THE BOARD OF TRANSPORT COMMISSIONERS FOR CANADA

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Criticism of freight rates is not new in Canada. Fifty years ago there was widespread dissatisfaction with railway rate practices. The chief complaints were that the published freight tariffs unduly favoured certain localities and that by means of secret rates and rebates some shippers were given an unfair advantage over others. In consequence of the public demand for effective regulation of the railways in such matters, the Honourable A. G. Blair, Minister of Railways and Canals, instructed Dr. S. J. McLean to report on rate grievances and to propose remedies for them. Dr. McLean, who later became Assistant Chief Commissioner of the Board, was at that time a Professor of Political Economy at the University of Arkansas. He prepared two reports respectively entitled: "Reports upon Railway Commissions, Railway Rate Grievances, and Regulative Legislation" and "Rate Grievances on Canadian Railways". As a result of these reports the Board of Railway Commissioners for Canada was established by the Railway Act of 1903. Subsequently its name was changed to the "Board of Transport Commissioners for Canada" by the Transport Act, 1938, section 3.

The Board is composed of a Chief Commissioner, an Assistant Chief Commissioner, a Deputy Chief Commissioner, and three other members. The Railway Act provides that any person may be appointed Chief Commissioner or Assistant Chief Commissioner who is or has been a judge of a superior court or who is a barrister or advocate of at least ten years' standing at the bar. The Act further provides that the Chief Commissioner, when present, shall preside, and the Assistant Chief Commissioner, when present, in the absence of the Chief Commissioner, shall preside, and the opinion of either of them upon any question arising when he is presiding, which in the opinion of the commissioners is a question of law, shall prevail.

Jurisdiction and Powers

The Board is purely a creature of statute and has only such jurisdiction as the statute gives it either in express terms or by necessary implication: *Duthie* v. *G.T.R.*[1] It is a court of record, and in respect of matters necessary or proper for the

[1] (1905), 4 C.R.C. 304.

due exercise of its jurisdiction has all such powers, rights and privileges as are vested in a superior court: sections 9(2) and 33(3) of the Railway Act. The orders or decisions of the Board cannot be questioned or reviewed in any court except on appeal under section 52.[2]

Originally the Board had jurisdiction over railways only. By subsequent legislation it was given a limited jurisdiction over other forms of transportation. In rough outline its present jurisdiction covers: (a) the construction, maintenance and operation (including rates) of railways; (b) the rates of telephone, telegraph and express companies; (c) the tolls on international bridges and tunnels; (d) the licensing and rates of ships on the "Great Lakes" and the "Mackenzie River" as defined in The Transport Act, 1938; (e) specific matters in regard to which jurisdiction is conferred by a number of general and special Acts, such as the Bridges Act, the Act respecting the Continental Heat and Light Company, and the Winnipeg Water Act.

By section 33 of the Railway Act, authority is given to the Board to inquire into, hear and determine any application by any party interested: (a) complaining that any company or person has violated or failed to comply with any provision of the Railway Act or the Special Act or any order made thereunder; (b) requesting the Board to make any order, or give any direction, leave, sanction or approval which by law it is authorized to make or give or with respect to any matter, act or thing which, by the Railway Act or the Special Act, is prohibited, sanctioned or required to be done. And by section 34 the Board has power to make rules or regulations (a) with respect to any matter, act or thing which by the Railway Act or the Special Act is sanctioned, required to be done or prohibited; (b) generally for carrying the Railway Act into effect; (c) for exercising any jurisdiction conferred on the Board by any other Act.

Procedure

The procedure to be followed in proceedings before the Board is prescribed by the Board's Rules and Regulations. Rules 2, 3 and 4 are as follows:

Application or Complaint

2. Every proceeding before the Board under the Railway Act shall be commenced by an application made to it, which shall be in writing and signed by the applicant or his solicitor; or in the case of

[2] Section 52(10).

a corporate body or company being the applicants shall be signed by their manager, secretary or solicitor. It shall contain a clear and concise statement of the facts, the grounds of application, the section of the Act under which the same is made, and the nature of the order applied for, or the relief or remedy to which the applicant claims to be entitled. It shall be divided into paragraphs, each of which, as nearly as possible, shall be confined to a distinct portion of the subject, and every paragraph shall be numbered consecutively. It shall be endorsed with the name and address of the applicant, or if there be a solicitor acting for him in the matter, with the name and address of such solicitor. The application shall be according to the forms in schedule No. 1.

