It was considered that rate 6 B 33 is a competitive rate in relation to the Mittellandkanal and, of course, this decision is not disputed by the applicants who benefit therefrom.

But the High Authority has ordered that Article 71 (b) of the scale of dues for navigation on the canal be abolished as being a protective rate of a discriminatory kind, not qualifying for authorization under the fourth paragraph of Article 70. Article 71 (b) provides for a reduction in favour of eastbound traffic from Minden destined for iron mines and iron- and steelworks. There can be no doubt about the special and discriminatory character of this rate.

The only question which calls for our attention is whether the High Authority has the power under Article 70 to take a decision on a navigation due, that is to say on a toll, the amount of which is set by the State and which, according to the applicants, is in the nature of a tax.

Articles 4 and 70 of the Treaty speak of 'transport *rates*'. It is certain that the expression 'rate' is normally used in relation to transport by rail or by road. However, it seems to me to be certain that the provisions of the Treaty on this subject are directed at all means of public transport, that is to say all those performed by an undertaking acting in a commercial capacity or by a public service. Navigation dues payable for use of a canal are elements in the *price* of transport and, as a result, of the production cost of the goods carried. A comparision with the rate of a competing means of transport (in this case the railways) would not fairly represent the facts if the dues were not taken into account. To my mind the fact that the toll is fixed by the High Authority in the form of a due is of little importance. The due must be regarded as the price of a service, and not as a tax.

I am of the opinion that:

Case 19/58 brought by the Government of the Federal Republic should be dismissed, and that the costs should be borne by the applicant;

Applications 3 to 18/58, 25 and 26/58 should be dismissed, and that the applicants should bear their own costs;

And that the cost incurred by the interveners should be borne by them.

ORDER OF THE PRESIDENT OF THE COURT of 11 APRIL 1960[1]

In Cases

3/58 – BARBARA ERZBERGBAU AG,
4/58 – GEWERKSCHAFT LOUISE,
5/58 – HERZ-LAHN-ERZBERGBAU AG,
6/58 – MANNESMANN AG,
7/58 – ERZBERGBAU SIEGERLAND AG,

1 — Language of the Case: German.

8/58 – ERZBERGBAU STAUFENSTOLLN GMBH,
intervener: LAND OF BADEN-WÜRTTEMBERG,
9/58 – HESSISCHE BERG- UND HÜTTENWERKE AG,
10/58 – STAHLWERKE SÜDWESTFALEN AG,
11/58 – HÜTTENWERKE SIEGERLAND AG,
12/58 – FRIEDRICHSHÜTTE AG,
13/58 – EISERFELDERHÜTTE GMBH,
14/58 – NIEDERDREISBACHERHÜTTE GMBH,
15/58 – GEWERKSCHAFT GRÜNEBACHER HÜTTE,
16/58 – BIRLENBACHER HÜTTE SCHLEIFENBAUM & CO. KG,
18/58 – ILSEDER HÜTTE AG,
25/58 – HÜTTENWERK SALZGITTER AG,
26/58 – LUITPOLDHÜTTE AG,

all represented by their Boards of Directors or by their managers, assisted by Heinrich Lietzmann, Barrister-at-Law, Essen, in Cases 3 to 16/58, 25 and 26/58, and by Ludwig Raiser, Professor of Law at the University of Tübingen in Case 18/58, with an address for service in Luxembourg at the office of A. Woopen, 2 rue du Fort-Élizabeth,

applicants,

LAND OF BADE-WÜRTTEMBERG represented by the acting Minister-President and the Minister for Economic Affairs, assisted by Joseph H. Kaiser, Professor of Law at the University of Freiburg,

intervener,

v

HIGH AUTHORITY OF THE EUROPEAN COAL AND STEEL COMMUNITY, represented by its Legal adviser, W. Much, acting as Agent, with an address for service in Luxembourg at its seat, 2 place de Metz,

defendant,

THE PRESIDENT OF THE COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES

makes the following

ORDER

Issues of fact

By an application lodged at the Registry on 1 April 1960 the applicants in Cases 3 to 16/58, 25 and 26/58 claim that the Court should:

'Order the suspension of the decisions or recommendations contained in the letter sent by the High Authority on 12 February 1958 to the Government of the Federal

Republic of Germany concerning special rates charged by the German Federal Railways for the carriage of mineral fuels, destined for the iron and steel industry and for the carriage of ores (published in the *OJ* of the ECSC, No 8, of 3 March 1958, p. 105/58 *et seq.* and p. 122/58 *et seq.*) until such time as final judgment is delivered in this case and in so far as the applicants have contested the aforementioned decisions or recommendations of the High Authority.'

By an application lodged at the Registry on 1 April 1960, the applicant in Case 18/58 claims that the Court should:

'Order a stay of execution of the decision of the High Authority of 9 February 1958 in so far as the latter concerns, under Nos II and III, C 2 and 3, rate 71 (b) (now 65) of the general scale of dues for navigation on the canals of West Germany until such time as final judgment is given in case 18/58.'

The applicants claim that their request is admissible.

They argue that since they have, by way of Applications 3 to 16/58, 18, 25 and 26/58, brought before the Court applications for the annulment of certain decisions contained in the abovementioned letters, they fulfil the conditions as to admissibility laid down by the second paragraph of Article 39 of the Treaty establishing the ECSC and by Article 83 (1) of the Rules of Procedure of the Court.

