The Union of India, Represented by The General Manager, North-Eastern Railway, Gorakhpur

Vs

The Indian Sugar Mills Association, Calcutta & Another

(K. N. Wanchoo, V. Bhargava JJ)

17.03.1967

JUDGMENT

BHARGAVA, J.

Belsund Sugar Co. Ltd., Riga, (hereinafter referred to as "the Company") was incorporated in the year 1932. Soon after the incorporation of the Company, the Company established a fairly large sugar mill near railway station Riga. The station was on the railway line of the Bengal and North Western Railway which, at that time, was owned by a limited Company known as the Bengal and North Western Railway Limited. At Riga railway station, the Railway had two main lines running, one along the passenger platform, and another forming a loop against it running parallel to the first line with points on both sides of the platform for taking the railway trains to line 2 when arriving from either direction at Riga railway station. For the sake of convenience, the line along the passenger platform will be referred to as line 1, and the other main line forming the loop as line 2. In addition, there was a goods platform and a line was run connecting line 1 to the line along the goods platform from both directions. That line is to be referred to hereinafter as line 5. Since the sugar factory of the Company was established close to Riga station, considerable goods tragic started being received for the Company and, at the same time, goods traffic was also booked by the Company for outward transmission from this station. During the crushing season, a large number of wagons loaded with sugarcane used to be received and, under the existing constructions of the Railway, delivery of the sugarcane had to be taken from the goods wagons on line 5 at the goods platform. Since the traffic was considerable, it became inconvenient and, consequently, an arrangement was entered into between the Railway and the Company for construction of two sidings, described as assisted sidings. In pursuance of this arrangement, two further lines (hereinafter referred to lines 3 & 4) were laid between lines 2 and 5 running parallel to these lines. Trains from line 1 could be taken to lines 3 and 4 from both directions in the same manner as they could be taken to line 5. At the time of construction of these assisted sidings represented by lines 3 and 4, an agreement was entered into between the Railway and the Company on 21st November, 1933. Under that agreement, part of the expenditure on the construction of these assisted sidings was met by the Company, while in that agreement that the Company will pay in advance, in two equal half-yearly installments on the first day of April and the first day of October respectively in each half-year, a fixed contribution of Rs. 709/8/-per half-year to the Railway for the use of the railway portion of the siding. The agreement proceeded to lay down that the payment of this contribution by the Company was to be taken in lieu of paying separately for interest on, and cost of maintenance of, the permanent-way, points and crossings and interlocking connected therewith and for freight on the traffic over the siding. It was further agreed that, in the event of the above contribution not being sufficient to meet the cost of the working of the siding, the Railway was entitled, on giving six months' notice of its intention to do so, to modify the above contribution and charge the Company such higher amount as it may consider necessary to meet the increased cost of working. Further

railway lines were also laid from Riga railway station up to the factory of the Company. A line ram from the junction of lines 3 and 4 on the western side of the station in a semi - circular loop and then entered the factory of the Company where the line was connected to four different lines. This line running from the junction up to a point where there was further bifurcation of lines, will be referred to as line 6. At the end of line 6, this line was connected to two lines, one situated to the south, and the other to the north. There was also a loop formed by connecting the northern line to the southern line by another connecting line. This loop is to be referred to as line 7. Lines 6 and 7 were laid at the cost of the Company. The arrangement was that the Company was to take delivery of its sugarcane wagons as well as all other goods on lines 3 and 4 at the assisted sidings. Thereafter, it was the duty of the Company to unload the wagons there, or to have them rolled into their own factory yard. It appears that the Company purchased a railway engine and used it for taking the loaded wagons to the factory and bringing back the unloaded wagons to these lines 3 and 4. For outward traffic also, the empty wagons often used to be loaded in the factory yard and brought by the factory engine to Riga railway station. On some occasions, the wagons were taken by being pushed by manual labour instead of using the engine. A third, alternative was that the Company would request the Railway to arrange for the shunting of their wagons from lines 3 and 4 to the factory yard. Whenever this arrangement was adopted, the Railway charged the factory for this service rendered. It appears that between the years 1956-57 to 1958-59, the Railway used to charge the Company at the rate of Rs. 18/-per hour, computing the time taken by the shunting engine in competing the work of the Company. The time computed began when the shunting engine came to lines 3 and 4 to take away the Company's wagons, ands ended when the engine returned to the railway station after competing the work of shunting the wagons. Sometimes, on return, the engine brought empty wagons, but this was considered immaterial, because the charge was made from the Company by the Railway on the basis of the time actually taken by the shunting engine calculated @ Rs. 18/-per hour. This rate of Rs. 18/-per hour will be described hereafter as the rate of the shunting engine charge. It may be mentioned that, in the year 1942, the Bengal ands North Western Railway was taken over by the Indian Government and, at the relevant time in the year 1958, the Railway was owned by the Union Government and was run under the name of North Eastern Railway, which is the name it continues to bear at present.

