law ; also that the rates charged by water carriers were not subject to regulation by the Board, nor were the rates charged by highway trucking concerns. 40

“ The Transport Act introduced *inter alia* control of rates to be charged (a) for water transport within a certain area, and (b) with respect to air transport.

“ Up to the enactment of Section 35, the object of the regulation of rates by the Board was to avoid monopoly ; and there seems to be no doubt that the relief given, or intended to be given, to the railways by Section 35 was in the way of restoring in part their original freedom of action, but, at the same time, preserving the condition of equality of treatment to all members of the public.

10 “ The whole policy of the transport control in Canada had always been to look after the interest of the shipper, but not after the interest of shippers *inter se*, or of carriers *inter se*. The idea of regulation was intended to control monopoly, but not competition.”

7.—The Appellants, who are both carriers of goods by rail, negotiated shortly after the Act came into force certain “ agreed charges ” with certain shippers for the carriage of certain goods wholly by rail from points in Eastern Canada to points in Western Canada, and applied to the Board, in pursuance of Section 35 of the Act, for approval of those charges.

8.—The Respondents, who are carriers of goods by water on (*inter alia*) the Great Lakes, and as such naturally desirous of securing traffic to carry on the Lakes, including the goods which if the Appellants’ agreed charges were approved would be carried all the way to Western Canada by the Appellants by rail, opposed the Appellants’ said applications and contended before the Board that it ought to take into account, as an element to be weighed against the approval of the agreed charges, the circumstance that the revenues of the Respondents would be affected if the Appellants carried the traffic in question. The Appellants on the other hand contended that this circumstance was irrelevant and ought not to be considered.

p. 4, ll. 20-24 ; p. 4, l. 42, to p. 5, l. 4

9.—The question depends, as already mentioned, on the construction of the statutes. The provisions most directly relevant are to be found in Sections 35 and 36 of the Transport Act, which are portions of Part V of that Act, headed “ Agreed Charges.” The material portions of those sections (which do not apply to the carriage by water of goods in bulk but otherwise apply to the carriage of goods by rail, water and air) run as follows :—

40 “ 35.—(1) Notwithstanding anything in the Railway Act, or in this Act, a carrier may make such charge or charges for the transport of the goods of any shipper or for the transport of any part of his goods as may be agreed between the carrier and that shipper : Provided that any such agreed charge shall require the approval of the Board, and the Board shall not approve such charge if, in its opinion, the object to be secured by the making of the agreement can, having regard to all the circumstances, adequately be secured by means

p. 25, ll. 12-26

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of a special or competitive tariff of tolls under the Railway Act or this Act : and provided further that when the transport is by rail from or to a competitive point or between competitive points on the lines of two or more carriers by rail the Board shall not approve an agreed charge unless the competing carriers by rail join in making the agreed charge.

\* \* \* \* \*

p. 26, ll. 4-30

“ (5) On an application to the Board for the approval of an agreed charge :—

- (a) any shipper who considers that his business will be unjustly discriminated against if the agreed charge is approved and is made by the carrier, or that his business has been unjustly discriminated against as a result of the making of the charge by virtue of a previous approval ;
- (b) any representative body of shippers ; and
- (c) any carrier,

shall, after giving such notice of objection as may be prescribed by the Board, be entitled to be heard in opposition to the application.

“ (6) Any shipper who considers that his business will be unjustly discriminated against if an agreed charge is approved and is made by the carrier, or that his business has been unjustly discriminated against as a result of the making of an agreed charge, may at any time apply to the Board for a charge to be fixed for the transport of his goods (being the same goods as or similar goods to and being offered for carriage under substantially similar circumstances and conditions as the goods to which the agreed charge relates) by the same carrier with which the agreed charge is proposed to be made, or is being made, and, if the Board is satisfied that the business of the shipper will be or has been so unjustly discriminated against, it may fix a charge (including the conditions to be attached thereto) to be made by such carrier for the transport of such goods.

\* \* \* \* \*

p. 26, l. 41, to p. 27, l. 18

“ (9) Where the Board has approved an agreed charge without restriction of time :—

- (a) any shipper who considers that his business has been unjustly discriminated against as a result of the making of the agreed charge,
- (b) any representative body of shippers, and
- (c) any carrier,

may, at any time after the expiration of one year from the date of the approval, apply to the Board for the withdrawal of its approval of the agreed charge, and, upon any such application, the Board may withdraw or refuse to withdraw, its approval, or may continue its approval subject to such modifications being made in the charge as it thinks proper and as the carrier and the shipper to whose goods the charge is applicable are prepared to agree to :

“ Provided that, where the Board has fixed a charge in favour of a

shipper complaining of an agreed charge, such shipper shall not be entitled to make an application under this subsection in respect of that agreed charge in so far as it relates to goods which are the same as or similar to any goods to which the charge so fixed relates.

