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

1942
*Dec. 7, 8.
1943
*May 4.

IN THE MATTER OF THE TRANSPORT ACT, 1938 (2 GEO. VI, C. 53).

Carriers—The Transport Act, 1938 (Dom., 2 Geo. VI, c. 53), ss. 35, 36, 3 (2) —Application to Board of Transport Commissioners for approval of agreed charge between shipper and competing carriers by rail—Relevant considerations for the Board—Effects of agreed charge on business and revenues of other carriers.

On an application to the Board of Transport Commissioners under s. 35 of *The Transport Act, 1938* (Dom., 2 Geo. VI, c. 53), for approval of an agreed charge between a shipper and competing carriers by rail, the Board is not precluded from regarding as relevant considerations the effects which the making of the agreed charge is likely to have on the business and revenues of other carriers, such as competing carriers by water. (*Contra, per* the Chief Justice and Rinfret J., dissenting).

Secs. 35 (1) (5) (13), 36 (1), 3 (2) of said Act particularly considered.

REFERENCE by the Board of Transport Commissioners for Canada, in pursuance of the powers conferred upon it by s. 43 of the *Railway Act* (R.S.C. 1927, c. 170) and s. 4 of *The Transport Act, 1938* (Dom., 2 Geo. VI, c. 53), for the opinion of the Supreme Court of Canada, of the following question, which, in the opinion of the Board, was a question of law:

On an application to the Board under section 35 of The Transport Act, 1938, for the approval of an agreed charge between a shipper and competing carriers by rail, is the Board precluded from regarding as relevant considerations the effects which the making of the agreed charge is likely to have on the business and revenues of other carriers?

The question arose in certain cases where applications were made to the Board for the approval of agreed charges. The applications were made by carriers by rail, and were opposed by competing carriers by water, who objected on the ground that the making of the agreed charge would prejudicially affect their business and revenues. The applicants contended that the Board was precluded from regarding such objection as relevant.

In two cases (heard together) the traffic covered by the agreed charge had been carried in part by rail only, in part by water and rail, and in part by rail, water and rail. Under the terms of the agreed charge the shippers undertook to

*PRESENT:—Duff C.J. and Rinfret, Davis, Kerwin and Hudson JJ.

1943

REFERENCE BY THE BOARD OF TRANSPORT COMMISSIONERS FOR CANADA.

ship by rail 100 per cent. of the aggregate volume forwarded by them of certain specified carload traffic. The Board refused to approve the agreed charge, Garceau, D.C.C., dissenting (1). The carriers by rail applied to the Board in each case under s. 51 of the *Railway Act* and s. 4 of *The Transport Act, 1938,* for a review of the Board's order dismissing the application, and for a rehearing of the application, contending, *inter alia,* that the Board's judgment was wrong in holding as a matter of law that approval of the agreed charge might properly be withheld on the ground that the agreed charge might be unduly prejudicial to competing water carriers. The Board reserved its decision on said application. Because of the difference of opinion among members of the Board on the question of law and in view of the number of applications to the Board in which the same question was likely to be raised, the Board considered it desirable to obtain the opinion of the Supreme Court of Canada.

I. C. Rand K.C. for Canadian National Railways.

G. A. Walker K.C. for Canadian Pacific Railway Company.

Hazen Hansard for Canada Steamship Lines Ltd., Northern Navigation Co. and Northwest Steamships Ltd.

H. E. B. Coyne for The Board of Transport Commissioners for Canada.

THE CHIEF JUSTICE (dissenting).—This appeal arises upon a case stated by the Board of Transport Commissioners for the opinion of this Court upon the following question which the Board declares is in its opinion a question of law:

> On an application to the Board under section 35 of The Transport Act, 1938, for the approval of an agreed charge between a shipper and competing carriers by rail, is the Board precluded from regarding as relevant considerations the effects which the making of the agreed charge is likely to have on the business and revenues of other carriers?