The arrangement mentioned above, continued up to 8th February 1958. On this date, a notice was given by the Railway to the Company proposing enhancement of the charges to be levied in pursuance of the agreement which had been entered into on 21st November, 1933, under which the Railway was empowered to enhance the charges, if it considered it necessary to meet the increased cost of the working of the assisted sidings. By this letter dated 8th February, 1958, the Railway gave six months' notice of enhancement of the charges, after mentioning that the fixed contribution of Rs. 709/8/-per half-year for use of the Railway portion of the siding in lieu of paying separately for interest on, and cost of maintenance of, the permanent-way, points and crossings and inter-locking connected therewith and for freight on the traffic over the siding was not considered sufficient to meet the cost of present-day working of the siding. The charges to be levied in lieu of existing fixed contribution were mentioned as a sum of Rs. 603.7nP per half-year in respect of interest on the capital and cost of maintenance of the permanent way, points and crossings and interlocking connected therewith, while for the freight on the traffic over the siding, described as the siding charge, the Railway demanded Re. 1/-per 4 - wheeled wagon over the siding, subject to a minimum of Rs. 7/-per shunt. The new rates were to come into force with effect from 10th August 1958. Though the Company did not agree to these new rates, the Railway demanded payment at these rates and ultimately, the Company was informed by the Railway that, if payments at new rates were not made, the facility of the assisted siding would be withdrawn. The Company made payments

under protest. Further, the Railway also enhanced the rate for the shunting engine charge. The rate was enhanced to Rs. 28/-per hour for the year 1959-60 and to Rs. 30/50nP per hour for the year 1960-61.

The Company, being dissatisfied with these charges, filed a complaint under section 41 (1) (c) of the Indian Railways Act, 1890 (hereinafter referred to as "the Act") before the Railway Rates Tribunal at Madras (hereinafter referred to as "the Tribunal") against the enhancement of the shunting engine charges from Rs. 18/-per hour to Rs. 28/-and subsequently Rs. 30/50nP per hour, as well as the enhancement of the siding charges by prescribing a scale of payment @ Rs. 1/-per wagon with a minimum of Rs. 7/-per shunt. It appears that there were a large number of sugar mills situated along various railway stations served by the North Eastern Railway, and with them also there existed similar arrangements as the one arrived at between the Railway and the Company in 1933 under the agreement mentioned above. All these sugar mills were members of the Indian Sugar Mills Association. This Association also joined as a complainant in the complaint of the Company representing all its constituent sugar mills. In the proceedings before the Tribunal, however, the Indian Sugar Mills Association did not take any active part and the case was actually fought out by the Company. It was urged in the complaint that both the shunting engine charges and the siding charges at the enhanced rates claimed by the Railway were unreasonable and the Tribunal was requested to fix reasonable charges in exercise of its powers under s. 41 (3) of the Act.

The complaint was contested by the Railway on three grounds. The first ground was that the charges, to which the complain related, were in respect of services which the Railway was not bound to render to the Company and was rendering under private agreements with the Company and, consequently, no complaint could be filed under s. 41 of the Act challenging them on the ground of being unreasonable. This plea was taken on the basis that the expression "any other charges" in s. 41 (1) (c) of the Act could only cover a charge made by the Railway in discharge of its duties under the statute and could not cover a charge made by the Railway for voluntary services which the Railway might render under a private agreement of a commercial nature to any other party. The second ground was that the complainants had not succeeded in showing that the charges demanded by the Railway were unreasonable and, that burden of proof not having been discharged by the complainants, the Tribunal was not competent to call upon the Railway to prove the reasonableness of the charges and to reduce the charges only on the ground that the Railway had failed to establish their reasonableness. The third point of contest was that the rates, at which the charges were demanded by the Railway, were, in fact reasonable and should not be reduced.

The Tribunal held that the complaint was competent and that the expression "any other charge" in s. 41 (1) (c) of the Act did cover both these charges to which the complaint related. The Tribunal did not, in specific words, hold that the complainants had established that the charges were unreasonable, before proceeding to examine the reasonableness of the charges. On the other hand, the Tribunal proceeded to examine the evidence of the parties adduced before it and came to the finding that, in both cases, the charges being demanded were unreasonable. Further, after examining in detail the evidence given on behalf of the Railway, and on making its own computation, the Tribunal held that a sum of Rs. 20/-per hour was a reasonable rate for the shunting engine charge. In respect of the siding charge, the Tribunal rejected the plea of the Railway that this charge should also be levied on the basis of the time taken in shunting the wagons of the Company to lines 3 and 4, after taking into account the shunting engine charge. It was held that, in the original agreement of 1933, parties, had agreed to a lumpsum in respect of various services, and the subsequent conduct of the Railway established that, out of the total sum of Rs. 1,419/-per year, a sum of Rs. 1,206/14 nP per year represented charges in respect of interest on the capital and cost of maintenance of the

permanent way, points and crossing and interlocking connected therewith. The remaining sum of Rs. 212 and odd was held to represent the freight on the traffic over the assisted reliable material provided by the Railway for arriving at a reasonable figure on any other basis, the Tribunal held that the only amount which the Railway could be permitted in respect of the siding charge would be double the amount originally chargeable under the agreement of 1933 and, consequently, allowed the Railway siding charge at a fixed rate of Rs. 424/-per year. It is against this decision of the Tribunal that the Railway has come up in this appeal to this Court by special leave, and in the appeal, has taken all the three points, mentioned above, on the basis of which the complaint before the Tribunal was resisted.