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\* \* \* \* \*

“(13) On any application under this section, the Board shall have regard to all considerations which appear to it to be relevant and, in particular, to the effect which the making of the agreed charge or the fixing of a charge is likely to have, or has had, on—

p. 27, ll. 33-42

(a) the net revenue of the carrier ; and

10 (b) the business of any shipper by whom, or in whose interests, objection is made to approval being given to an agreed charge, or application is made for approval to be withdrawn.

\* \* \* \* \*

“36.—(1) Upon complaint to the Minister by any representative body of carriers which, in the opinion of the Minister, is properly representative of the interests of persons engaged in the kind of business (transport by water, rail or air, as the case may be) represented by such body that any existing agreed charge places such kind of business at an undue or unfair disadvantage, the Minister may, if satisfied that in the national interest the complaint should be investigated, refer such complaint to the Board for investigation and if the Board after hearing finds that the effect of such agreed charge upon such kind of business is undesirable in the national interest the Board may make an Order varying or cancelling the agreed charge complained of or may make such other order as in the circumstances it deems proper.”

p. 28, ll. 1-14

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10.—The principal contention of the Respondents was and is that the provision in Section 35 (13) to the effect that the Board shall “have regard to all considerations which appear to it to be relevant” gives the Board the right to consider anything whatever which the Board thinks it right to consider, including the interests of persons like themselves, i.e., of carriers by a different—and only partly regulated—system of carriage having no connection with the subject-matter of the agreed charges except the desire to have more or all of the traffic in question for themselves. They also relied on :—

p. 38, ll. 9-38

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(1) Section 314 of the Railway Act, which provides that all tolls shall always, in substantially similar circumstances and conditions, be charged equally to all persons and at the same rate, and that no reduction or advance on any such tolls shall be made either directly or indirectly in favour of or against any particular person using the railway ;

p. 22, ll. 7-14

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(2) on Section 316 of the Railway Act, which prohibits a railway from giving any undue or unreasonable preference or advantage to any particular person or from subjecting any particular person to any undue or unreasonable prejudice or disadvantage ;

p. 22, l. 29, to p. 23, l. 15

p. 23, l. 19,  
to p. 24,  
l. 2

(3) on Section 3 of the Transport Act, 1938, which provides that it shall be the duty of the Board to perform the functions vested in it by the Transport Act, 1938, and by the Railway Act, with the object of co-ordinating and harmonising the operations of all carriers engaged in transport by railways, ships and aircraft.

pp. 13-15

11.—The Appellants contended and contend that the primary purpose of the legislation as to charges contained in the Railway Act and the Transport Act, 1938, is to protect shippers and in particular to protect them against unjust discrimination in favour of other shippers; that to protect carriers by one method—that of water transport—against the competition of carriers by another—that of rail transport—is to enter upon another field of legislation involving different objects and different considerations; and that the provision of Section 35 of the Transport Act should therefore not be read as involving by inference this step from one field to another, above all when another section of the Act, Section 36, has dealt expressly and subject to special limitations with the field in question. 10

pp. 25-9

p. 28

12.—The Appellants further contend that, if Parliament had intended that an agreed charge should not be approved if it would or might prejudicially affect the business of any competing carrier, it is reasonable to suppose that Parliament would either have expressly provided in Section 35 that the Board should not approve an agreed charge if it would or might prejudicially affect the business of any competing carrier, or would have provided in some other way in that section for the protection of the interests of competing carriers. 20

p. 25

It will be observed that, in Section 35 (1), Parliament has provided that, where the agreed charge is for transport by rail from or to a competitive point or between competitive points on the lines of two or more carriers by rail, the Board shall not approve of the agreed charge unless the competing carriers by rail join in making it, and that this provision to deal with questions of competition between carriers is confined to competition between carriers *by rail*, no provision being made in Section 35 (1) or elsewhere, save in so far as the matter is covered by Section 36, for the protection of the interests of other competing carriers. 30

p. 25

p. 28

p. 26, ll. 16-  
30; p. 27,  
ll. 33-42

Again, in Section 35 (6) and (13), Parliament has expressly provided that the interests of shippers shall be protected against undue discrimination; but again no similar provision is made for the protection of the interests of competing carriers.

p. 27, ll. 33-  
42.

