12, 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.*

RECORD OF PROCEEDINGS.

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RECORD OF PROCEEDINGS.

In the Supreme Court of Canada.

No. 1. Statement of Case, 11th September, 1942.

No. 1.

Statement of Case.

IN THE SUPREME COURT OF CANADA.

REFERENCE BY THE BOARD OF TRANSPORT COMMISSIONERS FOR CANADA FOR THE OPINION OF THE SUPREME COURT OF CANADA.

IN THE MATTER OF THE TRANSPORT ACT, 1938 (2 GEORGE VI, CHAPTER 53).

The question which The Board of Transport Commissioners for Canada submits to the Supreme Court of Canada concerns the true interpretation of The Transport Act, 1938, and, more particularly, the provision in
10 subsection (13) of Section 35 of the said Act that on an application for the

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No. 1. Statement of Case, 11th September, 1912— *continued.*

approval of an agreed charge, " The Board shall have regard to all considerations which appear to it to be relevant," and the restrictive effect, if any, of subsection (1) of Section 35 and other provisions of the said Act on the meaning of the words quoted.

I.

As used herein, unless the context otherwise requires,—

" agreed charge " means a charge agreed upon between a carrier and a shipper as in The Transport Act, 1938, provided, and includes the conditions attached thereto ;

" carrier " means any person engaged in transport to whom The Transport Act, 1938, applies, and includes any company which is subject to the Railway Act ;

" transport " means the transport of goods and passengers for hire or reward, to which The Transport Act, 1938, applies.

II.

The Board of Transport Commissioners for Canada has jurisdiction over tolls charged for transport by the following carriers :—

(*a*) carriers by rail which are within the legislative authority of the Parliament of Canada ;

(*b*) carriers by water from a port or place in Canada to another port or place in Canada on Lakes Ontario, Erie, Huron (including Georgian Bay) and Superior, and their connecting waters, and the St. Lawrence River and its tributaries as far seaward as the west end of the Island of Orleans—except as to the following tolls :—

(i) tolls charged for transport of goods in bulk ;

(ii) tolls charged for transport by ships of not more than five hundred tons gross tonnage ;

(iii) tolls charged for transport by ships or classes of ships which the Governor in Council has by regulation exempted under subsection (2) of Section 12 of The Transport Act, 1938 ;

(*c*) carriers by air between points and places named by the Governor in Council.

This jurisdiction is derived from the Railway Act (R.S.C., 1927, c. 170) and The Transport Act, 1938. The Board's powers include the power to disallow any tariff of tolls, or any part thereof, and to substitute tolls in lieu of those disallowed.

III.

The Railway Act, 1903, created the Board of Railway Commissioners for Canada, and gave it jurisdiction over tolls charged by railway companies within the legislative authority of the Parliament of Canada ; and such jurisdiction has been continued under subsequent amendments, revisions, and consolidations of the Railway Act.

The Transport Act, 1938, provided that the Board of Railway Commissioners for Canada should thereafter be and be known as The Board of Transport Commissioners for Canada. Under this Act, the Board has jurisdiction over tolls charged by carriers by water and carriers by air as above set out.

IV.

The Railway Act (ss. 314 (1) and 316 (3)) and The Transport Act, 1938 (ss. 24 (1) and 25 (2)) provide that all tolls shall always under substantially similar circumstances and conditions, in respect of all traffic of the same description and carried in like manner over the same route, be charged equally to all persons and at the same rate ; and prohibit the giving of any undue or unreasonable preference or advantage to or in favour of any particular person, or company, or any particular description of traffic, in any respect whatsoever.

V.

Subsections (1), (5) and (13) of Section 35 of The Transport Act, 1938, are as follows :—

" (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 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."

" (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."

" (13) On any application under this section, the Board shall have regard to all considerations which appear to it to be relevant and,

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

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."

VI.

In four cases (files numbered 40994.5, 40994.6, 40994.11, and 40994.12) where applications were made to the Board for the approval of agreed charges, the applications were made by carriers by rail and were opposed by competing water carriers.

Files numbered 40994.5 *and* 40994.6.

These cases were heard together. In each case the traffic covered by the agreed charge had been carried in part by carriers by rail, in part by carriers by water, and in part by operators of motor trucks. These operators of motor trucks were not subject to the jurisdiction of the Board. Under the terms of the agreed charges the shippers undertook to ship by rail not less than a fixed percentage of the aggregate volume forwarded by them of certain specified traffic. The percentage fixed in one case was 85 per cent. and in the other 95 per cent. In each case the competing carriers by water objected on the ground that the making of the agreed charge would prejudicially affect their business and revenues, and in each case the applicants contended that the Board was precluded from regarding such objection as relevant.

The judgment of the Board is reported in 51 Canadian Railway and Transport Cases, at page 185.

Wardrope, Assistant Chief Commissioner, stated that on his view of the facts it was not necessary to deal with the question of the relevancy of the objection of the carriers by water.

Stoneman and MacPherson, Commissioners, concurred in the judgment of Wardrope, Assistant Chief Commissioner.

Garceau, Deputy Chief Commissioner, held that the applicants were right in their contention that the Board was precluded from regarding the objection of the carriers by water as relevant.

VII.

Files numbered 40994.11 *and* 40994.12.

These cases were heard together. In each case the traffic covered by the agreed charge had been carried in part by rail only, in part by water and rail, and in part by rail, water and rail. None of the traffic had been carried by operators of motor trucks. Under the terms of the agreed charge the shippers undertook to ship by rail 100 per cent. of the aggregate volume forwarded by them of certain specified carload traffic. In each

case the competing carriers by water objected on the ground that the making of the agreed charge would prejudicially affect their business and revenues, and the applicants contended that the Board was precluded from regarding such objection as relevant.

In both cases the Board refused to approve the agreed charge, Garceau, Deputy Chief Commissioner, dissenting. The judgment of the Board is reported in 54 Canadian Railway and Transport Cases, page 1.

Cross, Chief Commissioner, said in his judgment, at page 15 :—

" The applicants contend that on an application under Section 35 for approval of an Agreed Charge, apart from the prohibitions to which reference has already been made, the only considerations which are relevant and to which the Board should have regard are those which under subsection (13) the Board is particularly required to have regard to.

" I cannot agree with the restricted interpretation thus suggested. Subsection (13) of Section 35 of The Transport Act states :

' (13) On any application under this section, the Board shall have regard to all considerations which appear to it to be relevant . . .'

" The generality of the foregoing is not, I think, in any way limited or restricted by the mention of the two particular matters at the end of the subsection.

" The legislature, by subsection (13), has required the Board to have regard to all considerations which appear to it to be relevant and. in the view which I take of the provision, 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."

And at page 16 :—

" 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.

" The applicant rail carriers urged that undue or unfair disadvantage to a competing carrier is covered by Section 36 and that this raises an implication that it is not a matter which the Board should take into consideration under Section 35 (13).

" Under Section 36 it is a representative body of carriers and not ' any carrier ' that has the right to complain to the Minister. The right to so complain only arises in respect to an existing Agreed Charge, that is, one which has been approved by the Board and is in effect. The representative body of carriers complaining must also satisfy the Minister that the Agreed Charge complained of places their kind of

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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.

In the Supreme Court of Canada.

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

VIII.

The question which, in the opinion of the Board, is a question of law and which the Board, in pursuance of the powers conferred upon it by Section 43 of the Railway Act and Section 4 of The Transport Act, 1938, submits for the opinion of The Supreme Court of Canada is :—

" 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 revenues of other carriers ? "

Dated at Ottawa this 11th day of September, 1942.

By Order of the Board.

P. F. BAILLARGEON,
Secretary,
The Board of Transport Commissioners for Canada.

No. 2. Board's Order No. 62697 directing service of the Case, 11th September, 1942.

No. 2.

Board's Order No. 62697 directing service of the Case.

ORDER No. 62697.

THE BOARD OF TRANSPORT COMMISSIONERS FOR CANADA.

Friday, the 11th day of September, A.D. 1942.

J. A. CROSS, K.C., *Chief Commissioner.*
HUGH WARDROPE, *Assistant Chief Commissioner.*
F. N. GARCEAU, K.C., *Deputy Chief Commissioner.*
G. A. STONE, *Commissioner.*
F. M. MACPHERSON, *Commissioner.*

In the matter of The Transport Act, 1938 (2 *George VI, Chapter* 53) *: and in the matter of the case stated by the Board for the opinion of the Supreme Court of Canada.*

File No. 43453.

It is ordered : That copies of the case in the above matter be served upon the following by sending a copy of the said case by a registered post letter to each of them at the address appearing after its name :—

Brandon Board of Trade, Brandon, Manitoba.
Calgary Board of Trade, Calgary, Alberta.

Canadian Industrial Traffic League, Toronto, Ontario.
Canadian Lumbermen's Association, Toronto, Ontario.
Canadian Manufacturers' Association, Toronto, Ontario.
Edmonton Board of Trade, Edmonton, Alberta.
Halifax Board of Trade, Halifax, Nova Scotia.
Hamilton Chamber of Commerce, Hamilton, Ontario.
Montreal Board of Trade, Montreal, Quebec.
Moose Jaw Board of Trade, Moose Jaw, Saskatchewan.
Regina Board of Trade, Regina, Saskatchewan.
Saint John Board of Trade, Saint John, New Brunswick.
Saskatoon Board of Trade, Saskatoon, Saskatchewan.
Toronto Board of Trade, Toronto, Ontario.
Transportation Commission of the Maritime Board of Trade, Moncton, New Brunswick.
Vancouver Board of Trade, Vancouver, British Columbia.
Western Manufacturers' Association, 460 Main Street, Winnipeg, Manitoba.
Winnipeg Board of Trade, Winnipeg, Manitoba.
Canadian Freight Association, Montreal, Quebec.
Canadian National Railways, Montreal, Quebec.
Canadian Pacific Railway Company, Montreal, Quebec.
Great Northern Railway Company, c/o E. F. Newcombe, K.C., 140 Wellington Street, Ottawa, Ontario.
New York Central Railroad Company, c/o W. L. Scott, K.C., 85 Sparks Street, Ottawa, Ontario.
Pere Marquette Railway Company, Detroit, Michigan.
Toronto, Hamilton & Buffalo Railway Company, Hamilton, Ontario.
Wabash Railway Company, St. Louis, Missouri.
Canada Steamship Lines, Limited, Montreal, Quebec.
Northern Navigation Company, Montreal, Quebec.
Northwest Steamships Limited, Toronto, Ontario.
Air Transport Association of Canada, P.O. Box 672, Station B, Ottawa, Ontario.
Canadian Cellucotton Products Company Limited, Niagara Falls, Ontario.
Chicopee Manufacturing Corporation, c/o A. E. Horsnell, 2155 Pius IX Boulevard, Montreal, Quebec.
Johnson & Johnson, Limited, c/o A. E. Horsnell, 2155 Pius IX Boulevard, Montreal, Quebec.
Personal Products, Limited, c/o A. E. Horsnell, 2155 Pius IX Boulevard, Montreal, Quebec.

J. A. CROSS,
Chief Commissioner,
The Board of Transport Commissioners for Canada.

In the Supreme Court of Canada.

No. 3. Factum of the Appellant Canadian National Railways and Appendix of Statutes.

No. 3.

Factum of the Appellant Canadian National Railways.

1. Statement of Facts.

The facts as set forth in the stated case are simple. The Canadian National, the Canadian Pacific and certain other Railways entered into agreed charges with a number of shippers under the Transport Act 1938 providing for carriage by them in two cases of 85% and 95% respectively, and in two cases of 100% of certain carload traffic between points in Eastern Canada and points in Eastern and Western Canada, part of which was at the time being carried for a portion of the total distance by water transportation on the Great Lakes.

On application to the Board of Transport Commissioners for Canada for approval of the agreed charges, as required by the Transport Act 1938, opposition to approval was presented on behalf of Steamship Companies operating on the Great Lakes on the ground that the agreed charges, by their express stipulations, involved the loss of part or the whole of the portion of that traffic then being carried by them; that such loss to a competing water carrier regulated in part under the Transport Act 1938, was a consideration which could and should be taken into account by the Board in respect of the proposed approval; and that in the circumstances presented it was an objection which the Board should accept as sufficient to call for a refusal to approve. The Board in the first two cases approved the charges and in the last two acting on the view urged by the Steamship Companies declined to do so.