Dealing with the first question, which was the only question of law raised in this case, learned counsel appearing for the Railway drew our attention to the definition of "railway" in s. 3(4) of the Act and, in particular, to clause (b) thereof under which the "railway" is defined to include all lines of rails, sidings or branches worked over the purposes of, or in connection with, a railway. It was urged that the assisted sidings, comprised of lines 3 and 4, were not worked over for the purpose of, or in connection with, the work of the railway and, consequently, these assisted sidings could not be held to be a part of the railway. Attention was also drawn to s. 11 of the Act, which lays down the duty of the Railway to make and maintain certain works, to show that there was no duty on the Railway to maintain the permanent way points and crossings and interlocking connections existing for the service of these assisted sidings, lines 3 and 4. The duties of the Railway in respect of goods traffic are laid down in s. 27 which requires the Railway to afford all reasonable facilities for the receiving, forwarding and delivering of traffic upon and from the several railways belonging to or worked by it and for the return of rolling stock. Under this provision also, there was no duty on the Railway to give delivery of goods to the Company on lines 3 and 4. The duty was to carry goods of the Company and to deliver them on line 5 which was the line maintained by the Railway itself for delivery of goods. It was urged that, in these circumstances, it must be held that the charges levied by the Railway for taking the wagons, containing the goods of the Company, to lines 3 and 4, as well as the charges for rendering the service of taking the wagons of the Company to the premises of its factory over lines 6 and 7 cannot be held to be charges levied for the purpose of performing any duty cast on the Railway by the Act. Section 29 of the Act lays down how rates are to be fixed. Under s. 29 (1), the Central Government is empowered, by general or special order, to fix maximum and minimum rates for the whole or any part of a railway, and prescribe the conditions in which such rates will apply. Under sub-s. (2), the Central Government is empowered, by a like order to fix the rates of any other charges for the whole or any part of a railway and to prescribe the condition in which such rates of charges are to apply. It was urged that the charges now in dispute will not be charges covered by s. 29 (1) or s. 29 (2) of the Act, and, on the same basis, they will not be charges covered by s. 41 (1) (b) or s. 41 (1) (c) of the Act.

We are unable to accept this submission made on behalf of the Railway. It is correct that s. 29 (1) of the Act will apply to rates of charges for carrying goods from station to station over the railway itself, in such a case, the Central Government can fix the maximum and minimum rates, whereas the actual rates to be charged can be fixed by the Railway Administration itself. If any person has a grievance that the rate being charged by the Railway is excessive, he can complain to the Tribunal, and the complaint would be covered by the provisions of s. 41 (1) (b) of the Act. This charge for carriage of goods over the railway or part of a railway is the only charge in respect of goods which can be the subject matter of a complaint under s. 41 (1) (b) of the Act. The language of s. 41 (1) (b), by itself, excludes its applicability to passenger fares. Charges are often made by the Railway for wharfage and demurrage, but the jurisdiction of the Tribunal to deal with the fixation of these charges is expressly taken away by s. 45 (1) (b) of the Act. Consequently, it appears that, in respect

