18, 1945

In the Privy Council.

No. 18 of 1944.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

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

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, NORTHERN NAVIGATION COMPANY and NORTH-WEST STEAMSHIPS LIMITED ... *Respondents.*

RESPONDENT'S CASE

CASE FOR THE RESPONDENTS.

RECORD

1.—This is an Appeal by Special Leave from a Judgment of the Supreme Court of Canada, dated the 4th May, 1943, which by a majority of 3 to 2 (Davis, Kerwin and Hudson, JJ., Duff, C.J.C., and Rinfret, J., dissenting) answered in the negative the following question in a case stated for the opinion of the Court by the Board of Transport Commissioners for Canada (hereinafter called " the Board "): p. 44 p. 8, ll. 1–10 pp. 1–8

> " 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 as relevant considerations the effects which the making of the agreed charge is likely to have on the business and revenue of other carriers ? " pp 25–27

The principal material provisions of the Transport Act, 1938 (hereinafter called " the Act ") are printed in the Record. pp. 23–28; 15–17

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p. 4, ll. 15–16

2.—The Act had as its object the bringing under regulation of all forms of transport subject to the legislative jurisdiction of the Parliamnnt of Canada, that is to say, transport by rail, water and air. No attempt was made to include the fourth important medium of transport, road haulage, or, as it is known in Canada, trucking, since for the most part the operations of the trucking companies fall under provincial jurisdiction. The main object of the Act is clearly expressed in Section 3 (2) which reads :—

> " It shall be the duty of the Board to perform the functions vested in the Board by this Act and by the Railway Act with the object of co-ordinating and harmonizing the operations of all carriers engaged in transport by rail, ships and aircraft and the Board shall give to this Act and to the Railway Act such fair interpretation as will best attain the object aforesaid."

References in the Act to carriers are confined to carriers to whom the Act applies (Section 2 (1) (*d*), not printed in the Record), and they are often called " regulated carriers," although that term does not occur in the Act.

p. 25, ll. 11–26

p. 27, ll. 33–42

3.—The Act empowered a regulated carrier to make such charges for carrying goods as might be agreed between the carrier and the shipper of the goods provided that such agreed charges had been approved by the Board. The Board is directed in considering whether or not to approve of agreed charges to have regard to all considerations which appear to the Board to be relevant. This direction is contained in Section 35 (13) which is in the following terms :

> " (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,—
>
> (a) the net revenue of the carrier ; and
>
> (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."

p 4, l. 8; p. 5, l. 4

4.—The Appellants, who are carriers by rail, applied in four cases to the Board under Section 35 of the Act for approval of charges which they had agreed with certain shippers who in consideration of concessions bound themselves to ship entirely by rail in the four cases respectively 85 per cent., 95 per cent., 100 per cent. and 100 per cent. of the goods specified.

p. 4, l. 11

p. 26, ll. 4–15

5.—The Respondents, who are carriers by water with freight services from the head of the Great Lakes to the sea which had theretofore in competition with carriers by rail carried a substantial part of the goods specified in the agreed charges, opposed the Appellants' applications in accordance with the provision of Section 35 (5) of the Act. which entitled

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any carrier giving notice of objection to be heard in opposition to an application to the Board for the approval of an agreed charge. The Respondents based their objection in each case on the ground that the making of the agreed charge would prejudicially affect their business and revenues. In each case the Appellants contended that the Board was precluded from regarding such an objection as relevant.

p. 4, ll. 20–22; p. 4, l. 42; p. 5, l. 2

p. 4, ll. 22–24; p. 5, ll. 3–4

6.—The first two applications were heard by Wardrope, Assistant Chief Commissioner, Garceau, Deputy Chief Commissioner, and Commissioners Stoneman, MacPherson and Stone. On the 26th April, 1940, the Board so constituted approved the agreed charges for reasons printed in the Joint Appendix. The Assistant Chief Commissioner (in whose reasons for Judgment Commissioners Stoneman and MacPherson concurred) in dealing with the first application set out that the purpose of the agreement on a charge was to enable rail carriers to meet the competition of highway transport (highway transport not being under the control of the Board), and stated the reasons why the Appellants contended that it was necessary to bind each shipper to ship by rail not less than 85 per cent. of the aggregate volume forwarded by him of the traffic covered by the agreement. The shippers estimated that the remaining 15 per cent. would be the amount carried by boat. The Assistant Chief Commissioner then dealt with the Respondents' objections with reference to the facts and the legal contentions of the parties and thought the objections unfounded. He expressed the view that the Appellants' argument that the effect of the agreed charge on the business of the Respondents was not relevant; suggested an interpretation of Section 35 of the Act which was entirely too restricted and narrow; but he considered that the application neither involved nor necessitated any pronouncement of general principles. The second application was dealt with in the same way.

