THE CANADIAN ELECTRICAL ASSOCIATION AND THE HYDRO-ELECTRIC POWER COMMISSION OF ONTARIO ..... } APPELLANTS;

1932
*Feb. 22.
*Mar. 31.

AND

CANADIAN NATIONAL RAILWAYS, CANADIAN PACIFIC RY. CO., MICHIGAN CENTRAL RD. CO. AND THE RAILWAY ASSOCIATION OF CANADA ..... } RESPONDENTS.

ON APPEAL FROM THE BOARD OF RAILWAY COMMISSIONERS FOR CANADA

Railways—Dominion and provincial electrical companies—Electric lines along or across railways—Order of the Board making companies wholly liable for damages—Jurisdiction—Whether Order is altering laws in force in provinces—Section 372 of the Railway Act, 1927, R.S.C., c. 170.

The Board of Railway Commissioners, acting under the powers given to it by section 372 of the *Railway Act,* issued a General Order in respect of the conditions and specifications applicable to the erection, placing and maintaining of electric lines, wires or cables along or across all railways, subject to the jurisdiction of the Board; and section 2 of the Order stipulated that "The applicant shall, at all times, wholly indemnify the company owning, operating or using the railway, from and against all loss, damage, injury and expense to which the railway company may be put by reason of any damage or injury to persons or property, caused by any of the said applicant's wires or cables,

*PRESENT:—Duff, Rinfret, Lamont, Smith and Cannon JJ.

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or any works herein provided for by the terms and provisions of this order, as well as against any damage or injury resulting from the imprudence, neglect or want of skill of the employees or agents of the applicant, unless the cause of such loss, cost, damage, injury or expense can be traced elsewhere." The appellants' contentions were that, upon an application for leave to cross railways with power lines, the authority of the Board is limited to imposing terms and conditions as to the manner and means of construction of the works; and that the Board is without jurisdiction to alter the law in force in the various provinces relating to the respective liabilities in damages of the railway and power companies.

Held, Rinfret and Cannon JJ. dissenting, that the Order was within the jurisdiction of the Board and that section 2 had been validly promulgated.

APPEAL by The Canadian Electrical Association and The Hydro Electric Power Commission of Ontario, by leave of the Board of Railway Commissioners for Canada under the provisions of section 52, subsection 3, of *The Railway Act,* on a question which in the opinion of the Board is a question of law or a question of jurisdiction, namely:—

"As a matter of law had the Board the jurisdiction to make General Order 490 dated 20th February, 1931?"

General Order no. 490 is an amendment of "The Rules for Wires erected along or across Railways" adopted by General Order no. 231 of the Board dated May 6, 1918, as amended by General Order 291 dated April 7, 1920, which rule establishes certain terms and conditions under which the Board would grant leave for crossings of railways by power transmission lines. Paragraph 2 of Part One of these Rules, as it was before General Order no. 490, read as follows:—

"The applicant shall at all times wholly indemnify the Company owning, operating or using the said railway of, from and against all loss, cost, damage, and expense to which the said railway company may be put by reason of any damage or injury to persons or property caused by any of the said wires or cables or any works or appliance herein provided for *not being erected in all respects in compliance with the terms and provisions* of this order, as well as any damage or injury resulting from the imprudence, neglect, or want of skill of the employees or agents of the applicant."

General Order 490 re-enacted this clause as follows:—

"2. The applicant shall at all times wholly indemnify the Company owning, operating, or using the railway from and against all loss, damage, injury and expense to which the Railway Company may be put by reason of any damage or injury to persons or property caused by any of the said applicant's wires or cables, or any works herein provided for by the terms and provisions of this Order as well as against any damage or injury resulting from the imprudence, neglect or want of skill of the employees or agents of the applicant, *unless the cause of such loss, cost, damage, injury, or expense can be traced elsewhere.*"

In effect the changes made by General Order 490 are shown by the italic portions of the above quoted paragraphs, the words underlined in the previous Order being omitted in Order 490 and the words in italic in the latter being added as new. The intended effect of the change was to impose upon the appellant Commission or any other person applying for and obtaining leave from the Board to construct and maintain power lines along or across a railway, the burden of wholly indemnifying the railway companies against all damages to persons or property resulting from the applicant's wires or cables unless the cause of the damage can be traced elsewhere. This matter originated in an application made by the respondents to the Board as a result of which the appellant Commission and others who were deemed to be interested were notified that certain amendments to General Order no. 231 were proposed by the respondents and to appear before the Board on February 27, 1928, to present any objections thereto. The appellant Commission and others accordingly appeared by counsel before the Board on that date and presented their objections to the proposed amendments, following which the Board took the matter under advisement and in February, 1931, rendered its decision and made the Order no. 490 appealed from.