of a commodity carried by a railway over its own railway lines, the only charge that the Railway can levy, ands which can be the subject - matter of a complaint under s. 41 (1) (b), will be the charge for carriage of the discharge by the Railway of its statutory duty of carrying goods between stations maintained by it. There does not appear to be any other statutory duty in respect of which any other charge could be levied by the Railway, and, consequently, if the interpretation sought to be put on behalf of the Railway is accepted, the result would be that s. 29 (2) will become ineffective and redundant, bookcases there would be no other charges in respect of which fixation of rates by the Central Government would be required. Similarly, the provision contained in s. 41 (1) (c) would also be redundant, as there would be no other charges in respect of which a complaint could be filed under this provision. It is clear that a complaint under s. 41 (1) (b) relates to fixation of a rate relating to charges mentioned in s. 29 (1), while s. 41 (1) (c) relates to a complaint in respect of any other charge mentioned in s. 29 (2). It appears to us, in these circumstances, that the expression " any other charge " used in s. 29 (2) and s. 41 (1) (c) cannot be given the narrow meaning of covering a charge in respect of the statutory duty of the Railway so as to exclude charges made or levied by the Railway for all other services. In this connection, the language used in clauses (b) and (c) of s. 41 (1) is significant. Section 41 (1) (b), as has been mentioned earlier, covers a complaint in respect of a charge for carriage of any commodity between two stations at a rate which is unreasonable, while s. 41 (1) (c) relates to a complaint in respect of any other charges which is unreasonable. The expression "any other charge" in clause (c) must, therefore, cover charges which are not included in clause (b). Clause (b) specifically mentions charges for carriage of a commodity between two stations, and, hence, the expression " any other charge " in clause (c) must necessarily include within it a charge for carriage of any commodity between places other than two stations. In the present case, the shunting engine charge and the siding charge are both being levied by the Railway for carrying goods from the Railway to sidings not forming part of the Railway. In bringing goods from other stations to Riga station on lines 1, 2 or 5, the railway would only be carrying the goods between stations. It is only thereafter, when the wagons are shunted by the railway to lines 3 and 4 or over lines 6 and 7 to the factory of the Company, that the railway will be carrying goods between a station and another place or between two different places which cannot either of them be described as stations. This charges for carriage of the commodity in the context in which the expression "any other charge" is used in s. 29 (2) and s. 41 (1) (c), must be covered by this expression. It appears to us to be immaterial that the charge being levied by the Railway for taking the wagons to the assisted sidings or to the factory of the Company arises only as a result of a voluntary agreement by the Railway which the Railway, at its option, might have refused to enter into. It is correct that the Railway was not bound to agree to carry the goods of the Company to the assisted siding or to the factory of the Company; but it seems to us that, once the Railway did, in fact, agree and decide to charge the Company for it, the Railway became bound to make the charge in accordance with s. 29 (2) of became bound to make the charge in accordance with s. 29 (2) of the Act. If a rate of charge is prescribed by the Central Government under s. 29 (2) for such voluntary service and the person receiving the service feels aggrieved, he can complain to the Tribunal under s. 41 (1) (c) of the Act and have the reasonable rate determined. Even if no rate is prescribed by the Central Government under s. 29 (2) for such voluntary service and the person receiving the service feels aggrieved, he can complain to the Tribunal under s. 41 (1) (c) of the Act and have the reasonable rate determined. Even if no rate is prescribed by the Central Government under s. 29 (2) and the Railway levies such a charge, it will be competent for the person aggrieved to file the complaint against the rate of charge before the Tribunal under s. 41 (1) (c).

In this connection, it was urged by learned counsel that the expression " any other charge " should not be given a very wide meaning and he cited before us instances of various other charges being

made by the Railway, such as charges for advertisement on railway premises, catering charges, retiring room charges and time - table charges, to urge that at least these charges would not be covered by the expression " any other charge" in s. 41 (1) (c) of the Act. It seems that, in this case, it is not at all necessary for us to examine whether charges of this nature mentioned by learned counsel will or will not be covered by the expression " any other charge ". In fact, we do not think it to be advisable that we should try to define the full scope of the expression " any other charge " in this case. It is enough to hold for the purposes of this case that at least the charges for carriage of goods from parts of the railway to points or places, not forming part of the railway, will certainly be covered by the expression " any other charge " used in s. 41 (1) (c), so that the complaint in the present case was competently entertained by the Tribunal.

This view that we have arrived at is in line with the principles laid down in England as noted in Halsbury's laws of England, 2nd Edn., Vol. 27, in paras 434 and 436 at p. 196. In para 434, the principle noted is that " loading and unloading, covering and uncovering in classes 7 to 21, though performed at the private siding, are services otherwise provided for in the standard charges, and the company must charge for these either the standard or an exceptional rate. And where the Railway Rates Tribunal have by order fixed charges for services not included in conveyance and terminals, as long as the order stands unchallenged the company may only exact the charges fixed by the Tribunal and not what the company thinks are reasonable charges". Then, in para 436, it is said : " So, even when the carriage charges are paid by a siding owner who has entered into an express agreement to pay a fixed or ascertainable sum for the private siding services, he may still refer the matter to the Railway Rates Tribunal..... The Tribunal may consider from a business point of view what is the money value of the services rendered or they may ascertain the total cost of the services over a year and divide it by the number of tons carried during the same period to give an addition to the tonnage rate ". These principles clearly indicate that the Railway Rates Tribunal is competent to determine the reasonableness of charges for services by a railway even on private sidings. The same principle is incorporated in s. 41 (1) (c) of the Act in India by empowering a complainant to complain to the Tribunal, if any charges, other than a charge for carriage of commodity between stations, is found to be unreasonable. The preliminary legal objection raised on behalf of the Railway was, therefore, rightly rejected by the Tribunal.

On the second question, we find that, in the pleadings taken before the Tribunal, the Railway did not in so many words specifically raise the issue that, before proceeding to examine the reasonableness of the rates demanded by the Railway, the Company should be called upon to show that those rates were unreasonable, though the issues, which were framed both with regard to the siding charges as well as the shunting engine charges, were couched in language enquiring whether the rates demanded by the Railway were unreasonable. It appears that, in the complaint, the Company had mentioned figures on the basis of which the Company requested the Tribunal to hold that these charges were unreasonable. In respect of the shunting engine charges, the pleading was that the Railway had been charging the Company at a rate of Rs. 18/-per hour for the years 1956-57 to 1958-59 and had, then, suddenly raised the charges to Rs. 28/-per hour without any justification. This sudden enhancement from Rs. 18/-out any justification. This sudden enhancement from Rs. 18/-to Rs. 28/-per hour in the year 1959-60 was alleged to be unreasonable. In the cases of siding charges, the pleading was that the Company had been paying earlier a fixed sum of Rs. 212/-per year, while, after the enhancement by the notice dated 8th February, 1958, the charges were so fixed that the burden on the Company rose to amounts in the next three years varying between Rs. 7,752/-to Rs. 9,676/-. According to the Company, thus the siding charges were fixed in such a manner that, after enhancement, the charges payable became 70 to 80 times the charges originally payable under the agreement of 1933. These figures given on behalf of the Company did, prima facie, indicate that the