The Canadian National and the Canadian Pacific Railway Companies, together with other competing rail carriers, applied to the Board under section 35 of *The Transport Act* (Part V) for approval of agreed charges made by the rail carriers of certain specific carload traffic of two shippers whose goods had been, up to that time, carried partly

(1) 54 Canadian Railway and Transport Cases 1.

by water and rail routes in which the Canada Steamship Lines participated. The applications were opposed by the Steamship Lines on the sole ground that the effect of the agreed charges would be to deprive them of revenue from the carriage of this traffic. It is not contended that the other statutory requirements of section 35 had not been complied with.

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

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

35. (1) Notwithstanding anything in the *Railway Act,* or in this Act, a carrier may make such charge or charges for the transport of the goods of any shipper or for the transport of any part of his goods as may be agreed between the carrier and that shipper: Provided that any such agreed charge shall require the approval of the Board, and the Board shall not approve such charge if, in its opinion, the object to be secured by the making of the agreement can, having regard to all the circumstances, adequately be secured by means of a special or competitive tariff of tolls under the *Railway Act* or this Act: and provided further that when the transport is by rail from or to a competitive point or between competitive points on the lines of two or more carriers by rail the Board shall not approve an agreed charge unless the competing carriers by rail join in making the agreed charge.

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

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

(*b*) any representative body of shippers; and

(*c*) any carrier,

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

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

(*a*) the net revenue of the carrier; and

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

36. (1) Upon complaint to the Minister by any representative body of carriers which, in the opinion of the Minister, is properly representative of the interests of persons engaged in the kind of business (transport by

1943

REFERENCE BY THE BOARD OF TRANSPORT COMMISSIONERS FOR CANADA.

Duff C.J.

water, rail or air, as the case may be) represented by such body that any existing agreed charge places such kind of business at an undue or unfair disadvantage, the Minister may, if satisfied that in the national interest the complaint should be investigated, refer such complaint to the Board for investigation and if the Board after hearing finds that the effect of such agreed charge upon such kind of business is undesirable in the national interest the Board may make an order varying or cancelling the agreed charge complained of or may make such other order as in the circumstances it deems proper.

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

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

The controversy does not lend itself to extended discussion. After fully considering the very able judgment of the Chief Commissioner and, I may add, the able argument of Mr. Hazen Hansard, my conclusion is that this section points unmistakably to the conclusion that the statute does not contemplate the rejection of an application for the approval of an agreed charge on the ground that the establishment of such a charge will prejudicially affect the business and revenues of competing carriers. The proper inference, I think, from that section is that the effect of the agreed charge upon competing carriers is not a relevant consideration within the meaning of section 35, subsection 13.

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

RINFRET J. (dissenting).—In pursuance of the powers conferred by sec. 43 of the *Railway Act* and sec. 4 of *The Transport Act, 1938*, The Board of Transport Commissioners for Canada submits for the opinion of this Court the following question:

On an application to the Board under sec. 35 of *The Transport Act, 1938*, for the approval of an agreed charge between a shipper and com-

peting carriers by rail, is the Board precluded from regarding as relevant considerations the effects which the making of the agreed charge is likely to have on the business and revenues of other carriers?

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

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

35. (1) Notwithstanding anything in the *Railway Act*, or in this Act, a carrier may make such charge or charges for the transport of the goods of any shipper or for the transport of any part of his goods as may be agreed between the carrier and that shipper: Provided that any such agreed charge shall require the approval of the Board, and the Board shall not approve such charge if, in its opinion, the object to be secured by the making of the agreement can, having regard to all the circumstances, adequately be secured by means of a special or competitive tariff of tolls under the *Railway Act* or this Act: and provided further that when the transport is by rail from or to a competitive point or between competitive points on the lines of two or more carriers by rail the Board shall not approve an agreed charge unless the competing carriers by rail join in making the agreed charge.

* * *

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

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

(*b*) any representative body of shippers; and

(*c*) any carrier,

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

* * *

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

(*a*) the net revenue of the carrier; and

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

Under the interpretation clause of *The Transport Act* (sec. 2), an "agreed charge" means a charge agreed upon between a carrier and a shipper as in this Act provided and includes the conditions attached thereto;

1943

REFERENCE BY THE BOARD OF TRANSPORT COMMISSIONERS FOR CANADA.

Rinfret J.