II. Points of Law.

The Board was in error in holding that the effect of an agreed charge made between rail carriers and shippers on the traffic of a competing water carrier was a relevant consideration which the Board could have regard to in dealing with an application for the approval of the agreed charge.

III. Argument.

1. The circumstances out of which Part V of the Transport Act of 1938 arose are well known. Since the enactment of the Railway Act 1903, dominion railways have been strictly regulated by the Board as to rates and services. With the advent of the internal combustion engine and its introduction to highway vehicles, and the improvements made in all classes of marine engines, new transport competition arose which was virtually unguessed at in 1903. In the early 1930's this had reached a point at which the unregulated services, ranging at large over the whole transportation field, threatened the capture of the more profitable traffic from the railways, which under the influence of outmoded concepts, remained subject to all the rigidities of the original regulation. The very condition of that

regulation, i.e., virtual monopoly, had in large measure disappeared. The relief given, or intended to be given, to the railways, by the Transport Act of 1938 was in the way of restoring in part their original freedom of action in relation to competition, but at the same time preserving the fundamental condition of equality of treatment to all members of the public.

2. That the interests of competing carriers were not contemplated as limitations upon the freedom of action so intended to be conferred upon railways is virtually demonstrated by the concluding proviso to Section 35 of the Transport Act of 1938, which is as follows :

" 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.*"

The Act provides for the regulation, in part, of water carriers and if there had been the slightest intention of securing to them any protection against the consequences of agreed charges made by railways, the proviso would have included them. It would have been extremely simple to strike out the words " by rail " where they appear in the proviso and the statute would have been precisely as the objecting water carriers now contend it should be construed. But the Act did not so provide and the context is appropriate to the application of the maxim, inclusio unius est exclusio alterius.

3. The possibility of injurious effects upon competing carriers through the operation of agreed charges is specifically contemplated by and provided for in Section 36 of the Act 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.

(2) Where under this section the Board cancels or varies an agreed charge, any charge fixed under this Part of this Act in favour of a shipper complaining of that agreed charge shall cease to operate, or shall be subject to such corresponding modifications as the Board may determine.

Now this is relief afforded *after an agreed charge has been approved.* The ground is that the *existing agreed charge places the competing carriers at an undue or unfair disadvantage.* This can only be because the operation of the agreed charge withholds or withdraws traffic from those carriers. That is precisely the ground of objection raised to the approval of the charges in question. But if it were a ground of objection on which the Board could and should act on the application for approval, then Section 36 could never become operative because there would never be the approval of an agreed charge which would have such an effect.

That one national interest contemplated could be considered to be that of the merchant marine on the Great Lakes is not beyond legitimate inference ; that marine service, however, is only in part regulated : the great volume of commerce carried by it is in bulk and remains unregulated. The bulk carriage of grain products for instance is probably of great importance to Canada ; the carriage of package freight on the Great Lakes is quite unimportant. It is conceivable that agreed charges might attain such dimensions as indirectly and seriously to affect the ability of the marine services to maintain the bulk carriage of those vital products. The national interest would then be touched and the contingency envisaged by the section would arise. Then, and then only would the question of undue and unfair disadvantage arise before the Board and that would be only after a reference to the Board by the Minister. It is the national interest, not the private interest, which is the concern of the statute and until the national interest emerges the carriers are left to the exercise of all of their competitive powers. That that exercise, within the given regulation, inures to the benefit of the public is an assumption underlying the legislation.

4. It is suggested that paragraph " c " in ss. 5 of Section 35, which permits a regulated carrier to object to the approval of an agreed charge, would be futile if the ground in question could not be raised and acted upon by the Board. But that is not so. A carrier could raise, among others, objections such as the following :

(a) As a railway, that the charge was in relation to traffic between competing points and that the objecting railway has not joined : here the issue would be whether competitive points within the meaning of Section 35, ss. 1, were present ;

(b) That the object to be secured by the charge could be adequately secured by a special or competitive tariff of tolls : sec. 35, ss. 1 ;

(c) That the net revenue of the carriers proposing the charge would be so affected as to justify the refusal of the Board to approve : sec. 35, ss. 13 ;

(d) That the rates proposed by the agreed charge are unreasonably and unnecessarily low ;

(e) That the agreed charge unjustly discriminates between different localities : sec. 24 (3).

5. The Board has interpreted ss. 13 of Section 35, which reads as follows :

> " 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 of 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."

as giving an unlimited scope to the field of considerations which may be taken into account as relevant to the decision to approve or decline to approve an agreed charge. The language of the sub-section admits of the application of the ejusdem generis rule, and that would exclude the ground acted upon by the Board. Then the sub-section must be read with the other provisions of the Act and where, as appears from the foregoing, undue or unfair disadvantage to competing regulated carriers is covered elsewhere in the statute, and otherwise the interest of such carriers is shown to be excluded as a consideration affecting an agreed charge made by other regulated carriers, then there is implied the exclusion from the general words of ss. 13 of such a circumstance. To deal otherwise with the language would be to disregard the proviso to ss. 1 of Section 35, to nullify Section 36, and to place a veto upon the absolute authorization of Section 35, ss. 1, to railways to enter into agreed charges regardless of other classes of carriers.

The purpose of the Act was to liberate regulated carriers : in the case of railways, competing carriers must join in the agreed charge, a limitation upon the freedom of rail carriers in relation to each other ; the matter of disadvantage to other classes of regulated carriers is exclusively dealt with by Section 36 ; the essential condition of authorizing an agreed charge is that no unjust discrimination shall result as between shippers ; the Board shall have regard to whether the object aimed at can be gained by means of ordinary tariffs and without resorting to the agreed charge, and to the effect on the net revenue of the carrier proposing the charge : subject to those conditions and limitations, regulated carriers were intended to be given a complete liberty of contractual action which would place all of them on an equality, between themselves and in relation to unregulated carriers, in the field of competitive operations. That prime and fundamental object is defeated by the ruling of the Board.

What could be the purpose of such a construction of the Act as would permit the Board to exercise in these cases a merely negative function ? The Board admittedly cannot prescribe the addition of water or other carriers to an agreed charge. What action by the railways toward water carriers would avoid the rejection of an application for approval ? Must all of the opposing carriers concur ? Let us suppose that half of them ask for inclusion—by some means or other—in the agreed charge, and the other half oppose approval, what action by the Board would be called for ? What if

water carriers desire to participate and air carriers oppose approval ? Or, if water and air carriers propose approval, and the railways oppose ?

Is it to be " unjust discrimination " or " *undue and unfair disadvantage* ? " Is there any material difference between these expressions? What degree of either is to be present to influence the Board's action ? The Board approves exclusive carriage by the railways of 85% and 95% of the traffic involved, respectively, and rejects approval of 100% ; what principle or rule is indicated here ? What is the measure of the disadvantage to be applied ? How are carriers to be able to tell whether their time and labour in formulating an agreed charge will be confirmed by its approval or be wasted because of uncertainty in administrative action ?

Are regulated carriers severally or as a body to be placed in the same relation to agreed charges and be admitted to absolute or relative participation in them in some manner similar to shippers who complain of unjust discrimination ? The language of Section 36 is not that invariably used in connection with unjust discrimination ; it is " undue or unfair disadvantage " ; the word " unfair " has not before appeared in a context dealing with unjust discrimination. Is the measure of " disadvantage " to be the same as that of " discrimination " and the whole body of administrative law developed in relation to the latter to be applied to the former ?

Such suggestions as the foregoing indicate the confusion to which the contention of the water carriers brings us. If it had been the intention of the Act to give those carriers in effect the same ground of objection and similar rights, as shippers, the Act would have so provided. If regulated carriers had been intended to be ranged in a hierarchy of rate relationships the Act would have so provided. The precipitation of the rule of administrative action is to be brought about by the Board from such a mass of considerations left uncertain and indeterminate in the statute. What Parliament abstains in such a field of difficulty from attempting to do, the Board is claimed to have the right to rush in and supply : a legislative formulation. To state such a proposition is, at the same time, to give the answer to it.

6. It is urged that Section 3 (2) of the Act furnishes a direction to the Board which controls its decisions of approval or disapproval of agreed charges : " to perform the functions vested in the Board " with " the object of co-ordinating and harmonizing the operations of all carriers etc." This general statement of purpose does not, of course, add to the Board's powers or jurisdiction nor control the plain meaning of the provisions of the Act. Within the exercise of the functions given, that end shall be served : but then, what are the functions and limitations ?

There is nothing in the Act to warrant the view implied by the ruling that Parliament intended to confer upon the Board the authority and duty negatively and indirectly to establish some sort of relation and balance between the rates, under agreed charges, of all competing regulated carriers. It is important to remember that agreed charges occupy only an insignificant

portion of the carrier rate field and that in respect of the rest of that field, carriers are free in their competitive activities. There is no regulation of them inter se. The Board was not here given a mandate negatively to administer the transportation of all classes of such carriers as a single field and to determine the precise rate and competitive relationships between those different classes. The effective means for achieving such balanced relationships in respect of agreed charges remain, as they are in the entire field of ordinary rates, the competitive pressures of the different classes of carriers. The Board was to have regard to the importance and utility of the function of each of the classes to the extent of its precise investment of administrative jurisdiction as, for instance, in the determination of public convenience and necessity as a preliminary to the issue of licenses for new services, Section 5 ; there we have ample scope for the exercise by the Board of its admitted powers in such a manner as to promote the object of " co-ordinating and harmonizing " all regulated carriage ; but it was never intended to commit the entire field of relationships to its direction. That conclusion, however, is involved in the ruling. *The fundamental regulation of carriers is in relation to the public, not to other carriers* ; the inter-relations of carriers have never been the subject, in Canada, of legislation ; jurisdiction over those inter-relations would be too high and important a public power as well as responsibility to be gathered by implication from a statute ; here we have not only a conclusion from implication but an implication that is contradicted by the express provisions in the statute. There should be no hesitation on the part of the Court to reject such an insupportable contention.

It is, therefore, respectfully submitted that the answer to the question submitted by the Board to the Court should be, Yes.

I. C. RAND,

Of Counsel for the Canadian National Railways.

APPENDIX OF STATUTES.

2 GEORGE VI.

CHAP. 53.

An Act to establish a Board of Transport Commissioners for Canada, with authority in respect of transport by railways, ships and aircraft.

(Assented to 1st July, 1938.)

His Majesty by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows :—

SHORT TITLE

1. This Act may be cited as The Transport Act, 1938.

* * * * *

In the Supreme Court of Canada.

No. 3. Factum of the Appellant Canadian National Railways and Appendix of Statutes—*continued.*

PART I.

THE BOARD OF TRANSPORT COMMISSIONERS FOR CANADA.

3. (1) The Board of Railway Commissioners for Canada shall hereafter be and be known as The Board of Transport Commissioners for Canada, and the expression " Board," wherever it occurs in this Act and in the *Railway Act* and in any other Act in which the expression " Board " is used to designate the Board of Railway Commissioners for Canada shall mean The Board of Transport Commissioners for Canada, and the expression " The Board of Transport Commissioners for Canada," shall be substituted for the expression " Board of Railway Commissioners for Canada " wherever that expression occurs in the *Railway Act* or in any other Act.

* * * * *

5. (1) Before any application for a licence is granted for the transport of goods and/or passengers under the provisions of this Act, the Board shall determine whether public convenience and necessity require such transport, and in so determining the Board may take into consideration, *inter alia*,—

(*a*) any objection to the application which may be made by any person or persons who are already providing transport facilities, whether by rail, water or air, on the routes or between the places which the applicant intends to serve on the ground that suitable facilities are or, if the licence were issued, would be in excess of requirements, or on the ground that any of the conditions of any other transport licence held by the applicant have not been complied with ;

(*b*) whether or not the issue of such licence would tend to develop the complementary rather than the competitive functions of the different forms of transport, if any, involved in such objections ;

(*c*) the general effect on other transport services and any public interest which may be affected by the issue of such licence ;

* * * * *

PART II.