rates fixed and demanded, which were challenged in the complaint, were unreasonable. Further, the new rate of Re. 1/-per wagon was, per se unreasonable inasmuch as the cost incurred by the Railway on shunting the wagons could not be in proportion to the number of wagons shunted and could not, in any case, be so high as to justify this rate even in cases when a large number of wagons were shunted together in one single shunt. Consequently, it was competent for the Tribunal to call upon the parties to adduce evidence and to determine what would be the reasonable rates according to the Tribunal itself. That being the factual position, we cannot hold that the Tribunal committed any error in going into the evidence given on behalf of the Railway and arriving at the reasonable rates, after a full consideration of that evidence and the evidence tendered on behalf of the Company. It is to be noted that the necessary facts for determining what expenses the Railway must be incurring in order to render the services for which they were demanding charges at the impugned rates were in the special knowledge of the Railway authorities only and, consequently, when, subsequently, the Tribunal examined this question, it proceeded rightly in carefully scrutinising the evidence tendered on behalf of the Railway.

On the merits, it appears to us that, so far as the shunting engine charges are concerned, the decision given by the Tribunal for arriving at the figure of Rs. 20/-per hour as the cost incurred by the Railway does not suffer from any such error as would justify interference by us. The Tribunal took into consideration the figures, provided by the Railway, of expenditure incurred per hour on the running of all types of engines, and noticed the fact that the cost in the case of shunting engines must be lower due to the inferior quality of coal consumer in them, when compared with the coal consumed in engines attached to passenger trains or even engines pulling the regular goods trains. It also took into account the fact that the calculation was based on the assumption account the fact that the calculation was based on assumption that a shunting engine would be running, on an average, @ 5 miles an hour for 12 hours a day, while, when calculating depreciation, the documents provided by the Railway itself showed that the average run of a shunting engine was calculated at 90 miles a day. The basis of a run of 60 miles a day of the shunting engine adopted by the Railway for calculating shunting charges could not, therefore, be accepted as correct. There was also the circumstance that, in making the calculation certain expenses had been included which were in no way connected with shunting operations, such as expenses on ticket checking staff. Taking these circumstances into account on the one side, and keeping in view on the other side the fact that, in the year 1959-60, there must have been a rise in the cost of running the shunting engine, as compared with the rate which was fixed in the year 1956-57, the Tribunal estimated that a reasonable rate for the shunting engine charges will Rs. 20.00 per hour. We do not think that the principles adopted by the Tribunal are in any way incorrect or suffer from any such error as would justify our examining the whole evidence considered by the Tribunal for ourselves and making fresh detailed calculations in order to find out whether this figure of Rs. 20 per hour arrived at the Tribunal should be varied to some extent. In these circumstances, we do not think it necessary to discuss in detail the evidence given by the Railway which was placed before us by learned counsel for the Railway to challenge the finding arrived at by the Tribunal. The finding of fact recorded by the Tribunal does not suffer from any such error as could induce us to go into this question as a regular Court of fact. Consequently, we think that the figure of Rs. 20/-per hour arrived at by the Tribunal, as representing the cost of the Railway for running the shunting engine must be accepted.

There is, however, one aspect which the Tribunal seems to have lost sight of. According to the admitted case of the parties, there is no obligation on the Railway to render the service of carrying the wagons of the Company from lines 3 and 4 to their factory premises, nor is there any obligation to bring back the empties or wagons loaded with outward traffic goods from the Company's yard to the railway station. In fact, the Company had an engine of its own for a number of years and a

second engine was purchased by the Company in the year 1962. Apart from carrying out these operations itself by the use of these engines, the Company also, on occasions, had the wagons hand-shunted. The Railway undertook the work only on occasions when the Company made a specific request to the Railway to do so. In thus agreeing to undertake the work, the Railway voluntarily entered into transactions with the object of expanding its commercial activities. In fact, the charges were levied by the Railway, because the Railway is run as a commercial undertaking for the purpose of earning profits and, consequently, the Tribunal, in fixing the reasonable rate for shunting charges, should have taken into account the profit-making motive of the Railway also and should not have confined the charges to the actual cost incurred by the Railway in rendering this service. We think that, in these circumstances, there is full justification for increasing the rate chargeable for rendering the service of shunting the wagons from lines 3 and 4 to the yard of the Company over its private lines and it should be fixed at Rs. 22/-per hour, giving a margin to the Railway of 10% over its actual cost.

