

BETWEEN:

CANADIAN LIFT TRUCK COM- }  
 PANY LIMITED ..... }

APPELLANT;

1954  
 May 3  
 June 15

AND

THE DEPUTY MINISTER OF }  
 NATIONAL REVENUE FOR }  
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RESPONDENT.

*Revenue—Customs and Excise—Goods subject to duty—Whether or not “Fork Lift Trucks” imported from U.S.A. are “of a class or kind not made in Canada”—The Customs Tariff Act, R.S.C. 1927, c. 44, Schedule A, Tariff items 427 and 427a—The Customs Act, R.S.C. 1927, c. 42 as amended, ss. 48(2) and 50(1)—Tariff Board—Question of law on appeal from Tariff Board—Material before Tariff Board—Whether Tariff Board as a matter of law erred in its finding—Court not to interfere with finding of Tariff Board if reasonably made—Appeal from Tariff Board dismissed.*

In 1951 appellant imported from the United States “one Towmotor Fork Lift Truck” equipped with “Full-Apron Upender for Rolls up to 40” in Diameter and Weighing 2,200 lbs.”, which respondent ruled dutiable under item 427 of the Customs Tariff Act, R.S.C. 1927, c. 44, namely “all machinery composed wholly or in part of iron or steel, n.o.p. and complete parts thereof.” From that ruling appellant appealed to the Tariff Board contending that the imported article was classifiable under Tariff item 427a, namely “all machinery composed wholly or in part of iron or steel, n.o.p. of a class or kind not made in Canada; complete parts of the foregoing”. The Board dismissed the appeal on the basis of an earlier decision in which it held that the rated capacity set at a load centre of 24” from the face of the fork as the common and most satisfactory way of measuring capacity, and then found that gas-powered Fork Lift Trucks having a rated lifting capacity of 4,000 to 15,000 pounds with a load centre of 24” from the face of the fork, were “ of a class made in Canada”. Leave to appeal to this Court from the decision of the Board, as provided by the Customs Act, R.S.C. 1927, c. 42, s. 50(1), was granted upon the following point of law: “Did the Tariff Board err as a matter of law in not deciding that Towmotor Lift Truck Serial Number 48511034 entered under Montreal customs entry No. 103418G (1951-52) was machinery of a class or kind not made in Canada and therefore classifiable under Tariff Item 427a”.

*Held:* That if there was material before the Tariff Board from which it could reasonably decide as it did, the Court should not interfere with its decision even if it might have reached a different conclusion if the matter had been originally before it. *Deputy Minister of National Revenue v. Parke, Davis and Co.* [1954] Ex. C.R. 1; *General Supply Co. of Canada v. Deputy Minister of National Revenue* [1954] Ex C.R. 340 referred to and followed.

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2. That there was here evidence before the Tariff Board to enable it to reach the conclusion that appellant had failed to establish "Upenders" as a class or kind and that the goods imported, notwithstanding the special added function of "upending", were within what the trade generally considered to be the class of "Fork Lift Trucks".
3. That the Tariff Board's approval of the formula adopted by the Department of National Revenue in differentiating between kinds and classes of Fork Lift Trucks on the basis of motive power and of capacity, was entirely a matter of exercising its discretion in the light of the evidence adduced before it.
4. That in reaching those conclusions the Tariff Board did not err as a matter of law.

APPEAL under the Customs Act from a decision of the Tariff Board.

The appeal was heard before the Honourable Mr. Justice Cameron at Ottawa.

*Gordon F. Henderson, Q.C.* for appellant.

*K. E. Eaton and C. R. O. Munro* for respondent.

The facts and questions of law raised are stated in the reasons for judgment.

CAMERON J. now (June 15, 1954) delivered the following judgment:

This is an appeal from a decision of the Tariff Board (No. 286) dated May 19, 1953. By s. 50(1) of The Customs Act, R.S.C., 1927, ch. 42, as amended, provision is made for such an appeal "upon any question that in the opinion of the Court or judge is a question of law" upon leave being obtained. Such leave to appeal was granted by the President of this Court on June 25, 1953, upon the following point of law:

Did the Tariff Board err as a matter of law in not deciding that Towmotor Lift Truck Serial Number 48511034 entered under Montreal customs entry No. 103418G (1951-52) was machinery of a class or kind not made in Canada and therefore classifiable under Tariff Item 427A.

