[HIGH COURT OF AUSTRALIA.]

VICTORIAN RAILWAYS COMMISSIONERS . APPELLANT;
RESPONDENT,

AND

McCARTNEY . . . . . RESPONDENT.
APPELLANT,

VICTORIAN RAILWAYS COMMISSIONERS . APPELLANT;
RESPONDENT,

AND

NICHOLSON . . . . . RESPONDENT.
APPELLANT,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

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MELBOURNE, *Mar.* 6, 7. *May* 9.

Rich, Starke, Dixon, Evatt and McTiernan JJ.

Transport Regulation—Commercial goods vehicle—Licence—Refusal by Board—Appeal—Existing transportation service—Railway service available—Interests of the public generally—Railways deficit considered—Reduction of railway freight rates required—Matters not proper for Board's consideration—Transport Regulation Act 1933 (*No.* 4198) (*Vict.*), *secs.* 26, 37.

The Transport Board of Victoria refused two applications for licences under the *Transport Regulation Act* 1933 (Vict.). In refusing the applications the Board regarded as a vital consideration the amount of the railway deficit for the preceding financial year, and the fact that a railway service between the termini of the proposed route was available. As a term of refusing the applications the Board required an undertaking from the Victorian Railways Commissioners that they would reduce the freight rates upon such railway.

Held (1) that the High Court had jurisdiction to hear the appeal; (2) that the Board was wrong in making the deficit in the railway accounts the main

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ground for its decision; (3) that the Board had no authority to control the conduct of the railway services by imposing an undertaking as to freight rates as a condition of refusing to grant the licences.

Decision of the Supreme Court of Victoria (Full Court): *McCartney* v. *Victorian Railways Commissioners*; *Nicholson* v. *Victorian Railways Commissioners*, (1935) V.L.R. 51, affirmed.

APPEAL from the Supreme Court of Victoria.

The respondent, Francis Allan Roy McCartney, applied to the Transport Regulation Board for licences in respect of four motor trucks which were to be used for the carriage of goods between Melbourne, Euroa, Shepparton and other towns. The respondent, John Nicholson, who was already engaged in motor transport of goods between Melbourne and Yarrawonga, applied for a licence in respect of that service. Objection was made to the grant of licences to both applicants by the Victorian Railways Commissioners on the grounds (1) that in each case service adequate for all reasonable requirements could be provided by railway, or by railway combined with a local feeder road service; and (2) that any convenience or advantage provided by the proposed service was not commensurate with the cost to the community, such cost including additional payments by taxpayers to meet increased railway deficits due to loss of traffic, or, alternatively, either the retention of higher railway charges than would otherwise be necessary, or the imposition of still higher charges upon the traffic carried by the railway. The Board refused the licences, and under sec. 37 of the *Transport Regulation Act* 1933, stated the grounds of its decisions for the opinion thereon of the Supreme Court.

Two matters were considered by the Board which weighed with it in refusing the licences; one was the deficit for the preceding year incurred by the Victorian Railways Commissioners in running the Victorian railways; the other was an undertaking from the Victorian Railways Commissioners which the Board obtained by which the Commissioners promised, in the event of their objection being upheld, that they would maintain reduced freight rates arising under " freight rate contracts " until the end of the current financial year, and would generalize these so as to extend the advantages of them to all users of the railway in question, whether parties to a

freight rate contract or not. In essence the system of "freight rate contracts" was one of conceding reduced freight rates to customers who undertook to deal exclusively with the railways in their transport requirements. The freight contract rates were lower than the normal freight book rates, and in most cases were at the same or a figure slightly higher than the road operator's charges, and in some instances were lower than those charged by the applicant operator.