On the merits of the rate fixed by the Tribunal for the siding charges, we find that the criterion adopted by the Tribunal is not justified. As has been mentioned earlier, the case of the Company was that the fixed contribution of Rs. 709/8/-per half-year, or Rs. 1,419/-per year represented the consolidated charges in lieu of the Company's paying separately for interest on, and cost of maintenance of, the permanent way, points and crossings and interlocking connected therewith and for freight on the traffic over the siding, and that a sum of Rs. 603/7 nP per half-year, or Rs. 1,206/14 nP per year out of this consolidated amount represented charges in respect of other items, besides the freight on the traffic over the siding. It was on this basis that the Company pleaded in the complaint that the freight on the traffic over the siding under the agreement amounted to Rs. 212/-per year only. We, however, find that, in the complaint, this break-up of Rs. 1,419/-was not specifically pleaded. The pleading was that, by the notice dated 8th February, 1958, the Railway had itself levied the charge in respect of interest on and cost of maintenance of, the permanent way, points and crossings and interlocking connected therewith at Rs. 603/7 nP per half-year, and that Rs. 212/-per year was the original charge in respect of freight on the traffic over the siding. How this figure of Rs. 212/-was arrived at was not specifically indicated in the pleadings. The result was that, in the counter-pleadings put forward by the Railway, no specific pleas were taken challenging the correctness of the break-up of the sum of Rs. 1,419/-now claimed by the Company. All that was that, with effect from 10th August, 1958, a sum of Rs. 603/7 nP per half-year was levied in respect of charges for interest on, and cost of maintenance of the permanent way, points and crossings and interlocking connected therewith and that the levy for siding charges was fixed at Re. 1/-per wagon with a minimum of Rs. 7/-per shunt. In these circumstances, we do not think that any inference can be justifiably drawn, as was done by the Tribunal, that the Railway had itself pleaded the break-up of Rs. 1,419/-as containing within it the sum of Rs. 1,206/14 nP per year in respect of the fixed charges for interest on, and cost of maintenance of, the permanent way, points and crossings and interlocking connected therewith, and the balance of Rs. 212/-represented what was initially fixed as the amount chargeable for freight on the traffic over the siding. The sum of Rs. 603/7nP per half-year was shown in the pleading as the levy to be in force from 10th August, 1958, and was not accepted as being the amount at which the levy for the same items had been included at the initial stage at the time of the agreement in 1933. The Tribunal was not, in these circumstances, justified in proceeding on the basis that the charge in respect of freight on the traffic over the assisted siding was only Rs. 212/-per year from 1933 up to 1958. In fact, the charge in respect of maintenance of the permanent way, points and crossing and interlocking connected therewith, as originally estimated in 1933, must necessarily have gone up with the rise in price index from 1933 to 1958, and the sum levied for these items in 1958 must have been much higher than the sum which was

included for these services in the original agreement. No doubt, one of the witnesses of the Railway, R. W. 5, C. R. Guha, Assistant Engineer of the Railway, in his evidence made some statements which might lend some support to the plea of the Company that the sum of Rs. 603/-and odd per half-year represented the levy in respect of interest and maintenance charges, etc., after excluding the freight on the traffic over the assisted siding; but we do not think that those admissions can be held to be binding on the Railway so as to lead to the conclusion that this was the amount for such charges even at the inception of the agreement in 1933. The Tribunal, therefore, committed an error in proceeding on the basis that the original charge in respect of freight on the traffic over the assisted siding was a sum of Rs. 212/-and odd per year only in the original agreement is 1933.

In any case, it appears to us that this aspect of the case is not very material, because, under the agreement itself, the Railway was given the right to enhance the charges in order to meet its actual cost on the working of the assisted sidings. The appropriate course, in these circumstances was to find out what was the cost being incurred by the Railway in taking the wagons of goods of the Company to these assisted sidings.