The applicants also allege that a stay of execution is urgent and necessary by reason of the following facts:

1. The Federal Government has informed the applicants that it will comply with the letters from the High Authority to the Federal Government dated 12 February 1958 and that it will, with effect from 15 April 1960, abolish the rates mentioned therein and replace them by new rates.

   The relevant letter from the Federal Minister of Transport dated 22 March 1960 is on the file.

2. (a) In the present state of the procedure on the substance, it is to be expected that the decision of the Court on these applications will be forthcoming fairly soon. Therefore it seems inappropriate that the Federal Government or the Federal Railways should introduce a temporary solution prior to that judgment by their decision to increase the rates from 15 April 1960, since in view of the expected judgment it is not possible to say whether that temporary solution will become permanent.

   (b) Until such time as the rates introduced on 15 April 1960 are abolished, consumers of coal and of ore will have to bear considerably higher transport costs than hitherto. The extra charges will cause grave and irreparable loss to the applicants because they have no *legal right* to require repayment by the Federal Railways or the inland waterway authorities of sums paid in excess.

   (c) The loss occasioned by the rise in rates will be particularly grave and irreparable for those applicants which produce ores.

   The consumers have informed these applicants that they will cease buying ore with effect from 15 April 1960 if the increases in the rates for ore fixed by the decisions of the High Authority of 12 February 1958 are applied as from 15 April 1960.

   The applicants have produced copies of some of these letters so as to substantiate their statements, and they offer to supply proof of their statements of fact.

The application lodged on behalf of the applicants in Cases 11 and 12/58 at the Registry on 13 March 1960 by Wolfgang Küster, advocate at Düsseldorf, is based in substance on the same grounds.

In addition, this application states that should the Court order a stay of execution before 15 April 1960 the Federal Government would be willing to delay applying its provisions which are due to come into force on 15 April.

The grounds put forward by the applicant in Case 18/58 are substantially the same as the arguments of the other applicants.

In its statement of 6 April 1960 the defendant states its position on the request for a stay of execution and it puts forward in particular the following arguments:

At the present stage of the procedure, to suspend the application of the contested decision would no longer be justified.

It is impossible to agree with the applicants' opinion according to which execution of the decision prior to delivery of judgment might cause them irreparable loss.

In so far as they apply to so-called *Vorharzgruben* works, the special ore rates 7 B 3 and 7 B 35 will not be subject to any change after 15 April 1960. Negotiations between the High Authority and the appropriate authorities of the Federal Republic are under way concerning the possibility of granting new protective rates in favour of those undertakings.

The High Authority also points out that with the exception of the undertakings Ilseder Hütte/Peine and Hüttenwerke Salzgitter AG, the contested decisions give all the applicants the benefit of transitional periods of from four to eight years and that therefore at the present moment all that is involved is the making of partial increases, and these could evidently be annulled at once if the Court gave judgment in favour of the applicants.

The High Authority contends that the request for a stay of execution lodged by the applicants should be rejected.

Grounds

During the course of the present procedure it is not necessary to decide whether and in what circumstances an intervener may claim a stay of execution, and it is sufficient to note that in judging whether the requests in question are well-founded it is not necessary to take into account the request of the Land of Baden-Württemberg to intervene in Case 8/58.

The requests for a stay of execution have been lodged less than six weeks before 10 May 1960, the date on which the judgment on the substance is to be published.

The applicants rely on the fact that the Federal Government has now resolved to execute the decisions of the High Authority of 9 February 1958, as it has long been required to do, as appears from the judgment of the Court of Justice of 8 March 1960 in Case 3/59.

From the time when the abovementioned decisions were adopted the applicants could have expected them to be executed and as from that time they could have lodged a request for a stay of execution which might have been justified.

In principle, it is for an applicant to decide whether it is appropriate to lodge a request for a stay of execution, and to decide at what stage of the procedure to lodge it.

However, there are obvious objections to granting such a request when it is lodged after the written procedure has come to an end and after the oral procedure on the

substance, at a time when the Court has already commenced its deliberations on the judgment on the substance.

Moreover, as the defendant has also observed, it is to be noted that the execution of the decisions of 9 February 1958 will not immediately provoke disadvantageous consequences for some undertakings and will result in only partial increases in rates for most of the other undertakings.

It is true that that constitutes a disadvantage for the undertakings affected by those measures, but there would not appear to be any grounds for the argument put forward by the applicants that these alterations in rates could not be withdrawn at a later stage.

The foregoing considerations require that the request be rejected, and it is not necessary to order the measures of inquiry proposed by the applicants.

The defendant has not put forward any conclusions concerning costs, and it is not therefore appropriate to order the applicants to bear the costs.

On those grounds,

Having regard to Article 39 of the Treaty establishing the ECSC, Article 33 of the Statute of the Court of Justice of the ECSC and Articles 83, 84, 85 and 86 of the Rules of Procedure of the Court,

THE PRESIDENT OF THE COURT OF JUSTICE

declares and orders:

1. **The applications are dismissed;**
2. **The applicants and the defendant must each bear their own costs.**

Luxembourg, 11 April 1960.

H. J. Eversen
Acting Registrar

A. M. Donner
President