TRANSPORT BY WATER.

10. (1) The Board may, subject to the provisions of this Part, license ships to transport passengers and/or goods from a port or place in Canada to another port or place in Canada.

(2) The licence shall be issued in the name of the owner, lessee or other person entitled to engage in transport by water by means of such ship.

(3) The licence may apply to one or more ships.

(4) The Board may in the licence state the ports between which the ship or ships named therein may carry goods or passengers and the schedule of services which shall be maintained : Provided that the licensee may be authorized to substitute another ship of approximately the same tonnage for a ship named in the licence.

(5) The Board shall issue a licence in respect of a ship built, building or about to be built, upon being satisfied that the proposed service is and will be required by the present and future public convenience and necessity, and unless the Board is so satisfied no licence shall be issued.

(6) No licence shall be issued in the case of a ship other than a British ship, hereafter imported into Canada, which was constructed more than ten years before such importation.

* * * * *

12. (1) This part shall not come into force on, or in respect of, any sea or inland water of Canada until proclaimed by the Governor in Council to be in force on, or in respect of, such sea or inland water.

(2) The Governor in Council may by regulation exempt any ship or class of ships from the operation of this Part.

(3) The provisions of this Part shall not apply to the transport of goods in bulk.

* * * * *

PART IV.

TRAFFIC, TOLLS AND TARIFFS.

24. (1) All tolls shall always under substantially similar circumstances and conditions, in respect of all traffic of the same description, and carried in like manner over the same route, be charged equally to all persons and at the same rate, whether by weight, mileage or otherwise.

(2) No reduction or advance in any such tolls shall be made either directly or indirectly, in favour of or against any particular passenger or shipper.

(3) No toll shall be charged which unjustly discriminates between different localities.

PART V.

AGREED CHARGES. (*Printed at p.* 25, l. 10.)

No. 4.

Factum of the Appellant Canadian Pacific Railway Company.

PART I.

STATEMENT OF FACTS.

This is a Case stated, of its own motion, by the Board of Transport Commissioners for the opinion of this Court upon 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

In the Supreme Court of Canada.

No. 4. Factum of the Appellant Canadian Pacific Railway Co. and Appendix of Statutes—*continued.*

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 revenues of other carriers ? "

The facts out of which the question arises are that the Canadian National and Canadian Pacific Railway Companies, together with other competing rail carriers, applied to the Board under Section 35 of The Transport Act (Part V) for approval of agreed charges made by the rail carriers for the carriage of certain specific carload traffic of two shippers whose goods had been, up to that time, carried partly by water and rail routes in which the Canada Steamship Lines participated. The applications were opposed by the Steamship Lines on the sole ground that the effect of the agreed charges would be to deprive them of revenue from the carriage of this traffic. It was not contended that the other statutory requirements of Section 35 had not been fulfilled by the Railways.

The majority of the Board (Garceau, D.C.C., dissenting) held, over the opposition of the Railways, that the probable loss of revenue to the Steamship Lines was a relevant consideration to which the Board should have regard.

The Railways applied under Section 51 of The Railway Act and Section 4 of The Transport Act for reconsideration or a re-hearing by the Board, or, in the alternative, for a Stated Case upon a question of law.

The Board reserved judgment on this application and subsequently, of its own motion, stated the foregoing question of law for the opinion of the Court.

The Sections of The Railway Act and of The Transport Act to which reference may be made are printed in the Appendix.

PART II.

POINTS OF LAW-

In its application to the facts of the two cases now pending for review before the Board (Files 40994.11 and 40994.12—Record, p. 4 ; l. 35) the question of law is whether the decision of the majority of the Board is wrong in holding that the effect of the agreed charges upon the business of the Steamship Lines is a relevant consideration to which the Board should have regard.

It is submitted that the decision of the majority of the Board is wrong, and that the question should be answered in the affirmative.

PART III.

ARGUMENT.

Before the passing of The Transport Act in 1938 the duties of Railway Companies in respect of the carriage of goods were governed by the provisions of The Railway Act, R.S.C., Ch. 170, Sections 312 to 359 inclusive. Section 314 requires that all tolls shall be charged equally to all persons

under like circumstances, and that no reduction or advance shall be made either directly or indirectly in favour of or against any particular person. Section 316, subsection 3, prohibits undue preference and undue discrimination.

The Transport Act (Part V) for the first time (in Canada) since railway rate regulation became effective, permitted a railway company, " notwithstanding anything contained in The Railway Act, or in this Act," to agree with an individual shipper for the carriage of the whole or any part of his goods at an agreed charge. subject to the approval of the Board and the observance of certain statutory conditions, only one of which is here pertinent, viz. : " 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."

A statute so clearly remedial in character should receive a fair, large and liberal interpretation.

Interpretation Act, R.S.C. 1927, Ch. 1, Section 15. (Record, p. 6. l. 31.)

A negative answer to the question submitted by the Board would defeat the object of the Act, the true intent of which was to confer upon the railways (as well as upon water carriers, to the extent to which their traffic is subject to regulation) some freedom of action in competing for traffic with other carriers not subject to the same rigid regulation.

Manifestly an agreement between a railway company and a shipper for the carriage of the whole of the shipper's traffic, such as is authorized by Section 35 of the Transport Act, could not be made without depriving a competing carrier of whatever share in the traffic of the shipper he might otherwise have hoped to enjoy.

While Part V of The Transport Act was enacted primarily for the relief of the Railways, the benefits to shippers should not be lost sight of. It is axiomatic to say that either before or since the passing of The Transport Act a shipper was at liberty to ship all his traffic by rail without infringing any legal right of a competing water carrier.

Can it, then, be said that what was formerly a matter of free choice on the part of a shipper has now become an illegal act or one which may be prevented by the action of the Board merely because the shipper obtains a benefit or advantage, contemplated by the statute, from doing by agreement with the rail carrier what he had a right to do apart from contract ?

It is significant that the provisions of subsection (5) of Section 35, under which " any representative body of shippers " or " any carrier " may be heard in opposition to approval of an agreed charge, contains no requirement that the party so objecting should be interested in the movement of the particular traffic covered by the agreed charge, or like traffic. The obvious purpose of these provisions, it is submitted, was to permit these classes of persons to be heard in order to provide a check upon the observance of the

statutory conditions and to prevent abuses from creeping into the administration of new and untried legislation.

The provisions of The Railway Act requiring equality of tolls and prohibiting undue preference and undue discrimination were enacted for the protection of shippers as against the railway, and not for the purpose of hampering or restricting competition as between competing carriers.

Before 1938 a water carrier had no right to complain of low railway rates, and no such right is given to him by The Transport Act, save by Section 36 (as one of a " representative body of carriers ") under which the Minister of Transport must be satisfied that the national interest is involved in the complaint.

It is submitted that the learned Chief Commissioner erred, in that he has imported into the provisions of Section 35 the element of " undue or unfair disadvantage " mentioned in Section 36, which is governed by totally different considerations.

Such an interpretation would make nugatory the provisions of Section 36. The tests with which Parliament has surrounded the question of " undue or unfair disadvantage " under that section are a clear indication that the question does not fall to be determined under Section 35.

Richards v. *McBride* (1881) 8 Q.B.D. 119, at p. 122–3 ;
Commissioners for Special Purposes of Income Tax v. *Pemsel* [1891] A.C. 531, at p. 549.

Under Section 36, both the Minister and the Board are to consider the complaint of " undue or unfair disadvantage " in relation to " the national interest." The determination of that issue would obviously turn upon many factors which would be irrelevant to the consideration by the Board of an application under Section 35 ; e.g., that the cost of carriage by water is much lower than by rail ; that the steamship lines are still subject to no regulation in respect of the transport by water of goods in bulk (Sections 12 and 38, Transport Act) which represents a large proportion of their total traffic ; that the steamship lines operate without the payment of tolls, through the system of canals and locks connecting the Great Lakes, maintained by the Dominion at an enormous annual cost, and many like considerations.

A comparison of the language of Part V of The Transport Act leaves no room for doubt that it was modelled upon The Road and Rail Traffic Act, 1933, of the United Kingdom, the corresponding sections of which are printed in the appendix.

The question now before the Court has been decided in England in a case involving the construction of the analogous provisions of the English Statute, in which the Court of Appeal, consisting of Lord Wright, M.R., Romer and Scott, L.JJ., held that the effect of an agreed charge upon the revenues of a competing coastal carrier was not relevant to the consideration of a contract between a rail carrier and a shipper, and that the Railway Rates Tribunal was neither bound nor entitled to consider it.

Great Western Railway Company v. *Chamber of Shipping of the United Kingdom* (1937), 25 Railway, Canal and Road Traffic Cases, p. 223.

The right given by Section 35 to " any representative body of shippers " and to " any carrier " to appear and oppose approval is not, as was argued on behalf of the water carrier before the Board, a vain or useless right. Such a party may object, for example—(a) that the object to be secured by the agreed charge can adequately be secured by means of a special or competitive tariff; (b) that all the competing carriers by rail have not joined in making the agreed charge; (c) that the agreed charge is not on the established basis of rate making, or that it offends against the rule that the carload rate for one car shall not exceed the carload rate for a greater number of cars; (d) that the net revenue of the carrier making the agreed charge will not be improved.

Escanaba and Lake Superior RR. Co. v. *U.S.*, 303 U.S., p. 315; 82 Law Ed'n, p. 867.

Before the Board much stress was laid by Counsel for the Steamship Lines upon the provisions of Section 3, subsection (2) of the Transport Act which reads as follows :—

" (2) 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 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."

A sufficient answer to this argument is to be found in the opening words of Section 35 by which the right to make agreed charges is to be exercised " notwithstanding anything contained in the Railway Act or in this Act."

But even if subsection (2) of Section 3 be given effect, it cannot support the view taken by the learned Chief Commissioner.

Mississippi Valley Barge Line v. *U.S.*, 292 U.S. 282; 78 Law Ed'n 1260, per Cardozo, J., at p. 1265.

For these reasons it is submitted that the question submitted by the Board should be answered in the affirmative.

GEO. A. WALKER,
Of Counsel for Canadian Pacific Railway Company.

APPENDIX OF STATUTES

The Railway Act, R.S.C. 1927, Ch. 170.

43. The Board may of its own motion, or upon the application of any party, and upon such security being given as it directs, or at the request of the Governor in Council, state a case, in writing, for the opinion of the Supreme Court of Canada upon any question which in the opinion of the Board is a question of law or of the jurisdiction of the Board.

In the Supreme Court of Canada.

No. 4. Factum of the Appellant Canadian Pacific Railway Co. and Appendix of Statutes—*continued.*

2. The Supreme Court of Canada shall hear and determine such question, and remit the matter to the Board with the opinion of the Court thereon. 1919, c. 68, s. 43.

* * * * *

51. The Board may review, rescind, change, alter or vary any order or decision made by it, or may rehear any application before deciding it. 1919, c. 68, s. 51.

* * * * *

314. All tolls shall always under substantially similar circumstances and conditions, in respect of all traffic of the same description, and carried in or upon the like kind of cars or conveyances, passing over the same line or route, be charged equally to all persons and at the same rate, whether by weight, mileage or otherwise.

2. No reduction or advance in any such tolls shall be made, either directly or indirectly, in favour of or against any particular person or company travelling upon or using the railway.

3. The tolls for carload quantities or longer distances, may be proportionately less than the tolls for less than carload quantities, or shorter distances, if such tolls are, under substantially similar circumstances, charged equally to all persons.

4. No toll shall be charged which unjustly discriminates between different localities.

5. The Board shall not approve or allow any toll, which for the like description of goods, or for passengers carried under substantially similar circumstances and conditions in the same direction over the same line or route is greater for a shorter than for a longer distance, within which such shorter distance is included, unless the Board is satisfied that, owing to competition, it is expedient to allow such toll.

6. The Board may declare that any places are competitive points within the meaning of this Act. 1919, c. 68, s. 314.

* * * * *

316. All railway companies shall, according to their respective powers, afford to all persons and companies all reasonable and proper facilities for the receiving, forwarding and delivering of traffic upon and from their several railways, for the interchange of traffic between their respective railways, and for the return of rolling stock.