Aimé Geoffrion K.C., Geo. H. Montgomery K.C. and *H. Hansard* for the appellant The Canadian Electrical Association.

E. Bristol K.C. for the appellant The Hydro-Electric Power Commission of Ontario.

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W. N. Tilley K.C. for the respondent The Railway Association of Canada.

A. Fraser K.C. for the respondent The Canadian National Railways.

E. P. Flintoft K.C. for the respondent The Canadian Pacific Ry. Co.

Vincent W. Price for the Michigan Central Railroad Co.

The judgments of Duff, Lamont and Smith JJ. were delivered by

DUFF J.—Section 372 was not attacked as *ultra vires*, and reading the term "along" as stretching "longitudinally" upon the right of way, it is not seriously open to objection. Otherwise the phrase "for other purposes" in the principal clause might be obnoxious to the *British North America Act* and the section might then have to be read as if those words were eliminated.

The substantive question is whether section 2 of the order in its amended form, has been validly promulgated. That section is as follows:—

> The applicant shall, at all times, wholly indemnify the company, owning, operating or using the railway, from and against all loss, damage, injury and expense to which the railway company may be put by reason of any damage or injury to persons or property, caused by any of the said applicant's wires or cables, or any works herein provided for by the terms and provisions of this order, as well as against any damage or injury resulting from the imprudence, neglect or want of skill of the employees or agents of the applicant, unless the cause of such loss, cost, damage, injury or expense can be traced elsewhere.

The controversy is, I think, susceptible of a brief solution. The Dominion Parliament has power to prohibit all such works as those comprised in the order under discussion. The language of subsection 3 is comprehensive enough to embrace any "term or condition"; and unless there is something in the order in question which is in itself absurd, or something in the statute which is repugnant to the order, then the order is valid. Lord Macnaghten's judgment in *Vacher* v. *London Society of Compositors* (1). The statute does not elsewhere deal with the subject matter of the order and there is nothing to which our attention has been called that is inconsistent with it. I can perceive no absurdity in the sense in which the word is used in the

(1) [1913] A.C. 107.

canon of construction laid down by Lord Macnaghten. I find it impossible to affirm that the condition required by section 2 is one which it would be unreasonable for an administrative body such as the Board of Railway Commissioners to enact as the price of such privileges as those with which the order deals.

As to the contention that the matter of the condition is in its nature a matter exclusively for the provincial legislatures, I can only say that I do not understand the point.

The appeal should be dismissed with costs.

The judgments of Rinfret and Cannon JJ. (dissenting), were delivered by

RINFRET J.—In the generation and distribution of electrical energy, it is frequently necessary for the electric power companies to construct and maintain lines, wires and other conductors and structures or appliances for the conveyance of power or electricity along or across a railway; or across or near other such lines, wires, conductors, structures or appliances which are within the legislative authority of the Parliament of Canada.

When a power company is desirous of constructing or maintaining its lines or wires along or across the lines or wires, etc., of any other Dominion company, it must either obtain the consent of the other company, or obtain the permission of the Board of Railway Commissioners of Canada, under section 372 of the *Railway Act* (c. 170 of R.S.C., 1927) which reads as follows:—

372. Lines, wires, other conductors or other structures or appliances for telegraphic or telephonic purposes, or for conveyance of power or electricity for other purposes, shall not, without leave of the Board, except as provided in subsection five of this section, be constructed or maintained.

(*a*) along or across a railway, by any company other than the railway company owning or controlling the railway; or

(*b*) across or near other such lines, wires, conductors, structures or appliances, which are within the legislative authority of the Parliament of Canada.

2. Upon any application for such leave, the applicant shall submit to the Board a plan and profile of the part of the railway or other work proposed to be affected, showing the proposed location and the proposed works.