The applicants appealed to the Supreme Court under sec. 37 of the *Transport Regulation Act* 1933. The appeals were referred by *Lowe* J. to the Full Court, which held (1) that the Court was not by sec. 37 of the *Transport Regulation Act* 1933 invested with the power and duty to review the evidence on which the Board had exercised its discretion; (2) that the railway service was an existing transportation service upon the route proposed to be served, within the meaning of sec. 26 (*b*) of the Act, and, therefore, the Board was justified in considering the effect upon that service of the service proposed to be provided by the applicant for the licence; and (3) that sec. 26 did not justify the Board in taking into consideration the existence of the deficit in the railways accounts; that the Board's decision should be set aside, and the matter remitted to the Board for reconsideration: *McCartney* v. *Victorian Railways Commissioners*; *Nicholson* v. *Victorian Railways Commissioners* (1).

From this decision the Victorian Railways Commissioners now, by special leave, appealed to the High Court.

Fullagar K.C. (with him *Herring*), for the appellant. The relevant provisions are secs. 3 and 15 of the *Transport Regulation Act* 1932 (No. 4100), and secs. 22, 26, 30, 36-38, 45,49, 51 and 54 of the *Transport Regulation Act* 1933. It is both relevant and logical to take into account the railway services and the interest of the public therein. Sec. 26 of the 1933 Act does not impose a restriction upon the Board, and even if it does, the phrase "interests of the public generally" are sufficiently wide to authorize the consideration by the Board of such matters. Those words are not cut down by the matters specifically enumerated in sec. 26. The Board was also justified in

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requiring the undertaking as to "freight rate contracts" from the Railways Commissioners.

Latham K.C. (with him *Spicer*) for the respondent McCartney.

Latham K.C. and *Sholl* for the respondent Nicholson.

Latham K.C. The Board has confused its functions under the 1932 Act, which, though very general, are merely advisory, with its very limited powers under the 1933 Act. (See secs. 3, 4 and 15 of the 1932 Act.) The Board is arrogating to itself the functions of Parliament in compelling the Railways Commissioners to reduce their freights, and is adopting the powers of Parliament to act for any or no reason. The Board is to regulate motor transport (Act of 1933, Part II., and see *Acts Interpretation Act* 1928, sec. 10), and not to co-ordinate it, as was required by sec. 15 of the 1932 Act. Secs. 7 and 23 of the 1933 Act indicate the scope of the Act. The Board is concerned with the operation of vehicles on highways only. Sec. 26 of the 1933 Act generally relates only to "transport benefits." Consequently, the "interest of the public generally" was the "interest" in relation to transport. There must be some limitation of the powers of the Board; the limitation is that the powers of the Board are restricted to regulating motor transport. The expression "other relevant matters" in clause (*g*) of sec. 11 must be read as *ejusdem generis* with the matters enumerated in the previous clauses of that section. Similarly, sec. 28 of the 1933 Act provides another example of the limitation of "the interests of the public generally" being restricted in a similar manner. So also must sec. 28 (2) (*c*) be restricted in meaning. The desirability of reducing the railway deficit governed the determination of the Board, and was a consideration which was purely political, and one which should not have governed the Board's decision. There is no reference to railways in the 1932 Act, except in sec. 4 (1). The more reasonable interpretation of sec. 36 of the 1933 Act is that the Board considers the problem only in relation to motor transport, and not in relation to railway transport at all. If under sec. 36 the Board refuses the licence because of the ordinary transport facilities on the road, and then finds that the railway services are not