2. Such facilities so to be afforded shall include the due and reasonable receiving, forwarding and delivering by the company, at the request of any other company, of through traffic, and in the case of goods shipped by carload of the car with the goods shipped therein, to and from the railway of such other company, at a through rate; and also the due and reasonable receiving, forwarding and delivering by the company, at the request of any person interested in through traffic, of such traffic at through rates.

3. No company shall

(a) make or give any undue or unreasonable preference or advantage to, or in favour of any particular person or company, or any particular description of traffic, in any respect whatsoever ;

(b) by any unreasonable delay or otherwise howsoever, make any difference in treatment in the receiving, loading, forwarding, unloading, or delivery of the goods of a similar character in favour of or against any particular person or company ;

(c) subject any particular person, or company, or any particular description of traffic, to any undue, or unreasonable prejudice or disadvantage, in any respect whatsoever ; or

(d) so distribute or allot its freight cars as to discriminate unjustly against any locality or industry, or against any traffic which may originate on its railway destined to a point on another railway in Canada with which it connects.

THE TRANSPORT ACT, 1938 (DOM.) Ch. 53.

PART I.

THE BOARD OF TRANSPORT COMMISSIONERS FOR CANADA.

Board of Transport Commissioners. R.S., c. 170, etc.

3. (1) The Board of Railway Commissioners for Canada shall hereafter be and be known as The Board of Transport Commissioners for Canada, and the expression " Board," wherever it occurs in this Act and in the *Railway Act* and in any other Act in which the expression " Board " is used to designate the Board of Railway Commissioners for Canada, shall mean The Board of Transport Commissioners for Canada, and the expression " The Board of Transport Commissioners for Canada " shall be substituted for the expression " Board of Railway Commissioners for Canada " wherever that expression occurs in the *Railway Act* or in any other Act.

Duties of Board.

(2) 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 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.

Railway Act procedure to apply.

The provisions of the *Railway Act* relating to sittings of the Board and the disposal of business, witnesses and evidence, practice and procedure, orders and decisions of the Board and review thereof and appeal therefrom, shall be applicable in the case of every inquiry, complaint, application or other proceeding under this Act, and the Board shall exercise and

enjoy the same jurisdiction and authority in matters under this Act as are vested in the Board by the *Railway Act*.

Application for licence. Public convenience and necessity.

5. (1) Before any application for a licence is granted for the transport of goods and/or passengers under the provisions of this Act, the Board shall determine whether public convenience and necessity require such transport, and in so determining the Board may take into consideration, *inter alia*,—

(*a*) any objection to the application which may be made by any person or persons who are already providing transport facilities, whether by rail, water or air, on the routes or between the places which the applicant intends to serve on the ground that suitable facilities are or, if the licence were issued, would be in excess of requirements, or on the ground that any of the conditions of any other transport licence held by the applicant have not been complied with ;

(*b*) whether or not the issue of such licence would tend to develop the complementary rather than the competitive functions of the different forms of transport, if any, involved in such objections ;

(*c*) the general effect on other transport services and any public interest which may be affected by the issue of such licence ;

(*d*) the quality and permanence of the service to be offered by the applicant and his financial responsibility, including adequate provision for the protection of passengers, shippers and the general public by means of insurance.

Board may accept evidence.

(2) Notwithstanding anything contained in subsection one of this section, if evidence is offered to prove,—

(*a*) that at any time during the period of twelve months next preceding the coming into force of the relevant Part of this Act on, in or in respect of the sea or inland waters of Canada, or the route between specified points or places in Canada or between specified points or places in Canada and specified points or places outside of Canada, or the part of Canada to which the application for a licence relates, the applicant was *bona fide* engaged in the business of transport, whether in bulk or otherwise, and

(*b*) that such ship for which such licence is sought was at any time during the period of ten years next preceding the coming into force of this Act used for the transport of goods other than goods in bulk, and

(*c*) that the applicant was during such period using ships or aircraft, as the case may be, for the purpose of such business,

the Board shall, if satisfied with such proof, accept the same as evidence of public convenience and necessity and issue a licence accordingly: Provided, however, that a ship temporarily out of service during the period of twelve months aforesaid shall nevertheless be deemed to have been in use during such period.

Proviso.

PART V.

AGREED CHARGES.

R.S., c. 170.

Charges by agreement between parties.

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 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.

Particulars of agreed charges to be filed with Board.

(2) Particulars of an agreed charge, including a duplicate original of the agreement, shall be lodged with the Board within seven days after the date of the agreement and notice of an application to the Board for its approval of the agreed charge shall be given at least thirty days before the hearing by publication in the *Canada Gazette* and in such other manner as the Board may direct.

How made and expressed.

(3) An agreed charge shall be made on the established basis of rate making and shall be expressed in cents per hundred pounds or such other unit as the Board may approve; and the car-load rate for one car shall not exceed the car-load rate for any greater number of cars.

Board approval of agreed charge.

(4) The Board may approve an agreed charge either for such period as it thinks fit or without restriction of time, and the date on which the charge shall become operative, or as from which it shall be deemed to have become operative, shall

be such date, not being earlier than the date on which application for approval was lodged, as may be fixed by the Board.

Interested parties to be heard on application for approval of agreed charge.

(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.

Shipper may apply for a fixed charge to meet competition by an agreed charge.

(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.

Conditions as to a fixed charge.

(7) The Board, in fixing a charge, may fix it either for such period as it thinks fit or without restriction of time, and may appoint the date on which it is to come into operation, but no such charge shall be fixed for a period beyond that for which the agreed charge complained of by the shipper has been approved.

Applicant for fixed charge may object to agreed charge.

(8) An application under this section may, if it is convenient, be combined with an objection by the shipper to the application for the approval of the agreed charge of which he complains.

Application for withdrawal of agreed charge—approval after one year.

(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 :

Proviso.

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.

Publication.

(10) All agreed charges shall, when approved, be published in the manner provided by section three hundred and thirty-one of the *Railway Act*.

Effect of approval or of withdrawal of approval.

(11) Where under this section the Board withdraws its approval of an agreed charge or continues its approval of an agreed charge, subject to modifications, any charges fixed under subsection five of this section in favour of a shipper complaining of that agreed charge shall cease to operate, or shall be subject to such corresponding modifications as the Board may determine.

Continuing approval.

(12) For the purpose of applications under this section a decision of the Board continuing its approval of a charge subject to agreed modifications shall be deemed to be the approval of an agreed charge.

Considerations to be given effect to on application.

(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.

If agreed charge causes an unfair advantage.

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.

Charge to cease to operate or be modified.

(2) Where under this section the Board cancels or varies an agreed charge, any charge fixed under this Part of this Act in favour of a shipper complaining of that agreed charge shall cease to operate, or shall be subject to such corresponding modifications as the Board may determine.

Rights preserved. R.S., c. 79. Crow's Nest Pass Agreement.

37. Nothing in this Part contained shall affect any right or obligation, granted or imposed, by the *Maritime Freight Rates Act* or by paragraph (*e*) of section one of chapter five of the statutes of 1897, as extended and preserved by subsection five of section three hundred and twenty-five of the *Railway Act*.

Not to apply to water transport of goods in bulk.

38. The provisions of this Part shall not apply to the transport by water of goods in bulk.

Coming into force by proclamation.

39. This Part shall not come into force until proclaimed as in force by the Governor in Council.

THE ROAD AND RAIL TRAFFIC ACT, 1933 (U.K.) Ch. 53.

PART II.

RAILWAY TRAFFIC.

37.—(1) Notwithstanding anything in the Railways Act, 1921, but subject to the provisions of this Part of this Act, a railway company may, if it thinks fit, make such charge or charges for the carriage of the merchandise of any trader, or for the carriage of any part of his merchandise, as may be agreed between the company and that trader :

Provided that any such agreed charge, including the conditions attaching thereto, shall require the approval of the Tribunal, and the

Tribunal shall not approve such a charge if, in its opinion, the object to be secured by the making of the charge could, having regard to all the circumstances, adequately be secured by the grant of appropriate exceptional rates under the Railways Act, 1921.

(2) In this Part of this Act, a charge so agreed as aforesaid, including the conditions attaching thereto, is referred to as " an agreed charge."

(3) Particulars of an agreed charge shall be lodged with the Tribunal within seven days after the date of the agreement, and notice of an application to the Tribunal for its approval of the agreed charge shall be given in such manner as the Tribunal may direct.

(4) The Tribunal may approve an agreed charge either for such period as it thinks fit or without restriction of time, and the date on which the charge shall become operative, or as from which it shall be deemed to have become operative, shall be such date, not being earlier than the date on which application for approval was lodged, as may be fixed by the Tribunal.

(5) On an application to the Tribunal for its approval of an agreed charge—

(i) any trader who considers that his business will be detrimentally affected if the agreed charge is approved and is made by the railway company, or that his business has been detrimentally affected as a result of the making of the charge by virtue of a previous approval ; and

(ii) subject to the provisions of the next succeeding section, any representative body of traders,

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

(6) Any trader who considers that his business will be detrimentally affected if an agreed charge is approved and is made by the railway company, or that his business has been detrimentally affected as a result of the making of an agreed charge, may at any time apply to the Tribunal for a charge to be fixed for the carriage of his merchandise (being the same merchandise as or similar merchandise to any merchandise to which the agreed charge relates) by the railway company with which he contracts for the carriage of that merchandise, whether the same company by which the agreed charge is proposed to be made or is being made, or another company ; and, if the Tribunal is satisfied that the business of the trader will be or has been so detrimentally affected, it may fix a charge (including the conditions to be attached thereto) to be made by the railway company with which he contracts for the carriage of such merchandise as the Tribunal may determine.

The Tribunal, in fixing a charge, may fix it either for such period as it thinks fit or without restriction of time, and may appoint the date on which it is to come into operation, but no such charge shall be fixed for a period in

excess of that for which the agreed charge complained of by the trader has been approved.

An application under this subsection may, if it be convenient, be combined with an objection by the trader to the application for the approval of the agreed charge of which he complains.

(7) Where the Tribunal has approved an agreed charge without restriction of time—

(i) any trader who considers that his business has been detrimentally affected as a result of the making of the agreed charge, and,

(ii) subject to the provisions of the next succeeding section, any representative body of traders,

may at any time after the expiration of one year from the date of the approval apply to the Tribunal for its approval of the agreed charge to be withdrawn and, upon any such application, the Tribunal 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 railway company and the trader to whose merchandise the charge is applicable are prepared to agree to :

Provided that, where under the last preceding subsection the Tribunal has fixed a charge in favour of a trader complaining of an agreed charge, the trader shall not be entitled to make an application under this subsection in respect of that agreed charge in so far as it relates to merchandise which is the same as or similar to any merchandise to which the charge so fixed relates.

Where under this subsection the Tribunal withdraws its approval of an agreed charge or continues its approval of an agreed charge subject to modifications, any charges fixed under the last preceding subsection in favour of a trader complaining of that agreed charge shall cease to operate or shall be subject to such corresponding modifications as the Tribunal may determine.

For the purposes of applications under this subsection a decision of the Tribunal continuing its approval of a charge subject to agreed modifications shall be deemed to be the approval of an agreed charge.

(8) On any application under this section, the Tribunal 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 railway company ; and

(b) the business of any trader 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.

(9) A railway company shall, in respect of an agreed charge which is for the time being approved by the Tribunal and in respect of a charge fixed

under this section which is for the time being operative, be exempt from the operation of—

(i) so much of section ninety of the Railway Clauses Consolidation Act, 1845, of section eighty-three of the Railways Clauses Consolidation (Scotland) Act, 1845, and of any section of a local and personal or private Act, as relates to the obligation of a railway company to make equal charges to all persons under like circumstances ; and

(ii) so much of section two of the Railway and Canal Traffic Act, 1854, and of any section of a local and personal or private Act, as relates to the obligation of a railway company to accord no undue preference to any person, company or description of traffic, and section twenty-seven of the Railway and Canal Traffic Act, 1888, which relates to complaints with respect to undue preference.