The Tribunal did not adopt this method and rejected the idea of the Railway that this method should be adopted, on the ground that it was not possible to work out with reasonable accuracy the time that would be taken by the shunting engine in doing the work of carrying the wagons of the Company to lines 3 and 4 which represented the assisted sidings. For this view, the Tribunal relied on two aspects. The first and the main reason was that, according to the Tribunal, if these assisted sidings had not been constructed, a certain amount of shunting of the wagons of the Company would have been necessary in order to give delivery at the goods platform on line 5, and it was not possible to estimate what was the extra time that would be needed in shunting the wagons to lines 3 or 4 instead of line 5. The evidence on the record, however, shows that a certain amount of extra shunting is hound to be necessary, if the wagons of the Company are to be delivered on lines 3 and 4 instead of being delivered on line 5. It would appear to be correct that if, on any particular train, the wagons received for the Company were all loaded with sugarcane and no other wagons were received at Riga station containing other goods of the Company, or goods of other consignees, the amount of shunting needed to take those wagons to line 3 would not be more than that needed to take them to line 3 would not be more than that needed to take them to line 5. However, if even one wagon of goods for any other consignee were received with those sugarcane wagons, the shunting work would be doubled, because sugarcane wagons would have to be taken to line 3 and that wagon of the other consignee to line 5. Similarly, if the sugarcane wagons of the Company were to be received with a wagon of the Company itself containing other goods, the shunting involved would again be doubled because the sugarcane wagons would have to be taken to line 3, and the wagon containing other goods to line 4. Further, if the wagons containing other goods of the Company or goods of other consignees be not attached at one end of the sugarcane wagons, the amount of shunting required would increase very considerably because of the sorting needed in order to take the wagons of other goods either to line 4 or line 5, while taking the sugarcane wagons to line 3. The witnesses, no doubt, admitted that a certain amount of marshalling was being done by the Railway at the despatching stations, but it is also clear that, in that marshalling, all that the Railway did was to place all wagons meant to be detached at Riga in one block in the train. The marshalling at the despatching stations did not include in it the sorting out of wagons of sugarcane, the wagons of other goods of the Company, or the wagons of other consignees inter se. In these circumstances, it it clear that the agreement entered into by the Railway to deliver sugarcane wagons of the Company on line 3 with the arrangement that wagons of the Company of other goods would be delivered on line 4 necessarily involved a considerable amount of extra shunting because of the different lines on which delivery had to be taken and even further shunting if there was need for

sorting out of wagons. On behalf of the Company, it was urged before us that most of the sugarcane received by the Company used to be brought to Riga railway station by cane specials or cane shuttles which would consist exclusively of wagons loaded with sugarcane. Learned counsel was, however, not able to point out to us that there was any evidence to show that the majority of sugarcane wagons received for the Company were brought to Riga station by cane specials or cane shuttles. He relied on the evidence of A. W. 2. Yognandan Jha, an employee of the Company, working as Rail Cane Inspector. He, is his evidence, tried to support the case of the Company by stating that, during the season, a number of cane specials were run and they contained only sugarcane wagons. The evidence of this witness was not accepted in full by the Tribunal, nor are we inclined to place complete reliance on it. On the other hand, witnesses examined on behalf of the Railway have stated that, even when cane specials or cane shuttles were run for the purpose of bringing the sugarcane of the Company, they did not invariably consist of sugarcane wagons only and, often enough, wagons of other types were also attached to them. They gave figures showing that, during the busy season, the number of sugarcane wagons received per day for the Company used to be about 50, while, on an average, one wagon per day was received for other consignees, and one wagon per day was received which contained other goods of the Company. Whenever these wagons were received, it is clear that the amount of shunting needed would be much more than the shunting which would have been required if delivery of all the goods could be given on line 5 at the goods platform, without having to sort out the wagons and without having to place different wagons on different lines. In these circumstances, we do not think that the Tribunal had justification for rejecting the principle of calculation, suggested on behalf of the Railway, of working out the cost on the basis of the time taken in shunting required for placing the wagons of the Company on the assisted sidings, when a calculation was already available showing the cost incurred by the Railway per hour for working a shunting engine.

Another aspect that has to be kept in view is that, according to the terms of the agreement of 1933, under which the Railway is demanding the enhanced charges, the Railway was entitled to charge for freight on the traffic over the assisted siding. This charge for freight on the traffic over the assisted siding was to be levied irrespective of the fact that, in some cases, the Railway may not be incurring extra expenditure over and above what it would have incurred if the delivery had been given at the goods platform on line 5. Since the claim is made under the terms and conditions of the agreement, we hold that the Tribunal was wrong in rejecting the mode of calculation put forward by the Railway, on the ground that it was not possible to estimate the difference in time required for shunting wagons to lines 3 and 4, as compared with the shunting to line 5.

On behalf of the Railway, evidence was tendered to show that, in the busy season, the shunting operations required to bring the sugarcane wagons of the Company to line 3, on an average, took 18 to 20 minute, while, in the slack season, the time would be about 10 minutes. It is to be remembered that the majority of sugarcane wagons must be received by the Company in the busy season and very few in the slack season. It was on this basis that the Railway put forward the plea before the Tribunal that the average amount of time taken for shunting should be 15 minutes per shunt. The Tribunal was not inclined to accept this figure and, for rejecting it, relied mainly on the evidence of R. W. 6, Umeshwar Prasad, a Traffic Inspector of the Railway, who had made a test-check of the shunting time on 10th October, 1959. According to the report submitted by this witness, the shunting operation at the time of the test-check, on the whole, took 13 minutes. This shunting operation consisted of taking wagons from line 1, placing them on lines 3 and 4, bringing back the engine with empties to line 1. According to him, the first operation of taking the loaded sugarcane wagons from line 1 to line 3 took seven minutes. Thereafter, two minutes were taken in shunting the wagons from line 3 to line 4, and another four minutes were taken in shunting the empties from line