All applications or complaints regarding rates, fares, charges, regulations, or practices; and all exhibits filed in connection therewith, or quoted therein, must give specific reference to the appropriate C.R.C. number to the tariff authority therefor.

In applications for highway crossings, whether by the railway company, the provincial department or the municipality, the applicant to advise the Board what, if any, interest the application may affect. If any such, the interested party or parties to be served with notice of the application.

The application, so written and signed as aforesaid, shall be left with or mailed to the Secretary of the Board and copies thereof mailed or delivered to the parties affected, together with a copy of any document, or copies of any maps, plans, profiles, and books of reference, as required under the provisions of the Act referred to therein, or which may be useful in explaining or supporting the same. The Secretary shall number such applications according to the order in which they are received by him, and make a list thereof. From the said list there shall be made up a docket of cases for hearing which, as well as their order of entry on the docket, shall be settled by the Board. Said docket list when completed to be put upon a notice board provided for that purpose which shall be open for inspection at the office of the Secretary during office hours.

Answer

3. Unless the Board otherwise directs, the respondent or respondents shall mail or deliver to the applicant, or his solicitor, a written statement containing in a clear and concise form their answer to the application, and shall also leave or mail a copy thereof with or to the Secretary of the Board at its office, together with any documents that may be useful in explaining or supporting it. The answer may admit the whole or any part of the facts in the application. It shall be divided into paragraphs, which shall be numbered consecutively, and it shall be signed by the person making the same, or his solicitor. It shall be endorsed with the name and address of the respondents, or if there be a solicitor acting for them in the matter, with the name and address of such solicitor. It shall be according to the form in schedule No. 2.

All answers to applications or complaints regarding rates, fares, charges, regulations, or practices; and all exhibits filed in connection

therewith, or quoted therein, must give specific reference to the appropriate C.R.C. number to the tariff authority therefor.

The time limit for filing and delivery of answer shall be as follows: Where the application or complaint arises (1) in the provinces of Ontario and/or Quebec, fifteen days from the date of service; (2) in the Maritime Provinces and/or between Port Arthur, Ontario, and the western boundary of the province of Saskatchewan, twenty days; and (3) west thereof, thirty days.

Reply

4. Within four days from the delivery of the answer to the application, the applicant shall mail or deliver a reply thereto to the respondents, and a copy thereof to the Secretary of the Board, and may object to the said answer as being insufficient, stating the grounds of such objection, or deny the facts stated therein, or may admit the whole or any part of said facts. The reply shall be signed by the applicant or his solicitor, and may be according to the form in schedule No. 3.

The Board may, at any time require the whole or any part of the application, answer or reply, to be verified by affidavit, upon giving a notice to that effect to the party from whom the affidavit is required; and if such notice be not complied with the application, answer or reply may be set aside, or such part of it as is not verified according to the notice may be struck out.

Hearings

It is only in the case of a complaint, that is, an application as described in section 33(a), that the Board is required to grant an oral hearing. But the practice is to give a "Day in Court" on any application, if one of the parties requests it.

The fact is, however, that most cases are disposed of without a hearing. For in many instances the parties reach a settlement and an order is made by consent; and in others there is no dispute as to the material facts and the parties are content to have the Board decide the case on written argument. During the year 1946, for example, 2,161 applications were made to the Board and 2,120 of these were disposed of without a hearing.

The Board considers the convenience of the parties in deciding where a hearing is to take place, and during the course of a year holds sittings in various cities and towns across Canada.

Reports

The judgments of the Board are published in "Judgments, Orders, Regulations and Rules", issued twice a month, and in the "Canadian Railway and Transport Cases".

Review of Decisions

The Board differs from other courts in that it has power, under section 51 of the Railway Act, to review, and vary or rescind any order or decision made by it.