sufficient, it may then grant the licence. Sec. 38 contains an express reference to railways, and appears to dispense with any application by the Railways Commissioners for running motor vehicles. Sec. 51 is the only other section in which reference is made to railways, and the section empowers the Board to make recommendations as to the opening or closing of railways. If the Board were required to consider railway finances, one would expect that to be made very clear. Sec. 26 is entirely limited to highway services, and in the absence of any precise reference to railways, this Act should be considered as a motor transport regulation Act regulating traffic upon roads. The Board must consider the service of a district, and any general consideration of railway finance, deficits, &c., are necessarily irrelevant. Under sec. 28 it is provided that certain conditions should be attached to the licence, and under sub-sec. 2 the Board may attach such other conditions as the Board thinks desirable in the public interest. The Board is not at liberty to impose conditions upon the Railways Commissioners requiring them to carry goods at rates specified by the Board, and thus control railway services. [He referred to *Railways Act* 1928, secs. 71, 79, and 95.] The *Railways Act* thus gives full discretion to the Railways Commissioners, and the Board cannot exercise its discretion so as to conflict with that of the Commissioners. The duty of the Commissioners under the *Railways Act* is not interfered with by the *Transport Regulation Act*, which does not deal with railways at all. Here the Board has said that it will grant a licence unless the railway rates are reduced, but under sec. 128 of the *Railways Act* rates are made by by-laws, and have to be approved by the Governor in Council, and where a discretion has to be exercised, the persons to exercise that discretion cannot be bound *in futuro*. The Transport Board has, in effect, said that the licence will be granted unless the Governor in Council gives an undertaking that the railway freight rates will be reduced. If this can be done, the Board can control the whole railway system. If the Railways Commissioners gave an undertaking purporting to bind the Governor in Council, such an undertaking would be void. The question of the undertaking is significant, not merely on the aspect of power, but also on the question of

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evidence. If any but the contract rates had been taken there would have been a " substantial advantage " in favour of the operator.

Fullagar K.C., in reply. On an appeal from the Board the Court is in an analogous position to that of a Court reviewing the findings of a jury. The Board may consider the railway services provided (secs. 26 (*b*), 36, 38, 51). If so, there is no ground for limiting the way in which they are to be considered. They must be considered as a whole. The Full Court has exaggerated the importance attached by the Board to the existence of the railways deficit as such, and even if it has not exaggerated it, the Board was right. As to the undertaking, the Board is there to grant or refuse licences. Any application must be advertised, and any person may appear and object. If it can refuse a licence, why can it not refuse subject to a condition to be performed by the objector ?

Cur. adv. vult.

May 9.

The following written judgments were delivered :—

RICH AND DIXON JJ. *Victorian Railways Commissioners* v. *McCartney*.—This is an appeal by special leave from an order of the Supreme Court of Victoria made under sec. 37 of the *Transport Regulation Act* 1933 (Vict.). In the opinion of the Supreme Court that section does not empower it to exercise upon review the administrative discretion committed to the Transport Regulation Board.

The provision has been construed in such a way that the Supreme Court obtains under it no power which is not strictly of a judicial nature. No one impugns this construction, and we willingly accept it as a satisfactory escape from the bewilderment which the text of the provision produces. As a result, the order made in the exercise of the authority conferred by the section so interpreted is one which falls within the appellate jurisdiction of this Court.

The decision appealed from imposes a restriction upon the considerations which theretofore had entered into the determination of the Transport Regulation Board in refusing licences for commercial goods vehicles. That restriction is stated in the reasons given by

Irvine C.J., *Mann* J. and *Macfarlan* J. The Court held that the Board should not have taken into consideration as a ground for its decision the fact that a deficit existed in the railway accounts. The Supreme Court in this view found it unnecessary to deal with another error attributed to the Board. It appears that, as a condition of refusing the application, the Board exacted from the Railways Commissioners an undertaking that they would, for a specified period, be ready and willing to carry goods for and from residents of certain named districts at the rates which the Commissioners would charge if the goods were carried under freight contracts. A freight contract is an agreement with the Commissioners by which a consignor agrees to consign all his goods by rail to the exclusion of motor transport. The dominant provisions of the statute in reference to these two questions are secs. 23 and 26, and it is convenient to state at once the effect which we think sec. 23 produces, and the meaning which we assign to certain expressions occurring in sec. 26. Sec. 23 provides that a commercial goods vehicle shall not operate on any public highway unless it is licensed in accordance with Part II. Considered with the other provisions of the part, this section appears to us to express a prima facie prohibition which can be overcome only by a successful application for a licence. The burden is upon the applicant to show before the Board some particular reason why the rule should be relaxed in his favour. If he brings himself within sec. 22 he has a right to such a relaxation. If he does not, he must show under sec. 26 a reason which, in the Board's opinion, makes it to the public interest that it should be relaxed. The expression "the interests of the public generally" is indefinite, and appears to us to mean little more than such expressions as "public benefit" and "the general advantage," which refer to "public" in opposition to "private" or "individual," and to "interests," "benefit" and "advantage" in opposition to "detriment." We think the expression "persons providing facilities" includes the Victorian Railways Commissioners, and the expression "the existing transportation service for the carriage of goods" includes any railway or other service conducted by them for that purpose. The expression "present adequacy and probabilities

