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-WESTERN STEAMSHIPS LIMITED ... Respondents

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JOINT APPENDIX

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JOINT APPENDIX

No. 1

REASONS for JUDGMENT of BOARD of RAILWAY COMMISSIONERS re Canadian National Railways and Canadian Pacific Railway et al vs. Canada Steamship Lines Ltd. et al (Files 40994.5 and 40994.6)

Re Agreed Charge No. 5

No. 1
Reasons for judgment of Board of Railway Commissioners re C.N.R. & C.P.R. et al vs Canada Steamship Lines et al

26th April 1940

(A) Wardrope A.C.C. (concurred in by Stoneman and MacPherson CC.)

(A) WARDROPE A.C.C.: This application was heard at sittings of the Board held in Ottawa on November 23, 1939, and February 8, 1940, in the presence of counsel and representatives of the rail carriers, Canada Steamship Lines Ltd., the Toronto

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Board of Trade, Montreal Board of Trade, Canadian Manufacturers' Ass'n, Johnson & Johnson Ltd., and Bauer & Black Ltd. The provisions of the Board's General Order No. 581 were complied with so far as concerns notice in the Canada Gazette forwarding copies of the agreement to interested parties, etc.

The purpose of the agreement is to enable rail carriers to meet competition of highway transport. The shipper undertakes to ship by rail not less than 85% of the aggregate volume forwarded by him of the described traffic within the area specified. The object sought by the applicants in establishing this agreed charge cannot, they allege, be attained by the publication of a special or competitive tariff, because such a tariff would give no adequate assurance that the traffic would move by rail, and would permit other persons to obtain the benefit of the lower rate without any obligation to ship their products by rail, such as is provided for by the agreement. The railways assert that, notwithstanding that they had established within the territory in question reduced truck competitive rates under a pick-up and delivery arrangement, they were and are losing, or are in the immediate prospect of losing practically the entire business of the shippers parties to the agreement for the reason that said rates were not low enough to meet those in effect via the competing form of transport. It is stated that in negotiations with the shippers concerning rates necessary to permit rail shipment, the figures suggested by shippers as fair and reasonable for an agreed charge were found to be somewhat higher than the truck rates. With regard to the figure of 85% of the aggregate volume of traffic, the shippers, owing to the fact that they estimate 15% of the entire traffic would move by boat, have not offered the rail carriers the entire traffic but have reserved that portion for boat service.

Under the provisions of s. 35(5) of the Transport Act 1938 (Can.), c.53, the Canada Steamship Lines Ltd., gave notice of objection to approval of this agreed charge by the Board in the form and under the conditions thereof. Counsel for this company opposed any limitation being placed on the quantity of traffic any shipper may deliver to water carriers operating under the Transport Act. He alleged the agreement is unjustly discriminatory,

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being an attempt to limit or divert from one form of regulated carrier to another type of regulated carrier a substantial volume of traffic, and contended that Part V of the Act was not intended as a medium whereby one type of carrier subject to the Board's jurisdiction may contract traffic away from another type of carrier also subject to the Board's jurisdiction, but was designed to allow all carriers subject to the Act to contract for traffic in competition with unregulated forms of transport. He pointed out that the agreement fails to disclose that 15% of the shipper's traffic is reserved for the water carriers, so that the rail carriers may compete for 100% of the shipper's traffic. In other words, the 15% not covered by the agreement may be competed for by railways, water carriers and trucks. I do not see how an agreement between rail carriers and shippers could expressly embody conditions relating to the carriage of traffic by a carrier not a party thereto. In written submissions filed with the Board by Johnson & Johnson Ltd. (the other two companies are wholly-owned subsidiaries), they advise that they propose shipping 15% of their total traffic in the Province of Quebec and Ontario by Canada Steamship Lines, reserving the right, however, to use other means of transportion should the steamship methods or service be unsatisfactory at any time. They say that under present competition in business, especially when meeting opposition which is located in another city, such as Toronto, it is essential that quick delivery of shipments be made because competing firms can make delivery the same day as orders are placed. By rail they can load at Montreal shipments for Toronto on one day, and they are delivered the next day, whereas, when forwarded by Canada Steamship Lines, delivery would be the third day following date of shipment. They state "this is a very important point which should not be overlooked and affects any possibility of the Canada Steamship Lines increasing their business with us irrespective of whether or not their rates are lower."

It is noted from figures which were filed that of the total traffic of these shippers for the years 1938 and 1939 within the territory covered by the agreed charge, the amount carried by Canada Steamship Lines was less than 15% of the total traffic in these two years during which, of course, there was no agreed charge.

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Counsel for the rail carriers and Canada Steamship Lines referred to various sections of the Transport Act; advanced their opinions as to the interpretations which should be placed thereon; and outlined general principles which they urged should be followed by the Board in the administration of the Act. Counsel for Canada Steamship Lines directed his arguments principally to the proposition that in no case should the Board approve an agreed charge where a competing regulated carrier objects on the ground that it is not a party to the agreement, and has not consented thereto. Stress was laid on s-s. (2) of s. 3 of the Transport Act, and it was strongly urged that approval of this agreed charge would conflict with the intent of this subsection.

The Act provides that in certain cases the Board shall not approve an agreed charge unless the competing carriers by rail join in making the agreed charge, but there is no corresponding provision in respect to other competing regulated carriers. In my opinion, the inference is plain that the Act contemplates that the Board may approve an agreed charge even if a competing regulated carrier (other than a carrier by rail) does not join in the agreed charge, has had no opportunity of becoming a party to it, and has not consented to it.

It has been suggested on the part of the applicants that on an application for approval of an agreed charge the Board is precluded from considering as relevant anything which does not have a direct bearing on the points which the Board is specifically required to consider in s. 35 of the Transport Act and that, consequently, the effect of the agreed charge on the business of the Canada Steamship Lines was not relevant.

I am of opinion that the interpretation suggested is entirely too restricted and narrow. Subsection (13) of s. 35 of the Transport Act says:- "On an application under this section, the Board shall have regard to all considerations which appear to it to be relevant .... "

However, I am of opinion that consideration of this application neither involves nor necessitates any pronouncement of general principles. Apart from the specific requirements of s.35, the wording

of s-s. 13 thereof suggests such flexibility that each application must be determined on its merits and in the light of the circumstances and conditions surrounding it.

On the record before us, the Canada Steamship Lines have not, in my opinion, shown that they would be affected very seriously, if at all, by the approval of this agreed charge. Having in mind the object of the agreed charge, I do not believe our approval thereof should be denied and the rail carriers prevented from securing the carriage of traffic, which will enhance their net revenue, because of some possible detrimental effect upon a regulated carrier not a party to the agreement. I am of the opinion that the object to be secured by the making of the agreement in question cannot, 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. The agreed charge will be approved for the period of one year from September 1, 1939. If application for approval of another agreed charge between the same parties is again made on or before the expiration of this time, the Canada Steamship Lines will be in a position to give notice of objection and be heard.

At the hearing in Ottawa on November 23, 1939, the carriers and shippers advised the Board of their agreement to add the Wabash Railway Co. as a participating carrier, and to amend the term "toilet preparations" in sections "C" and "E" of the agreement to read "toilet preparations (except perfumes and toilet waters)." Johnson & Johnson Ltd., in written submission also advised that, due to the number of articles they ship, it was understood between them and the railways that facial cleansing tissues, handkerchiefs, neck strips and sanitary belts were included in the agreement, but, in order that there might be no misunderstanding asked that they be specifically named. The railways consent. When printing the agreed charge tariff, these amendments may be made therein.

The Northwest Steamships Ltd., filed a brief written submission recording their opposition to this agreed charge, but nothing is contained therein that was not advanced by counsel for the Canada Steamship Lines. The Northwest Steamships did not

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allege that they would be detrimentally affected by the approval of this agreed charge.

The representatives of the Canadian Manufacturers Ass'n and the Toronto and Montreal Boards of Trade made no representations to the Board in this matter.

Smith & Nephew Ltd., Montreal, applied, under s. 35(6) of the Act, to have the Board fix a charge for the transport of their traffic by rail. They desire the charge to be the same, applicable on the same commodities, and within the same territory as the agreed charge. Inasmuch as they are shipping the same goods under substantially similar circumstances and over the same carriers to the same destinations as Johnson & Johnson Ltd., et al, unless a similar charge is fixed for them, it is alleged they will be unjustly discriminated against. So far as the Canada Steamship Lines are concerned, they carried none of this firm's traffic during 1939, and only 340 pounds in 1938. Our order will grant this application, subject to the same terms and conditions as the agreed charge. The railways stated they had no objection to this action.

The J.B. Williams Co. made similar application in respect of their traffic from Montreal, but there is a question concerning the items embraced under the term "toilet preparations" which remains unsettled, so that this application will be dealt with later. It may be stated that this company's shipments via Canada Steamship Lines amounted to 47,400 pounds in 1938 and 1,240 pounds in 1939.

Section 35(6) of the Act provides, in effect, that any shipper who considers that his business will be unjustly discriminated against if an agreed charge is approved, may 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, and, if the Board is satisfied that the business of the shipper will be so unjustly discriminated against, it may fix a charge to be made by such carrier for the transport of such goods.

