COMPETITION COMMISSION OF INDIA

(Case No. 47 of 2012)

Dated: 13.12.2012

IN THE MATTER OF:

M/s Mineral Enterprises Limited ……Informant

v.

Ministry of Railways, Union of India ….Opposite Party No. 1

The Railway Board ….Opposite Party No. 2

ORDER UNDER SECTION 26(1) OF THE COMPETITION ACT, 2002

As per R.Prasad (Minority)

Allegations

1. The present information has been filed by M/s Mineral Enterprises Limited ('the informant') under Section 19(1)(a) of the Competition Act, 2002 ('the Act') against Ministry of Railways, Union of India ('OP No. 1') and The Railway Board (OP No. 2) alleging *inter-alia* contravention of Section 4 of the Act.

2. The informant is a duly registered company engaged in varied activities including mining, logistics and infrastructure development. Its core area of business comprise of mining, trading and exports of iron ore. For transportation of iron ore extracted from the mines of the informant, it uses the services of rail transport, owned and controlled by opposite parties.

3. The main allegation against the OPs are that prior to the enactment of Indian Railways Act, 1890, rail transport was largely managed by private players with the interference of Government being limited to coordination, regulation and apportionment of claims amongst the railways companies. Subsequently, the

Railways Act, 1989 was enacted, which empowered the Central Government to fix rates for carriage and passengers and goods by the Railways, to classify or reclassify any commodity etc. OP No. 2 prescribes the freight circulars for any commodity by obtaining the sanction of the Central Government, in terms of the Indian Railways act, 1890. Empowered so under the Indian Railways Act, OP No. 2 has issued various rate circulars or rate instructions ('rate instructions') adjusting the freight rates during April 2003 and 2012. OP No. 2 also reclassified the iron ore based upon its end use, thereby imposing different freights on iron ore based on its end use. The iron ore meant for domestic consumption for manufacture of iron and steel was charged at a lower rate and iron ore transported for other domestic purpose or for export purpose attracted a higher freight. It is stated that the unfair and discriminatory levy imposed by the railways based on end use was affecting the competition in the sector in adverse manner and amounted to a contravention of the Competition Act and aggrieved by this classification, the informant has approached this Commission alleging abuse of dominant position by the opposite parties under section 4 of the Act.

4. It is the majority's view that the Informant has failed to define the relevant market and to prove that the OPs are holding dominant position in that market. In this regard my view is that the onus is not on the Informant to prove that the OPs are holding dominant position. It is the job of the Commission to find out whether the OPs are holding dominant position in the relevant market. Informant is merely an information provider. He is not supposed to be expert on the Competition Law. His job is to bring it to the notice of the Commission that some anti competitive act is being committed and then it is for the Commission to find out whether that act is prima facie anti competitive.

5. It is also the majority's view that without going into the determination of relevant market and assessment of dominance of the Opposite Parties, no *prima facie* case has been made out by the Informant as the power of reclassification and revision of rates/freight is entrusted the Central Government under section 31 of the Railways Act, 1989 and the OPs have discharged their statutory function in accordance to the

Railway Act. The exercise of such functions by itself, in the absence of any other cogent evidence establishing that such conduct is a violation of the provisions of the Act, does not justify a direction by the Commission to recommend the DG to investigate and analyze the conduct of the Opposite Parties.

Findings

6. I, however, do not agree with the above findings of the Majority Members. In the cases where government departments have been made opposite parties, it is important to go into the philosophy of Competition Law. The Parliament has enacted a law to ensure that a level playing field is created to all market players irrespective of their size, resources, market position, economic strength etc. The intention of the statute is very clear that there should not be any discrimination between a private player and a government player and all players should be treated equally so that they can operate independently and freely in a given market. This is the reason why section 2(h) has included even the government enterprise. A perusal of the definition would show that any government department which is engaged in any activity relating to carrying a business would be an enterprise under the Competition Act 2002. This interpretation is supported by the following observations made by Ld. Single Judge of the Hon'ble High Court of Delhi in the order passed in W. P. (C) No. 5770 of 2011 on 04.11.2011:

> *"Respondent no.2, prima facie, would also fall within the expression 'enterprise" as used in the Act which is very widely worded to even include a person or a department of the government rendering services "of any kind" and excludes only those activities of the government which are relatable to sovereign junctions of the government and all activities carried out by the departments of the Central Government dealing with atomic energy, currency, defence and space. Respondent no.2 does not fall in any of the said exceptions."*

The Delhi high court has also held in the case of Railway that the Indian Railways was carrying out commercial functions and was therefore an enterprise. There is, therefore, no reason to hold that the OPs are not an enterprise and cannot abuse their dominance.

7. Another argument which is generally raised is that with reference to the last part of section 2 (h) which allows exemption to any activity relating to sovereign function of the Government including all activities carried on by Department of Central Government dealing with atomic energy, currency, defence and space and since this is an exclusionary item the government department which carries out sovereign functions has to be exempted from the definition of enterprise. The fact is that the first portion of this section talks about any activity whereas the last portion of the section talks of any activity relating to sovereign functions. As this is an exclusionary item in the statute, the interpretation has to be strict and narrow. It was therefore necessary on the part of the government departments to establish that it was carrying on of sovereign functions and this has not been done. Merely because the MOR works under the statute of Parliament it does not become a sovereign power. If MOR was carrying out sovereign functions then it would have been included along with atomic energy, currency, defence etc. There is no doubt that MOR is carrying out commercial functions as held by Delhi High Court and MOR has not established as to what sovereign functions it is carrying.