Again, in Section 35 (13), Parliament has expressly provided that the Board shall have regard to the effect which the making of the agreed charge is likely to have, or has had, on the net revenue of *the carrier* who is a party to the agreed charge; but no provision is made in Section 35 directing the Board to have regard to the effect which the making of the agreed charge is likely to have, or has had, on the net revenue of a person who is not *the carrier* but another, a competing carrier. 40

13.—The Appellants point out that before the passing of the Transport Act, 1938, shippers had an absolute right to send all their traffic by rail and not by water if they chose so to do, and the Appellants contend that Section 35 of the Act should not be construed as depriving them of that right by enabling carriers by water to resist the approval of those shippers' agreed charges on the ground that the making of such charges would affect the revenues of such carriers by water.

14.—The Appellants also point out that, before the passing of the Transport Act, 1938, carriers by water had no right to complain of the adverse effect on their business of low railway rates, and the Appellants contend that Section 35 of the Act should not be construed as conferring that right by inference upon carriers by water.

15.—With regard to the very important Section 36 of the Transport Act, the Appellants contend that Parliament has made special provision in that section for the investigation of complaints that agreed charges adversely affect the business of competing carriers ; that it is not competent for the Board to hold an investigation of such complaints except in the circumstances and under the conditions prescribed by Section 36 ; and, in particular, that the duty imposed on the Board by Section 35 (13) to have regard to all considerations which appear to it to be relevant cannot be read so widely as to empower the Board by implication to hold such an investigation otherwise than under the provisions and conditions of Section 36.

It will be observed from the terms of Section 36 that an investigation thereunder can be held only if the following conditions are satisfied :

- (i) that a complaint is made by a representative body of carriers ;
- (ii) that the Minister of Transport is satisfied that the complaining body is properly representative of the interests of persons engaged in the kind of business represented by such body ; and
- (iii) that the Minister of Transport is satisfied that it is in the national interest that the complaint should be investigated.

And it will further be observed that, even when the investigation is held, no action can be taken by the Board either by way of varying or cancelling the charge unless the Board finds that the effect of the charge upon the kind of business represented by the complaining body is undesirable in the national interest.

The Appellants point out that, if the Respondents' contentions are right, then :

- (a) the Board, notwithstanding the provisions of Section 36, can hold such an investigation
- (i) upon the objection of a single carrier representing no one's interests but his own ; and
- (ii) whether or not it is in the national interest that such an investigation should be held ; and

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(b) the Board can give effect to the objection without being satisfied that it is desirable in the national interest that it should do so.

It is submitted that this result cannot have been intended by Parliament and that the Respondents' contentions leading to that result are inconsistent with the express provisions of Section 36.

16.—Finally, the Appellants submit that the Respondents' contentions disregard the purpose of Part V of the Transport Act, 1938. That purpose is to relieve railway companies from the obligation imposed by the Railway Act to charge equal tolls to shippers using the railways, and to relieve carriers by water or by air from the similar obligation imposed upon them by Part IV of the Transport Act, 1938, while continuing to afford shippers adequate protection against unjust discrimination. As the obligation to charge equal tolls was imposed upon carriers for the benefit of the public, and not for the purpose of restricting competition between carriers or different classes of carriers, so the requirement that agreed charges should be submitted to the Board for its approval was not designed for the restriction of competition between carriers. Apart from the special case of carriers by rail from or to or between competitive points, Parliament in enacting Part V of the Transport Act, 1938, did not intend to restrict competition between carriers unless it appeared desirable in the national interest to do so. For that case Parliament made provision in Section 36.

p. 17, ll. 15-25

pp. 5-7

p. 8, ll. 6-10

17.—When the matter was argued before the Board there was a division of opinion. The majority (Garceau, Deputy Chief Commissioner, dissenting) held in favour of the Respondents that the question set out in paragraph 3 hereof should be answered in the negative, i.e., that a probable loss of revenue by the Respondents was a relevant consideration to which the Board might properly have regard in dealing with the Appellants' application. The Board, by the same majority, refused to approve the agreed charges.