"carrier" means any person engaged in the transport of goods or passengers for hire or reward to whom the Act applies, and shall include any company which is subject to the *Railway Act;* "shipper" means a person sending or receiving or desiring to send or receive goods by means of any carrier to whom the Act applies; "transport" means the transport of goods or passengers, whether by air, by water or by rail, for hire or reward, to which the provisions of the Act apply; and "transported" and "transporting" shall have corresponding meanings.

It is common ground that, prior to the enactment of *The Transport Act,* in 1938, the "agreed charge" was unknown as an instrument of rate making under the law; also that the rates charged by water carriers were not subject to regulation by the Board, nor were the rates charged by highway trucking concerns.

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

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

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

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

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

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

The proviso to such an agreement is that the agreed charge shall require the approval of the Board. And the

Board is directed not to approve the charge if, in its opinion, the object to be secured by the agreement can, "having regard to all the circumstances", adequately be secured by means of a special or competitive tariff of tolls under the *Railway Act* or the *Transport Act;* or, when the transport is by rail from or to a competitive point, or competitive points on the lines of two or more carriers by rail, the Board shall not approve an agreed charge, unless the competing carriers by rail join in making the agreed charge.

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

Under subsection 13,

> the Board shall have regard to all considerations which appear to it to be relevant and, in particular, to the effect which the making of the agreed charge or the fixing of a charge is likely to have, or has had, on the net revenue of the carrier; and the business of any shipper by whom, or in whose interests, objection is made to approval being given to an agreed charge, or application is made for approval to be withdrawn.

The Chief Commissioner of the Board of Transport ordered that copies of the Case be served upon boards of trade, traffic leagues, chambers of commerce, railway companies and steamship lines, and several other associations and companies likely to be interested in the matter.

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

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

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

1943

REFERENCE BY THE BOARD OF TRANSPORT COMMISSIONERS FOR CANADA.

Rinfret J.

Moreover, so it was contended, Parliament, while not restricting the Board's discretion, saw fit to indicate two specific considerations to which the Board must have regard: the net revenue of the carrier; and the business of any shipper by whom, or in whose interests, objection is made to approval being given to an agreed charge, or application is made for approval to be withdrawn.

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

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

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

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

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

Subsection 1 does not enact, in the main provision thereof, that the agreed charge must be approved by the Board, the requirement for the approval is to be found only

in the proviso; and the proviso whereby the approval of the Board is required also specifies the particular cases in which the Board is to withhold or refuse its approval.

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

The considerations to which the Board is directed to have regard are the considerations which appear to it to be relevant, that is to say: relevant under the provisions of section 35. The Board is to decide whether the agreed charge should be approved in view of the two considerations which are mentioned in the proviso contained in subsection 1 of section 35. Those are the considerations which are relevant under the section. The Board is not permitted to have regard to all considerations whatsoever. It is, however, directed to consider also the effect which the making of the agreed charge, or the fixing of a charge, is likely to have on " the net revenue of the carrier " and " the business of any shipper by whom, or in whose interests, objection is made to approval being given to an agreed charge, or application is made for approval to be withdrawn."

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

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

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

who considers that his business will be unjustly discriminated against if the agreed charge is approved and is made by the carrier, or that his business has been unjustly discriminated against as a result of the making of the charge by virtue of a previous approval.

It means, therefore, that the application of section 35, so far as shippers are concerned, remains subject to the con-

1943

REFERENCE BY THE BOARD OF TRANSPORT COMMISSIONERS FOR CANADA.

Rinfret J.

dition that there should result no unjust discrimination. I mention that only in passing, because no individual shipper or no representative body of shippers has come forward before the Court to submit any argument.

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

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

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

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

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

As to section 36 of the *Transport Act,* to which our attention has been drawn by the steamship companies, it may first be said that, for the same reason which should exclude a reference to subs. 2 of section 3, anything found in section 36 cannot help in interpreting section 35. But it may be further added that section 36 deals with a different matter. It gives " any representative body of carriers "

the right to complain to the Minister of Transport "that any existing agreed charge places such kind of business at an undue or unfair disadvantage". In such a case, the Minister, "if satisfied that in the national interest the complaint should be investigated", may refer such complaint to the Board for investigation. And the section states what should then take place and how the Board should act in those circumstances.