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pp. 1–13

p. 9, l. 44

p. 2, ll. 7–8

p. 2, ll. 9–33

p. 2, ll. 34–39

p. 2, l. 40; p. 5, l. 56

p. 4, ll. 29–43

p. 4, ll. 44–46

p. 8, l. 29; p. 9, l. 43

7.—The Deputy Chief Commissioner (with whom Commissioner Stone agreed) rejected the Respondents' objections not, as had the majority, because injury was not proven but because they were irrelevant and not pertinent in law. In his view Part V of the Act is a self-contained Act not affected by the Railway Act or (apart from the name and definitions in Sections 1, 2 and 3) by any other part of the Act. He considered that Part V gives any regulated carrier the absolute right by unrestricted competition to secure the traffic of any shipper by means of an agreed charge provided the object cannot be adequately secured by a competitive or special tariff of tolls and provided that when the transport is by rail the competing rail carriers must join in making the agreed charge. He was of opinion that other carriers have no protection of the Board against any consequence of the exercise of this right unless the Minister acts under Section 36. The Deputy Chief Commissioner (quite wrongly in the Respondents' submission) then argued that, because the Board has no jurisdiction except on reference by the Minister to interfere with existing agreed charges even when the effect of the charge on competing carriers is

p. 13, l. 31

p. 10, ll. 1–27

p. 10, l. 28; p. 11, l. 10

p. 11, ll. 11–26

p. 11, l. 27; p. 12, l. 8

p. 12, ll. 9–33

JOINT APPENDIX

undesirable in the national interest, the Board is by necessary implication precluded from considering the mere possibility of such an effect before a charge is approved and in operation. In his view the Respondents had no right to complain of injury to their traffic.

p. 12, ll. 34–40

pp. 14–51

8.—The third and fourth applications were heard by Cross, Chief Commissioner, Wardrope, Assistant Chief Commissioner, Garceau, Deputy Chief Commissioner, and Commissioners MacPherson and Stone. For reasons given on the 6th January, 1942, the Board (the Deputy Chief Commissioner dissenting) refused both applications.

p. 31, l. 47
p. 14, l. 23 ;
p. 15, l. 44
p. 15, ll. 33–35
p. 15, l. 45 ;
p. 16, l. 43
p. 16, l. 44 ;
p. 17, l. 46
p. 17, l. 47 ;
p. 25, l. 9
p. 25, l. 10 ;
p. 26, l. 20
p. 19, ll. 43–46
p. 26, ll. 21–42
p. 27, ll. 1–13
p. 27, ll. 14–41
p. 27, l. 42 ;
p. 31, l. 45
p. 31, ll. 31–39

9.—The Chief Commissioner (in whose reasons the Assistant Chief Commissioner and Commissioner MacPherson concurred after summarising the agreements in question including a provision against shipment of any of the specified goods by any means of transportation whatsoever other than railway, examined Section 35 of the Act. He stated its effect and the reasons for passing it. Turning to the agreements before the Board the Chief Commissioner found grounds for withholding approval which are not material to this Appeal, and then stated the nature of the Respondents' business and the objections raised by them. Having already found that the Appellants were clearly seeking to deprive the Respondents of participation in the traffic, the Chief Commissioner considered the argument as to what the Board could properly have regard to. He pointed out that by giving any carrier a right to object and to be heard and, after approval, to apply to the Board for withdrawal of its approval, the Act differed from the British Act containing provision for agreed charges (Part II of the Road and Rail Transport Act, 1933 ; 23 and 24 George 5, Chapter 53) which gave no individual carrier any right to object before or after approval. The Canadian Act does not restrict a carrier's grounds of objection, but directs the Board to have regard to all considerations which appear to it relevant, while requiring the Board to have regard to specified matters. Accordingly he could not agree with the restricted interpretation suggested by the Appellants that the Board could only have regard to the specified matters. He therefore considered on their merits the grounds of objection raised by the Respondents, and by another body not represented by Counsel, and concluded that the applications should be dismissed. The only rule of interpretation which he would lay down is that it is for the Board in the light of the facts and circumstances surrounding each case to determine what considerations are relevant and to have regard to them.

p. 32, l. 1 ;
p. 33, l. 31
p. 33, l. 32 ;
p. 51, l. 28
p. 46, l. 36 ;
p. 47, l. 7

10.—Commissioner Stone agreed that both applications be dismissed on grounds not relevant to this Appeal. The Deputy Chief Commissioner would have approved the agreed charges in both cases. After dealing with other matters, the considered whether the effect of the agreements on the Respondents' business and revenues was a relevant consideration, and expressed the view that although Section 3 (2) of the Act directs the Board