(10) Notwithstanding anything in this section, any port or harbour authority, dock company, or authority owning and working docks, which has reason to believe that any railway company is by an agreed charge placing the port, harbour, or dock of the authority or dock company at an undue disadvantage as compared with any other port, harbour or dock to or from which traffic is or may be carried by means of the lines of the railway company, either alone or in conjunction with those of other railway companies, may make complaint thereof to the Railway and Canal Commissioners, and the Commissioners shall have the like jurisdiction to hear and determine the subject matter of any such complaint as they have to hear and determine a complaint of a contravention of section two of the Railway and Canal Traffic Act, 1854, as amended by subsequent Acts, and section twenty-seven of the Railway and Canal Traffic Act, 1888, shall apply with respect to any such complaint.

39.—(1) In this section the expression " charge " (except in the phrase " agreed charge ") includes any charge (whether described as a charge, or as a rate, or otherwise) which is made by any carrier in respect of the carriage of merchandise.

(2) If at any time a representation is made to the Minister by anybody which, in the opinion of the Board of Trade, is properly representative of the interests of persons engaged in the coastwise shipping business (in this section referred to as " coastal carriers ") that any agreed charges or exceptional rates which are being made or charged by a railway company in competition with coastal carriers—

(a) place coastal carriers at an undue or unfair disadvantage ; or

(b) are inadequate, having regard to the cost of affording the service or services in respect of which they are made or charged,

the Minister shall consult with the Board of Trade upon the matter, and if, after such consultation, it appears to him *prima facie* that the complaint is

one which in the national interests should be investigated, he shall refer the matter to the Tribunal for investigation and review.

(3) Upon any reference to the Tribunal under the preceding subsection, the Tribunal shall hold an inquiry and investigate all matters which appear to it to be relevant, including the circumstances in which the agreed charges or exceptional rates complained of are being made or charged by the railway company and their adequacy or inadequacy, having regard to the cost of affording the service or services in respect of which they are made or charged, and shall have regard to the charges for the carriage of merchandise by any route which is in competition with the route to which any agreed charge or exceptional rate complained of applies, whether any such charge is payable in respect of carriage by rail, by sea, or by road, or in respect of carriage partly by one of those forms of transport and partly by another of them, or by all of them.

(4) If, after examining all witnesses whose evidence it considers to be necessary and after giving all parties whom it considers to be concerned an opportunity of calling witnesses and being heard, the Tribunal is of opinion that, having regard to all the circumstances, any agreed charges or exceptional rates made or charged by the railway company in competition with coastal carriers—

(a) place coastal carriers at an undue or unfair disadvantage in the competition ; or

(b) are inadequate, having regard to the cost of affording the service or services in respect of which they are made or charged,

and that in either case, the action of the railway company is by reason of its prejudicial effect upon the interests of coastwise shipping undesirable in the national interests, the Tribunal may by order cancel or vary all or any of those agreed charges or exceptional rates, or may make such other order upon the railway company as in the circumstances of the case it thinks proper, and any order of the Tribunal may be expressed to operate for so long only as any conditions specified therein with respect to charges on competitive routes, or otherwise, are satisfied.

Where under this subsection the Tribunal cancels or varies an agreed charge, any charges fixed under this Part of this Act in favour of a trader complaining of that agreed charge shall cease to operate, or shall be subject to such corresponding modifications as the Tribunal may determine.

(5) The Tribunal, on an application made to it by the railway company, or on a subsequent reference to it under subsection (2) of this section, may cancel or vary any order made under the preceding subsection.

(6) There shall be constituted a panel (hereinafter referred to as the " shipping panel ") consisting of six persons nominated by the President of the Board of Trade, after consultation with such persons as he may consider to be properly representative of the interests of coastal carriers, and for the

purposes of the powers and duties of the Tribunal under this section there shall be added to the Tribunal one additional member selected by the Minister from the shipping panel, and subsection (4) of section twenty-four of the Railways Act, 1921, shall not apply.

Subsections (2) and (5) of the said section twenty-four shall apply in relation to a member of the shipping panel as they apply in relation to a member of the general panel.

(7) Upon any inquiry under this section the President of the Tribunal shall, notwithstanding anything in section twenty-five of the Railways Act, 1921, have a second or casting vote.

(8) Section thirty-nine of the Railways Act, 1921, shall have effect as if the words "shipping or" and the words "coastwise shipping or," were omitted therefrom.

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PART I.—THE FACTS.

The present reference arises out of an application by the Canadian National Railway Company and the Canadian Pacific Railway Company, through their representative Canadian Freight Association (hereinafter for the sake of brevity referred to as the "Rail Carriers") to the Board of Transport Commissioners to review, or alternatively to grant leave to appeal from, or again alternatively to state a case in respect of, the Board's Order dismissing two previous applications by the Rail Carriers to the Board for approval for certain agreed charges under the provisions of Section 35 et seq. of the Transport Act, 1938 (Record, p. 7, line 32). The approval of these agreed charges had been opposed by Canada Steamship Lines Limited and Northern Navigation Co., its subsidiary, as well as by Northwest Steamships Limited (all hereinafter for the sake of brevity referred to as the "Water Carriers") as objecting carriers under Subsection 5 (c) of Section 35 of the Transport Act, the said Water Carriers being "carriers" within the meaning of Subsection (d) of Section 2 of the said Act.

After full hearings the Board refused to approve the agreed charges in question, Garceau, Deputy Chief Commissioner, dissenting. Extracts from the majority judgment of the Board appear at Record p. 5, lines 8 et seq. and from the dissenting judgment of the Deputy Chief Commissioner at Record p. 6, lines 20 et seq.

One (but only one) of the considerations to which the Board had regard in arriving at its decision to refuse approval of these agreed charges was the effect which the making of such agreed charges was likely to have on the

business and revenues of the Water Carriers (Record p. 5, lines 9 and 20). It had been shewn that, previous to the making of the agreed charges, the Water Carriers had participated in the carriage of a substantial portion of the traffic originating with the shippers who were parties thereto and that the effect of the agreed charges would be to deprive the Water Carriers of this business, thus accomplishing the avowed purpose of the Rail Carriers to divert one hundred per cent. of the traffic in question to themselves (v. Judgment of Cross, CC. 54 C.R.T.C. at p. 7, referred to at Record p. 5, line 8). The Board found that this 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 and unfair disadvantage." (Record p. 5, line 33.)

The Rail Carriers had argued that the Board was precluded by the terms of the Transport Act from having regard to such a consideration in arriving at its decision and the Deputy Chief Commissioner in his dissenting judgment agreed with that argument (Record p. 6, lines 20 et seq.). The question submitted to this Court for its opinion, which appears at Record p. 10, line 14, is restricted to this one point, namely, whether the Board, on a proper interpretation of the Transport Act, is precluded from regarding as a relevant consideration the effect which the making of an agreed charge is likely to have on the business and revenues of other carriers.

Part II.

The Points in Issue.

The sole question at issue in this appeal is whether the Board, in exercising the discretionary powers conferred upon it by the Transport Act, 1938, to approve or disapprove of agreed charges, may have regard to the specific consideration referred to in the question promulgated (Record p. 8, line 6), or is precluded by the terms of the statute from so doing. The Water Carriers respectfully submit that the question promulgated ought to be answered in the negative.

Part III.

The Argument.

Prior to the enactment for the Transport Act in 1938, the "agreed charge" was unknown as an instrument of rate making under our law. Railway freight rates had for many years been regulated under the various Railway Acts, the general principle in respect of regulated rates being that the carrier should charge equal tolls to all shippers for like services. The general rules in this connection are laid down in Section 314 of the Railway Act, which provides as follows :

> "314. All tolls shall always under substantially similar circumstances and conditions, in respect of all traffic of the same description and carried in or upon the like kind of cars or conveyances,

passing over the same line or route, be charged equally to all persons and at the same rate, whether by weight, mileage or otherwise.

" 2. No reduction or advance in any such tolls shall be made, either directly or indirectly, in favour of or against any particular person or company travelling upon or using the railway.

" 3. The tolls for carload quantities or longer distances may be proportionately less than the tolls for less than carload quantities, or shorter distances, if such tolls are, under substantially similar circumstances, charged equally to all persons.

" 4. No toll shall be charged which unjustly discriminates between different localities.

" 5. The Board shall not approve or allow any toll, which for the like description of goods or for passengers carried under substantially similar circumstances and conditions in the same direction over the same line or route is greater for a shorter than for a longer distance, within which such shorter distance is included, unless the Board is satisfied that, owing to competition, it is expedient to allow such toll.

" 6. The Board may declare that any places are competitive points within the meaning of this Act."

See also Subsection 3 of Section 316, which provides as follows :—

" 3. No company shall

(a) make or give any undue or unreasonable preference or advantage to, or in favour of any particular person or company, or any particular description of traffic, in any respect whatsoever ;

(b) by any unreasonable delay or otherwise howsoever, make any difference in treatment in the receiving, loading, forwarding, unloading, or delivery of the goods of a similar character in favour of or against any particular person or company ;

(c) subject any particular person, or company, or any particular description of traffic, to any undue, or unreasonable prejudice or disadvantage, in any respect whatsoever ; or

(d) so distribute or allot its freight cars as to discriminate unjustly against any locality or industry, or against any traffic which may originate on its railway destined to a point on another railway in Canada with which it connects."

By Section 323 of the Railway Act, the Rail Carriers may publish tariffs of their tolls, which must be in accordance with the above. Such tariffs and the tolls they contain are under Section 325 subject to disallowance by the Board which is thereby given express power to substitute other charges or tolls and to fix rates.

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All of the foregoing provisions were in effect when the Transport Act was passed in 1938 and are still in effect.

Prior to the passing of the Transport Act the rates charged by Water Carriers were not subject to such regulation nor were the rates charged by Highway Trucking concerns which at that time were affording serious competition to the Rail Carriers in certains parts of the country and for certain types of traffic.

The Transport Act did not purport to supersede the Railway Act, but rather to supplement it. By Section 3 of the former, the name of the Board set up by the Railway Act to administer that Act was changed from " The Board of Railway Commissioners " to " The Board of Transport Commissioners " and the same Board was charged with the administration of both Acts by Subsection (2) of Section 3 which reads as follows :—

> " (2) 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 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."

The Transport Act introduce *inter alia* control of rates to be charged (a) for water transport within a defined area and with respect to certain classes of traffic, including the package freight traffic here in question, and (b) with respect to air transport. It did not however attempt to regulate truck transport or the rates charged in respect thereof.

By Section 24 equal application of tolls is again provided for in the following language :—

> " 24. (1) All tolls shall always under substantially similar circumstances and conditions, in respect of all traffic of the same description, and carried in like manner over the same route, be charged equally to all persons and at the same rate, whether by weight, mileage or otherwise.
>
> " (2) No reduction or advance in any such tolls shall be made either directly or indirectly, in favour of or against any particular passenger or shipper.
>
> " (3) No toll shall be charged which unjustly discriminates between different localities."

Publication of tariffs is provided for by Sections 17 to 23 inclusive. By Section 26, power is likewise given to the Board to disallow such tariffs and tolls and to prescribe others in their place.

It will therefore be seen that the general rule as to all regulated transport whether by rail, water or air, is that equal rates shall be charged by way of public tariffs to all members of the shipping public for like services.

Part V of the Transport Act, comprising Sections 35 to 39 inclusive, introduces the agreed charges as an instrument of rate making, by way of

exception. The exceptional nature of the provisions is made apparent by the opening phrase of Section 35 (1) which reads :—

> " 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 etc."

Such opening language was obviously necessary where the Legislature had, not only in the Railway Act, but in the very statute of which Section 35 forms part, laid down expressly to the contrary.

It is submitted therefore that, Sections 35 and following must be interpreted restrictively. See Maxwell " Interpretation of Statutes " 7th ed. p. 136 :—

> " An author must be supposed to be consistent with himself and, therefore, if in one place he has expressed his mind clearly, it ought to be presumed that he is still of the same mind in another place, unless it clearly appears that he changed it. In this respect, the work of the Legislature is treated in the same manner as that of any other author and the language of every enactment must be construed as far as possible in accordance with the terms of every other statute which it does not in express terms modify or repeal. The law, therefore, will not allow the revocation or alteration of a statute by construction when the words may be capable of proper operation without it."

