1965

*May 19, 20
June 7

CANADIAN PACIFIC RAILWAY COMPANY ..... APPELLANT;

AND

THE ATTORNEY GENERAL OF QUEBEC and THE MINISTER OF ROADS OF QUEBEC ..... RESPONDENTS;

AND

THE MINISTER OF HIGHWAYS OF ALBERTA ..... INTERVENANT.

ON APPEAL FROM THE BOARD OF TRANSPORT COMMISSIONERS FOR CANADA

Railways—Construction of overhead bridge as replacement for existing subway—Apportionment of cost—Railway Act, R.S.C. 1952, c. 234, ss. 39, 53(2), 260, 262, 267.

The Board of Transport Commissioners for Canada ordered the appellant railway to contribute 12½ per cent of the total cost of constructing an overhead bridge to replace an existing subway constructed in 1908 on a main highway in Quebec. The Board also directed a contribution of 50 per cent of the cost from the Railway Grade Crossing Fund. The balance was to be paid by the Department of Roads. Contending that the Board had erred in determining the amount to be paid by it, the railway company obtained leave to appeal to this Court.

Held: The appeal should be dismissed.

Sections 39 and 262 of the *Railway Act* give the Board very wide discretionary powers to order any construction, alterations, substitution or reconstruction of any railway crossing structure or subway and to apportion the cost of any such works between the railway company, municipal or other corporation or person. The discretionary powers so exercised are not subject to review by this Court. It is within the jurisdiction of the Board under s. 39(2) of the Act to determine by whom and in what proportions the cost and expense of the construction should be borne. *Toronto Transportation Comm. v. C.N.R.*, [1930] S.C.R. 94. There was no error in law in the judgment of the Board in relation to s. 267 of the Act.

Chemins de fer—Construction d'un pont pour remplacer un viaduc—Répartition des frais—Loi sur les Chemins de Fer, S.R.C. 1952, c. 234, arts. 39, 53(2), 260, 262, 267.

La Commission des Transports du Canada a ordonné à la compagnie de chemin de fer appelante de contribuer 12½ pour-cent du coût total de la construction d'un pont pour remplacer un viaduc construit en 1908 sur une des routes principales de Québec. La Commission a aussi ordonné une contribution de 50 pour-cent des frais de la part de la

---

*PRESENT: Taschereau C.J. and Abbott, Judson, Hall and Spence JJ.

Caisse des passages à niveau de chemins de fer. La balance devait être payée par le département de la Voirie. Prétendant que la Commission avait fait erreur en déterminant le montant qu'elle devait payer, la compagnie de chemin de fer a obtenu permission d'appeler devant cette Cour.

Arrêt: L'appel doit être rejeté.

Les arts. 39 et 262 de la *Loi sur les Chemins de Fer* donnent à la Commission des pouvoirs discrétionnaires très vastes de rendre une ordonnance pour toute construction, modification, substitution ou reconstruction de toute traverse à niveau ou viaduc, et pour répartir les frais de ces ouvrages entre la compagnie de chemin de fer, la corporation municipale ou autre ou la personne. Ces pouvoirs discrétionnaires ainsi exercés ne sont pas sujets à revision par cette Cour. Il est de la compétence de la Commission en vertu du l'art. 39(2) de la Loi de déterminer par qui et dans quelle proportion les frais et dépenses de la construction doivent être payés. *Toronto Transportation Commission v. C.N.R.*, [1930] R.C.S. 94. Il n'y avait aucune erreur de droit dans la décision de la Commission quant à l'art. 267 de la Loi.

APPEL d'une décision de la Commission des Transports du Canada. Appel rejeté.

APPEAL from a decision of the Board of Transport Commissioners for Canada. Appeal dismissed.

K. D. M. Spence, Q.C., and *J. E. Paradis, Q.C.*, for the appellant.

Jean Turgeon, Q.C., for the respondents.