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

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

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

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

I do not think this Court has any power to lay down any rule restricting the administrative function and duty vested in the Board by section 35 or precluding the Board from having regard under that section to any consideration which may appear to it to be relevant.

I should answer the question in the negative.

1943

REFERENCE BY THE BOARD OF TRANSPORT COMMISSIONERS FOR CANADA.

Kerwin J.

The judgment of Kerwin and Hudson JJ. was delivered by

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

> On an application to the Board under section 35 of *The Transport Act, 1938,* for the approval of an agreed charge between a shipper and competing carriers by rail, is the Board precluded from regarding as relevant considerations the effects which the making of the agreed charge is likely to have on the business and revenues of other carriers?

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

> (2) It shall be the duty of the Board to perform the functions vested in the Board by this Act and by the *Railway Act* with the object of co-ordinating and 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.

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

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

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

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

(*e*) "goods in bulk" means the following goods laden or freighted in ships, and except as herein otherwise provided, not bundled or enclosed in bags, bales, boxes, cases, casks, crates or any other container;

grain and grain products, including flour and mill feeds in bulk or in sacks,

ores and minerals (crude, screened, sized, refined or concentrated, but not otherwise processed), including ore concentrates in sacks,

sand, stone and gravel,

coal and coke,

liquids,

pulpwood, woodpulp, poles and logs, including pulpwood and woodpulp in bales,

waste paper loaded as full ship's cargo,

iron and steel scrap and pig iron.

Turning now to section 35, a carrier may by virtue of its provisions make such charge or charges for the transport of goods of any shipper, or for the transport of any part of his goods, as may be agreed between the carrier and that shipper. Such agreed charge requires the approval of the Board, which shall not be given if in the opinion of the Board the object to be secured by the making of the agreement can, having regard to all the circumstances, adequately be secured by means of a special or competitive tariff of tolls under the *Railway Act* or *The Transport Act*. There is another proviso, which, however, was complied with in this case, since the railways concerned joined in making the agreed charge, and it need not be considered.

It will be observed that subsection 1 of section 35 commences with the words, "Notwithstanding anything in the *Railway Act,* or in this Act". These words, however, do not have the effect contended for by the Railways, of making entirely inapplicable the provisions of subsection 2 of section 3 quoted above. In my view, they were inserted because, for the first time, Parliament has authorized the making of an agreed charge. The functions of the Transport Board, applying as they do to transport by air and transport by water, are much wider than were those of the Board of Railway Commissioners. While this would be apparent from a reading of the Act as a whole, even if sub-

1943

REFERENCE BY THE BOARD OF TRANSPORT COMMISSIONERS FOR CANADA.

Kerwin J.

section 2 of section 3 had not been included, its insertion, in my view, takes on particular significance when an application for approval of an agreed charge is made to the Board.

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

Subsection 5 of section 35 states:

> (5) On an application to the Board for the approval of an agreed charge:—
>
> (*a*) any shipper who considers that his business will be unjustly discriminated against if the agreed charge is approved and is made by the carrier, or that his business has been unjustly discriminated against as a result of the making of the charge by virtue of a previous approval;
>
> (*b*) any representative body of shippers; and
>
> (*c*) any carrier,
>
> shall, after giving such notice of objection as may be prescribed by the Board, be entitled to be heard in opposition to the application.

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

It is urged that in view of the provisions of section 36, the Board, on an application under section 35 by carriers

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

It is said that the decision in *Great Western Railway Company* v. *Chamber of Shipping of the United Kingdom* (1) is in the opposite sense. There the Railway Rates Tribunal had refused to hear the objectors (the Chamber of Shipping) upon an application by the Railway Company for the consent of the Tribunal to set exceptional rates more than forty per cent. below the standard rates. The objectors appealed to the Court of Appeal. As Lord Justice Romer puts it at page 234:

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

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

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

Question submitted answered in the negative.

(1) (1937) 25 Railway, Canal & Road Traffic Cases 223.