In consequence, due regard must be had to the proviso which attaches to the permission thus granted to make agreed charges. This proviso (Sec. 35 (1)) reads as follows :—

> " 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 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."

It will therefore be seen that the absolute prerequisite to the valid exercise by a carrier of this exceptional right is that the agreed charge must be approved by the Board.

The statutory power to approve thus conferred necessarily carries with it a concomitant power to disapprove. The use of the word " approve " connotes an exercise of discretion. This is further illustrated by the subsidiary portions of the proviso above quoted. Thus Parliament has chosen to deny to the Board a discretion in the matter in two instances, both negative. That is to say the Board is expressly told that it must not approve an agreed charge.

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(a) " 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 of a special or competitive tariff of tolls under the Railway Act or this Act : and

(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."

It will be observed that, in the case of the first of these restrictions on the Board's discretion, Parliament still leaves it to the opinion or discretion of the Board in the light of all the circumstances to determine whether the condition for the application of the restriction exists. As will be noted upon reference to the full judgment of the Board, this was one of the principal grounds upon which the Board's refusal to approve turned. In the present instance the competing carriers by rail did join in making the agreed charges under discussion so that the second restrictive provision need not be further considered.

Where Parliament has thus conferred the power of approval or disapproval on the Board, and has seen fit to lay down specific cases in which such approval may not be granted, the obvious implication is that the Board's discretion is to be unfettered in all other cases.

Subsection (13) of Section 35 must be read in conjunction with Subsection (1) above quoted on a determination of what are the discretionary powers conferred upon the Board in respect of approval or disapproval of these agreed charges. This subsection reads as follows :—

" 13. On an 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 ;

(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."

It is submitted that no wider language could conceivably have been employed in conferring discretion than that by which the Board is directed to have regard to all considerations *which appear to it to be relevant.* Not only is the Board directed to have regard to all relevant considerations, but it is even given the power to decide what is and what is not relevant.

In subsection (13), while not restricting the exercise of the Board's discretion, as it did in subsection (1), Parliament has seen fit ro indicate two specific considerations to which the Board must have regard. The statute does not, however, prescribe what conclusion the Board must arrive at, having had regard to such considerations.

It is respectfully submitted that the argument put forward by the Rail Carriers, and adopted by the Deputy Chief Commissioner in his

dissenting judgment, that the Board is restricted by the language of subsection (1) to disapproving an agreed charge in the two cases specifically mentioned in the proviso to that subsection, and that the Board is restricted by the language of subsection (13) to having regard only to the two considerations there specifically mentioned, utterly disregards the plain meaning of the unequivocal language used. Thus, if the first proposition were sound, there would be no reason at all for requiring the Board's approval, since Parliament would merely have enacted that no agreed charges could be made in the two cases mentioned. So far as concerns the second proposition, it is submitted that this is obviously unsound since it involves the complete disregard of the words " all considerations " and the words " in particular " which occur in subsection (13).

Furthermore, if by subsection (1) the Board could only disapprove in the two cases specifically mentioned, what purpose would there be in directing it, by subsection (13) to have regard to other considerations ?

Even conceding for the purposes of argument that either of the above two subsections, read by itself, contains any ambiguity or obscurity, when read together there can be no doubt as to their meaning. The first thing to be considered in construing a statute is the reading of all parts of that statute together. See Beal's Cardinal Rules of Legal Interpretation 3rd ed. p. 309 and *Lincoln College's Case* there cited :—

> " The office of a good expositor of an Act of Parliament is to make construction on all parts together, and not of one part only by itself."

In the event of obscurity, the object or intention of Parliament is to be determined by reference to any expression of that intention or object which may be found in the preamble or elsewhere in the statute. See in this connection the leading case of *Wharburton* vs. *Loveland* (1828, 1 Hudson & B. Irish Cases 623 at p. 648) cited by Beal at p. 343 :—

> " I apprehend it is a rule in the construction of statutes, that in the first instance, the grammatical sense of the words is to be adhered to. If that is contrary to, or inconsistent with any expressed intention, or declared purpose of the statute, or if it would involve any absurdity, repugnance, or inconsistency, the grammatical sense must then be modified, extended or abridged, so far as to avoid such inconvenience, but no farther."

Pocock v. *Pickering* (18 Q.B. 789 at p. 797).

> " In construing an Act of Parliament, our first business, I conceive, is to examine the words themselves which are used ; and if in these there be no ambiguity, it is seldom desirable to go further ; and although from the common uncertainties of language we may very frequently be driven to ascertain the intention by a consideration of the preamble where it recites the object . . ."

The object of the Transport Act, and indeed express direction to the Board as to the manner in which it shall exercise the discretionary powers

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thereby conferred upon it, is clearly set forth in Section 3 (2) in the following language :—

> " (2) 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 railways, ships and aircraft and the Board shall give to this Act and the Railway Act such fair interpretation as will best attain the object aforesaid."

By this statute Parliament is for the first time undertaking to regulate the three main forms of Transportation which fall under its jurisdiction. Parliament wishes to " coordinate " and " harmonize " the operation of all carriers engaged in those three forms. Parliament has left it to the Board, within the limits defined by the statute, to determine how that shall be done. In considering the breadth of the discretionary power thus conferred, due significance must be given to the fact that Parliament has seen fit—

> (*a*) by Section 3 (2) to empower the Board to give the Transport Act and the Railway Act " such fair interpretation as will best attain " its stated object of co-ordinating and harmonizing.
>
> (*b*) by Section 35 (13), in dealing with approval or disapproval of agreed charges, to leave it to the Board to have regard to all considerations " which appear to it to be relevant."

How then can it be said that the Board, in exercising these extremely broad discretionary powers, is precluded from regarding as relevant to its decision whether or not to approve an exceptional means of rate making, the undue, unfair and prejudicial effect which that exceptional means would have on the already existing operations of a class of carriers which Parliament has expressly said should be co-ordinated and harmonized with those of the class of carriers seeking the approval ?

This Court has already considered the position of the same Board in respect of discretionary administrative powers conferred on it by the Railway Act in *C.N.R.* v. *Bell Telephone & M. L. H. & P. Cons.* (1939 S.C.R. 308) where the Chief Justice, speaking for the Court, says (at p. 314) :—

> " As Lord Macmillan observed in delivering the judgment of the Privy Council in *Canadian Pacific Railway* vs. *Toronto Transportation Commission*, Section 39 is obviously an administrative provision. The whole passage is important and should be quoted verbatim :
>
> ' Section 39 does not indicate any criterion by which it may be determined whether a person is interested in or affected by an order of the Railway Board. It does not even prescribe that the interest must be beneficial or that the affection must not be injurious. The topic has in a number of cases in the Canadian Courts been much discussed but inevitably little elucidated. Where the matter is left so much at large, practical considerations of common sense must be

applied especially in dealing with what is obviously an administrative provision.'

These observations are concerned with the effect of the first paragraph of Section 39, but they are also applicable to the second paragraph. It is equally true that the last mentioned paragraph affords no criterion or rule or canon by which the Board is to be guided in allocating costs. Its jurisdiction is restricted in two respects : first, where it is otherwise expressly provided the Board is not competent to act ; and second, orders under this subsection can only be made

10 ' on a company, municipality or person interested in or affected by the order directing the works '

(*Toronto* v. *Toronto* [1920] A.C. 436 ; *Canadian Pacific Railway* v. *Toronto Transportation Commission* [1930] A.C. 696).

Subject to this, the Board is invested by the statute with jurisdiction and charged with responsibility in respect of such orders. The law dictates neither the order to be made in a given case nor the considerations by which the Board is to be guided in arriving at the conclusion that an order, or what order, is necessary or proper in a given case. True, it is the duty of all public bodies and others invested

20 with statutory powers to act reasonably in the execution of them, but the policy of the statute is that, subject to the appeal to the Governor in Council under Section 52, in exercising an administrative discretion entrusted to it, the Board itself is to be the final arbiter as to the order to be made."

at p. 319 :—

" Obviously the intention of Parliament was to charge the Board with responsibility in respect of this subject of allocation of costs, and there can be no ground for supposing that subsection 3 of Section 52 was intended to make it possible to bring before this Court for

30 determination as questions of law questions which, in pith and substance, are within the administrative discretion of the Board and in respect of which the Board subject to the appeal to the Governor in Council, is charged by the Act with exclusive responsibility."

There remains to dispose of the argument of the Rail Carriers founded on Section 36 (1) of the Transport Act. This provision reads :—

" 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

40 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

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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."

The suggestion is that, because the above quoted section provides for a reference to the Board where in the opinion of the Minister the "kind" of business of a representative body of carriers is placed at "an undue or unfair disadvantage" by an existing agreed charge, the Board is precluded from considering the effect of an agreed charge, submitted for approval, on the business and revenues of a carrier objecting to such approval under Section 35 (5) (*c*).

Subsection 5 of Section 35 reads as follows :—

"(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."

It will be noted that the grounds of opposition contemplated in the foregoing subsection are not specified or otherwise indicated. By its terms, "any carrier" (which includes the Water Carriers) is "entitled to be heard in opposition to the application" for approval. It cannot have been intended that this right to be heard in opposition was thus given to carriers generally merely to enable them to "police" the actions of their competitors in availing themselves of the exceptional agreed charge privilege by bringing to the Board's attention violations of the specific prohibitions of the statute, since the agreed charge must be submitted to the Board and the latter is required to have regard to these prohibitions even in a case where the application is not opposed. Therefore, it is submitted, the grounds of opposition open to other individual carriers under this provision must be grounds which are "personal" to the opposing carrier.

It is submitted that one of the principal reasons for opposition from any carrier would be the effect the making of the agreed charge would likely have upon the business and revenue of the opposing carrier. Under subsection 13 of Section 35 the Board is directed to have regard to all considerations which appear to it to be relevant and under subsection 2 of Section 3 the Board is charged with the duty of interpreting not only the Transport Act but also the Railway Act as will best attain the object of coordinating and harmonizing the operations of all carriers. Here the provisions of the Transport Act have been interpreted by the Board as

enabling them to take into consideration the grounds of opposition raised by the Water Carriers and have in so doing carried out the duty required of them by, and acted within the provisions of, the Statute.

It must not be lost sight of that subsection (5) gives a right to oppose to individual carriers before approval of the agreed charge, whereas Section 36 deals, not with individual carriers, but with a " representative body of carriers " and also confers a right to complain to the Minister only in respect of " any existing agreed charge " ; i.e., after approval.

It is submitted that the two provisions deal with entirely different situations—the one with an administrative question to be determined by the Board and the other with a question of national policy, to be dealt with in the first instance by the Minister as a matter of " national interest."

At all events, Section 36 does make it plain that Parliament look with disfavour on agreed charges which place the business of a competing class of carriers at an undue or unfair disadvantage and it is obviously the simplest sort of common sense on the part of the Board, having regard to its broad discretionary powers, to give consideration to whether the agreed charge submitted to it for approval will have the effect of offending against Section 36. If, as in the present instance, the Board finds this to be the case, its obvious duty is to refuse approval to an agreed charge which would only be returned for its consideration on the same ground at a later date and after the damage was done.

In conclusion therefore the Water Carriers respectfully submit that the question submitted for the opinion of this Court ought to be answered in the negative.

The whole respectfully submitted.

Montreal, October 23rd, 1942.

HAZEN HANSARD,
Commission Counsel,
Canada Steamship Lines Ltd.
Northern Navigation Co.

G. P. CAMPBELL,
Counsel for Northwest Steamships Limited.

In the Supreme Court of Canada..

No. 6. Formal Judgment, 4th May, 1943.

No. 6.

Formal Judgment.

IN THE SUPREME COURT OF CANADA.

Tuesday, the 4th day of May, 1943.

Present

The Right Honourable THE CHIEF JUSTICE OF CANADA.
The Honourable Mr. Justice RINFRET.
The Honourable Mr. Justice DAVIS,
The Honourable Mr. Justice KERWIN,
The Honourable Mr. Justice HUDSON.

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

IN THE MATTER of The Transport Act, 1938 (2 George VI, Chapter 53).