Bauer & Black Ltd., John A. Huston Co. Ltd.,

Richard Hudnut Ltd., and J. Stevens & Son Co.Ltd., all of Toronto, Ont., made written submissions requesting that the Board fix a charge for the transport of their goods, similar to the goods of Johnson & Johnson Ltd., et al, from Toronto to the same territory as covered by agreed charge No. 5. The applications of Richard Hudnut Ltd.,and J. Stevens & Son Co. Ltd., were subsequently withdrawn. Inasmuch as from Montreal the traffic may be moved by highway transport at rates somewhat lower than those covered by the agreed charge, it is difficult to see wherein the agreed charge, in itself,creates any rate situation placing the Toronto shipper at any disadvantage that has not heretofore existed actually or potentially. Again, in the area in which the Toronto shipper does most of his business, his freight rates are, and would be, under the agreed charge from Montreal very appreciably lower than the rates paid by the Montreal shipper. This is due to the disadvantage of geographical location of the Montreal shipper in respect to a large area beginning at some point east of Toronto and extending throughout the balance of the territory covered by the agreed charge. In Fraser Valley-Surrey Farmers' Co-operative Ass'n et al v. C.P.R. & C.N.R., 43 C.R.C. 97 at p.110, the Board stated:

"'One criterion of unjust discrimination is whether the district alleged to be discriminated in favour of has profited at the expense of the locality against which it is alleged the discrimination has taken place.'

"Wegenast v. G.T.R., 8 C.R.C. 42 at p. 45.

"Toronto & Brampton v. G.T.R. & C.P.R., 11 C.R.C. 370 at p. 375.

"Massiah v. C.P.R., 18 C.R.C. 358."

"'In Ontario Paper Co. v G.T.R., 24 C.R.C.177, no evidence was submitted that any rate advantage possessed by any competitor had rendered it more difficult for the applicant company to do business, and the allegation of unjust discrimination was held to be unfounded.

"'Evidence is required as to how rates complained of react to the detriment of the applicant.'

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"Zwicker & Co. v. C.N.R., 12 Board's O. & J. at pp. 152 and 153.

"'The ultimate test of discrimination is to be found not in difference of rates but in the question whether as a result of this difference an injury is worked to an individual or locality. One test of this is whether the locality alleged to be favoured actually gets into a common market on a lower rate. The rate paid rather than the distance travelled is important. Re Telegraph Tolls, 20 C.R.C. 23.'

"In Plunkett & Savage v. Express Traffic Ass'n, 28 C.R.C. 402 at p. 407, it is stated:

"'One criterion of unjust discrimination is whether the district or individual alleged to be discriminated in favour of has profited at the expense of the locality against which it is alleged the discrimination has taken place. Where no evidence was submitted that any rate advantage possessed by a competitor had rendered it more difficult for the applicant company to do business, the allegation of unjust discrimination was held to be unfounded.' Ontario Paper Co. v. G.T.R., 24 C.R.C. 177."

I do not consider that what was placed before us in these submissions justifies our directing the fixing of a charge for the traffic of these shippers from Toronto.

Re Agreed Charge No. 6.

This application was heard at sittings of the Board in Ottawa on February 8, 1940, along with agreed charge No. 5, and the record was made common to both applications. The provisions of the Board's General Order No. 581 were complied with so far as concerns notice in the Canada Gazette forwarding copies of the agreement to interested parties, etc.

The purpose of the agreement is to enable the rail carriers to meet competition of highway transport. The shipper undertakes to ship by rail not less than 95% of the aggregate volume forwarded by him of the described traffic within the area specified, the remaining 5% being reserved to cover emergency shipments and short haul highway transport.

It was alleged that the object to be secured by the making of the agreement cannot adequately be secured by the publication of special or competitive tariffs under which the railways would have no assurance that the traffic would move by rail. The railways also stated that although they had published truck competitive rates under a pick-up and delivery arrangement, these were not low enough to meet those via the competing form of transport, and the railways were, and are, losing practically the entire business of the shipper. The figures determined as fair for an agreed charge are stated to be the same as, or somewhat higher than, the truck rates.

The Canada Steamship Lines gave notice of objection to approval of this agreed charge by the Board. Their position with respect thereto is the same as already outlined herein in connection with agreed charge No. 5, and, consequently, need not be repeated. While Niagara Falls is not, in itself, a water port of call for Canada Steamship Lines, they handle traffic originating at and destined to that point through cartage absorption over their docks at St. Catharines or Thorold. They will, do doubt, lose some traffic which they have heretofore carried for this shipper. The situation is, however, on the record before us, that the railways are losing practically the entire business of this shipper because their rates are not low enough to meet those via the unregulated form of transport. By means of this agreement, they will obtain the carriage of the traffic at rates which will increase their net revenue. I am of opinion that the object to be secured by the making of the agreement in question cannot, 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. I do not consider approval should be denied and the rail carriers prohibited from securing the carriage of such traffic.

The agreement will be approved for a period of one year from March 8, 1940.

STONEMAN, and MACPHERSON CC., concurred.

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26th April 1940

(B) Garceau D.C.C. (concurred in by Stone C.)

Re Agreed Charge No. 5

(B) GARCEAU D.C.C.:- I am in agreement with the conclusions of the judgments rendered by the Assistant Chief Commissioner, Re Agreed Charge No. 5, supra, but I would dismiss the objections of the Canada Steamship Lines, summarized by Mr. Hansard, counsel, viz.:

"Either this Board in the exercise of the almost unlimited discretion given to it (s-s. (2) of s. 3) should look at an agreed charge of this kind and say, that has got one of those percentage provisions in it by which one regulated carrier, or a class, is going to narrow the field for the others. We do not think that should be done. We think that either those other regulated carriers should have been given an opportunity to become parties to that agreement - not to participate in it after it is an accomplished fact, but parties to it - or that agreement should before it can be approved, be so worded that it is not an undertaking by a shipper to ship all or a portion of his goods by one class of regulated carrier, but that it is an undertaking by the shipper to ship all or some portion of his goods by regulated carriers - "

not because injury is not proven, as stated in the judgments, but because they are irrelevant and not pertinent in law.

With due deference for a different opinion, I submit:

Part V of the Transport Act is a special act, self-contained, governing agreed charges, from A to Z, to the exclusion of the provisions of the Railway Act or of the other parts of the Transport Act, except those sections, 1, 2, 3(1), which have reference only to the name of the Act and definitions. Section 35 reads:

"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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(B) Garceau D.C.C. (concurred in by Stone C.)

The above provisions repudiate formally the above mentioned contentions of the Canada Steamship Lines and give to any and all individual regulated carriers the absolute right to secure all or part of the traffic of any shipper by means of an agreed charge when such object cannot be adequately secured by means of a competitive or special tariff of tolls under the Railway or the Transport Acts.

In other words, an unrestricted competition is permitted to any carrier against any or all other carriers, with the sole exception that when the transport is by rail, competing rail carriers must join in making the agreed charge.

The applicants are rail carriers, they have joined in making the agreed charge.

By the very provisions of the above legal enactment, they have the right to secure part or all of the traffic of any shipper, from any other carrier. If they have such a right, it follows necessarily that the other carriers cannot expect the protection of the Board against any consequence of the pursuit or exercise of this lawful right, except in the circumstances mentioned in the Act. Section 36 is their only protection against unlimited competition, and it reads:

"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

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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."

The above provisions are the logical consequence of s. 35, confirm the above interpretation, that problematical or possible disadvantage to a carrier, except as provided for the railways, is not a reason against the approval of an agreed charge; for, the protection is given to the carrier only when the existing agreed charge has injuriously affected its traffic to the extent that such injury would react against national interest.

The Board, which has no immediate jurisdiction to hear a complaint against an existing agreed charge, on account of undue and unfair disadvantage, even when such disadvantage is so injurious as to react against national interest, cannot assume that it has the jurisdiction to hear such a complaint when the injury is only a possibility, and it is until the approval of the charge is granted and has been in operation.

I submit, with due deference for a different opinion that the judicial discretion given to the Board by s. 35(13) must be found within the four corners of the Act or as a necessary implication from its provisions, but cannot exist when the contrary is formally enacted or necessarily implied as in this instance.

The reason given in the judgments for denying to the Canada Steamship Lines the right to be a party to the agreement - because there is no such provision granting this right - also applies to their supposed right to complain of injury to their traffic. The Act has no provisions granting either right.

Re Agreed Charge No. 6

I also concur in the conclusions of the judgments, Re Agreed Charge No. 6, provided the following words, on p. 194, are deleted, viz.:

"While Niagara Falls is not, in itself, a water port of call for Canada Steamship Lines, they handle traffic originating at and destined to that point through cartage absorption over their docks at St. Catharines or Thorold. They will, no doubt, lose some traffic which they have heretofore carried for this shipper. The situation is, however, on the record before us, that the railways are losing practically the entire business of this shipper because their rates are not low enough to meet those via the unregulated form of transport. By means of this agreement, they will obtain the carriage of the traffic at rates which will increase their net revenue. I am of the opinion that the object to be secured by the making of the agreement in question cannot 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. I do not consider approval should be denied and the rail carriers prohibited from securing the carriage of such traffic."

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(B) Garceau D.C.C. (concurred in by Stone C.)

The last paragraph would then read as follows:

"The Canada Steamship Lines gave notice of objection to approval of this agreed charge by the Board. Their position with respect thereto is the same as already outlined herein in connection with agreed charge No. 5, and, consequently, need not be repeated.

"The agreement will be approved for a period of one year from March 8, 1940."

STONE C., concurred.

No. 2
Reasons for judgment of Board of Transport Commissioners re Canadian Freights Association vs. Canada Steamship Lines

6th January 1942

(A) Cross C.C. (concurred in by Wardrope A.C.C. & MacPherson C.)