JOINT APPENDIX

to co-ordinate and harmonise the different transport systems that sub-section is overridden by Section 35 (1) which Section 35 (13) is in turn powerless to override. He then set out in detail the grounds upon which he rested his opinion. p. 47, l. 8; p. 51, l. 9

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11.—No appeal was taken from the Board's decision on any of the applications, but the Appellants applied under Section 51 of the Railway Act and under Section 4 of the Act for reconsideration or a re-hearing by the Board of the third and fourth applications. The Board reserved its decision on this application and stated the present case for the opinion of the Supreme Court, ordering that copies of the case be served on a large number of parties who might be interested. The parties to the original proceedings before the Board on the applications for approval appeared before the Supreme Court of Canada, the Appellants urging an affirmative answer and the Respondents urging a negative answer to the question propounded. The Supreme Court of Canada by a majority (Davis, Kerwin and Hudson, JJ.), answered the question in the negative (Duff, C.J., and Rinfret, J., dissenting). p. 7, ll. 32–38. p. 22, l. 4; p. 23, l. 10. p. 7, l. 39; p. 8, l. 10. p. 8, l. 18. pp. 10–21. pp. 33–43. p. 44.

12.—In his reasons for Judgment Duff, C.J., expressed the view that Section 35 (13) is very comprehensive and would *prima facie* embrace everything which the Board may reasonably think has a bearing upon the issue before it, which generally would be of fact only : but he thought that the proper inference from Section 36 is that the effect of the agreed charge upon competing carriers is not a relevant consideration. pp. 45–47. p. 46, ll. 34–38. p. 46, l. 48; p. 47, l. 10.

13.—The Respondents respectfully submit that Section 36, as appears from its terms, is inserted in the Act to provide for cases where, after an agreed charge has been duly approved by the Board and by being put into effect has become an existing agreed charge, it is found by experience that the general effect on the business of the other persons engaged in transport by water, rail or air is undesirable in the national interest. In such cases machinery is provided for getting rid of the evil. If, however, this section is used to restrict the wide meaning of Section 35 (13) an astonishing position results. Assume a case where it could be shown that the result of approving an agreed charge would be to create the evil which the Act seeks to remedy. The Board would then be bound in law (if there is no other objection to the agreed charge) to authorise the evil. To remove the evil it would, however, then be necessary to await results disadvantageous to the nation, the formation if necessary of a body representative of the interested persons, representations to the Minister, and the intervention of the Minister. Not until these conditions are fulfilled could the Board vary or cancel the agreed charge. Yet the agreed charge was one which in the opinion of the Board ought never to have been approved and never would have been approved if the Act (on this construction) had not debarred the Board from considering on an application to approve the charge the matters rendering necessary its variation or cancellation. The Respondents

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No. 1. Statement of Case,- 11th September, 1942— *continued.*

business at such an undue or unfair disadvantage that in the national interest the complaint should be investigated. If the Minister is thus satisfied, he may then refer the 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.

" By subsection (5) of Section 35, any carrier is given the right to object and is entitled to be heard in opposition to the application for approval of an Agreed Charge, that is, before approval and not after approval. The objections which are being here considered fall within that category. I am therefore of opinion that undue or unfair disadvantage to a competing carrier is not excluded from consideration by reason of the provisions of Section 36."

Wardrope, Assistant Chief Commissioner, concurred in the judgment of Cross, Chief Commissioner. MacPherson and Stone, Commissioners, concurred in the result.

Garceau, Deputy Chief Commissioner, said in his judgment at page 34 :—

" The omission in Section 35 (1) and the inclusion in Section 36 of unfair disadvantage or losses to competing carriers according to the rules of interpretation ' *inclusio unius fit exclusio alterius* ' would show conclusively, even if the terms of Section 35 (1) were not so explicit as to the right of the Applicants, that losses to competing carriers cannot be considered against the approval of the agreed charges.

" Section 35 of The Transport Act must be read together with Section 15 of the Interpretation Act, R.S.C. 1927, c. 1. This Section 35 gives the railways a privilege which they did not previously possess, which reads in the words of the Judgment :—

' The authority to make such charge or charges for the transport of all or any part of the goods of any shipper as may be agreed between the railway and the shipper ; and such charges may be lowered from the regular tariff rate.'

" Section 15, above quoted, reads :—

' Every Act and every provision and enactment thereof shall be deemed remedial, whether its immediate purport is to direct the doing of anything which Parliament deems to be for the public good, or to prevent or punish the doing of anything which it deems contrary to the public good ; and shall accordingly receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act and of such provision or enactment, according to its true intent, meaning and spirit.'