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Rich J. Dixon J.

of improvement to meet all public demands" requires the Board to estimate the public demands, and to consider how those conducting the services are likely to meet them. But neither this phrase nor the remainder of the section appears to us to mean that the Board may itself intervene and attempt to control the actual conduct of the services, either directly or by using its power to license *in terrorem*.

The authority of the Board to annex conditions to a licence which it grants is dealt with by secs. 28 and 29. No provision expressly empowers it to exact from an opponent who carries on an existing transport service an undertaking restricting his freedom to conduct it in the manner the law allows. To seek or require such an undertaking as a condition of refusing the application, or even as a matter which will affect the discretion of the Board in dealing with the application is a course which, if legitimate, enables the Board indirectly to regulate in a measure the conduct of existing services. Unless those carrying on the services submit to the regulation, they will or may be exposed to the competition sanctioned by a grant of licences.

The *Railways Act* 1928 confides to the Commissioners, subject to the provisions which it contains, the control of the Victorian railways. Rate fixing is their task. Generally it is to be performed by means of by-laws, and these require the confirmation of the Governor in Council. In the present case the Transport Regulation Board sought and obtained from the Commissioners an undertaking as to the manner in which in relation to the places specified they would exercise their authority over rates. This appears to us to involve the introduction into the considerations affecting the grant of a licence, an element foreign to the duties of the Board and falling within the province of the Commissioners. It is unnecessary to examine the authority of the Board to require undertakings from other persons or bodies conducting transport services who oppose the grant of licences. In the case of opponents who themselves conduct motor transport services, the fact that they must be licensed gives the Board another source of authority over them, and the question may be so reduced to one of form almost. But in the case of the Commissioners, functions committed to them by statute are

involved. In seeking to affect the manner in which the Commissioners should perform their duties, the Board appears to us to have exceeded the discretion reposed in it. In doing so the Board has raised a question of much importance which we think admits of a clearer and readier answer than that decided by the Supreme Court; and for that reason we have dealt with it.

The difficulty we find in the question whether the Board erred in the attention it paid to the deficit in railway accounts arises from some uncertainty as to the actual effect upon the Board's decision produced by that consideration. The Board, rightly as we think, regarded it as necessary for the applicant to show that some good reason existed why, in the interest of those needing transport facilities or to secure some other advantage of a public nature, the applicant should be let in to divert freight from the railway. It seems to us that, notwithstanding the degree to which the Board's discussion of the problem before it revolved round the railway deficit, in the end it was a consideration which actually may have done no more than supply the Board with a justification for and confirmation of the presumption in favour of confining the available freight to the existing railway system, and this we should think legitimate reasoning. While we agree that railway finance is not the responsibility of the Board, we should find it difficult to say, if this matter arose on certiorari or mandamus to hear and determine according to law, that the Board's determination was invalidated by the use it had made of that particular consideration. But, having regard to the emphasis laid, in some of the reasons given by the Board, upon the railway deficit, we are not prepared to disagree with the view that exercising this statutory jurisdiction the Supreme Court rightly remitted the matter on this ground to the Board for its reconsideration. The ambit of the discretion of the Board is not discoverable from the words "interest of the public" as they occur in sec. 26. It is governed by the general scope and object of the enactment.

In our opinion the appeal should be dismissed.

Victorian Railways Commissioners v. *Nicholson*.—For the reasons we have given in *Victorian Railways Commissioners* v. *McCartney*, we think that this appeal should be dismissed.