p. 7, l. 32, to p. 8, l. 10

18.—The Appellants thereupon applied to the Board to re-hear their application under the powers conferred upon the Board by Section 51 of the Railway Act and Section 4 of the Transport Act, 1938, or to state a Case for the opinion of the Supreme Court of Canada upon the question of law involved. The Board, which is empowered to state a Case, either of its own motion or upon the application of any party, by Section 43 of the Railway Act and Section 4 of the Transport Act, 1938, heard this application, reserved its decision upon it, and subsequently without actually giving a decision on the application—of its own motion stated the said question of law for the opinion of the Supreme Court of Canada, formulating it as shown in paragraph 3 of this Case.

p. 44 ; pp. 45-56 ; pp. 52-56

19.—The argument was heard before the Supreme Court on the 7th and 8th December, 1942, and on the 4th May, 1943, the Court delivered



its judgment. The majority of the Court (Davis, Kerwin and Hudson, JJ.) answered the question in the ~~negative~~ <sup>affirmative</sup>. Sir Lyman Duff, C.J., and Rinfret, J., were for answering the question in the ~~negative~~ <sup>affirmative</sup>. pp. 45-52

20.—Sir Lyman Duff, C.J., was of opinion that the provisions of Section 36 of the Transport Act pointed unmistakably to the conclusion that the Act did not contemplate the rejection of an application for the approval of an agreed charge on the ground that the establishment of such a charge would prejudicially affect the business and revenues of competing carriers. pp. 45-47

10 21.—Rinfret, J., was of opinion that, in dealing with an application under Section 35, the Board were not entitled to have regard to all possible considerations, but only to those which were relevant under the provisions of Section 35. The relevancy of these considerations was to be decided by reference to the matters specified in Section 35 (1) and Section 35 (13). pp. 47-52  
p. 50, l. 38  
to p. 51, l. 6

He observed that the only carrier whose net revenue was to be taken into consideration under Section 35 (13) was the carrier who had entered into the agreement with the shipper, and he was of opinion that the express mention of the revenue of one carrier necessarily excluded a consideration of the revenue of any other carrier. p. 51, ll. 9-14

20 He also relied on the express provisions of Section 35 (13), which direct the Board to consider the business interests of any shipper alleging unjust discrimination, as an indication that the Board were not empowered to take into consideration the business interests of any competing carrier. p. 51, ll. 15-23

To an argument based by the Respondents on the provisions of Section 3 (2) of the Transport Act, directing the Board to perform its functions "with the object of co-ordinating and harmonising the operations of all carriers engaged on transport by railway, ships or aircraft," he found a sufficient answer in the provisions of Section 35 (1), which provide that the power of carriers to make such charges as may be agreed between them and the shipper conferred by that sub-section should take effect "notwithstanding anything in the Railway Act or in this Act." pp. 51, l. 40, to p. 52, l. 2

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22.—Davis, J. was of opinion that the Court had no power to lay down any rule restricting the administrative function and duty vested in the Board by Section 35, or precluding the Board from having regard under that section to any consideration which might appear to it to be relevant. pp. 52-53

23.—Kerwin, J. (with whose judgment Hudson, J. concurred) was of opinion that the words of Section 35 (13) indicated an intention on the part of Parliament to leave it to the Board, and not to any other Court, to determine what is and what is not relevant. In answer to the Appellants' argument that the provisions of Section 36 were inconsistent with any construction of Section 35 giving the Board power to consider the effect which the making of an agreed charge was likely to have on the business and revenue of carriers by water, he pointed out that a complaint under pp. 53-56  
p. 55, ll. 12-21  
p. 55, ll. 27-39

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Section 36 could be made only by a representative body of carriers, whilst an objection under Section 35 could be made by any carrier, that under Section 36 the Minister could only refer a complaint to the Board if he were satisfied that it was in the national interest that the complaint should be investigated, and that it was only on the same ground that the Board might make an Order varying or cancelling the agreed charge complained of.

24.—The Appellants humbly submit that this appeal should be allowed for the following, among other

### REASONS.

1. Because, on the true construction of Sections 35 and 36 10 of the Transport Act, 1938, the Board, on an application for the approval of an agreed charge between a shipper and competing rail carriers under Section 35, are precluded from regarding as relevant considerations the effects which the making of an agreed charge is likely to have on the business and revenues of other carriers.
2. For the reasons given in the judgments of Sir Lyman Duff, C.J., and Rinfret, J.

D. N. PRITT,  
G. A. WALKER, 20  
B. MacKENNA.

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LIMITED, NORTHERN NAVIGATION  
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APPELLANTS' CASE.

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