Although the principle of *stare decisis* does not apply to the Board, nevertheless in practice the Board in arriving at a decision is governed largely by precedents. For example, Fullerton, C.C., said in *C.N.R.* v. *Bell Telephone,*[3] in discussing the incidence of costs of a grade separation, that, if the matter had been *res integra,* he would have had no hesitation in holding that utility companies should be compensated for the expense of removing their plant and equipment, but that a different rule had been laid down by previous decisions and that he felt he should follow the practice so long established.

Appeals

Under section 52 of the Railway Act an appeal lies to the Governor in Council from any order or decision of the Board. Upon a question of jurisdiction there is also a right of appeal under that section to the Supreme Court of Canada by leave of a judge of that court; and upon a question of law or of jurisdiction or both, by leave of the Board.

Section 44 provides that the finding or determination of the Board upon any question of fact shall be final and conclusive. This provision has a bearing on the meaning of the phrase "question of law" as used in section 52. Mr. Justice Duff (as he then was) said in *C.N.R.* v. *Bell Telephone:*

> . . . by long usage, the term 'question of law' has come to be applied to questions which, when arising at a trial by a Judge and jury, would fall exclusively to the Judge for determination; for example, questions touching the construction of documents and a great variety of others including questions whether, in respect of a particular issue of fact, there is any evidence upon which a jury could find the issue in favour of the party on whom rests the burden of proof. The determination of such a question seldom depends upon the application of any principle or rule of law, but upon the view of the Judge as to the effect of the evidence adduced. Nevertheless, it falls within the category described by the phrase 'question of law'. My own opinion is that, having regard to the provisions of s. 44, the phrase 'question of law' in s. 52 does not embrace such questions: whether (that is to say) there is any evidence to support a given finding of fact.[4]

In addition to the rights of appeal specifically given by the Railway Act, there is a right of appeal direct to the Privy

[3] (1932), 40 C.R.C. 29.
[4] (1939), 50 C.R.T.C. 10, at p. 18; [1939] 3 D.L.R. 8; [1939] S.C.R. 308.

Council by special leave granted by it in the exercise of the King's prerogative.[5]

Power to Act of Its Own Motion

The rule in our courts is that a judge has no power to initiate proceedings. He remains inactive until called upon by one of the parties to exercise his jurisdiction. This principle of passivity does not apply to the Board, for by section 36 of the Railway Act the Board may of its own motion inquire into, hear and determine any matter or thing which under the Act it may inquire into, hear and determine upon application or complaint.

Under section 33 of the Act no person has the right to make an application to the Board unless he is a "party interested" within the meaning of that section. But if at any stage of the proceedings the Board comes to the opinion that certain things should be inquired into, the status of the applicant is of little consequence. For the Board may make an order of its own motion.

And so in *Alberta Motor Transport Association* v. *Railway Association of Canada* the Board said:

> It is perhaps advisable first to discuss the points raised by the respondents as to the status of the complainants and the jurisdiction of the Board. Whatever the status of the complainants may be, there is no doubt that their businesses are seriously affected by the rules in question. In any event, the Board has power to act of its own motion, and as it has notice from the railway companies themselves of these rules which show discrimination on their face, the Board will decide whether such discrimination is or is not unjust and will rule accordingly. The Board does not think that its jurisdiction in this regard is open to serious question.[6]

And in *Grand Trunk Pacific Railway* v. *Purcell*, when leave to appeal was asked by the railway company upon the ground that the complainant had no status before the Board, Anglin J. said it was clear that upon this point the case was concluded against the contention of the railway company by section 28 (now section 36), which gave the Board power to act of its own motion.[7]

Extent of Encroachment on the Jurisdiction of Other Courts

One criticism of tribunals which are outside of the regular judicial system is that in exercising their functions they encroach

[5] *Toronto Railway* v. *Toronto* (1919); 25 C.R.C. 318; [1920] A.C. 426; 51 D.L.R. 55.
[6] (1942), 54 C.R.T.C. 165, at p. 168.
[7] (1912), 15 C.R.C. 314 (Supr. Court).

upon the customary jurisdiction of the ordinary courts. This criticism applies to the Board of Transport Commissioners to a limited extent only.

