Privy Council Appeal No. 18 *of* 1944

Canadian National Railways and others - - - *Appellants*

v.

Canada Steamship Lines Ltd. and others - - *Respondents*

FROM

THE SUPREME COURT OF CANADA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 16TH APRIL, 1945

Present at the Hearing:

THE LORD CHANCELLOR
LORD RUSSELL OF KILLOWEN
LORD MACMILLAN
LORD ROCHE
LORD SIMONDS

[*Delivered by* LORD MACMILLAN]

This appeal arises from an application presented to the Board of Transport Commissioners for Canada by the Canadian National Railways, the Canadian Pacific Railway Company and other Canadian Railways under section 35 of the Transport Act, 1938, for the approval by the Board of charges agreed between the Railways and certain shippers—or "traders" as they would be termed in English railway parlance. The agreed charges were for the carriage by rail in car-loads between eastward and westward points in Canada of specified goods which up to that time had been carried for a portion of the route by water transportation on the Great Lakes. In two of the cases the agreed charges affected 85 per cent. and 95 per cent. respectively of the traffic and in the two other cases 100 per cent.

The application was opposed by Steamship Companies operating on the Lakes on the ground mainly that the agreed charges if sanctioned would have the effect of depriving them of the whole or a large part of their share of the traffic and would prejudicially affect their business and revenues. On behalf of the Railways it was contended that the Board was precluded from considering an objection by the Steamship Companies on this ground.

The Board refused to approve the agreed charges, Deputy Chief Commissioner Garceau dissenting. The opinion of the majority is thus expressed by Chief Commissioner Cross:—

> "I think therefore that the effect the agreements will have on the objecting carriers' business and revenues is a relevant consideration and that approval and the putting into effect of the said agreed charge agreements would likely be unduly prejudicial to the objecting water-carriers who have participated in the carriage of the traffic and place them and their business at an undue or unfair disadvantage."

An application having been made to the Board on behalf of the Railways for a review and rehearing, the Board, in pursuance of the power conferred upon it by section 43 of the Railway Act (R.S.C. 1927, c. 170) and section 4 of the Transport Act, stated a case for the opinion of the Supreme Court of Canada on the following question of law:—

> "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 or revenues of other carriers? "

The Supreme Court by a majority (Davis, Kerwin and Hudson, JJ.) answered the question in the negative, Sir Lyman Duff, Chief Justice, and Mr. Justice Rinfret dissenting. Special leave having been granted to the Railways to appeal to His Majesty in Council, their Lordships have now in turn to consider the question.

The legislation on the subject of agreed charges is contained in Part V of the Transport Act, which for the first time sanctioned the making of such charges. Part V consists of five sections, of which only sections 35 and 36 need be considered.

Section 35 (1) empowers a carrier to make such charges for the transport of the goods of any shipper as may be agreed between the carrier and that shipper, provided that the agreed charges are approved by the Board. By section 2 of the Act " carrier " means any person engaged in the transport of goods and passengers for hire or reward to whom the Act applies; " shipper " means a person sending or receiving or desiring to send or receive goods by means of any carrier to whom the Act applies; and " transport " means the transport of goods or passengers whether by air, by water or by rail for hire or reward to which the provisions of the Act apply. In two cases the Board is directed not to approve of an agreed charge, viz., (1) if in its opinion the object of the agreed charge can, having regard to all the circumstances, adequately be secured by means of a special or competitive tariff of tolls under the Railway Act or the Transport Act; and (2) 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.

Subsection (5) of section 35 confers on *inter alios* " any carrier " the right to object and to be heard in opposition to an application for the approval of an agreed charge. Subsection (9) authorises *inter alios* " any carrier " to apply after a year for the withdrawal by the Board of its approval to an agreed charge.

Subsection (13), on the interpretation of which the question at issue turns, must be quoted in full. It reads as follows:—

> " On any applications 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."

" The carrier " here mentioned is the carrier with whom the charge has been agreed.

It will be observed that subsection (13) applies to any application under section 35 and is therefore applicable not only to the initial sanctioning of an agreed charge under subsection (5) but also to a subsequent application under subsection (9) for the withdrawal of the Board's approval. The agreed charges may have been agreed between a shipper and any carrier whether by air, water or rail. An affirmative answer to the question propounded would thus preclude the present appellants from objecting to the approval of a charge agreed between a shipper and the respondent Shipping Companies for the carriage of goods by water on the ground of the effects which the making of the agreed charge would be likely to have on the business or revenues of the Railways.

It would be difficult to conceive a wider discretion than is conferred on the Board as to the considerations to which it is to have regard in disposing of an application for the approval of an agreed charge. It is to have regard to " all considerations which appear to it to be relevant." Not only is it not precluded negatively from having regard to any considerations but it is enjoined positively to have regard to every consideration which in its opinion is relevant. So long as that discretion is exercised in good faith the decision of the Board as to what considerations are relevant would appear to be unchallengeable. The circumstance that the general words are followed by a specific direction to the Board to have regard in par-

ticular to two specified topics in no way derogates from the generality of their discretion. It is not a case to which the *ejusdem generis* rule applies for the general words do not follow on an enumeration of particular instances but precede the particular instances. " I know of no authority," said Lord Chancellor Cave, " for applying that rule to . . . a case where to begin with the whole clause is governed by the initial general words " (*Ambatielos* v. *Anton Jurgens Margarine Works* [1923] A.C. 175 at p. 183). Nor is the maxim *expressio unius est exclusio alterius* applicable to such a case as the present. In their Lordships' view the mention of the particular matters of (*a*) the net revenue of the carrier who has agreed the charge and (*b*) the business of the objecting shipper, as matters to be considered does not justify any inference that consideration of the revenue or business of an objecting carrier is excluded.