3. The Board may grant the application and may order the extent to which, by whom, how, when, on what terms and conditions, and under what supervision, the proposed works may be executed.

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4. Upon such order being made the proposed works may be constructed and maintained subject to and in accordance with such order.

5. Leave of the Board under this section shall not be necessary for the exercise of the powers of a railway company under section three hundred and sixty-seven of this Act, nor for the maintenance of works now authorized, nor when works have been or are to be constructed or maintained by consent and in accordance with any general orders, regulations, plans or specifications adopted or approved by the Board for such purposes."

Pursuant to the provisions of that section, which was then section 246 of chapter 37 of the Revised Statutes of 1906, the Board issued General Order no. 231 adopting "rules for wires erected along or across railways," to which was annexed a schedule setting forth "standard conditions and specifications for wire crossings" and providing for two methods of crossing: Part I, Over-crossing; and Part II, Underground lines. General Order no. 231 was later amended by General Order no. 291.

In view of certain objections made or terms insisted upon by the railway companies, the General Order was again amended on the 20th February, 1931, and paragraph 2 of the Standard Conditions relating to Over-crossings was made to read as follows:—

2. The applicant shall, at all times, wholly indemnify the company owning, operating or using the railway, from and against all loss, damage, injury and expense to which the railway company may be put by reason of any damage or injury to persons or property, caused by any of the said applicant's wires or cables, or any works herein provided for by the terms and provisions of this order, as well as against any damage or injury resulting from the imprudence, neglect or want of skill of the employees or agents of the applicant, unless the cause of such loss, cost, damage, injury or expense can be traced elsewhere.

The question in controversy is whether the Board had jurisdiction to issue that Order (No. 490). It comes before this court, pursuant to leave granted under subsection 3 of section 52 of the *Railway Act*, upon the following question submitted by the Board:

As a matter of law, had the Board jurisdiction to make General Order No. 490 dated 20th February, 1931?

The appellants are The Canadian Electrical Association and The Hydro-Electric Power Commission of Ontario. They submit that, upon an application for leave to cross railways with power lines, the authority of the Board is "limited to imposing terms and conditions as to the manner and means of construction of the works;" and, that, in this connection, the Board is without jurisdiction to alter the

law in force in the various provinces relating to the respective liabilities in damages of the railway company and the power companies.

The respondents are The Canadian National Railways, The Canadian Pacific Railway Company, The Michigan Central Railroad Company, and The Railway Association of Canada. They uphold the Order, and they contend that it is well within the competence of the Board of Railway Commissioners.

The Hydro Electric Power Commission of Ontario is a provincial institution. The Canadian Electrical Association includes several companies provincially incorporated. This should be borne in mind when dealing with the matter now before the court.

The appellants were authorized, by Dominion or provincial statutes, to construct or maintain their respective transmission lines in a given territory. They were incorporated to render a public service; and the legislature which called them into existence may be assumed to have regarded the services of these electrical and power companies as being in the public interest in no lesser degree than the services of the railway. The Dominion companies—railway or power—derive their authority from the same legislature. In the absence of a specific provision, section 372 should not be so construed as to give the Board the right to prevent the electrical companies from crossing altogether, or to attach to the permission granted by it such conditions as would practically defeat their statutory rights, or as would give to the railway companies a preferential position in respect of liability in damages. The enactment should, we think, be interpreted to mean that the Board ought to grant leave subject to certain terms and conditions. See *Attorney General for Canada* v. *Attorney General for British Columbia* (1). When Parliament intended, in the *Railway Act,* to delegate to the Board the power to refuse leave, it said so in express words. An instance of this may be found in the very next section of the Act, subsection 4 of section 373:

The Board may refuse or may grant such application in whole or in part, etc.

(1) [1930] A.C. 111, at 123.

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The real question is what "terms and conditions" the Board may prescribe upon granting the application; and that question turns upon the interpretation of subsections 3 and 4 of section 372. So far as material, the language is:

> 3. The Board * * * may order * * * on what terms and conditions * * * the proposed works may be executed.
>
> 4. Upon such order being made the proposed works may be constructed and maintained subject to and in accordance with such order.