On December 20, 1951, the appellant imported into Canada what was described in the entry form as "1 Truck Towmotor Fork Lift Truck as—Towmotor Fork Lift Truck (less than 2 tons) Machinery and Parts of Iron or Steel". The goods were purchased by the appellant from the manufacturer, Towmotor Corporation of Cleveland, Ohio, and were described in the invoice by that exporter as "1 LT-48 Towmotor Fork Lift Truck". Certain specifications

were given and then it was stated that the truck was equipped with certain things, including "Full-Apron Upender for Rolls up to 40" in Diameter and Weighing 2,200 lbs". The goods were classified by the port appraiser as being of a class or kind made in Canada and were entered under Tariff Item 427. That classification was confirmed by the Dominion Customs appraiser on August 26, 1952. Mr. Hooper, as agent for the appellant and under s. 48(2) of The Customs Act, requested the Deputy Minister to review the decision of the appraiser as to the tariff classification and to classify the entry under Item 427(a). By his letter of December 9, 1952, the respondent upheld the classification of the appraiser that the goods were of a class or kind made in Canada and were dutiable under Item 427.

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An appeal was taken to the Tariff Board and after taking evidence and hearing argument the Board unanimously dismissed the appeal, its decision being as follows:

In bringing down its finding in an earlier Appeal (No. 246) *re* certain Fork-Lift Trucks, the Tariff Board recorded its view that the criterion used by the Department of National Revenue in determining whether or not an imported truck was "of a class or kind made in Canada" was "the most common and the most satisfactory" method as yet devised. That a perfect method—one giving due and proper weight and proportion to several varying criteria—has not as yet been discovered, no one familiar with the complexities of the problem would deny. This, indeed, was the consideration which led the Board, in earlier declarations regarding equipment of this nature, to suggest to the Minister of Finance that perhaps the time had come to give *eo nomine* classification in the Tariff to lift-trucks, in order that "class or kind" decisions might no longer be necessary.

Therefore, in accord with the finding of the Board in Appeal No. 246, the present Appeal is dismissed.

The dispute is as to whether the imported goods are or are not "of a class or kind not made in Canada". If the former, they are properly classifiable under Item 427a; if the latter they are within Item 427. These tariff items are as follows:

427. All machinery composed wholly or in part of iron or steel n.o.p., and complete parts thereof.

427a. All machinery composed wholly or in part of iron or steel, n.o.p., of a class or kind not made in Canada; complete parts of the foregoing.

The duty imposed on goods classified under Item 427a is substantially less than on those classified under Item 427.

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The greater part of the evidence before the Board consisted of illustrated pamphlets put out by the manufacturer. The Towmotor Corporation manufactures Fork Lift Trucks and Tractors and numerous accessories. The basic parts of the equipment which are common to all the vehicles are (a) a gasoline-powered truck on wheels and which comprises the motive power, a seat for the operator and all the controls; and (b) a steel mast in front of the truck on which the load to be carried is raised or lowered.

Page 1 of Exhibit D-8 gives an illustration of what I think may be regarded as the standard fork lift truck, Model LT-48, the initials "LT" meaning "Lift Truck". It shows the truck and mast, and also the fork lift attachment mounted on a carriage which moves up and down with its load on the mast. The fork consists of two or more angle irons, the forward ends of which are placed under the load and support it in transit or in lifting. The rated capacity of Model LT-48, equipped with forks, is 4,000 pounds with the load centre 24" from face of lifting carriage; and its maximum capacity is 5,000 pounds with a load centre of 17" or less.

Exhibit D-9 is another circular issued by Towmotor and headed "Towmotor Accessory Data—Extra Arms and Hands for the One-Man-Gang". It describes and illustrates two types of "Upenders" which are front end attachments used for picking up heavy rolls of paper from either the horizontal or vertical position, transporting the rolls, and "upending" them to either a vertical or horizontal position for stacking. In the partial-apron Upender, the load is picked up on two forks and rests against the partial apron. The full-apron Upender has no forks and the full-apron is inserted under the load and the apron supports and cradles the load. Each type is equipped at one end with a removable steel blade at right angles to the apron to support the rolls vertically. The Upender is hydraulically operated and rotates the load 90 degrees from the horizontal to the vertical and vice versa. It is mounted on an auxiliary carriage in front of the usual carriage which is raised and lowered on the mast.

The Upenders are used especially in the pulp and paper industry for moving and stacking rolls of paper. The article imported by the appellant was the full-apron Upenders. It had no forks and no other lifting accessories were imported with it.