No. 2

REASONS for JUDGMENT of BOARD of TRANSPORT COMMISSIONERS re Canadian Freight Association v. Canada Steamship Lines et al (Files 40994.11 and 40994.12)

(A) CROSS C.C.: These are separate applications under Part V, s.35 of the Transport Act,1938 (Can.), c.53, by the Canadian Freight Association representing the respective railway companies specified above, for approval of the said Agreed Charges. The applications were heard together in Ottawa. Both applications were opposed by Canada Steamship Lines Ltd., and Northern Navigation Co. Ltd., its wholly-owned subsidiary, herein sometimes described as Canada Steamship Lines; and by Northwest Steamships Ltd. The grounds of objection and the questions involved in the two cases are similar in many respects and to that extent may be considered together.

Reference to Johnson & Johnson Ltd., herein includes also Chicopee Mfg. Corp. and Personal Products Ltd.

Both agreements apply to certain described commodities in packages, carloads, handled by, for, or in connection with, the business of the shipper to Calgary, Alta., Edmonton, Alta., Regina, Sask., Saskatoon, Sask., and Winnipeg, Man.

The Johnson & Johnson agreement applies to shipments from Montreal, Que., of sanitary belts, napkins, pads and towels as a carload unit with a minimum carload weight of 15,000 pounds and also applies to those commodities in mixed carloads, minimum carload weight 15,000 pounds, with paper facial cleansing tissues, handkerchiefs and neckstrips. With the mixed carloads, up to 20% of the total weight of the contents of the car, or of the minimum carload weight, may consist of advertising matter; bandages, surgical; cellulose absorbent; cheesecloth, cut or uncut; cotton, absorbent; dressings, surgical; plaster, adhesive; toilet preparations (except cosmetics, perfumes and toilet waters). The rates to be charged for either of the foregoing carloads are the current 3rd Class all-rail rates.

The Canadian Cellucotton Products Co.Ltd. agreement applies from Niagara Falls, Ont., and is somewhat different than that applicable for Johnson & Johnson Ltd. It provides for rates equivalent to the 4th Class all-rail rates on paper facial cleansing tissues, handkerchiefs and neckstrips with a carload minimum of 20,000 pounds, which commodities and rates are the present classification basis. In effect, therefore, as to these commodities the incorporation thereof into the Agreed Charge is a continuation of existing rates without any change. The agreement also provides the equivalent of 3rd Class rates on sanitary belts, napkins, pads and towels with a carload minimum of 15,000 pounds when shipped as a carload unit. Provision is also made for mixed carloads at the equivalent of the 3rd Class rates, carload minimum 15,000 pounds, for paper facial cleansing tissues, handkerchiefs and neckstrips; sanitary belts, napkins, pads and towels, and may include not more than 20% of the total weight of the contents of the mixed carload, or of its minimum weight, of advertising matter; disinfectants, other than medicinal; tablets, medicinal.

Each agreement also sets out the conditions attaching to the agreed charge. These conditions are similar and among other things provide that the shipper agrees to deliver or cause to be delivered to the railway for carriage between Montreal, in the case of the Johnson & Johnson agreement, and Niagara Falls, in the case of the Canadian Cellucotton Products Co. Ltd. agreement, and the other stations specified the said traffic however directed or consigned; and not to ship or permit or cause to be carried any part of the said traffic by any other means of transportation whatsoever; the agreement to become effective on such date as may be approved by the Board and continue until terminated by either party by a three months' notice in writing, effective at the end of one year from the said approval or at any time thereafter; provided that should the Board's approval thereof be restricted as to time, the period so specified (being not less than one year from the date of approval) shall be deemed to be the term of the agreement.

Section 35 of the Transport Act, 1938, notwithstanding anything in the Railway Act, or in that Act, authorizes a carrier (which includes a railway) to make such charge or charges for the

No. 2
Reasons for judgment of Board of Transport Commissioners re Canadian Freights Association vs. Canada Steamship Lines.

6th January 1942

(A) Cross C.C. (concurred in by Wardrope A.C.C.& MacPherson C.)

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 the shipper, but the Agreed Charge requires the approval of this Board.

Section 2(1)(d) of the Transport Act, 1938, defines "carrier" as follows; "'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."

The Act applies, to the extent therein provided, to persons engaged in the transport of goods or passengers for hire or reward by rail, water and air. It is therefore apparent that not only a railway company, but a carrier, by water or air, as well, is authorized, under the provisions of s.35 of the Transport Act, 1938, to make an Agreed Charge.

The Board is not permitted to approve an Agreed Charge if, in its opinion, the object to be secured by the making of the agreement could, 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, 1938. The Board is further not permitted to approve an Agreed Charge when the transport is by rail from or to a competitive point on the line of two or more carriers by rail unless the competing carriers by rail join in making the Agreed Charge, and this requirement has been fulfilled in the instant cases. Subject to the prohibitions mentioned the Board is left at large to approve or not to approve an Agreed Charge, provided that, before coming to a conclusion, it hears any objecting shipper who considers that his business will be unjustly discriminated against if the Agreed Charge is approved and made by the carrier; any objecting body of shippers; and any objecting carrier, and has regard to all considerations which appear to it to be relevant, and, in particular, to the effect which the making of the Agreed 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.

The railways under the provisions of the Railway Act had for many years been subject to strict regulation and control in respect to the carriage

of traffic, the tolls or rates to be charged for such carriage, equality of treatment of the public as to carriage, tolls and facilities, and in many other ways; while, competing carriers by water, motor vehicles on highways and by air remained generally unregulated and free to make such contracts as they saw fit with a shipper to handle his shipments, as to rates to be charged and otherwise, as might be agreed upon between such carrier and the shipper.

Section 35 of the Transport Act, 1938, gives to the railways a privilege which they did not previously possess, that is 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, hence such charges may be lower or different from the regular tariff rate. The Act at the same time brought under regulation of the Board transport by water and air, to the extent specified in the Act, but in no way applies to transport by motor vehicles on highways or roads. It should be mentioned that Part II of the Transport Act, 1938, which deals with transport by water does not apply to the transport of "goods in bulk", laden or freighted in ships, as defined by s.2(1)(e) of the Act, which comprise a substantial portion of the traffic of many water carriers.

While the Legislature has thus deprived a shipper of the right to complain of inequality of charge or treatment under the provisions of the Railway Act, or Part IV of the Transport Act, by reason of an Agreed Charge made under Part V of the Transport Act, 1938, it has conferred upon him, in addition to the right to object to approval of the agreement, the right to apply to the Board to fix a charge in his favour concurrently with the approval of an Agreed Charge of which he complains; and also, if he has not in this manner secured a charge in his favour, and subsequently considers that his business has been unjustly discriminated against as the result of the making of the Agreed Charge, the right to apply to the Board at any time to fix a charge in his favour; and also, after one year from approval, where the Board has approved an Agreed Charge without restriction of time, to apply to the Board for withdrawal of its approval.

In the present cases no shipper or representative body of shippers has objected, nor has any

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shipper applied to have a charge fixed for him.

The object to be secured by the making of each of the agreements which we are asked to approve, from the interest of the shipper, as stated in the material filed with the Board, and which accompanied the applications, is as follows: "This agreement was based on the desire of the shipper to have his traffic handled by rail on an all year round charge, in order to avoid storage of goods in anticipation of Winter requirements, and rates as shown in the agreement were necessary to accomplish this desire on the part of the shipper."

And from the standpoint of the railways, as appears from the evidence given by an official of one of the railways at the hearing, to secure the carriage of the traffic for 100% movement by rail; to increase the carloadings; reduce the number of cars necessary to carry the traffic; to increase the revenue of the railway by carrying the traffic all-rail and eliminating the water haul with the expected result that it would lead to an improvement of the net revenue of the railway.

The applicants contend that the object to be secured by the making of the agreements cannot adequately be secured by the publication of special or competitive tariffs of tolls conforming to the provisions of the Railway Act, or the Transport Act, 1938, for the following reasons: (a) By the publication of a special or competitive tariff the railways would have no adequate assurance that the traffic would move by rail, and, (b) The publication of a special or competitive tariff would permit other persons to obtain the benefit of the lower rate without corresponding obligations to ship by rail.

A witness called by Canada SteamshipLines explained that to territory like Winnipeg, Regina, Saskatoon, Calgary, and Edmonton, while they had through rates at the present time on a differential basis with the rail lines, they have no joint rates via the Head of the Lakes (Fort William or Port Arthur) with any division between the rail and water line; they pay the full local rate from the Head of the Lakes to these points in the West; but on the rail-water-rail route in which they are interested there is an automatic division of the

rates between the rail and the water lines. The same witness, in referring to the rates provided for in the Agreed Charges, stated that these rates are considerably below the rates which are now in effect via what he described to be the cheapest form of transportation, namely, the water and rail route; that there is no way in which Canada Steamship Lines can meet the Agreed Charges rates by the publication of a tariff unless they wanted to pay someone a lot of money for the privilege of carrying the traffic.

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After consideration of all of the evidence placed before us, and following a study of the matter, I am of the opinion that the object to be secured by the making of each of the agreements can be attained by a special or competitive tariff of tolls under the Railway Act or the Transport Act, 1938, in respect of all goods covered by the agreements with the exception of the commodities described as "Paper Facial Cleansing Tissues, Handkerchiefs and Neck Strips" in the agreement for Canadian Cellucotton Products Co. Ltd. for which a minimum carload weight of 20,000 lbs. is provided. In the case of the exception, above noted, the provision in the agreement is that these commodities will continue to pay the same rates as are at present published, namely 4th Class rates, but the agreement has the effect of restricting the movement to all rail routing at the all rail rates. The shipper has agreed to give this traffic to the rail carriers and deprive itself of the use of lower rates by water; in a sense, therefore its agreement indicates a quid pro quo for concessions in respect of the other commodities covered by the agreement.