The expressions are very wide; and, to borrow the language of Lord Macmillan, delivering the judgment of the Judicial Committee in *Canadian Pacific Railway Company* v. *Toronto Transportation Commission* (1),

> Where the matter is left so much at large, practical considerations of common sense must be applied, especially in dealing with what is obviously an administrative provision.

Liability in damages is fundamentally a matter of property and civil rights. While the competence of the Dominion Parliament to provide for matters which, though affecting civil rights, are necessarily incidental to effective legislation in respect of Dominion railways, may not be doubted (2), Parliament should not be assumed to have legislated so as to appropriate the provincial field, except if the intention so to do is clearly indicated. And if that be true of Parliament, *a fortiori* must it be so of a subordinate body, like the Board of Railway Commissioners, whose duties, when acting under section 372, are essentially administrative.

The power to create civil liability is not easily understood to have been delegated. In order to conclude that Parliament intended to delegate it in the premises, we should require more explicit language than that found in subsections 3 and 4 of section 372.

Full effect can be given to the language of those subsections without implying the grant of the power claimed by the Board when framing General Order no. 490. Having regard to the ordinary functions of the Board and to the general scheme of the *Railway Act*, the safe course is to interpret the expression "terms and conditions" as having reference to the engineering features and protective devices relating to the actual construction of the works and their maintenance, and to decide that they are limited to pre-

(1) [1930] A.C. 686, at 697.

(2) [1894] A.C. 189; [1896] A.C. 348; [1930] A.C. 111, at 118.

scribing the manner and the means of construction, that is: the material safeguards, with a view to protection and safety.

It was suggested that the Order might be supported on the ground of compensation, and that a provision for indemnifying the railway companies in all cases of accidents might be considered as a means—even if unusual—of ordering payment of compensation.

But the answer to that suggestion would be:

1. That, under the *Railway Act* (except in cases specially provided for), the Board has nothing to do with the proceedings whereby compensation is to be ascertained; and

2. That wherever it was intended to empower the Board to make directions as to compensation, a special authorization to that effect is contained in the section of the Act under which action is to be taken.

In that respect, reference may be made to sections 39, subs. 1; 215 to 243, dealing with expropriations; 252, subs. 3 (*e*); 255, 256, subs. 3; 257, subs. 2; etc., of the *Railway Act*. Under each of these sections, although the Board is given the power to grant applications upon such " terms and conditions " as it deems expedient, yet where it was intended that compensation may be made a term of the order, it was deemed necessary to insert in the enactment a special provision to that effect. On the contrary, when the expression " terms and conditions " is used alone, without reference to compensation, it is to be found in sections where, on account of the nature of the enactment, it does not appear to have been the intention of Parliament that compensation should be paid.

Let us illustrate the point by a reference to sections 272 and 273 of the Act, dealing with farm crossings. The Board may, upon the application of any landowner, order the company to provide and construct a suitable farm crossing across the railway wherever, in any case, the Board deems it necessary for the proper enjoyment of his land; and the Board may order and direct how, when, where, by whom and upon what " terms and conditions " such farm crossing shall be constructed and maintained. One would hardly suggest that, by these expressions, Parliament intended to empower the Board to impose conditions of

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civil liability upon the farmer as a result of using the farm crossing. In that respect, Parliament did impose civil responsibility upon its creature, the railway company; but it did so in specific terms, and not by way of delegation. (*Railway Act,* sects. 385 and following). Under section 372 the power is not given to the Board, either in express terms or by necessary implication therefrom.

That the Board itself up to the time the present orders were issued, understood its powers and the policy of the *Railway Act* to be in accordance with the views we are now expressing may be gathered from the judgments of Chief Commissioners Blair, Killam and Mabee respectively in the *York Street Bridge* case (1); *Duthie* v. *Grand Trunk Railway Co.* (2), and *Bell Telephone Co.* v. *Nipissing Power Co.* (3); also from comparatively recent pronouncements of the Board: *City of Windsor* v. *Bell Telephone Co.;* and *Bell Telephone Company* v. *City of Ottawa* (4).

We think our conclusion is also supported by the decision of the Judicial Committee in *Grand Trunk Pacific Railway Company* v. *The Landowners on streets in Fort William* (5).