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STARKE J. These appeals involve a consideration of the *Transport Regulation Act* 1933 of Victoria. That Act sets up a Transport Regulation Board. It contains provisions for the regulation of motor transport, including both commercial passenger vehicles and commercial goods vehicles. Sec. 23 provides that a commercial goods vehicle shall not operate on any public highway unless such vehicle is licensed in accordance with the part of the Act dealing with motor transport. The Board is required by sec. 22 to grant such a licence in certain cases, but the present case is not one of those cases. Otherwise the Board may, on the application of the owner of a commercial goods vehicle, grant in respect of such vehicle a commercial goods vehicle licence (sec. 24). By sec. 26, before granting or refusing to grant any such licence, the Board shall have regard primarily to the interests of the public generally, including those of persons requiring as well as those of persons providing facilities for the transport of goods, and without restricting the generality of the foregoing requirement shall take into consideration: —(*a*) the advantages of the service proposed to be provided, and the convenience which would be afforded to the public by the provision of such service; (*b*) the existing transportation service for the carriage of goods upon the routes or within the area proposed to be served in relation to :—(i.) its present adequacy and probabilities of improvement to meet all reasonable public demands; and (ii.) the effect upon such existing service of the service proposed to be provided; (*c*) the benefit to any particular district or districts or to the residents thereof which would be afforded by the service proposed to be provided; (*d*) the condition of the roads to be included in any proposed route or area; and (*e*) the character, qualifications and financial stability of the applicant. These provisions give to the Board the widest powers, and, within reason, the Board is master of the situation. It is said, however, that the Board should not have regard to the interests of the Railways Commissioners as affecting an applicant's right to a licence. But the railways constitute an existing transportation service, and the Commissioners are a body providing facilities for the transport of goods. Again it is contended that even if the Board can consider the interests of the Victorian Railways Commissioners, it nevertheless transcends

its functions if its decision be rested largely upon the existence of a deficit in the railway accounts.

The Board conceived "that we have imposed upon us the duty of entertaining any consideration which may affect the public generally, relevant to the grant or refusal of a licence, and that there is no limitation or restriction upon such considerations which we are bound to entertain before disposing of any application. We cannot find either in the general scheme of the Act or in any specific words any limitation which would modify our duty or relieve us of the responsibility which is contained in this general direction. We conceive, for example, that the general interests of the public might in any case extend to and include matters affecting the health both of those who transport goods and those who may be affected by their activities; might extend to and include the economic interests in the existence as well as the character of transport of the community, including the taxpayers and those who use transport as well as those who provide it; and extend to and include the comfort and convenience of dwellers along routes upon which transport operates and is conducted, the value of land held by landowners in such districts, and in general any matter which appears to affect the general well-being arising out of the existence of an economic community of which transportation is an essential part."

Wide as are the powers of the Board, I cannot think that they extend so far as is claimed in this passage. The Board is a transport authority, and general considerations regarding the social, political or economic conditions of the community appear to me to be outside its functions. Following upon this general view of its powers, the Board resolved to consider what the effect of granting an application would be upon the existing railway service, or more strictly upon the railway service which would exist at the date when an applicant's proposed service would come into effect. The Board found that the net cost to the State of Victoria, or the taxpayers, of the operation of the railways system, and the payment of the interest on the debt incurred in its construction during the last financial year was in the order of £1,600,000. "The starting point" the Board asserted, "of any principles in connection with this matter must be the

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assumption that the reduction of this burden upon the community is advisable and advantageous if it can be obtained without imposing substantial burden or cost on the whole or any particular class of the community."

The Board may well, I think, require an applicant to satisfy it that the service he proposes confers upon the public some advantage over any existing service, such as the railways. One element in that consideration, naturally, is that a new service would withdraw business from an existing service and reduce its revenue. Such a reduction is not the less a matter for consideration because the deficit in an existing service is known and is of large dimensions. But the Board exaggerates the importance of these considerations in its assertion that the reduction of the railway burden upon the community is the dominant matter for its consideration. The dominant consideration for the Board is the desirability of the proposed service, having regard to existing services and other matters, such, for instance, as those referred to in sec. 26.