I am not impressed with the declared object of the shippers that they wish to avoid storage of goods in anticipation of Winter requirements because I feel that to achieve the utmost benefit from the agreements there is a necessity to increase carload quantities and possibly incur greater storage costs than heretofore.

As to the object of the rail carriers - there is no question that they seek to deprive the water carriers of participation in the handling of the traffic.

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As to all of the commodities included in the agreements, with the exception I have noted, the prevailing method of division of revenue whereby the railroads in Western Canada, operating from the Head of the Great Lakes to the destinations concerned, require payment of their full local rates under a different method of applying mixed carload privileges, makes it obvious that the water carriers could not hope to publish rates with the usual differentials under those here proposed which would enable them to meet this Western condition and leave sufficient revenue to carry the traffic to the Head of the Lakes by water. In fact the through rates so constructed would, in many cases, be lower than the local rates exacted by the railways from the Head of the Lakes as their proportion of the revenue on this traffic.

By s.35(13) of the Transport Act, 1938, one of the considerations which the Board is particularly required to have regard to, is the effect which the making of the Agreed Charge is likely to have on the net revenue of the carrier. The rates which have been agreed upon between the carrier and the shipper, in each of the agreements are, in general, considerably lower than the published tariff of tolls relating to the traffic involved, with the exception of the 4th Class rates on Facial Cleansing Tissues, etc., which are the same as the present tariffs.

In respect to the effect upon the net revenue of the carrier, the only evidence by the applicant was a statement by a witness for one of the carriers, who had considerable to do with the formulation of the agreements under consideration, to the effect that the making of the agreements would result in more net revenue to the rail carriers - that they would make a little more money. No data were however submitted in support of such statement.

Due to the inadequacy of the evidence as to the effect upon the carriers' revenue by the making of the agreements, the Board, subsequent to the hearing, requested and was furnished with, by the rail carriers and the competing water carriers, details of quantities, class of goods and charges paid of each shipment made by the shippers in the eighteen months' period January 1, 1939, to June 30, 1940, showing how carried, that is, All-Rail, Rail-

Lake-Rail, or Water and Rail. From the material supplied it has been ascertained that the tonnage of the shippers moved in the following manner:

Via	Canadian Products Company Ltd. Winter	Canadian Products Company Ltd. Summer	Cellucotton Johnson & Johnson Ltd. Winter	Cellucotton Johnson & Johnson Ltd. Summer
All Rail	40.4%	9.6%	36.7%	14.6%
Rail-Lake-Rail		28.6%		45.1%
Water and Rail		21.4%		3.6%

It will be observed that, despite the availability of water transportation at lower than All-Rail rates, about 10% of the Cellucotton traffic and about 15% of the Johnson traffic was forwarded via All-Rail in the summer season.

The division of the shipments between carload and less than carload is shown by the following tabulation:

Via	Canadian Products Company Ltd. Carload	Canadian Products Company Ltd. Less-Carload	Cellucotton Johnson & Johnson Ltd. Carload	Cellucotton Johnson & Johnson Ltd. Less Carload
All Rail ...	94	41	14	1068
Rail-Lake-Rail	54	66	11	1179
Water and Rail	32	..	3	5

It will be seen, therefore, that the bulk of the shipments which moved via water routes was via the Rail-Lake-Rail service, a service which originates and terminates the traffic on the rail lines and on which the water haul is part of the railway's own water differential routes.

In so far as the division of the revenue on such traffic is concerned it is indicative that the total charges paid by the shippers for all shipments were $88,301.27 of which amount the railway's proportion was $78,544.24 or 89%; the water lines' proportion from the Rail-Lake-Rail traffic was $5,871.21 or 6½%; the water lines' proportion of the Water and Rail traffic was $3,885.72 or 4½%; therefore, the water lines collectively secured only 11% of the total revenue but carried about 50% of the total traffic.

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It should be borne in mind that the water lines participated in about 50% of the 18 months' traffic of which 7 months were in the winter season when navigation is closed and 11 months were in the summer. As the "All-Rail" routes only obtained about 10% of the Cellucotton and 15% of the Johnson traffic in the season of navigation it is of interest to note that on the traffic carried by the water routes on which accrued a total revenue of $41,910.63 the rail lines' proportion was $32,153.70 or 77%; the water lines' proportion for Rail-Lake-Rail service was $5,871.21 or 14% and of the Water and Rail service $3,885.72 or 9%.

It should be pointed out that to the destinations covered by these agreements rail service is a necessary part, no matter how the shipments may be routed. It is the policy of the railroads to exact their full local rates on traffic they receive at the Head of the Lakes and on traffic which moves via the railways' own differential water routes, i.e. Rail-Lake-Rail, a basis of divisions of revenue is in force which does not favour the Western lines to the same extent as the revenue received from Water and Rail traffic.

In order to obtain some indication of the possible effect upon the carriers' revenues by the making of the agreements, the data were recast as to shipments made within the 18 months' period upon the assumption that the method of shipment would be re-arranged to obtain the fullest advantage of the agreements. This would involve the consolidation into carloads the less than carload lots and, in the case of Canadian Cellucotton Products Co.Ltd., the segregation of their shipments of "Tissues, Handkerchiefs and Neck Strips" into straight carloads of 20,000 pounds - a method which they appear to have adopted since the change of classification on February 12, 1940, when such commodities were accorded 4th Class rates instead of a commodity rate the equivalent of 2nd Class. I am fully aware that commercial necessities may dictate, at times, a different method of shipment, consequently I would consider this as representing a maximum possibility rather than the actual result.

Based on this premise, it would appear that the rail lines would have carried, for Canadian

Cellucotton Products Co. Ltd., 1,277,679 pounds more traffic between Niagara Falls, Ont., and the Head of the Lakes for an additional revenue of $1,822.03 or at an average rate of 14.3 cents per 100 pounds; and would have carried, in the same way, from Montreal for Johnson & Johnson Ltd., an additional 619,497 pounds, but would incur, by reason of the agreement, a loss of revenue of $8,883.02.

Both agreements were submitted for approval simultaneously and, from the evidence, it seems quite evidence that each is complementary to the other - both companies shipping similar goods. Therefore, considering the two agreements collectively in order to gauge the effect upon the carriers' revenues the following tabulation is illustrative:

	Pounds	
Total weight shipped	3,828,453	
Shipped "All-Rail"	1,931,277	
Shipped via Water Routes	1,897,176	
Total "All Rail" charges at present rates	$46,390 54	
Total "All Rail" charges under agreements	36,498 04	
Reduction on All-Rail revenue		$9,892 50
Water traffic by All-Rail at agreement rates	$36,431 10	
Less rail revenue received (present rates)	32,153 70	
Additional rail revenue by diversion of water traffic to All-Rail		4,277 40
Shrinkage in rail revenue as result of agreements		5,615 10
Less revenue received by the C.P.R. Lake service from carriage by water		1,445 89
Total loss of revenue to railways		$7,060 99

Therefore, assuming that all of the 18 months' traffic had moved under the agreements, the net result would have been that the All-Rail routes would have also carried the proportion which moved via water routes and would have foregone $7,060.99 revenue as well.

It should not be taken from what has been stated that the carriage of the traffic on the terms stipulated in the agreements would be unremunerative to

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the railways. The traffic covered thereby is what might be called high grade and its carriage at the agreed rates would, no doubt, yield a greater margin of profit to the rail carriers than the average earned from the carriage of all traffic. What we are, however, required to consider is what the effect is likely to be upon the net revenue and not where there is still a profit. It is a cardinal principle that the rates on high grade traffic must bear a share of the cost of moving those of lower grade, consequently the expedient of securing the complete carriage of the higher grade at the risk of considerable loss of gross revenue must lead to the conclusion that the indicated loss is totally in the net revenue.

There would be, undoubtedly, advantages to the rail carriers in the economies resulting from increased car loadings, longer average haul and reduced station handling expense but it is extremely doubtful that such economies would offset the loss in revenue.

It has been calculated that the average revenue per ton mile accruing to the rail lines from their proportion of the total charges is 3.64 cents and that, under agreement rates, it would have been 2.65 cents, or a reduction of 27.2% which I feel is a reduction of that amount in railway net revenue from this traffic.

In view of the conclusions which I will make later I do not wish too much stress to be laid upon the remarks I have made concerning the net revenue position of the railways; for one thing it has been contended, since the hearing, that a large percentage of the less than carload shipments of Johnson & Johnson will continue to move at tariff rates and not under the agreement. This admission on the part of the railways will, to some degree, modify both the estimates of reduced revenue and of the possible economies in operation, as well as detract from the purpose of making the agreement; it is also contradictory to the statement made by counsel at the hearing to opposing counsel for the water lines wherein, in answer to the question as to what percentage of traffic would be diverted from water to rail by the agreement, he stated "It is 100 per cent and you can assume that everything you have carried will be lost." I am also aware that

that there is no present obligation upon the shippers to adhere to rail shipment and that they might choose to intensify movement in navigation periods; in that case the rail lines might be adversely affected on their Eastern lines - but the water routes have always been available to the shippers and I think it can be inferred that the shippers have considered it to their advantage to use rail carriage even in the season of navigation.