In that case, the Board of Railway Commissioners ordered that the railway company might construct its line of railway along certain streets through the city of Fort William. The order was made subject to the express condition that the railway should

> make full compensation to all persons interested for all damage sustained by reason of the location of the said railway.

On behalf of the landowners (respondents), it was contended that section 47 of the *Railway Act,* on its true construction, authorized the Board to impose the condition contained in its order, or that otherwise it had implied authority to frame its order as it thought right. It was urged that the Board, in considering whether a proper location of the railway should or should not be approved, must, in the proper exercise of its discretion and taking into account all the circumstances, judicially determine whether it should impose any and what condition on which its approval should be granted. The language of section 47 of

(1) (1904) 4 Can. Ry. Cas. 62.
(2) (1905) 4 Can. Ry. Cas. 304.
(3) (1909) 9 Can. Ry. Cas. 473, at 477.
(4) (1917) 22 Can. Ry. Cas. 416 and 421.
(5) [1912] A.C. 224.

the *Railway Act*, as it then was, related to the conditions which the Board may impose, and stated, in part, as follows:—

> The Board may direct in any order that such order or any portion or provision thereof shall come into force * * * upon the performance, to the satisfaction of the Board or persons named by it, of any terms which the Board may impose upon any party interested.

Lord Shaw, delivering the judgment of the Judicial Committee, said:—

> This language is certainly general and comprehensive; but, in their Lordships' view, it cannot be interpreted as being designed to alter the other and specific provisions of the statute as to the compensation payable by the railway company. The particular application now being dealt with falls within the scope of s. 237, which applies to "any application for leave to construct the railway upon, along, or across an existing highway." By subs. 3 of that section it is provided that when the application is of that character "all the provisions of law at that time applicable to the taking of land by the company, to its valuation and sale and conveyance to the company, and to the compensation therefor, shall apply to the land exclusive of the highway crossing required for the proper carrying out of any order made by the Board." It does not appear to their Lordships that it would be safe to infer from the generality and comprehensiveness of the powers of the Board, and apart from any specific reference to the compensation itself and the parties entitled thereto, that these provisions of s. 237 were liable to be altered, abrogated or enlarged by the exercise of the Board's administrative power under s. 47.
>
> The reasons above referred to, which might induce administrative action so as to make the compensation properly equate with the injury to all interests, are reasons which might or might not appear sufficient for direct legislative interposition, but, as already mentioned, their Lordships, apart from that, cannot interpose by the inference argued for. On the contrary it appears to them that the administrative action taken was beyond the powers of the Board of Railway Commissioners for Canada, under the law as it stood at the date of the order.

An additional argument in favour of the appellant's contention may be found in the wording of subsection 3 of section 372, which is to the effect that the Board

> may order * * * on what terms and conditions * * * the proposed work may be executed,

the more natural meaning of that language being that the terms and conditions which the Board is empowered to order have reference to the actual execution of the work. After the work has been executed in accordance with the terms and conditions of the order, by force of subsection 4, there exists a statutory obligation to maintain the works in accordance with the terms and conditions laid down for its execution.

General Order no. 490, as already stated, amended General Order no. 231 (as amended by General Order no. 291),

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by striking out paragraph 2 of part 1, Over-Crossings, and substituting in lieu thereof the new paragraph 2 quoted at the beginning of this judgment. It also added two additional paragraphs relating to notice of accidents, and preserving all rights as between power companies and railway companies for crossing privileges. These added paragraphs are not in question under this appeal.

For the reasons stated, so far as concerns the substituted paragraph 2, we would answer the question submitted in the negative.

The respondents should pay to the appellants the costs of this appeal.

Appeal dismissed with costs.

Solicitors for the appellant, The Canadian Electrical Association: *Brown, Montgomery & McMichael.*

Solicitors for the appellant, The Hydro-Electric Power Commission of Ontario: *Bain, Bicknell, White & Bristol.*

Solicitor for the respondents, The Canadian National Railways and the Railway Association of Canada: *Alistair Fraser.*

Solicitor for the respondent, The Canadian Pacific Ry. Co.: *E. P. Flintoft.*

Solicitors for the respondent, Michigan Central Railroad Co.: *Saunders, Kingsmill, Mills & Price.*