4 back to the train. This whole operation of one shunt thus required 13 minutes. The Tribunal, in considering the evidence of this witness, laid emphasis on the fact that the time taken in shunting the engine on its return from line 4 to line 1 was only 4 minutes, while, according to the Station Master, R. W. 3, B. L. Das, on whose evidence the Railway relied, this time must be at least 5 minutes. This difference was, on the face of it, not very material. In his evidence, R. W. 6, Umeshwar Prasad, also stated that the average time for placement on lines 3 and 4 for both up and down trains should be in the vicinity of 18 to 20 minutes for the complete operation. Owing to the mention of both up and down trains, the Tribunal held that this evidence given by the witness led to the inference that only 9 to 10 minutes would be taken for placing the wagons from either up or down train alone or lines 3 and 4. We think the Tribunal committed a clear error. When the witness stated that the time for the placement on lines 3 and 4 for both up and down trains should be in the vicinity of 18 to 20 minutes for the complete operation, he clearly meant that this would be the time taken whether the train be an up train or a down train. It is, on the face of it, impossible that there should be simultaneous shunting for two different trains, one up train and the other down train, and that the witness should be required too estimate the time which would be taken in simultaneous shunting from two trains. In fact, simultaneous shunting from two trains is not possible. The use of the conjunctive "and" between up and down in the question put to him did not mean that he was being asked to estimate the time for simultaneous shunting from two different trains. The halving of the period 18 to 20 minutes by the Tribunal, in order to hold that the estimate of average time of 15 minutes by the Railway is too high, was, therefore, not at all justified. On the other hand, the evidence of this witness, Umeshwar Prasad, as well as the figures given by him from the test-check, appear to bear out the case put forward by the Railway that the average time taken will certainly be 15 minutes per shunt or more. In the test-check itself, the complete shunting operation took 13 minutes. In his evidence, Umeshwar Prasad has stated that this test-check was carried out in ideal conditions of visibility and the time taken was also less, because the train was a non-vacuumed one. Further, the test was carried out on 19th October, 1959, which was clearly slack season, and the case of the Railway itself was that, in the slack season, the average time taken for a shunt was 10 to 12 minutes. The Tribunal, in these circumstances, was not justified in making the comment that the time of 18 to 20 minutes per shunt given by the Railway as the time taken during the busy season was due to inefficiency. In any case, the Railway, in calculating the charges, has itself very reasonably suggested 15 minutes as the average time per shunt, and the difference of 2 minutes between this suggested time and the time of 13 minutes taken in the test carried out under ideal conditions will not justify the rejection by the Tribunal of the figures suggested by the Railway. It is also to be noted that in the test carried out no sorting operations were involved and that, if some sorting had also been necessary, the time taken would certainly not have been less than 15 minutes, completely justifying the average figure put forward by the Railway. It was, therefore, clearly a case where the Tribunal could have and should have arrived at a finding on the evidence that, on an average, the time taken per shunt, in order to work over the assisted sidings consisting of lines 3 and 4, will be 15 minutes; and, since such a figure could be arrived at, the siding charges representing the freight on the traffic over the assisted sidings should have been calculated on this basis. We have already held earlier that there is no reason to vary the figure of Rs. 20/-per hour as the cost incurred by the Railway over a shunting engine carrying out shunting operations. At this rate, the cost incurred by the Railway per shunt for rendering service on the assisted sidings consisting of lines 3 and 4 works out to Rs. 5/-.

This cost that has been worked out is, according to the Railway itself, the average cost, taking into account the circumstance that, in some of the shunting operations, there may be only one or two wagons, and, in others, the number of wagons may be large and as many as 20 or 25. Since the cost

of the Railway depends on the time during which the shunting engine has to operate in order to complete the shunting of the wagons, and the average time has been calculated by the Railway after considering shunts which included any number of wagons, there is clearly no justification for the Railway levying a charge on the basis of the number of wagons shunted. The average cost worked out will not exceed Rs. 5/-per shunt, though, of course, in some particular shunts where the number of wagons may be large and the shunting operations required may be more complicated, the cost may work out at more than Rs. 5/-. On the other hand, there would also be some shunting operations in which, there being no wagons except sugarcane wagons, or the number of wagons being small, the cost per shunt would be less than Rs. 5/-. This circumstance justifies the view of the Tribunal that the Railway could not reasonably fix a rate for siding charges on the basis of a particular amount per wagon. The only proper way of fixing the rate would be the amount of cost incurred by the Railway per shunt. Learned counsel appearing for the Railway, in these circumstances, himself stated that he will not press in this appeal the demand of the Railway for a charge based on the number of wagons, and that the rate may be fixed only per shunt. That rate has to be Rs. 5/-per shunt.

As a result, the appeal is partly allowed. It is directed that the rate for the shunting engine charge is fixed at Rs. 22/-per hour. The siding charges in respect of freight on the traffic over the assisted sidings shall be payable by the Company at the rate of Rs. 5/-per shunt, irrespective of the number of wagons included in any shunt, a shunt consisting of the operation starting with the moment when the engine moves from the main lines 1 or 2 in order to take the wagons to lines 3, 4 or 5, and ending with the time when the engine returns to the train and is again attached to it. In the circumstances of this case, we direct parties to bear their own costs of this appeal.

R. K. P. S. Appeal allowed in part.

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