Canada Steamship Lines Ltd.,and Northern Navigation Co., its wholly owned subsidiary,and Northwest Steamships Ltd., the objecting water carriers are licensed carriers and as such are subject to the terms and provisions of the Transport Act,1938, except as to the transport of "goods in bulk."

The rates for transport by such licensees of goods involved in each of the Agreed Charges are subject to regulation under the terms and conditions of the Transport Act, 1938, which regulation is similar in scope and effect as is imposed upon the rail carriers by the Railway Act.

The Canada Steamship Lines Ltd., operates regular package freight services on the St. Lawrence and Great Lakes Waterways to Fort William and Port Arthur. It also performs some of the water service of the regular rail-water-rail routes of the railways, either by itself or by its wholly owned subsidiary the Northern Navigation Co.Ltd.; the latter being the integral part of the Canadian National Railways' rail-water-rail route. These two companies have been participating in the carriage of the goods of the shippers mentioned in the agreements. The Northwest Steamships Ltd., occupies a similar position to that of the Canada Steamship Lines, but has not actually engaged in the carriage of traffic of the shippers parties to the Agreed Charges, but claims to be vitally concerned.

The objections of Canada Steamship Lines Ltd., and Northern Navigation Co. Ltd., to the approval of the two agreements which we are asked to approve may be summarized briefly as follows:

1. Part V of the Transport Act, 1938 (Agreed Charges) was designed only for the purpose of permitting regulated carriers to meet competition of unregulated carriers - a purpose which is not stated

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in these applications - in fact, such unregulated carrier competition is not present in these cases.

2. The proposed agreements reserve to the rail carriers 100% of the shippers' traffic to the destinations concerned and, if approved, will effect the withdrawal of the traffic from the field of competition by regulated carriers generally and will have an adverse effect on the water carriers' revenues.

3. Withdrawal of traffic from regulated carriers' competitive field, either for a specific or unlimited period of time, is contrary to the expressed purposes and intent of the Transport Act, 1938, and would not be in the national interest.

4. The alleged object to be secured can be attained by medium of published tariffs.

All of the objections raised by Northwest Steamships Ltd., to the approval of the agreements are included in the foregoing objections and need not be repeated here.

Counsel for the applicants and the opposing water carriers directed argument to the question of the grounds on which a carrier might object to the approval of an agreed charge, and as to what the Board could properly have regard to, on an application for approval under s.35 of the Transport Act, 1938.

Section 3 5(5), of the Act provides that on an application to the Board for approval of an Agreed Charge:

"35(5)(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."

And by s.35(9), where the Board has approved an Agreed Charge without restriction of time, any carrier "may, at any time after the expiration of one year from the date of the approval, apply to the Board for withdrawal of its approval of the agreed charge, and, upon any such application, the Board may withdraw, or refuse to withdraw, its approval ...."

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The provisions of the Act referred to give to "any carrier" two rights, namely: A right to object and to be heard in opposition to an application for approval and, after approval, under the circumstances stated, to apply to the Board for withdrawal of its approval of the Agreed Charge. In these respects Part V of the Transport Act, 1938, differs from Part II of the Road and Rail Transport Act, 1933, c.53 of 1933 (British) to which our attention has been directed, and which contains corresponding Agreed Charge provisions. Under the British Act an individual carrier is not given any right to object either before or after approval.

Part V of the Transport Act, 1938, does not stipulate on what grounds a carrier may object to approval, nor can I find anything in the Act which limits his grounds of objection. In my opinion he is not limited as to grounds of objection.

The applicants contend that on an application under s.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 s-s.(13) the Board is particularly required to have regard to.

I cannot agree with the restricted interpretation thus suggested. Subsection (13) of s.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 s-s.(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.

I shall now proceed to consider the specific grounds of objection of the opposing carriers.

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The first objection is in substance that the Board should establish the principle that approval will not be given to an Agreed Charge where no competition exists from unregulated transportation.

While, in the present cases, it is not shown or contended that the carriage of the traffic involved is subjected to unregulated carrier competition, I cannot find any provision in the Transport Act denying any carriers subject thereto the privilege of making Agreed Charges. In fact it is quite clear that the provisions of Part V do not permit of such an interpretation and that the presence of competition by an unregulated carrier is not essential to entitle a carrier, within the meaning of the Act, to make an Agreed Charge and submit it to the Board for approval. On the other hand, as I have already stated the objecting carrier is not limited as to grounds of objection; and by s-s.(13) of s.35 of the Transport Act the Board is required to have regard to all considerations which appear to it to be relevant.

In my opinion the presence or absence of unregulated competition may, nevertheless, be a relevant consideration, and the absence of such competition in these cases renders more important the consideration of the effect upon the carrier's revenue and the object to be attained by the making of the agreements.

The second objection relates to the withdrawal of traffic from the field of open competition amongst regulated carriers and the consequent effect the approval of the agreements would have upon the water carriers' business and revenues.

From the evidence and the study which has been made of the revenue position of the carriers, based on the traffic data previously referred to herein, it is quite clear that the water carriers stand to lose as much as 100% of the traffic they formerly enjoyed and it must be remembered that in accomplishing this purpose the applicants stand to lose a considerable amount of their revenue and would probably only achieve the complete carriage of the shippers' traffic.

The water lines participated in the carriage of about 50% of the shippers' traffic but secured

only 11% of the revenue, of which 6½% was derived from performing the water link in the rail-lake-and-rail movement. This in round figures meant about $10,000 total revenue to the water carriers all of which may be lost to them.

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 s.36 and that this raises an implication that it is not a matter which the Board should take into consideration under s.35(13).

Under s.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 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 s-s.(5) of s.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 s.36.

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As to the third and fourth objections, I have dealt already with the question as to whether the object can be secured by means of a tariff of tolls under the Transport or Railway Acts and no further comments appear to be necessary at this time. The question as to the withdrawal of traffic from open competition amongst regulated carriers has also been sufficiently covered. The only other point of objection is the contention that approval would not be in the national interest. In view of what has already been stated I do not think it necessary to deal any further with the question of national interest.

It was also urged on behalf of the objecting water carriers that because of what is stated in s.3(2), of the Transport Act, 1938, the Agreed Charges should not be approved; and that to do so the Board would act contrary to the mandate of the statute. Subsection (2) of s.3 provides that - "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."

As already stated, the railways under the provisions of the Railway Act had for a long time been subject to strict regulation. The Transport Act, for the first time, brought under regulation, to a degree, transport by water carriers and air carriers, and the Legislature by s-s.(2) of s.3 has laid down a general principle or policy for the direction and guidance of the Board in the administration and interpretation of the two Acts, with the object of co-ordinating and harmonizing the operations of all three classes of carriers.

The Board dealt with the duties imposed by s.3 (2) in Re Canadian Airways Ltd., Mackenzie Air Service Ltd. & Northern Alberta Rys. (1941), 52 C.R.T.C. 321 at p. 332, and said: "We are of the opinion, therefore, that the powers, referred to in s. 3(2) of the Transport Act, 1938, are to be exercised by us in such manner as not to subordinate any advantages enjoyed by one class of carrier for the benefit of any other class of carrier, and that, in so doing,

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we should and will continue to apply remedial action under the same principles as we have applied heretofore in our administration of the Railway Act."

In the matter there considered there was no question involving Part V of the Transport Act. It must not be overlooked that s.35 states that "Notwithstanding anything in the Railway Act, or in this Act, a carrier may ..." Consequently I do not think that the provisions of s.3(2) override any of the provisions of Part V. There are, undoubtedly, sufficient discretionary powers conferred on the Board by s.35(13) to assure fair treatment to all carriers subject to the regulative powers of the Board.

The Canadian Industrial Traffic League, by letter to the Board, objected to the approval of the Agreed Charges, but were not represented at the hearing. The ground of objection was that the League "is opposed to the so-called 'patronage' clause in the Agreed Charge Agreements whereby one class of regulated carrier could contract traffic away from another class of regulated carrier, particularly as regards traffic within the territory covered by rail and water transportion." An objection similar to that of the Canadian Industrial Traffic League was raised by the objecting carriers by water, which objection has already been dealt with. It would, therefore, not seem necessary to add anything further.

It was urged by counsel that we should lay down some rule of interpretation to govern applications, of the nature now before us, in the future. As previously stated, 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. It is therefore not considered desirable to attempt to lay down precise rules, of general application.

After consideration of all the evidence placed before us, both the general evidence and that relating to each of the Agreed Charges, and what was submitted by counsel for the parties concerned, I have reached the conclusion that each of the applications should be dismissed. Orders will issue accordingly.

WARDROPE A.C.C. and MACPHERSON C., concurred.

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(B) Stone C.

(B) STONE C.: I have carefully perused the judgments prepared by my colleagues the Chief Commissioner, concurred in by the Assistant Chief Commissioner, also that written by the Deputy Chief Commissioner, on the application for approval by the Board of Agreed Charges Nos.11 and 12, submitted, on behalf of certain Canadian railroad companies, by the Canadian Freight Association, Montreal, Que., for the carriage of 100% of the business shipped by certain specified shippers from Montreal, Quebec, and from Niagara Falls, Ontario, to points in Alberta, Saskatchewan, and Manitoba, the application being made under the provisions of Part V of the Transport Act, 1938.