The Board, in my opinion, was on firmer ground when it said that it dealt with "cases of competitive service . . . on the basis of substantial advantage." "The principle which we have laid down is that a licence shall be granted to a haulier even when competitive with a railway line where the operations of the haulier provide a substantial advantage to consignors and consignees over the service provided by the railway. This principle is based upon our acceptance of the conclusion arising from evidence submitted to us that in normal circumstances additional traffic to the railway system in most areas in this State can be handled without corresponding additional cost to that system. The result of additional traffic is to increase the excess of revenue over expenditure, or what would normally be called profit to private operators. We conclude that normally the interest of the public generally would be conserved by maximizing this excess revenue or profit. The public are, as both taxpayers and users, directly concerned with the stability and economy of the railway system. Where, however, a substantial advantage to users can be obtained by the operations of a haulier in competition with the railways, it is thought that the cost to the

community resulting from the deprivation of railway traffic may be compensated for by this additional substantial advantage." Such considerations are legitimate and reasonable, and within the function of the Board. But it has, I think, introduced into the phrase "substantial advantage" some considerations or elements, above referred to, which transcend its functions or are irrelevant to the grant or refusal of a licence.

Further, it was contended that the Board was in error in refusing an application for a licence upon an undertaking of the Victorian Railways that the Commissioners would be ready and willing to carry goods for and from residents of certain districts at the freight contract rates charged to its customers in those districts. The Commissioners found no difficulty in giving this undertaking, despite the provisions of the *Railways Act* 1928, and doubtless it could and would have been performed. But the Board has no right or authority to control the business operations of the opponent of a licence, either directly or indirectly. It would be an arbitrary and capricious act, and therefore unwarranted in law, for the Board to extort such an undertaking from an opponent of a licence as a condition of its refusal. And it would not be less objectionable if the undertaking were proffered by an opponent. For it involves the Board in the exercise of its powers and discretion in the grant or refusal of a licence in a consideration of matters extraneous to the application for a licence, and in the ultimate control of business operations which are beyond its functions. In other words—to use the language of the mandamus cases—the Board, in such circumstances, would not have heard and determined the application for a licence according to law, because it took into consideration matters which it had no right to consider.

The right of appeal to the Supreme Court in these cases is given by sec. 37 (6) of the *Transport Regulation Act*. This right extends, as I understand the learned Judges of the Supreme Court, to matters which can be determined upon legal principles, that is, matters of a judicial and not of an administrative nature. Accepting as I do this construction of the section, the appellate jurisdiction of this Court is then clear.

Both appeals should be dismissed.

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EVATT AND McTIERNAN JJ. Sec. 26 of the *Transport Regulation Act* 1933 of the State of Victoria provides that before granting or refusing to grant a commercial goods vehicle licence, the Transport Board shall be guided by certain principles and rules. The only question in these two appeals from the Supreme Court of Victoria is whether, in the two cases now under appeal, the Board departed from the rules and principles laid down by sec. 26. It is reasonably clear that in each of the cases the decision of the Board was affected adversely to the present respondents by the existence or the amount of the deficit in the accounts of the Victorian Railways Commissioners. It is also clear that the applications of the respondents were refused as a result of the imposition by the Board of a condition that a railway by-law should be gazetted before January 1st, 1935, so as to extend certain railway rates for the carriage of goods to certain specified towns.

Sec. 26 requires that the Board "shall have regard primarily to the interests of the public generally including those of persons requiring as well as those of persons providing facilities for the transport of goods."

Without restricting the generality of those provisions the Board is required to take into consideration: (1) The advantages of the service proposed to be provided, and the convenience which would be afforded to the public by the provision of such service (sec. 26 (*a*)); (2) the existing transportation service upon the routes or within the area proposed to be served (sec. 26 (*b*)); (3) the benefit to any particular district which would be afforded by the service proposed (sec. 26 (*c*)); (4) the condition of the roads to be included in the proposed route or area (sec. 26 (*d*)); (5) the character, qualifications and financial stability of the applicant (sec. 26 (*e*)).