If the objecting carrier in resisting the approval of a charge agreed between a rival carrier and a shipper were to be precluded from referring to its probable effect on his own business it is not easy to see on what other grounds of objection he could rely. According to Mr. Justice Rinfret, one of the two learned Judges in the minority in the Supreme Court, " the right of ' any carrier ' to be heard in opposition to an application for the approval of an agreed charge which is given by subsection (5) must be limited to the consideration of one of the two circumstances included in the proviso of subsection (1) of section 35," being one of the two cases in which the Board is directed not to approve of an agreed charge. With all respect their Lordships find themselves unable to agree with this view. The proviso in subsection (1) excepts two cases from the power of the Board to approve agreed charges and to that extent limits its jurisdiction. To hold the objecting carrier restricted to objections based on that proviso would be to limit his challenge to questions of the Board's competency and would preclude him altogether from advancing any objections on the merits. It is only in the case of an application which the Board can competently entertain and grant, that is, one not excluded by the proviso in subsection (1), that the Board is to have regard to all considerations which appear to it to be relevant. In giving to " any carrier " the right to be heard in opposition to any agreed charge the Act means that he shall be heard in opposition to any agreed charge which the Board may competently approve. Permissible opposition is not confined to the competency of the Board to approve a particular agreed charge but includes all considerations on the merits which to the Board appear relevant. Moreover subsection (13) applies not only to applications for approval of an agreed charge under subsection (5) but also to applications under subsection (9) for the withdrawal of the approval given by the Board to an agreed charge, that is to say to an agreed charge of which it must have had jurisdiction to approve in the first instance. It is thus plain that the considerations to which the Board may, at the instance of " any carrier," have regard in disposing of an application for the withdrawal of their previous approval of an agreed charge cannot be confined to objections based on the proviso in subsection (1). There can be no reason for holding that a carrier should have a more limited scope in objecting to the initial approval of an agreed charge than he has in applying for the withdrawal of the approval previously given to an agreed charge.

The learned Chief Justice gives quite a different reason for answering the question in the affirmative. He refers to section 36 which reads as follows:—

> " (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."

This section, in the opinion of the Chief Justice, " points unmistakably to the conclusion that the statute does not contemplate the rejection of an application for the approval of an agreed charge on the ground that the establishment of such a charge will prejudicially affect the business and revenues of competing carriers. The proper inference, I think, from that section is that the effect of the agreed charge upon competing carriers is not a relevant consideration within the meaning of section 35, subsection (13)." By this the Chief Justice must be taken to mean that the Board are not entitled to treat it as a relevant consideration.

Mr. Justice Rinfret, while agreeing with the Chief Justice that the question propounded should be answered in the affirmative, disagrees with him as to the bearing of section 36 on the question. He regards the section, and in their Lordships' opinion rightly regards it, as dealing " with an entirely different matter." Section 36 can be invoked only by a representative body of carriers; a complaint under it is addressed to the Minister, not to the Board; it involves consideration of the national interest and of kinds of businesses; it assumes that a charge has been competently agreed and approved and is in existence and operation. Section 35 is concerned with quite different topics arising at a different stage. An individual carrier may have interests distinct from and possibly even opposed to the national interest. He cannot at his own hand invoke section 36; it is to his rights under section 35 that he must look for his protection.

There are wider considerations which lend support to the view which has commended itself to the majority of the learned judges of the Supreme Court and which commends itself to their Lordships. The Act of 1938 introduces important extensions and innovations in the transport law of Canada. It provides for the first time for the control of rates for transport by water and transport by air, as well as providing for the first time for agreed charges. The extension of the Board's jurisdiction is not only signalised by the change in its name but is accompanied by a special injunction addressed to it by Parliament as to the administration of its enlarged functions. Section 3 (2) of the Act thus exhorts the Board—

> " 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 harmonising the operations of all carriers engaged in transport by railways, 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."

It would be strange if in attempting to co-ordinate and harmonise the operations of all carriers by rail, water and air the Board were to be precluded, when performing their new and important duty of scrutinising agreed charges, from considering their effect on the businesses of all carriers concerned in the traffic affected. Mr. Justice Rinfret draws attention to the opening words of section 35—" notwithstanding anything in the Railway Act or in this Act "—and apparently takes the view that these words absolve the Board when dealing with agreed charges from the duty enjoined by section 3 (2) of co-ordinating and harmonising the operations of all carriers by rail, water and air. This is a misapprehension. The exhortation in section 3 (2) applies to all the Board's functions, including that of approving agreed charges. The opening words of section 35 (1) are intended only to indicate that agreed charges may be sanctioned notwithstanding the general provisions as to the universality of charges.

Reference was incidentally made to the case of the *Great Western Railway Company* v. *Chamber of Shipping of the United Kingdom*, [1937] 2 K.B. 30. In the Supreme Court judgments it is mentioned only in the judgment of Kerwin, J., concurred in by Hudson, J., and there only to observe that it is of no assistance in the present case. Their Lordships agree. That case arose on an Imperial statute confined in its operation to railways and turned upon different language and different considerations from those with which the present case is concerned.

Their Lordships will humbly advise His Majesty that the appeal be dismissed and the judgment of the Supreme Court be affirmed. The appellants will pay the respondents' costs of the appeal.

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In the Privy Council

CANADIAN NATIONAL RAILWAYS AND OTHERS

v.

CANADA STEAMSHIP LINES LTD. AND OTHERS

DELIVERED BY LORD MACMILLAN

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