8. There is a plethora of decisions of the Supreme Court of India in relation to the manner in which a Government can enter into contracts. Some of the landmark judgments are the cases of Lucknow Development Authority vs. M.K. Gupta 1994 AIR 787 1994 SCC (1) 243 and Union of India & Ors. vs. Hindustan Development Corporation 1994 AIR 988 1993 SCR (3) 128, wherein it has been held that there are different manifestations of economic power in different fields of economic activity. On such manifestation is the achievement by one or more units in an industry of such a dominant position that they are able to control the market by regulating prices or output or eliminating competition. Therefore, the avowed policy of the Government particularly from the point of view of public interest is to prohibit concentration of economic power and to control monopolies so that the ownership and control of the material resources of the Community are so distributed as best to subserve the common good and to ensure that while promoting industrial growth

there is reduction in concentration of wealth and that the economic power is brought about to secure social and economic justice.

9. Now coming to the provisions of the Act, the explanation to section 4 states “dominant position means a position of strength enjoyed by an enterprise in the relevant market in India, which enables it to operate independently of competitive forces prevailing in the relevant market; or affect its competitors or consumers or the relevant market in its favour.” In the present case, all the OPs are holding a dominant position because they are government departments and as such they are operating independently of competitive forces prevailing in the relevant market and affecting their competitors, the relevant market and ultimately the consumers.

10. The Indian Railways performs various functions. It is an operator, a regulator and a licensor which has a total monopoly over the entire railway network. It has power to make rules also and therefore performs legislative functions in addition to its administrative and adjudicatory functions. Therefore Indian Railways performs different functions and the Supreme Court in the case of electricity authority reported in 2010(4) SCC 603 has approved such a role for an enterprise. One important issue may be raised as to whether a policy formulation amounts to a discharge of sovereign functions.

11. The question is whether fixing a rate or issuing a rate circular amounts to a delegated legislation and whether the CCI could go into question of validity of such a circular which was stated to be in the nature of delegated legislation. In the case of Arshiya, it was stated by the Railway that price fixation was essentially a legislative function and that Courts did not have power to fix the price. It was further argued that a court was neither concerned with policy nor with rates. It was also stated that a court could not evaluate and consider the prices would be injurious some manufacturers or producers.

12. The proposition given by the Railways is partly correct. Fixation of price is an administrative function and not a legislative function. It has been held by various courts that fixing of prices required expertise which a court does not have. Courts also do not interfere in policy decisions and with rates because the policy as well as the rates are framed and fixed by an expert body and a court is normally not competent to look into these aspects. But the Commission is not a court and it is an economic body which can look into the economic aspects of the decision taken. The Commission has no jurisdiction to examine the validity of action taken in accordance with the statute. A court can interfere in a policy decision if it is against public interest and also interfere in fixation of rates if the fixations rates are discriminatory or violates part III of the Constitution of India. In such a case the Court has a power to set aside the policy and the fixation of rates. But the Commission does not have any restriction in examining a policy decision or a fixation of rates if it is unfair and discriminatory. Because as CCI has been mandated by the Parliament under Section 18 of the Competition Act to prevent any conduct and practices which are anti-competitive.

13. I have already held in the case of Arshiya that there are two markets which are relevant to this case (i) the provision of rail services in India and (ii) rail freight services. In this connection the factors mentioned in Section 19 (5), (6) & (7) of the Act have to be applied and the geographic market relevant to this analysis would be entire India. Considering the facts of the case, the rail freight services on the rail network are treated as the relevant product market. There is no doubt that railways operates in a larger market known as rail services in India and in this market not only freight but passengers have also to be considered.

14. The next issue to be considered is the issue of position of strength in the relevant market. In the railway services market or the railway freight market there is no other operators other than the Indian Railways. Thus, there is no doubt about the dominance of the Indian railways in this market. In fact in the market of rail freight services there is no substitutability and interchangeability with any other service. The chances of substitutability and interchangeability is more evident when we are considering a product but when we are considering a service the issue of interchangeability and substitutability are less likely to occur. Therefore in this relevant product market of rail services / rail freight services there is no substitutability or interchangeability with any other service.

15. Now we have to examine whether the railways abused its dominant position in the relevant market. It is seen that the OPs have been prescribing the freight circulars from time to time for any commodity and have issued various rate circulars or rate instructions adjusting the freight rates during April 2003 and 2012. OP No. 2 also reclassified the iron ore based upon its end use, thereby imposing different freights on iron ore based on its end use. The iron ore meant for domestic consumption for manufacture of iron and steel was charged at a lower rate and iron ore transported for other domestic purpose or for export purpose attracted a higher freight.

16. Thus, Prima facie, it can be concluded that the unfair and discriminatory levy imposed by the railways based on end use was affecting the competition in the sector in adverse manner and is a case of abuse of dominant position by the opposite parties under section 4 of the Act.

17. Secretary is directed to inform all concerned accordingly.

Sd/-
(R.Prasad)
Member