In the first place we agree with the Supreme Court that the "existing transportation service" mentioned in sec. 26 (*b*) includes the Victorian Railways Commissioners in relation to their provision of transport service. Further, we are of opinion that the phrase "persons providing facilities for the transport of goods" (in the introductory words of sec. 26) is intended to include the Victorian Railways Commissioners. It follows that as the Board is bound to have regard to the interests of the public generally, including those

who require, as well as those who provide, transport facilities, it is bound to consider the adequacy and economy of the particular railway service provided, and the effect which the granting of the application for a licence might have upon such service. It does not follow that in performing its important but restricted duty of co-ordinating commercial transport to and within a particular area, the Board should concern itself with such matters of general social and political policy as the deficit of accounts for the services of the Railways Commissioners regarded as a whole. Such a deficit may be due to a multiplicity of causes quite outside the range of the Board's proper activities. The mere fact of the existence of a deficit in the accounts affords no assistance on the questions before the Board, because it is a matter of common knowledge that the development of the country is one of the objects pursued by these publicly owned transportation services.

In our opinion, the Board's duty in any particular case is to look to the railways as an actual or prospective transport-providing authority within the area. The Board has to regard the interests of "the public generally" in obtaining reasonably efficient transport facilities. It has to consider also whether the existing railway service is not sufficient to meet reasonable public requirements. If the Board is satisfied that the railway service is not adequate to meet the reasonable requirements of the area, it would not be effectuating the intention of the statute if it refused an application for a licence merely because of a general deficiency in railway accounts. Indeed, a general deficiency in railway accounts might, upon the contrary view, be used for the purpose of refusing every application for a licence so long as some sort of railway transport was provided for the use of the public in the district concerned.

We agree that it is difficult to impute error of law in cases like the present. But sec. 37 of the Act enables and requires the Supreme Court of Victoria to review all questions of law and fact arising upon a decision by the Board, and the question of the relevance of the Board's consideration of the deficit in the railways accounts does arise in both these cases. With the knowledge that the railways were not merely business enterprises, but instruments for developing the country, Parliament itself, it may fairly be assumed, has fully considered the interests of the public as the proprietors of the railways. The general object of the relevant part of the legislation is to conserve these interests so far as that is consistent with a reasonable regard

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Evatt J. McTiernan J.

for the interests of such members of the public as are carriers, consignors, consignees and users of goods. Hence the Board is authorized to license carriers who might take some of the freight which would otherwise be available for the railways. But the Board is not authorized to weigh and balance the wider public interests that the State has, as proprietor of the railways and allied services, in the avoidance or reduction of a deficit in the accounts, against the interests of those who might be advantaged by allowing another transportation service to be conducted on a particular route.

In our opinion, therefore, the existence and amount of such deficit is too remote from the consideration to which the Board is bound to advert in carrying out the mandate of sec. 26. Indeed, the strength of the case against the Board may be expressed by pointing out that it was probably the existence of a railway deficit which led to the creation of the Board by Parliament. It is the latter, and not the subordinate administrative authority which is the proper tribunal to suggest or effect a means of remedying such deficits.

We are also of opinion that the Board had no authority to ask for any undertaking from the Railways Commissioners as a condition of the refusal of the applicant's licence. Under sec. 26 of the Act, the Board has to grant or refuse the application. It is true that under sec. 26 (*b*) (1) the Board may have regard to the " probabilities of improvement " in the existing transport services (including the railways), so that, if the Railways Commissioners sufficiently evidenced an intention on their part to provide a more efficient or a cheaper service, the Board could properly have regard to such intention as bearing upon the probability of improvement in the existing service. But it is one thing to grant or refuse a licence after considering all the circumstances actual and prospective. It is quite a different thing to impose a condition when the section gives no authority to do so.

In our opinion, both the appeals should be dismissed with costs.

Appeals dismissed with costs.

Solicitor for the appellant, *F. G. Menzies*, Crown Solicitor for Victoria.

Solicitors for the respondents, *G. D. Lawrence* and *Alexander Grant, Dickson & Pearce.*

H. D. W.