The Board of Transport Commissioners for Canada, pursuant to the authority conferred upon it by Section 43 of the Railway Act and Section 4 of The Transport Act, 1938, having stated a Case in writing for the opinion of the Supreme Court of Canada upon the following question which the Board declared to be in its opinion a 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 and revenues of other carriers ? "

And the said question of law having come on before this Court for consideration on the seventh and eighth days of December, nineteen hundred and forty-two, in the presence of Counsel for The Board of Transport Commissioners, Canadian National Railways, Canadian Pacific Railway Company, Canada Steamship Lines Limited, Northern Navigation Company and North-Western Steamships Limited : whereupon and upon hearing what was alleged by Counsel aforesaid, this Court was pleased to direct that the said question should stand over for determination, and the same having come on this day for determination ;

This Court, for the reasons contained in the documents hereto annexed, Doth Determine the said question as follows :—

> The answer to the question is in the negative ; the Chief Justice and Mr. Justice Rinfret, dissenting, would answer the question in the affirmative.

And The Court Doth Order that the matter be remitted to the Board with this opinion.

(Signed) PAUL LEDUC,
Registrar.

No. 7.

Reasons for Judgment.

(A) THE CHIEF JUSTICE.

This Appeal arises upon a Case stated by the Board of Transport Commissioners for the opinion of this Court upon the following question, which the Board declares is in its opinion a 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 and revenues of other carriers ? "

The Canadian National and Canadian Pacific Railway Companies, together with other competing rail carriers, applied to the Board under Section 35 of The Transport Act (Part V) for approval of agreed charges made by the rail carriers of certain specific carload traffic of two shippers whose goods had been, up to that time, carried partly by water and rail routes in which the Canada Steamship Lines participated. The applications were opposed by the Steamship Lines on the sole ground that the effect of the agreed charges would be to deprive them of revenue from the carriage of this traffic. It is not contended that the other statutory requirements of Section 35 had not been complied with.

The majority of the Board held that the probable loss of revenue by the Steamship Lines was a relevant consideration to which the Board might properly have regard in dealing with the application. The question raised by the stated Case is whether or not that decision was wrong.

It is convenient to reproduce in full Section 35, subsections 1, 5 and 13, as well as Section 36 (1) :—

> " 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 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.

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(A) Sir Lyman P. Duff, C.J.— *continued.*

" (5) On an application to the Board for 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 . . .

" (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.

" 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."

We have had the advantage of a very able judgment by the Chief Commissioner, as well as a full discussion of all the points by Counsel.

The language of subsection 13 is very comprehensive. " All considerations which appear to be relevant " would *prima facie* embrace everything which the Board may reasonably think has a bearing upon the issue before it. Generally speaking, that question will be a question of fact only. But the appellants contend that these words must be read as subject to some limitation arising out of the nature of the subject-matter and the enactments of Part V. Section 36 is particularly emphasised and relied upon.

The controversy does not lend itself to extended discussion. After fully considering the very able judgment of the Chief Commissioner and I may add, the able argument of Mr. Hazen Hansard, my conclusion is that this section 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.

(A) Sir Lyman P. Duff, C.J.— *continued.*

The question submitted ought, therefore, to be answered in the affirmative. There should be no order as to costs.

(B) RINFRET, J.

(B) Rinfret, J.—

In pursuance of the powers conferred by Section 43 of The Railway Act, and Section 4 of The Transport Act, 1938, the Board of Transport Commissioners for Canada submits for the opinion of this Court the following question :—

" 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 effect which the making of the agreed charge is likely to have on the business of other carriers ? "

The circumstances which led the Board to submit the question are clearly and completely stated in the reference and need not, therefore, be recited here.

It is, however, essential to the proper understanding of the answer about to be given that some subsections of Section 35 be set out :—

" 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 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."

* * * * *

" (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

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(B) Rinfret, J.— *continued.*

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."

* * * * *

" (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."

Under the interpretation clause of The Transport Act (Section 2), an " agreed charge " means a charge agreed upon between a carrier and a shipper as in this Act provided and includes the conditions attached thereto ; " carrier " means any person engaged in the transport of goods or passengers for hire or reward to whom the Act applies, and shall include any company which is subject to the Railway Act ; " shipper " means a person sending or receiving or desiring to send or receive goods by means of any carrier to whom the Act applies ; " 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 ; and " transported " and " transporting " shall have corresponding meanings.

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.

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.

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.

Bearing in mind this historical background, we may now turn to an analysis of Section 35.

The first point to be noted in that section is that it shall be applied " notwithstanding anything in the Railway Act or in the Transport Act " ; and, therefore, the interpretation of the section is not to be controlled by the enactments in the other sections of those two Acts.

Subsection 1 authorises a carrier and a shipper to agree upon the charge, or charges, for the transport of the shipper's goods. That is the general purpose of the section.

The proviso to such an agreement is that the agreed charge shall require the approval of the Board. And the Board is directed not to approve the charge if, in its opinion, the object to be secured by the agreement 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 ; or, when the transport is by rail from or to a competitive point, or 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.

Under subsection 5, on an application for an approval of an agreed charge, any representative body of shippers, any carrier and any shipper alleging that his business has been, or will be, unjustly discriminated against as a result of the agreement, is entitled to be heard in opposition to the application.

Under subsection 13, " 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 the net revenue of the carrier ; and 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 Chief Commissioner of the Board of Transport ordered that copies of the Case be served upon boards of trade, traffic leagues, chambers of commerce, railway companies and steamship lines, and several other associations and companies likely to be interested in the matter.

The Court heard argument on behalf of the Canadian National Railways, the Canadian Pacific Railway, the Canada Steamship Lines Ltd., the Northern Navigation Company and the Northwest Steamships Limited.

The two railway companies submitted that the answer to the question should be in the affirmative ; while the steamship companies submitted that the question ought to be answered in the negative.

The steamship companies argued that no wider language could conceivably have been employed in conferring discretion to the Board than that by which the Board is directed to have regard to all considerations which appear to it to be relevant. It was pointed out that the Board is not only directed to have regard to all relevant considerations ; but it is even given the power to decide what is and what is not relevant.

Moreover, so it was contended, Parliament, while not restricting the

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(B) Rinfret, J.—
continued.

Board's discretion, saw fit to indicate two specific considerations to which the Board must have regard : the net revenue of the carrier ; and 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.

On behalf of the railway companies, it was argued that so to interpret Section 35 would be to render it practically ineffective and to defeat the object of the section, which was intended to give relief in the way of restoring in part freedom of action in relation to competition.

In my view, Section 35 must be construed as a code dealing with the whole matter of agreed charges, irrespective of the other sections of the Railway Act or of the Transport Act, except so far as the other sections are necessary to supply machinery for its carrying out.

The initial words of the section show that Parliament intended that the section should be so construed.

Moreover, the subject-matter of the section, the " agreed charges," is a new policy introduced in Canadian transport legislation ; it is entirely distinct from the rate structure envisaged by the legislation up to the introduction of Section 35, and the language used by Parliament indicates an intention that the section should be understood and applied independently of the remainder of the legislation, except in so far as the machinery already referred to.

Undoubtedly, the agreed charge is subject to the approval of the Board ; but the proviso, wherein the approval is stated to be required, at the same time indicates for what purpose such approval is deemed necessary ; the Board is to decide whether the object to be secured by the making of the agreement could adequately be secured by means of a special or competitive tariff of tolls, or the Board is to ascertain as a fact whether the agreed transport is by rail from or to a competitive point, or between competitive points on the lines of two or more carriers by rail ; and, in case such should be the fact, it is to refuse the approval of the agreed charge " unless the " competing carriers by rail join in making the agreed charge."

Subsection 1 does not enact, in the main provision thereof, that the agreed charge must be approved by the Board, the requirement for the approval is to be found only in the proviso ; and the proviso whereby the approval of the Board is required also specifies the particular cases in which the Board is to withhold or refuse its approval.

When, therefore, subsection 13 enacts that the Board " shall have " regard to all considerations which appear to it to be relevant," it cannot mean that the Board is directed to have regard to all possible considerations which it might, in its discretion, deem advisable to take into account.

The considerations to which the Board is directed to have regard are the considerations which appear to it to be relevant, that is to say : relevant under the provisions of Section 35. The Board is to decide whether the agreed charge should be approved in view of the two considerations which are mentioned in the proviso contained in subsection 1 of Section 35. Those are the considerations which are relevant under the section. The

Board is not permitted to have regard to all considerations whatsoever. It is, however, directed to consider also the effect which the making of the agreed charge, or the fixing of a charge, is likely to have on " the net revenue of the carrier " and " 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."

Notice must be taken of the very special wording of these two " particular " considerations.

The enactment is not that the Board is to take into consideration the net revenue of any carrier. Subsection 13 (a) is limited to the consideration of the net revenue of " the " carrier, which means the carrier who has entered into the agreement with the shipper. This mention specifying " the " carrier necessarily excludes a consideration of the revenue of any other carrier.

Further, " the business of any shipper " which is to be particularly considered is the business of a shipper " by whom, or in whose interests, " objection is made to approval being given to an agreed charge," etc. And if we turn to subsection 5 of Section 35, we find there which " shipper " may make an objection to the approval. It is a 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."

It means, therefore, that the application of Section 35, so far as shippers are concerned, remains subject to the condition that there should result no unjust discrimination. I mention that only in passing, because no individual shipper or no representative body of shippers has come forward before the Court to submit any argument.

But when it comes to an individual carrier, such as the Canada Steamships Line, the Northern Navigation Company, or the Northwest Steamships Ltd., who have submitted arguments to this Court, it seems quite clear that the Board is not authorised by subsection 13 to take into consideration the effect the making of the agreed charge will have on their revenues. By subsection (a), that consideration is limited to the carrier who has entered into the agreement with the shipper.

The right of " any carrier " to be heard in opposition to an application for the approval of an agreed charge, which is given by sub-s. 5, must be limited to the consideration of one of the two circumstances included in the proviso of subsection 1 of Section 35.

The steamship companies invoked subsection 2 of Section 3 of The Transport Act, which is to the effect that it shall be the Board's duty to perform its functions " with the object of co-ordinating and harmonising the operations of all carriers engaged in transport by railways, ships and aircraft," and the Board is directed to give to the Transport Act and to the Railway Act " such fair interpretation as will best attain the object aforesaid."

A sufficient answer to this argument is to be found in the opening words

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(B) Rinfret, J.— *continued.*

of Section 35, by which the right to make agreed charges is to be exercised " notwithstanding anything in the Railway Act, or in this Act."

Subsection 2 of Section 3 cannot prevail against the express language of Section 35 and cannot be interpreted as giving to the Board an unlimited scope to the field of considerations which the Board may take into account as relevant to the decision to approve or decline to approve an agreed charge.

As to Section 36 of the Transport Act, to which our attention has been drawn by the steamship companies, it may first be said that, for the same reason which should exclude a reference to subsection 2 of Section 3, anything found in Section 36 cannot help in interpreting Section 35. But it may be further added that Section 36 deals with a different matter. It gives " any representative body of carriers " the right to complain to the Minister of Transport " that any existing agreed charge places such kind of business " at an undue or unfair disadvantage." In such a case, the Minister, " if satisfied that in the national interest the complaint should be " investigated," may refer such complaint to the Board for investigation. And the section states what should then take place and how the Board should act in those circumstances.

The words of the section are that the Minister should be satisfied that the particular kind of business is placed at an undue or unfair disadvantage and that he should also be satisfied that, " in the national interest," the complaint should be investigated. That is an entirely different matter from the unjust discrimination which an individual shipper is allowed to oppose on application for the approval of an agreed charge under subsection 5 (a) of Section 35 or from the objection which an individual carrier may put forward. The latter subsection deals with individual interests; the application of Section 36 is limited to a matter of " national interest."

I would, therefore, answer in the affirmative the question submitted by the Board.

In my opinion, this is not a case where costs should be allowed to either of the parties who were heard before this Court.

(C) Davis, J.

(C) DAVIS, J.