In two previous applications filed for approval by the same applicants for reduced rates from Montreal, Que., and from Niagara Falls, Ont., to specified points in Ontario and Quebec, the shippers undertook, under Agreed Charge No. 5, to ship by rail not less than 85% of the aggregate volume forwarded to the area specified, reserving 15% for boat service. Under Agreed Charge No. 6 the shipper undertook to ship by rail not less than 95% of the aggregate volume forwarded, the remaining 5% being reserved for emergency shipments and short haul highway transport: C.N.R. & C.P.R. v.Can.SS. Lines Ltd. (1940), 51 C.R.T.C. 185.

While majority and minority judgments were rendered on the application for approval of Agreed Charges Nos. 5 and 6, the Board was unanimous in its opinion that - "the object to be secured by the making of the agreement in question cannot, having regard to all the circumstances, adequately be secured by means by a special or competitive tariff of tolls under the Railway Act or the Transport Act". /p.190/

Within the Provinces of Ontario and Quebec the highway transport traffic is keenly competitive with the steam railways, and throughout the Provinces of Alberta, Saskatchewan, and Manitoba, within railroad areas, unregulated highway traffic cannot be regarded as on the same competitive parallel as in Ontario and Quebec.

In my opinion, those commodities carried under agreement, as proposed, with the intention of establishing a complete monopoly of a shipper's business,

could be well taken care of, as stated by the Chief Commissioner in his judgment, "by a special or competitive tariff of tolls under the Railway Act or the Transport Act, 1938, etc".

I am, to some extent, in agreement with the Deputy Chief Commissioner's opinion, as expressed in his judgment, regarding the use of the information as to railroad revenue filed subsequent to the hearing on Agreed Charges Nos.11 and 12, and find myself at variance with the analysis as recorded in the Chief Commissioner's judgment regarding the possible detrimental financial effect upon the railroad companies' revenues by enactment of the proposed Agreed Charges, as there are certain factors which, in my opinion, enter into railroad operating economy known to and exercised principally through the operating and transportation officials which are unforeseen or unknown when statistical computations are made, which are usually compiled from general averages, previous records, or speculative anticipations.

(B) Stone C.

The proposed Agreed Charges Nos.11 and 12, entailing a contractual obligation for 100% of the shippers' business over a large transportation field, have developed extensive study of these cases by the Board and its Officers, and, having regard to all that has been submitted, including oral evidence, and with due respect to difference of other opinions, I agree with the Chief Commissioner in the conclusions recorded in his judgment "that both applications be dismissed".

(C) GARCEAU D.C.C. (dissenting):- Agreed Charges 11 and 12 were submitted to the Board together and the record of the hearing was, as far as applicable, made to relate to each of the applications. Both were opposed by the Canada Steamship Lines and the Northern Navigation Co., its wholly owned subsidiary, also by the Northwest Steamships Co., mainly on the grounds that the above mentioned water carriers would be adversely affected, the object of the agreed charges being to gather to the applicants 100% of the traffic of the contracting shippers, the water carriers having up to date enjoyed a rather substantial part of their traffic.

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At the hearing, the practice heretofore followed by the Board not to question statements of the

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railways as to the effect of the agreed charges on their net revenues when such statements were not challenged was disregarded and they were asked by the Chief Commissioner to do so, as follows:-"Please understand that I am not questioning in any sense the correctness of the statement made by counsel but as far as I am concerned, I would like, if you have an officer, to be told something about the probable effect on the net revenue ..."

Counsel for both railways registered strong protests and claimed that the rates of the agreed charges should be considered as the other rates filed with the Board, which are accepted prima facie to be reasonable and not discriminatory unless challenged.

Mr. Knowles, Commissioner of Traffic for the Canadian National Rys., was called to satisfy the Chief Commissioner's request. After his long experience with the making of tariffs had been established, he was asked the following questions:

"Q. Now, you have had something to do with the formulation of the agreed charge with Johnson & Johnson Ltd.? - A. Yes. Q.... Who negotiated, so far as the C.N.R. is concerned, with the shipping parties to this agreement? - A. I did. Q. And did you examine thoroughly the traffic field involved in this? - A. Yes, sir ... Q. Dealing with both of these applications what would you say was the object from the standpoint of the railways to be achieved? - A. To increase the revenue of the railway and to make sure that we get the traffic if we can at a certain rate. Q. You say to increase the revenue to the railway? - A. yes, sir. Q. But, how would that be brought about? - A. By the fact that we could carry the traffic all rail between the east and Port Arthur, eliminating the water haul from Sarnia to Port Arthur. Q. Was there any water haul of any part of this traffic? - A. Yes, there was. Q. And your object was to do what? - A. First of all, to secure the traffic for the rail lines, for 100% movement by rail, and second, to increase the car loadings. I mean the quantity which can be loaded into a car, and reduce the number of cars necessary to carry this traffic .... Q. What would be the further object of getting the traffic, increasing your car loadings and increasing your carloads? To what would that lead?

A. To more net revenue. Q. You have considered the question of net revenue? - A. Yes, sir. Q. Are you in a position to make a statement on the resulting revenue from this agreed charge? - A. Yes, I think I can give the Board some information which will show we make a little more money out of it. Q. I just want you to make a statement to the Board with respect to whether or not as a result of this agreed charge the net revenue of the C.N.R. will be improved? - A. That is a correct statement."

This evidence was not affected by cross-examination nor by adverse witnesses, though Mr. Rand had asked: "If there is any other consideration which might appear to the Board to be relevant, I should be very happy to go into it with the witness."

These agreed charges had been filed with the Board and known for months to its officers and the water carriers.

However, though the evidence had been declared closed at the hearing, with the right only to counsel for railways to file submissions or data on the exhibit filed and evidence given by Mr. Cornell, the applicants and the water carriers were asked at a later date to give data as to all traffic carried during the 18 months preceding June 20, 1940, as to weight, cost of transportation, etc. The data were given by each party but were not communicated to the opposing parties, being considered by the carriers as rather confidential.

On these data, a report was made to the Board by its officers and the judgment of the Chief Commissioner is based on this report. Because the data were considered confidential, the Board, on October 17, 1941, had the following letter written to Mr. W.M. Matthews, Chairman, Canadian Freight Association, and to Mr. Hansard, counsel for the water carriers:

"Reference is made to our letter to you of October 2, 1940, requesting the preparation of certain statements in the manner as per sample marked 'A' enclosed in the letter. A request was at the same time made to Mr. Hansard for similar information from the Steamship Companies concerned.

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"The statements and information requested were furnished by you on behalf of the railways and by Mr. Hansard for the Steamship Companies.

"While, as it is understood, the statements were to form part of the record, some of the correspondence on our file indicates that the statements were for the confidential information of the Board, and that a copy of same was therefore not furnished to the opposite party. I am directed to state that it is difficult for the Board to appreciate that the statements are part of the record and at the same time be treated as only for the information of the Board.

"The statements referred to purport to cover the traffic of the shipper for the eighteen months' period of January 1, 1939, to June 30, 1940, and show date of shipment, destination, description of commodity; weight of each commodity, total weight of shipment, rate charged and charges assessed by the carrier.

"I am directed to state that if the statements are part of the record the Board considers it essential that it make use of some of the information (not in detail) contained in the statements referred to, such as the amount of traffic carried by each of the carriers in the eighteen months' period, the revenue earned by each from such carriage, and particularly in consideration of the probable effect of the agreed charge on the net revenue of the applicant rail carriers.

"In respect to the effect on the net revenue, from the statements referred to it is quite feasible to make a close approximate estimate of the revenue that would have been derived by the railways had all of the traffic of the shippers during the eighteen months' period moved "all rail" under the rates specified in the agreed charges, and to compare this with the revenues earned by all of the carriers both rail and water for the carriage of the goods of the shippers in the same period. This is in greater detail one of the purposes for which the Board may wish to make use of the statements filed by the rail and water carriers.

"As copies of the said statements filed with the Board were not exchanged between the opposing

parties, in order to avoid any misunderstanding, I am directed to ask if you are agreed that the statements were intended to form part of the record and that the Board make such use of the statements and information contained therein as it may consider necessary."

To this letter, Mr. Hansard replied, on October 25, 1941, giving this conditional consent:

"... Our understanding, in other words, was that while the information filed would form part of the record and could be used by the Board in arriving at its decision, the details of individual business carried on by any one shipper with any one carrier could not be made available to competing carriers or other shippers or the public generally.

"So far as we are concerned therefore, there can be no objection to the Board making use of the information furnished it in these statements in the general way outlined in your letter to Mr. Matthews."

And, on October 31st, the C.N.R., through their counsel, Mr. Rand, did not give any consent but rather objected strenuously to these data being used, in the following terms: "From your communication to Mr. Matthews, I gather that you are stressing the question of the effect of the agreed charge on the net revenue to the rail carriers and that this probably has assumed the importance of the determining factor. With the utmost respect, I desire, as strongly as possible, to express my dissent from such an attitude. It would be most dangerous - from the standpoint of sound judgment - so to treat the point of net revenue because there are so many variable factors involved which prevent its ascertainment otherwise than an uncertain estimate ... "

However, on December 2, 1941, Mr. W.M. Mathews sent the following letter:

"Referring to your letter of October 17th, files 40994.11 and 40994.12, in connection with Agreed Charge - Johnson & Johnson, Limited, et al, and the Canadian Cellucotton Company Limited.

"The shippers involved in these applications

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have been approached in connection with the point raised in your letter, and have expressed no objection to the statements furnished with my letter of December 27th, 1940, being considered part of the record and the statements and the information contained therein may, therefore, be used by the Board as considered necessary."

Before dealing with the merits of the judgment, I believe it is proper to consider whether the evidence, data filed ex parte after the hearing was closed, and our officers' memorandum based on such data, are regularly and legally part of the record.