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Exhibit D-9 states as follows:

On both types of Upenders the apron and blade assemblies are readily detachable if the truck is also to be used as a regular fork lift truck. With the partial-apron Upenders, the apron and blade are removed, leaving the forks on the carriage. With the full-apron Upenders, the apron and blade are removed and forks must be attached to the carriage. (Forks are not included with the full-apron Upenders, but can be furnished at additional cost.) If a truck equipped with an Upenders carriage is used with forks, the standard capacity of the truck is reduced to some extent because of the increase in load center with the Upenders carriage (see table of capacities on back of this sheet).

Exhibit D-10 is another illustrated pamphlet of the manufacturer entitled "Towmotor Standard Accessories". It describes and illustrates fourteen such accessories, most of which consist of special forms of lifters which may be used instead of the forks for special purposes, and they are described as "Crane Arm, Scoop, Bale Clamp, Cotton Truck for Handling Bales, a Bale Clamp, etc." and included in these accessories is the full-apron Upenders such as was imported by the appellant. Exhibit D-11 is a similar pamphlet entitled "Towmotor Special Engineering". It describes and illustrates some additional 25 or 30 special lifting devices to be used with the standard truck and mast, all of which are custom engineered by Towmotor for specific jobs. Included in these is an illustration of the Upenders with an adjustable apron.

As has been noted, the Board dismissed the appeal on the basis of its finding in Appeal No. 246. In order to appreciate the submissions now made on behalf of the appellant, it is necessary to refer to that finding which is dated May 29, 1952, and is as follows:

The Department of National Revenue in its ruling published in Memo. Series D No. 51 MCR 120 differentiated between kinds and classes of fork-lift trucks on the basis of the kind of motive power and on the basis of capacity. At the hearings, there was no suggestion from any quarter that divisions on the above bases were improper. The main point at issue between the various parties was simply as to the correct method of measuring capacity.

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The Board considers that the rated capacity set at a load centre of 24 inches from the face of the fork is the most common and the most satisfactory way of measuring capacity. The Board finds that gas-powered fork-lift trucks having a rated lifting capacity of 4,000 pounds to 15,000 pounds with a load centre 24 inches from the face of the fork were at the time of importation made in Canada in sufficient numbers to be deemed to be of a "class made in Canada". All other capacities of gas-powered fork-lift trucks constitute classes which at that time were not made in Canada.

Accordingly, the Clark gas-powered fork-lift truck Model 4024, imported under Windsor Entry No. 15231E, is dutiable under Tariff item 427 and the Towmotor Model LT-44, entered under Fort Erie Entry No. 9408A, is dutiable under Tariff item 427a.

It will be noted that the Board approved the method adopted by the department in differentiating between kinds and classes of Fork Lift Trucks on the basis of motive power and of capacity. The Board held that the rated capacity set at a load centre of 24" from the face of the fork as the common and most satisfactory way of measuring capacity. Then it found that gas-powered Fork Lift Trucks having a rated lifting capacity of 4,000 to 15,000 pounds with a load centre 24" from the face of the fork, were "of a class made in Canada" (the evidence in the instant case indicates that such is still the fact). They held, also, that all other capacities of gas-powered Fork Lift Trucks constituted classes which at that time were not made in Canada.

No objection is taken by the appellant to the principles established by the Board in Appeal No. 246. It was one of the parties to that appeal and its Towmotor Model LT-44 was found to be of a class not made in Canada.

The first point taken by counsel for the appellant is that the Board erred in finding that the imported machine fell within the class or kind known as "Fork Lift Trucks". He points to the fact that it had no forks, that the lifting was done either by an apron or by the blade, and that it performed not merely the function of lifting rolls of paper, but also that of upending them through 90 degrees. He stresses the fact that no fork attachments were purchased with the machine and that to convert it from an "Upender" to one equipped with forks, it would be necessary to remove the second carriage with all its upending equipment and attach the forks to the first carriage, an

operation which would perhaps take some hours to complete. Then he submits that the particular "Upender" imported, together with three or four other types of equipment which are suitable for upending other types of goods (and which are illustrated in the manufacturer's literature) constitute a class quite distinct from Fork Lift Trucks, a class which might be called as a group "the Upenders". From that he said that as the evidence established that "Upenders" were not made in Canada, the machine should have been classified under Item 427a.