The Board deals as a rule with cases where the main question for decision is what is reasonable or what is expedient in the public interest. That type of question is one with which judges are unaccustomed to deal. Chief Justice Campbell, speaking in the House of Lords on the Railway and Canal Traffic Act (1854), said that he knew not how to determine what was a reasonable fare or what was undue delay, that the judges, including himself, felt themselves incompetent to decide such matters, and that questions of this nature should be decided by a tribunal other than one composed of judges. And Davies J., in *G.T.R.* v. *Perrault,* made the following observations in discussing the interpretation of section 198 of the Railway Act of 1903:

> Many considerations have to be weighed in reaching a conclusion under this section, and some of them relating to the 'public interest' may be quite apart from the immediate surroundings. What weight, if an ordinary Court was considering the question, would they give or have a right to give to the 'public interest'? The special Board of Commissioners is enjoined to consider what would be safe in the public interest. The ordinary Court is not so enjoined, and I know not on what ground but one of statutory injunction they would be justified in such a matter as farm crossings in considering the safety of the general public. These considerations on which alone its judgment would be based would, I should imagine, be limited to the rights and interests of the land-owner on the one side and the railway company on the other.[8]

The most important encroachment on the jurisdiction of provincial courts is made by section 35 of the Railway Act, which is as follows:

> 35. Where it is complained by or on behalf of the Crown or any municipal or other corporation or any other person aggrieved, that the company has violated or committed a breach of an agreement between the complainant and the company — or by the company that any such corporation or person has violated or committed a breach of an agreement between the company and such corporation or person, — for the provision, construction, reconstruction, alteration, installation, operation, use or maintenance by the company, or by such corporation or person, of the railway or of any line of railway intended to be operated in connection with or as part of the railway, or of any structure, appliance, equipment, works, renewals or repairs upon or in connection with the railway, the Board shall hear all matters relating to such alleged violation or breach, and shall make such order as to the Board may seem reasonable and expedient, and in such order

[8] (1905), 5 C.R.C. 293, at pp. 299–300; 36 S.C.R. 671, at p. 679.

> may, in its discretion, direct the company, or such corporation or person, to do such things as are necessary for the proper fulfilment of such agreement, or to refrain from doing such acts as constitute a violation or a breach thereof.

In dealing with applications under this section the Board has held that it should interfere with the jurisdiction of the provincial courts only so far as is strictly necessary, and that if adequate remedy can be obtained from such courts, action by the Board under section 35 is precluded.[9] Action by the Board is also precluded if there is any serious question as to the existence or the meaning of the agreement,[10] or if the breach alleged falls only inferentially within the scope of the agreement.[11]

Where the Board exercises its powers under this section, it acts upon principles different from those which govern provincial courts. The Board is to make such order as to it may seem "reasonable and expedient", and may exercise its discretion as to whether the agreement in question shall be enforced or not. And so in an application to enforce an agreement as to the construction of a subway, the Board held that it could deal with the whole question involved in the interests of the public and the railway under its general powers as to crossings and public safety, and was not bound by the exact terms of the agrement.[12]

What has been said in regard to section 35 may serve to illustrate the statement which Killam, C.C., made early in the Board's history in *Duthie* v. *G.T.R*:

> The business of the Board is to enforce the railway legislation of the Dominion Parliament, and, for that purpose, to order the performance of some acts and to prohibit others. It was not created to supplant, or even to supplement, the Provincial Courts in the exercise of their ordinary jurisdiction, but to exercise an entirely different jurisdiction, though perhaps occasionally overlapping that of the Provincial Courts.[13]

[9] *Red Deer Valley Coal Co.* v. *C.P.R.* (1926), 55 C.R.T.C. 23.
[10] *Aylmer* v. *Hull Electric Co.* (1945), 58 C.R.T.C. 94.
[11] *Red Deer Valley Coal Co.* v. *C.P.R., supra.*
[12] *Saskatoon* v. *C.N.R.* (1923), 28 C.R.C. 339.
[13] (1905), 4 C.R.C. 304, at p. 315.