" I submit that the above direction imposes the obligation on the Board to favour agreed charges when those agreed charges are within the provisions of Part V of The Transport Act ; that the only parties to be protected in the approval of the agreed charges in question are the parties protected similarly by the provisions of Section 35 (1) ; and that protection is due to the other regulated carriers affected by the agreed charges only when as mentioned in the Act.

" I submit that the provisions of Section 35 (1) and of Section 15 of the Interpretation Act are peremptory directions to the Board excluding any judicial discretion not inferred from the formal provisions of Part V. When the law does not make any distinction, it is not within the judicial discretion of any tribunal to make any. I will add ' when the Board is satisfied that the agreed charges would no doubt yield a greater margin of profit to the rail carriers than the average earned from the carriage of all traffic ' it must, in my opinion, approve the agreed charges in order to give effect to the Remedial Act (The Transport Act) and grant the privileges of the Act to the carriers for whom it was enacted."

and at page 35 :—

" True, a carrier is entitled to be heard in opposition to the application (35 (5) (*c*)) but not in opposition to the operation of the Act or its application.

" It can object that the Applicant can adequately secure the whole object of his agreement by competitive or special tariff of tolls, or that the effect of the agreement is likely to have on the net revenue of the carrier, or that it does not comply with any of the enactments of the Act ; but not because it would be adversely affected, for then, as in this instance, he is asking the Board to deny to the Applicant a right conferred by law, ' to make such charge or charges for the transport of the goods of any shipper or any part of his goods as may be agreed between the carrier and the shipper.' "

The carriers by rail applied to the Board in each case under Section 51 of the Railway Act and Section 4 of the Transport Act, 1938, for a review of the Board's Order dismissing the application, and for a rehearing of the application contending, *inter alia*, that the Board's judgment was wrong in holding as a matter of law that approval of the agreed charge might properly be withheld on the ground that the agreed charge might be unduly prejudicial to competing water carriers.

The Board reserved its decision on the said application.

Because of the difference of opinion among members of the Board on the question of law, as indicated by the statements above given, and in view of the number of applications to the Board in which the same question is likely to be raised, the Board considers it desirable to obtain the opinion of the Supreme Court of Canada.

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be secured by means of a competitive tariff of tolls under the Railway Act or this Act ; or

p. 25, l. 22 (b) " 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 . . . unless the competing carriers by rail join in making the agreed charge."

Neither of these restrictions on the Board's discretion is, however, applicable to the present case.

22.—The Respondents submit that, where Parliament has thus conferred the power of approval or disapproval and has seen fit to lay down two specific cases in which such approval may not be granted, the obvious implication would be that the Board's discretion is to be unfettered in all p. 27, l. 33 other cases. Moreover Parliament in Section 35 (13) has expressly conferred discretion on the Board in the widest possible language by which not only is the Board directed to have regard to all relevant considerations but is also given the power to decide what is and what is not relevant.

23.—The Appellants have relied below on the decision of the English Court of Appeal in *Great Western Railway Company* v. *Chamber of Shipping* (1937) 25 Railway, Canal and Road Traffic Cases 223. The Respondents submit that this case, which turned on the true construction of Section 37 (1) of the Railways Act, 1921, is clearly distinguishable and in fact involves no such question as is before the Court on the present appeal.

24.—The Respondents accordingly submit that the present appeal should be dismissed and the Judgment of the Supreme Court of Canada dated the 4th May, 1943, affirmed, for the following amongst other

REASONS.

1. Because sub-section (13) of Section 35 of the Act expressly empowers and directs the Board to have regard to all considerations which appear to the Board to be relevant, and the Board is thereby empowered to determine what considerations are or are not relevant.

2. Because the effects which the making of an agreed charge is likely to have on the business and revenues of other carriers as defined in the said Act are in fact relevant considerations on the question of approval of such agreed charge, particularly having regard to the express direction of sub-section (2) of Section 3 of the Act.

3. Because under sub-sections (1) and (13) of Section 35 the Board is given an absolute discretion in the matter of

approving or not approving agreed charges, and having regard to the effect which the making of an approved charge is likely to have on the business and revenues of other regulated carriers is a proper exercise of that discretion.

4. Because sub-section (5) of Section 35 makes express provision for opposition to the approval of agreed charges by individual carriers and if the question is answered in the affirmative the right of opposition thus given to the individual carriers would be nullified.

10 5. Because of the other reasons stated in the Judgments of the Chief Commissioner and of the majority of the Supreme Court of Canada.

WALTER MONCKTON.
HAZEN HANSARD.
FRANK GAHAN.

In the Privy Council.

No. 18 of 1944.

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v.

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