The Board is a Court of Record - (s. 9 of the Railway Act). See also s.33(3), which is as follows: "The Board shall, as respects the attendance and examination of witnesses, the production and inspection of documents, the enforcement of its orders, the entry on and inspection of property, and other matters necessary or proper for the due exercise of its jurisdiction, have all such powers, rights and privileges as are vested in a superior court."

It is the general practice of all Superior Courts that all documents, data or submissions filed must be interchanged or communicated to the litigant parties.

The litigants are entitled to know all of any document filed and no part of any exhibit or document can be considered confidential against one of the parties.

As it appears by the Board's letter of October 17, 1941, the data filed by the parties were not communicated to the others. Moreover, the Board asked that part of these documents be still considered confidential and the consent by the water carriers was qualified.

There was no consent given by counsel for the rail carriers and the consent given by Mr. Matthews, Chairman of the Canadian Freight Association, concerns only the shippers.

I will add: any consent given on such a letter could not cover the irregularity or the illegality of the production of the exhibits because the letter

of the Board did not specify for what purpose it would use the data. The suggestion as to their use is rather misleading if we consider the main reason of the judgment which was not even mentioned in the letter, but another suggested.

A consent to be valid must be on specific and determined facts and considerations. But, in this case, all the facts which might be covered by such a consent were not known or even mentioned to the consenting parties and the data supplied by the different carriers were unknown to the other carriers; but, even if these various letters can be considered as a consent, such consent can not cover the memorandum prepared by our officers on data filed ex parte and such memorandum can not be considered to be for the use of the Board only.

It would have been different if the data had been filed by the parties before or at the hearing, with the opportunity to each of the parties to cross-examine the witnesses filing such exhibits, and to file contrary evidence. Then, the Board could properly have had our officers prepare a memorandum on the exhibits or evidence filed. But, in this instance, I submit, our officers must be considered as ordinary witnesses filing exhibits and subject to the rights of the parties to question or challenge the data and the accuracy of the submissions or conclusions.

I am aware that the Board can act proprio motu and ask for further evidence after the hearing, but in such instance it must act as any other Court would do, and either re-open the hearing or direct that the further evidence be filed and made known to the parties and permit the parties to file additional evidence and submissions. The same rules apply, mutatis mutandis, under s.69 of the Railway Act. The regulative authority of the Board over the management of the railways adds to the obligation of the Board to see that the management of the railways should be aware of any submissions or data, especially in this instance.

On account of this function, at the hearing the Board was asked by Mr. Rand, after the evidence of Mr. Knowles had been given: "If there is any other consideration which might appear to the Board to be relevant, I shall be very happy to go into it with the witnesses."

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And by Mr. Walker: "If your traffic officer said to you, Here is a rate which is pretty close to the line and I am not sure that the railways will make any money if they put in this freight rate, then the Board would very properly say to us: Our traffic officers suggest that this rate is too low and we want some evidence as to the net revenue of the carrier and the position of the railways under the application of this particular rate."

These suggestions of counsel for the railway were proper because of the regulative function of the Board and, as aforesaid, because the practice followed by the Board previously concerning evidence on agreed charges was then changed, the Board having up to the time of this hearing followed the same practice as in England in similar instances, and its own concerning the filing of rates: the assertion by the officers of the railways being considered sufficient evidence unless challenged.

There is, besides, another cogent reason why the railways should have received a copy of our officers' memorandum: Part V of the Transport Act was enacted to give the privilege of making agreed charges especially to the railways. It is the duty of the Board to give to the railways every opportunity to enter into such agreements and to show cause why they should be approved: the opinion of the railways to prevail when there is doubt; for effect must be given to law and confidence placed in the competence of the railway officials to promote and develop traffic and increased revenues.

In the Halifax Grain Rates Case (1930), 37 C.R.C. 247, it is stated (at p. 252):

"The powers which are conferred upon the Board are regulative and not managerial. It is not the Board's function, as delegated by Parliament, to make rates to develop business, but to deal with the reasonableness of rates, either on complaint or of its own motion, British Columbia News Co. v. Express Traffic Assn., 13 C.R.C. 176.

"The Board must find the scope of its powers within the Railway Act or such other Act of Parliament as may be found to be pertinent as, for example, the National Transcontinental legislation. It has been decided that the railways have powers in regard

to developing traffic which are not held by the Board; that is to say, the railway, taking the risk of profit or less, may put in a rate to develop traffic which it would not be justifiable for the Board to install. The railway may put in development rates with a view to increasing traffic, but such rates, I submit, the Board has no power to put in."

The object of Parliament in enacting Part V of the Transport Act was not to restrict the discretionary powers of the railways to issue rates, but to add to such powers: the agreed charges being special rates, to secure adequately all or a specific part of a shipper's traffic. (s.35(3) of the Transport Act.)

I submit that the evidence filed after the hearing and the memorandum of our officers are irregulary if not illegally part of the record.

From the data furnished ex parte giving information as to all the goods carried by rail and motor carriers during the 18 months preceding the agreements, the technicians of the Board have prepared a memorandum and different schedules, stating that if all the goods carried during that period had been carried under the rates mentioned in the agreements, the revenues of the railways would have been $7,060.99 less and the water carriers would have lost a revenue of about $10,000. The following admission that the railways would have realized substantial economies in transportion costs on account of increased carloadings, and less handling costs, etc., would disagree with the above statement. I quote (pp. 12-13 of memorandum):

"All of the above remarks should not, however, create the impression that the average revenue per ton mile on all the traffic, even though it will be reduced through the agreement by 27.2%, has reached a level considered as unremunerative to the railways. Far from it, the traffic covered by these agreements is what might be called high-grade traffic on which the railways are able to earn far more than their out-of-pocket cost for handling it. Compared to the average revenue per ton mile for all commodities now moving by rail which today stands at about 1c. per ton mile, it will be seen that the participating carriers to the agreement can still

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show quite a reasonable profit on the handling of the commodities concerned in the agreement.

"It is reasonable to assume that the cost of moving the traffic under the proposed agreements will be somewhat ameliorated. The factors which enter into this cost study cannot be estimated without first obtaining considerable additional detailed information from the railways which would not appear to be a necessary procedure in view of the remarks stated herein. The main factors involved in such cost study would necessarily take into consideration the following :-

"(a) the average weight of revenue freight per car and as a corollary the average revenue per carload.

"(b) the reduction in shed handling costs brought about through the consolidation of less than carload shipments into carload lots. This item of expense is quite large constituting in most instances over 50 per cent of the total cost of moving less than carload traffic.

"(c) reduction in car miles as a maintenance of equipment savings through the use of a smaller number of cars to handle not only the present but the additional traffic already referred to.

"(d) the setting up of the proper proportion of return empty movement of car equipment which should be charged to the traffic under consideration.

"(e) the actual comparative of road haulage costs under the two different sets of circumstances, i.e. the present versus the proposed methods".

It would appear by the remarks contained herein that the memorandum does not even give a definite picture of what would be the exact effect of the agreed charges if future traffic under the agreed charges would be exactly the same as in the previous period referred to; and from this incomplete report, conclusions are drawn in the judgment on the effect of the agreed charges, not only on the revenues of the applicants, but also of the opposing water carriers as well; that competitive rates could secure the traffic, the "object" of the Agreements.

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The first conclusion of the judgment is as follows: "After consideration of all of the evidence placed before us, and following a study of the matter, I am of the opinion that the object to be secured by the making of each of the agreements can be attained by a special or competitve tariff of tolls under the Railway Act or the Transport Act, 1938, in respect of all goods covered by the agreements with the exception of the commodities described as 'Paper Facial Cleansing Tissues, Handkerchiefs and Neck Strips' in the agreement for Canadian Cellucotton Products Co. Ltd. for which a minimum carload weight of 20,000 lbs. is provided. In the case of the exception, above noted, the provision in the agreement is that these commodities will continue to pay the same rates as are at present published, namely 4th Class rates, but the agreement has the effect of restricting the movement to all rail routing at the all rail rates. The shipper has agreed to give this traffic to the rail carriers and deprive itself of the use of lower rates by water; in a sense, therefore its agreement indicates a quid pro quo for concessions in respect of the other commodities covered by the agreement."

If any of the commodities covered by the agreements cannot be "adequately secured" by a competitive or special tariff of rates and/or tolls, as admitted in the above declaration, I submit that the Board has no authority, under Part V of the Transport Act, to refuse their approval because a special rate would secure part of the commodities.

The Board is directed to consider the agreement as a whole: "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 adequately be secured by means of a special or competitive tariff."

The object to be secured in these agreements is the traffic of all the commodities mentioned in the agreement, and certainly not only those carried under the lower rates. The lower rates were granted to induce the shippers to accept the higher rates on facial tissues, and in the words of the judgment, "deprive themselves of the use of lower rates by water routes". Page 18 of the memorandum says: "Upon the premise that the rates in the Agreement

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would be published in a tariff and that the rate via the 'Water and Rail' route would be as per column 2 the Schedule shows that only the carload 'Tissue' traffic could be handled by that route in competition with 'All Rail'. Page 4 of the Schedule makes this apparent. In the case of the 'Tissue' traffic there would be a balance of 60c per 100 lbs., left available for the steamship line after paying to the Western railways their local rate. This 60c is only 3c less than the local rate of the water line from Niagara Falls to the Head of the Lakes; it is the same proportion as they obtain under present tariff arrangements and it is logical to assume that it is satisfactory to the steamship company. Insofar as the other commodity groups are concerned, Page 4 of the Schedule plainly shows that the steamship company would, in practically every case, be compelled to shrink its local rate to the Head of the Lakes to such an extent that it would not be possible to earn sufficient revenue to pay for the lake haul, and in a number of cases they would have to haul the traffic to the Lake Head for nothing and pay an additional amount to the Western railways."