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Before the Board, the representative of the appellant invited the Board to establish a class to be called "Upenders" as distinct from Fork Lift Trucks. Undoubtedly the Board had power to do so and there was some slight evidence which might have led them to accede to that invitation. On the other hand, there was a great deal of evidence which indicated that in the trade there was no class known as "Upenders" and that the "Upender" such as was imported by the appellant was merely an attachment to the class of machine known in the trade as "Fork Lift Trucks". As I have stated above, the manufacturer in both the entry form and in the invoice, described the machine as "1 LT-48 Towmotor Fork Lift Truck", and in the latter it was stated that the truck was *equipped* with a "full-apron Upender for Rolls". In Exhibit A-5—a letter from the manufacturer to the department dated April 2, 1953—reference was made to the precise machine imported, in these words: "in connection with the capacity rating for towmotor *Fork* Lift Truck, Serial No. 48511034". In Exhibit D-10, the "Upender" is referred to as one of many "standard accessories" and in Exhibit D-9 it is stated that the apron and blade assemblies of both types of Upenders are readily detachable if the truck is also to be used as a regular Fork Lift Truck.

I think it may be assumed that lift trucks were originally equipped with forks and therefore in the trade acquired the name of Fork Lift Trucks. Later, as occasion required, various other interchangeable front end accessories—including the "Upender"—were manufactured to meet the requirements of lifting special types of containers, but the general name "Fork Lift Trucks" seems to have been

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retained and applied to all regardless of the type or function of the special accessory and whether the accessory operated with forks or some other device, such as a Ram, Upender, Scoop or Clamp. The basic machine which comprised the truck, engine and mast, and which was the most costly part of the equipment, remained the same. That view of the matter is strongly supported by a perusal of Exhibit D-12 which is a trade magazine, "Handling Library Series—Study No. 1", and dated October, 1952, the particular issue being entitled "Fork Truck Attachments—Specifications, Recommended Uses, Costs, Savings, and Other Helpful Data on the Main Classes of *Attachments*". The assistant editor commences his comment with these paragraphs:

Since World War II the fork truck has changed from a rarity to industry's most prominent materials handling tool. In the last few years, there's been a new factor in the fork truck field—a factor that is expanding fork truck usage and cost-saving potentialities in amazing ways. This is the tremendous development of attachments to perform special handling functions. The basic popularity of the fork truck is easily explained . . .

Now, attachments are increasing the fork truck's versatility to the stage where it is truly "many machines in one".

With an appropriate attachment, the fork truck can scoop up and transport all kinds of bulk material; handle rapidly and often without pallets, common objects such as barrels, crates, drums, cartons, pipe reels, boxes, bales and rolls; or perform special actions such as rapidly inverting whole pallet loads of goods. It can serve as a portable crane, plow, powered sweeper or elevator.

In fact, the fork truck-plus-attachment combination can handle just about any material you can think of, and do practically anything with it. It sounds fantastic. It is. For with attachments like those described in the following pages, the fork truck becomes a mechanical bull gang, which you can direct to work handling miracles in your operation.

Included in that exhibit are a great number of attachments, one of which is an "Upender". A substantial number of these attachments, such as an Arm Clamp, Scoop, Clam Shell, Bucket, etc., are not equipped with forks, but all are referred to as fork truck attachments.

The Board reached the conclusion on this evidence that the appellant had not made out a case for establishing "Upenders" as a class or kind and that the goods imported, notwithstanding the special added function of "upending", were within what the trade generally considered to be the class of "Fork Lift Trucks". That was essentially a matter



for the Board to determine in the light of the evidence before them and I am unable to find that the Board as a matter of law erred in deciding as they did.

The second point raised by counsel for the appellant is that if the imported "Upender" is a Fork Lift Truck, the Board should have found that it was a Fork Lift Truck of a class or kind not made in Canada. As I have said, the Board dismissed the appeal on the basis of its finding in Appeal No. 246 (*supra*). In that appeal the Board ruled that all gas-powered Fork Lift Trucks, other than those having a rated lifting capacity of 4,000 to 15,000 pounds, with a load centre 24" from the face of the fork, constituted classes which at that time were not made in Canada. It is submitted that the "Upender" imported had a rated lifting capacity of less than 4,000 pounds with a load centre 24" from the face, and that therefore it was of a class or kind not made in Canada.

Counsel for the respondent suggested that the appellant had not proven that at the time the "Upender" was imported, Fork Lift Trucks of less than 4,000 pounds capacity, with a load centre 24" from the face, were not manufactured in Canada, but as I read the evidence, there seems to have been a tacit understanding that such was the case and I think the Board proceeded on that assumption.