J. J. Frawley, Q.C., for the intervenant.

The judgment of the Court was delivered by

HALL J.:—On June 22, 1962, the Minister of Roads of the Province of Quebec applied under s. 260 of the *Railway Act* to the Board of Transport Commissioners for Canada for an Order requiring the construction of an overhead bridge to replace an existing subway at mileage 100.54 Sherbrooke Sub-Division near the Village of South Stukely which had been constructed in 1908 pursuant to an Order of the Board of Railway Commissioners for Canada dated April 10, 1908, as No. 4593. Between the years 1908 and 1962 changes in the character and speed of highway traffic and size and number of highway vehicles had made the 1908 subway inadequate in dimensions and hazardous to modern highway traffic. The highway served by this subway had become Provincial Highway No. 1 between the Cities of Montreal and Sherbrooke. The new bridge over the railway line was

1965

C.P.R. v. ATTORNEY GENERAL OF QUEBEC et al.

Hall J.

to be built at mileage 100.36 and the subway at mileage 100.54 closed and the cost of closing the subway was to be included in the cost of construction of the overhead bridge at mileage 100.36.

With the consent of all parties and to enable the work to proceed, the Board of Transport Commissioners issued Order No. 109763 dated December 7, 1962, authorizing the constructing of the bridge, directing a contribution of 50 per cent of the cost of the construction from the Railway Grade Crossing Fund, reserving for further consideration the question of further apportionment of the balance of the cost of construction and assessing the cost of maintenance of the new structure to the Department of Roads of the Province of Quebec. On May 5, 1964, the Board of Transport Commissioners held a public hearing in the City of Quebec to determine the question reserved under its Order No. 109763 as to apportionment of the remaining 50 per cent of the cost of construction. The Board, on June 18, 1964, by Order No. 114746, directed that of the balance remaining to be allocated after the contribution of 50 per cent previously directed to be paid from the Railway Grade Crossing Fund 25 per cent (or 12½ per cent of the total) should be paid by Canadian Pacific Railway Company and the remainder by the Department of Roads of the Province of Quebec. This meant a contribution of approximately $42,000 by Canadian Pacific Railway Company. The Railway company had maintained that it should not be assessed any amount exceeding $15,000 which amount it argued represented the value of the only benefit that the Railway company would receive from the reconstruction project. The Railway company applied under s. 53(2) of the *Railway Act* and was given leave to appeal to this Court upon the following question of law:

> Did the Board of Transport Commissioners, by its judgment of June 18, 1964, fail to exercise its discretion validly under section 262 of the Railway Act to determine the portion to be borne by the appellant of the cost of a highway bridge across the railway, when it acted on the view that section 267 of the Railway Act imposed upon the railway company an obligation to replace a subway constructed in 1908 with a structure such as to afford safe and adequate facilities for present-day highway traffic?

Section 267 of the *Railway Act* reads as follows:

> Every structure by which any railway is carried over or under any highway or by which any highway is carried over or under any railway, shall be so constructed, and, at all times, be so maintained, as to afford

safe and adequate facilities for all traffic passing over, under or through such structure.

The contention of the Railway company before this Court was that the Board of Transport Commissioners erred in law in taking into consideration at all the provisions of s. 267 of the *Railway Act* and that, having given some weight to a continuing obligation on the part of the Railway company under s. 267 the Board had not properly or validly exercised the discretion which it had under s. 262 of the *Railway Act* to determine the portion to be borne by the appellant.

The question as framed by the appellant and the argument of counsel for the appellant would appear to suggest that the Board founded its judgment solely on s. 267. That such was not the case will be seen from the judgment of the Board which reads:

> In trying to establish the value of its contribution, the Company makes the assumption that its obligation is limited to the maintenance or the replacement of the old structure. Yet, according to section 267 of the Railway Act, these structures "shall be so constructed and at all times be so maintained as to afford safe and adequate facilities for all traffic passing over, under or through them."
>
> I believe that this can only be interpreted as meaning that the obligation of the Railway are related to the adequate facilities required, rather than to only the old structure, where it is no longer adequate for the traffic offering.
>
> In the case of replacement of a level crossing by a grade separation, the Railway is asked to contribute on a percentage basis towards the cost of the grade separation. The Board has established a formula of apportionment of costs of construction whereby the Railway usually contributes 5 per cent, which has been generally accepted as representing the responsibility of the Railways with respect to such improvements. As the Board contributes 80 per cent of the cost of such works, the Railway's share is the equivalent of one-quarter of the remainder of the cost.
>
> I believe that the responsibility of the Railway is no less in respect of the replacement of a grade separation which is inadequate for present day traffic. The fact that the Railway Act limits the contribution from The Railway Grade Crossing Fund to 50 per cent of the cost of the new structure is no reason why the proportion to be paid by the Company should be less than one-quarter of the remainder, as is the case for new grade separations.
>
> I cannot agree with the position taken by the Company that its obligation to contribute towards the cost of grade separations to replace inadequate structures should be limited to the value of the improvement in its net financial position that would result from discontinuance of its commitments to maintain its existing structure. On the other hand, I consider that the suggestion of the Department that the Company should contribute 20 per cent of the cost of the structure is not well founded. There is no doubt that it will be difficult to assess, in dollars and cents,

1965

C.P.R. v. ATTORNEY GENERAL OF QUEBEC et al.

Hall J.

the value of the advantages that will accrue to the highway traffic as a result of this improvement. It is not difficult to see, however, that the benefits are greater to the highway than they are to the Railway.

I consider that it is fair and reasonable in this case to require the Company to contribute one-quarter of the remainder of the cost of construction, after the 50 per cent grant from The Railway Grade Crossing Fund, or 12½ per cent of the total cost, the remainder to be paid by the Quebec Department of Roads.

I am unable to see any error in law in the judgment of the Board in relation to s. 267.

Sections 39 and 262 of the *Railway Act* read as follows:

39. (1) When the Board, in the exercise of any power vested in it, in and by any order directs or permits any structure, appliances, equipment, works, renewals or repairs to be provided, constructed, reconstructed, altered, installed, operated, used or maintained, it may, except as otherwise expressly provided, order by what company, municipality or person, interested or affected by such order, as the case may be, and when or within what time and upon what terms and conditions as to the payment of compensation or otherwise, and under what supervision, the same shall be provided, constructed, reconstructed, altered, installed, operated, used and maintained.

(2) The Board may, except as otherwise expressly provided, order by whom, in what proportion, and when, the cost and expenses of providing, constructing, reconstructing, altering, installing and executing such structures, equipment, works, renewals, or repairs, or of the supervision, if any, or of the continued operation, use or maintenance thereof, or of otherwise complying with such order, shall be paid.

262. Notwithstanding anything in this Act or any other Act, the Board may order what portion, if any, of the cost is to be borne respectively by the company, municipal or other corporation or person in respect of any order made by the Board under section 259, 260 or 261, and such order is binding on and enforceable against any railway company, municipal or other corporation or person named in such order.

These sections give the Board very wide discretionary powers to order any construction, alteration, substitution or reconstruction of any railway crossing structure or subway and to apportion the cost of any such works between the Railway Company, municipal or other corporation or person. The discretionary powers so exercised are not subject to review by this Court. It is within the jurisdiction of the Board under s. 39(2) to determine by whom and in what proportions the cost and expense of the construction should be borne: *Toronto Transportation Comm. v. C.N.R.*[1]

The appellant relied strongly on *Sharpness New Docks and Gloucester and Birmingham Navigation Co. v. Attorney-General*[2] and *Attorney-General v. Great Northern Rail-*

[1] [1930] S.C.R. 94 at 100, 1 D.L.R. 231, 36 C.R.C. 175.

[2] [1915] A.C. 654.

way Co.[1]. These cases which were decided in the House of Lords in 1915 and 1916 were considered by the Board of Railway Commissioners for Canada in *City of Hamilton v. Canadian Pacific and Toronto, Hamilton and Buffalo Railway Companies*[2]. Chief Commissioner Carvell there held that the principle followed in these two cases was not applicable to the situation in Canada where the jurisdiction and discretion of the Board were to be found in the provisions of the *Railway Act*. I am in agreement with this view and do not think that the two cases in question assist the appellant.

The appeal should accordingly be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellant: K. D. M. Spence, Montreal.

Solicitor for the respondents: J. Turgeon, Quebec.

Solicitor for the intervenant: J. J. Frawley, Ottawa.