It seems, in my opinion, evident on account of the admission of the judgment and the remarks of the memorandum, that a competitive rate could not secure adequately all the traffic of the commodities mentioned in the agreed charge and thus could not attain the object of the agreement as required by s.35(1).

It seems that the incomplete data requested were tabulated in the different schedules not to find "if the railways would profit by the agreements", but if the objecting carriers would lose more than the railways would profit. This opinion is corroborated by the interpretation of s. 35(13) in the judgment: "There is sufficient discretionary power conferred on the Board to assure fair treatment to all carriers subject to the regulative powers of the Board." This intention is again manifest in the findings as to the effect of the agreed charges on the net revenue of the railways.

The judgment says: "I do not wish too much stress to be laid upon the remarks I have made concerning the net revenue position of the railways." and the judgment adds, a few pages after: "It is

quite clear that the water carriers stand to lose as much as 100% of the traffic they formerly enjoyed, and it must be remembered that in accomplishing this purpose the applicants stand to lose a considerable amount of their revenue and would probably only achieve the complete carriage of the shipper's traffic."

The memorandum speaks quite differently, p.12, above noted, and the judgment corroborating the memorandum, says: "It should not be taken from what has been stated that the carriage of the traffic on the terms stipulated in the agreements would be unremunerative to the railways. The traffic covered thereby is what might be called high grade and its carriage at the agreed rates would, no doubt, yield a greater margin of profit to the rail carriers than the average earned from the carriage of all traffic."

But it adds as a correction: "What we are, however, required to consider is what the effect is likely to be upon the net revenue and not whether there is still a profit. It is a cardinal principle that the rates on high grade traffic must bear a share of the cost of moving those of lower grade, consequently the expedient of securing the complete carriage of the higher grade at the risk of considerable loss of gross revenue must lead to the conclusion that the indicated loss ($7,060.99) is totally in the net revenue."

This last conclusion seems to be denied by the following paragraph: "There would be, undoubtedly, advantages to the rail carriers in the economies resulting from increased carloadings, longer average haul and reduced station handling expense but it is extremely doubtful that such economies would offset the loss in revenue."

Moreover, it is to be noted that all commodities mentioned in the agreements are "high-grade traffic" and the above "cardinal principle" applies only when there is lower grade traffic, the cost of transportation of which is borne by the high-grade traffic. It is evident that the indicated loss in gross revenue in this instance is not and cannot be "totally in the net revenue."

Now, if we refer to Item "b" of the part of

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the report above quoted (pp.12 and 13) it reads: "The reduction in shed handling costs brought about through the consolidation of less than carload shipments into carload lots. This item of expense is quite large constituting in most instances over 50 per cent of the total cost of moving less than carload traffic."

Can it not be expected that the loss in gross revenue could be more than offset by the economies realized by the agreed charges if we consider war conditions, the necessity of car space and the taxation to their utmost of the facilities of the railways to handle L.C.L. traffic. Our technicians had not the data to fix the amount of the economies to be realized by the agreements, but the railways had, and Mr. Knowles affirms: the railways would make more money, in other words, the economies would offset the loss in revenue. The amount of $7,060.99, given as the amount of the losses of the railways, is not exact; it is $5,615.10. The judgment and the memorandum added to the supposed losses of the railways the supposed losses of a water carrier, a subsidiary of the C.P.R. railway, $1,445.98, which amount in regard to agreed charges cannot be computed as a loss to the railways even if it is a loss to the C.P.R. railway as owner of the water transportation company affected.

From the evidence, the memorandum, and a certain dictum of the judgment, we must conclude that the agreements would permit the railway to "secure traffic" which it could not by competitive rates; also that the agreed charges would be remunerative to the railways, increasing the carloadings, permitting the use of cars and all the facilities available to handle more traffic generally.

Is the judgment justified under the provisions of Part V of the Transport Act in assuming the protection of the water carriers and refusing the approval of the agreed charges because "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."

Section 3(2) of the Transport Act directs the Board to co-ordinate and harmonize the different transport systems, but s. 35(1) overrides this s.3(2) as admitted in the judgment, and I submit that the discretionary powers given to the Board by s.35(13) cannot override any of the formal provisions of Part V.

The discretionary powers of the Board must be inferred from the provisions of Part V: they are given to the Board for the enforcement of Part V and any of its provisions, but certainly not to restrict or prevent their operation or to give a right not mentioned in the provisions.

If "potential losses" to competing regulated carriers were a reason against the approval of the agreed charges, s.35(1) could not have any effect or come into operation, for its very object is to permit regulated carriers to withdraw from the competing field of carriers, whether regulated or not, any or all of the traffic of any or more shippers, - except as to railways which are obliged to join - and it stands to reason that the operation of s. 35(1), or that any agreement made under its authority, will mean potential losses to competing carriers.

The potential losses to competing carriers nor the benefit to applicants cannot be computed even approximately because, by s.35(6), other shippers of the same commodities may join before or after the approval of the agreed charges; and this impossibility is another peremptory argument against the relevancy to be considered against approval.

However, the exception in favour of the railways under any rule of legal interpretation means that the other carriers are not included in the exception.

When such potential losses are the logical result of the application or operation of a formal legal enactment, the Board, a Court of Record with full powers to decide any question of law, cannot have any judicial discretion to prevent the proper operation of an act or any of its provisions. The discretion of the Board as of any other Court is always judicial, however broad it may be, never legislative. In this instance, the Board is

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specifically also precluded from considering potential losses by the provisions of s.36, which is the only enactment of Part V dealing with losses to regulative carriers and indicating when and by whom, in what circumstances such losses to competing carriers are to be considered.

The omission in s.35(1) and the inclusion in s.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 s.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 s.15 of the Interpretation Act, R.S.C. 1927, c. 1. This s.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 any thing which Parliament deems to be for the public good, or to prevent or punish the doing of any thing 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 s.35(1); and that protection is due to the other regulated carriers affected by the agreed charges only when as mentioned in the Act.

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I submit that the provisions of s. 35(1) and of s.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.

It is evident from the memorandum and the judgment that the railways could quite easily urge that in the future a far greater amount of traffic might be lost to them if the shippers decided to utilize the cheaper water routes to a greater extent. In that case, they would or could lose the haulage on their Eastern lines and have to be content with what earnings would result on their Western lines. It is true that the shippers have had the facilities available to them to do this in the past (and the memorandum shows that they have availed themselves to a certain extent) but the fact remains that a greater intensity of water route shipments is possible and that it would adversely affect the railways.

If the Board is to consider the effect the agreed charges is likely to have on the net revenue of the applicants, it is bound as a corollary also to consider the effect the refusal to the approval of the agreed charges is likely to have on their revenue.

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 the effect 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

No. 2
Reasons for judgment of Board of Transport Commissioners re Canadian Freights Association vs Canada Steamship Lines

6th January 1942

(C) Garceau D.C.C.

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 law .... is always speaking ...,the same shall be applied to the circumstances as they arise, so that effect may be given, to each Act /Part V/ and every part thereof, according to its spirit,true intent and meaning" (Interpretation Act, s.10).

By s.35(9)(c), any carrier may at any time after the expiration of one year after approval of the agreed charge, apply to the Board for the withdrawal of its approval,but only when the Board has approved an agreed charge without the restriction of time, but this right is given only to the contracting carrier and shipper. As under the section "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."

The only protection of the contracting parties is the intent of the above provisions,and from the silence of the Act we must infer that, even after approval of an agreed charge, whatever losses have been suffered by competing carriers, the Board has no more jurisdiction to consider such real losses than it has to consider potential losses - Qui dicit de uno, megat de altero - Where the terms of a statute express the intention of the Legislature with sufficient clearness the Court will not consider the reason of the law, nor will it interfere with its execution on the ground of the inconvenience and danger to the public which may result therefrom (Montreal v. Standard Light & Power Co./1897/ A.C. 527).

I would approve the Agreed Charges which will, in the words of the judgment, "no doubt yield a 'greater margin' of profit to the rail carriers than the average earned from the carriage of all traffic;" I would suggest that the practice followed in England concerning the approval of such charges be followed by the Board.

The British statute has been passed for the same reasons as Part V; the provisions of both are virtually the same except that there is no provision in the British statute entitling a carrier to object against the approval, but as aforesaid, the economy of the Act is not modified by this provision. I would declare that potential losses to competing carriers is not a relevant consideration against the approval of an agreed charge.

As it appears in the memorandum that all data to establish the possibilities of the agreements are not on record, the applicants not having had the opportunity to file these data nor submissions in answer to the memorandum, I would, in the interests of parties concerned, or regulated carriers, order a rehearing or at least furnish the railways with a copy of the memorandum and give them the right to file the missing data and submissions.

Any doubt as to the effect of the Agreed Charges on the net revenue of the applicants or as to whether a competitive rate could adequately assure the object of the agreements might thus be solved; and then an appeal would lie to the Supreme Court on the rulings of the Board on questions of law as provided in s.52(3) of the Railway Act, which Court could determine once and for all the true intent and meaning of Part V and of its provisions.

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-WESTERN STEAMSHIPS LIMITED
Respondents

JOINT APPENDIX

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