The dispute on this point centres around the fact that in ascertaining the rated capacity the appellant and the department are not rating the same thing. The appellant determined the capacity by reference to the precise article imported, namely, the LT-48 equipped with a full-apron Upender. By reason of the fact that the weight of the upender equipment substantially exceeded the weight of the standard fork equipment, the lifting capacity of the "Upender" was less than that of a truck equipped with forks. Exhibit 4 is a metal plate which was attached or to be attached to the imported article and was prepared by the manufacturer. It rates the lifting capacity at 2,100 pounds when not over 20" from the face of the carriage, and the evidence is that its capacity when 24" from the face would be about 1,750 pounds. There is no dispute that the lifting capacity of the "Upender" was approximately as stated.

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That being so, the appellant says that the Board should have adhered to its ruling in Appeal No. 246 and have placed the machine in Tariff Item 427a.

The department carried into practice the Board's ruling in Appeal No. 246, applying it to all machinery popularly known as Fork Lift Trucks. In ascertaining the lifting capacity of any particular machine which fell within that category, it looked to the rated lifting capacity of the basic machine when equipped with forks, with a load centre 24" from the face, and not to the lifting capacity of the imported machine when equipped with any other particular device such as an Upender, Clamp, Scoop or Ram. It took the position that the tariff status of all Fork Lift Trucks depended upon the rated lifting capacity of the machine as a lift truck equipped with forks. They considered that to be a formula which was fair and equitable and that the capacity should not be ascertained by taking into account the lifting capacity of the basic machine when equipped with different attachments such as the Upender, Clamp, Arm, etc., some of which would lessen while others would increase the lifting capacity by reason of their varying weight and position. It recognized also the practical difficulties which would follow if the basic machine—the truck—were imported with two or more attachments of varying weights which would affect the lifting capacity of the machine. In Appeal No. 246, the Board expressed its approval of that formula; and again in this appeal, while recognizing that it is not a perfect formula, the Board considered it to be the most common and most satisfactory system yet devised. It is established by the evidence that the basic machine which was here imported was a Model LT-48 with a rated lifting capacity of 4,000 pounds, with a load centre 24" from the face and a maximum capacity of 5,000 pounds at a load centre of 17" or less.

Counsel for the appellant says that the department's method of rating "capacity" is wrong in that it is not a rating of the actual machine which was imported, but is based on something which the appellant never had—a truck equipped with forks. He says that it was the duty of the department to classify the entry according to the nature and capacity of the goods actually imported and

not on some general formula which for the convenience of the department had been adopted so as to apply to all Fork Lift Trucks.

It may be noted here that general formulas of this nature have been applied by the department in other cases where there are a great number of front end attachments which may be affixed to various basic machines. One instance is that of power cranes or shovels when the basic machine may be equipped with many attachments such as Shovel, Clamp, Hoe, Dragline, etc. There the status of the imported article is dependent upon the nominal dipper capacity of the machine when operating as a shovel. The Board, in Appeal No. 272, found that such a criterion was a defensible one.

Now, as I have said, the Board approved the application of the formula adopted by the Department. They recognized the complexities arising in cases of this sort and that no perfect system had been devised which would take into consideration and give due weight to all the various criteria which might be considered in classifying machinery which consisted of one basic or standard machine but could be equipped with a variety of attachments. Then they concluded that the formula of the department was the most satisfactory yet devised and approved it. Inasmuch as the rated lifting capacity of the Fork Lift Truck imported, when equipped with forks was shown to be 4,000 pounds at a distance of 24" from the face, the Board found that it came within the formula laid down by it in Appeal No. 246 as being of a class or kind made in Canada.

Again, the question is not whether their conclusion was right or wrong, but whether in reaching that conclusion they erred as a matter of law. Various alternatives were presented to them and of these they selected the one which to them seemed the most practical and feasible. It was entirely a matter of exercising their discretion in the light of the evidence adduced. They reached the conclusion that the main consideration should be given to the basic machine—the truck—and to its ascertained lifting power under certain conditions, namely, when equipped with forks. I am unable to perceive that in reaching that conclusion there was any error in law.

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Reference may be made to *Deputy Minister of National Revenue v. Parke Davis & Co.* (1), in which the President of this Court stated that if there was material before the Board from which it could reasonably decide as it did, the Court should not interfere with its decision even if it might have reached a different conclusion if the matter had been originally before it. I am of the opinion in this case that there was evidence before the Board on which it could reasonably reach the conclusion arrived at.

For these reasons my answer to the question of law submitted is "No". The appeal therefore fails and will be dismissed with costs.

*Judgment accordingly.*