Section 35 of The Transport Act, 1938, is essentially an administrative provision. On an application to the Board under the section for the approval of an agreed charge, " any carrier " (which includes a carrier by water) shall be entitled to be heard in opposition to the application. Subsection 5 (c). It is to be observed that the grounds of opposition available to " any carrier " are not specified or otherwise indicated; the right to be heard in opposition envisages, I should think, the protection of the opposing carrier's business interests. Then by subsection 13, on any application under the section the Board shall have regard to " all considerations which appear to it to be relevant," and, in particular, to the effect of two specified conditions.

I do not think this Court has any 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 may appear to it to be relevant.

I should answer the question in the negative.

(D) KERWIN, J. : (concurred in by HUDSON, J.)

The Board of Transport Commissioners for Canada has stated a Case for the opinion of this Court upon a question which in the Board's opinion is a question of law. The question is :—

> 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 revenues of other carriers ?

Before the coming into force of The Transport Act, 1938, referred to in this question, there was in existence the Board of Railway Commissioners for Canada. By subsection 1 of Section 3 of that Act, the Board of Railway Commissioners was to be known thereafter as The Board of Transport Commissioners for Canada. By subsection 2 of Section 3 :—

> " (2) 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."

By virtue of Section 4, the provisions of Section 43 of the Railway Act are made applicable to the new Board and it is under the powers conferred upon it, thereby that the case is submitted for our opinion.

At the outset it should be emphasised that the Board does not now exercise jurisdiction only over railways. It possesses also a certain jurisdiction over transport by air and transport by water but none over highway transport. We need not concern ourselves with transport by air, which is dealt with in Part III. It may be noted, however, that Part II, " Transport by Water," " shall not apply to the transport of goods in bulk " (subsection 3 of Section 12), and that Section 35, mentioned in the question, is one of the Sections 35 to 39 inclusive, which appear in Part V under the heading " agreed charges." Section 38 provides that the provisions of that Part shall not apply to the transport by water of goods in bulk. The expressions " agreed charge," " carrier," and " goods in bulk " are defined in the interpretation sections as follows :—

> " (a) ' agreed charge ' means a charge agreed upon between a carrier and a shipper as in this Act provided and includes the conditions attached thereto ;

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(D) Kerwin, J : (concurred in by Hudson, J.)— *continued.*

" (d) ' carrier ' means any person engaged in the transport of goods or passengers for hire or reward to whom this Act applies, and shall include any company which is subject to the Railway Act ;

" (e) ' goods in bulk ' means the following goods laden or freighted in ships, and except as herein otherwise provided, not bundled or enclosed in bags, bales, boxes, cases, casks, crates or any other container, grain and grain products, including flour and mill feeds in bulk or in sacks, ores and minerals (crude, screened, sized, refined or concentrated, but not otherwise processed), including ore concentrates in sacks,

sand, stone and gravel,
coal and coke,
liquids,
pulpwood, woodpulp, poles and logs, including pulpwood and woodpulp in bales,
waste paper loaded as full ship's cargo,
iron and steel scrap and pig iron."

Turning now to Section 35, a carrier may by virtue of its provisions, make such charge or charges for the transport of goods of any shipper, or for the transport of any part of his goods, as may be agreed between the carrier and that shipper. Such agreed charge requires the approval of the Board, which shall not be given if, in the opinion of the Board, the object to be secured by the making of the agreement 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. There is another proviso which, however, was complied with in this case since the railways concerned joined in making the agreed charge and it need not be considered.

It will be observed that subsection 1 of Section 35 commences with the words, " notwithstanding anything in the Railway Act or in this Act." These words, however, do not have the effect contended for by the Railways, of making entirely inapplicable the provisions of subsection 2 of Section 3 quoted above. In my view, they were inserted because, for the first time, Parliament has authorised the making of an agreed charge. The functions of the Transport Board applying as they do to transport by air and transport by water are much wider than were those of The Board of Railway Commissioners. While this would be apparent from a reading of the Act as a whole, even if subsection 2 of Section 3 had not been included, its insertion, in my view, takes on particular significance when an application for approval of an agreed charge is made to the Board.

Two such applications were made by carriers by rail and were opposed by competing water carriers. The Board refused the applications and in written reasons indicated that the majority of the members of the Board regarded as relevant considerations the effects which the making of the agreed charge was likely to have on the business and revenues of the opposing water carriers.

Subsection 5 of Section 35 states :—

" (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."

By virtue of this clause and clause (d) of the interpretation section, any carrier by air or any carrier by water may be heard in opposition to an application for an agreed charge to which carriers by rail are parties. Similarly, under subsection 9 of Section 35, where the Board has approved an agreed charge without restriction of time, " any carrier " may apply for withdrawal of the Board's approval. Subsection 13 is important and when it states that the Board shall have regard to all considerations " which appear to it to be relevant," it appears to me that Parliament intended to leave that body, which is a court of record, and not to any other court, the determination of what is and what is not relevant. The concluding part of the subsection merely indicates two considerations to which the Board must have regard. These considerations do not fall within any definable class so as to exclude others of a different class, and, what is more important, they are stated to be relevant only " in particular " and not to the exclusion of other considerations.

It is urged that, in view of the provisions of Section 36, the Board, on an application under Section 35 by carriers by rail, is precluded from regarding as a relevant consideration the effect which the making of the agreed charge is likely to have on the business and revenues of carriers by water. In the first place it is to be noted that, after an approval has been given under Section 35, the complaint to the Minister under Section 36 must be by a representative body of carriers, which is a very different thing from the legislative permission to " any " carrier to object in the first instance to the granting of an approval. Furthermore, under Section 36, it is only if the Minister is satisfied that a complaint should be investigated in the national interest that he may refer the matter to the Board, and it is only on the same ground that the Board may make an order varying or cancelling the agreed charge complained of, or make such other order as in the circumstances it deems proper.

It is said that the decision in *Great Western Railway Company* v. *Chamber of Shipping of the United Kingdom* (1937) 25 Ry. & Can. Tr. Cas. 223, is in the opposite sense. There the Railway Rates Tribunal had refused to hear the objectors (the Chamber of Shipping) upon an application by the Railway Company for the consent of the Tribunal to set exceptional rates

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(D) Kerwin, J.: (concurred in by Hudson, J.)— *continued.*

more than forty per cent. below the standard rates. The objectors appealed to the Court of Appeal. As Lord Justice Romer put it at page 234 :—

> " The only question to be determined upon this appeal is whether the Rates Tribunal when hearing an application by a railway company for granting an exceptional rate under Section 37 (1) of the Railway Act, 1921, are bound to consider the question whether the exceptional rate will prejudice coastal carriers in the sense of placing them under a disadvantage, and will, therefore, be undesirable in the national interest. In my opinion, the Rates Tribunal are not bound to consider that matter when granting an exceptional rate." 10

That is, the Tribunal had declined to consider the question as relevant and the Court of Appeal decided that it was justified in so doing. Furthermore, what was there in question was a section of the Railways Act, 1921, that is an Act dealing with railways alone.

In view of these facts, I fail to see how the decision can be of any assistance to this Court in the present instance. The question should be answered in the negative. There should be no order as to costs.

In the Privy Council.

No. 8. Order of His Majesty in Council granting Special Leave to Appeal, 17th November, 1943.

No. 8.

Order of His Majesty in Council granting Special Leave to Appeal.

AT THE COURT AT BUCKINGHAM PALACE. 20

The 17th day of November, 1943.

Present :

THE KING'S MOST EXCELLENT MAJESTY

LORD PRESIDENT	MR. CHANCELLOR OF THE DUCHY OF LANCASTER
LORD HANKEY	
SECRETARY SIR JAMES GRIGG	MR. WILLINK

WHEREAS there was this day read at the Board a Report from the Judicial Committee of the Privy Council dated the 11th day of November 1943 in the words following, viz. :— 30

> " WHEREAS by virtue of His late Majesty King Edward the Seventh's Order in Council of the 18th day of October 1909 there was referred unto this Committee a humble Petition of the Canadian National Railways and the Canadian Pacific Railway Company in the matter of an Appeal from the Supreme Court of Canada between the Petitioners Appellants and the Canada Steamship Lines Limited Northern Navigation Company and North-Western Steamships Limited

Respondents setting forth (amongst other matters) that the Petitioners desire to obtain special leave to appeal from a Judgment of the Supreme Court, 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 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.): that the matter concerns certain agreed charges for the carriage solely by railway of manufactured goods of various descriptions from Montreal and Niagara Falls to points in Western Canada, which were negotiated between the Petitioners and two firms of shippers of the goods in question and submitted by the Petitioners for approval to the Board of Transport Commissioners for Canada (formerly entitled the Board of Railway Commissioners for Canada and thereinafter called the Board): that the negotiation of such agreed charges and the submission thereof to the Board for approval took place by virtue of Section 35 of the Transport Act: that the Petitioners' applications to the Board for approval of the said agreed charges were opposed by the Respondents who had previously carried some of the traffic involved along the Great Lakes as part of "rail-water-rail" or "water and rail" traffic from Eastern Canada to Western Canada: that the Respondents based their opposition simply on the ground that the effect of the agreed charge would be to deprive them of revenue from the carriage by water of some of the traffic involved and did not dispute that the statutory requirements for approval of the charges laid down by the said Section 35 had been fulfilled: that the Board on the 6th January 1942 delivered its decision refusing by a majority its approval of the agreed charges: that the majority of the Board (Garceau, Deputy Chief Commissioner dissenting) held that the probable loss of revenue by the Respondents was a relevant consideration to which the Board might properly have regard in dealing with the application: that the Petitioners applied to the Board to re-hear their application under the powers conferred upon it by Section 51 of the Railway Act and Section 4 of the Transport Act or to state a case for the opinion of the Supreme Court upon the point of law involved: that the Board of its own motion stated the question of law for the opinion of the Supreme Court formulating it as follows:—

> "'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 revenues of other carriers?':

that at the hearing before the Supreme Court the Petitioners were treated as Appellants and were required by the Court to assume the burden of supporting the affirmative answer to the question of law

In the Privy Council.

No. 8. Order of His Majesty in Council granting Special Leave to Appeal, 17th November, 1943—*continued.*

submitted by the Board and the Respondents, who were treated as Respondents argued for a negative answer: that the Supreme Court gave judgment on the 4th May 1943 Sir Lyman Duff, C.J., and Mr. Justice Rinfret accepted the arguments put foward by the Petitioners and would have answered the question in the affirmative but Justices Davis, Kerwin, and Hudson were of the opposite opinion, and accordingly by a majority the Court answered the question in the negative: And humbly praying Your Majesty in Council to order that the Petitioners shall have special leave to appeal from the Judgment of the Supreme Court dated the 4th May 1943 or for such further or other Order as to Your Majesty in Council may appear just:

"THE LORDS OF THE COMMITTEE in obedience to His late Majesty's said Order in Council have taken the humble Petition into consideration and having heard Counsel in support thereof and in opposition thereto Their Lordships do this day agree humbly to report to Your Majesty as their opinion that leave ought to be granted to the Petitioners to enter and prosecute their Appeal against the Judgment of the Supreme Court of Canada dated the 4th day of May 1943 upon depositing in the Registry of the Privy Council the sum of £400 as security for costs:

"And Their Lordships do further report to Your Majesty that the proper officer of the said Supreme Court ought to be directed to transmit to the Registrar of the Privy Council without delay an authenticated copy under seal of the Record proper to be laid before Your Majesty on the hearing of the Appeal upon payment by the Petitioners of the usual fees for the same."

HIS MAJESTY having taken the said Report into consideration was pleased by and with the advice of His Privy Council to approve thereof and to order as it is hereby ordered that the same be punctually observed obeyed and carried into execution.

Whereof the Governor-General or Officer administering the Government of the Dominion of Canada for the time being and all other persons whom it may concern are to take notice and govern themselves accordingly.

E. C. E. LEADBITTER.

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).

CANADIAN NATIONAL RAILWAYS and CANADIAN PACIFIC RAILWAY COMPANY

v.

CANADA STEAMSHIP LINES LIMITED, NORTHERN NAVIGATION COMPANY and NORTH-WESTERN STEAMSHIPS LIMITED

RECORD OF PROCEEDINGS.

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(A15555*)