

1929
 *12 Sept.
 *7 Oct.

IN THE MATTER OF ORDER OF THE BOARD OF
 RAILWAY COMMISSIONERS No. 448, REGARD-
 ING THE SUBJECT OF RAILWAY FREIGHT
 RATES IN CANADA.

ON APPEAL FROM THE BOARD OF RAILWAY COMMISSIONERS
 FOR CANADA

Appeal—Leave to appeal—Jurisdiction—Extension of time—Special circumstances—Order of the Board of Railway Commissioners—Freight rates—Railway Act, [1927] R.S.C., c. 170, s. 52, subs. 2 and 3; s. 325, subs. 5.

The action of the Canadian National Railways in obtaining from the Board of Railway Commissioners extensions of time covering a period of nearly two years within which to make application for leave to appeal from an order fixing freight rates from Armstrong to Quebec city and the applying for such leave only when a reduction of the rates fixed by the order was threatened and an application had been made to obtain a rate to maritime ports based on those rates, indicate that the Canadian National Railways had no *bona fide* intention of appealing against the order on account of any rates fixed therein; and, therefore, the obtaining of such extensions and the application now being made to the Board cannot be considered as "special circumstances" within the meaning of subsection 2 of section 52 of the *Railway Act*, under which "special circumstances" alone a judge of this court may grant extension of time for applying for leave to appeal.

Moreover, even if such extension of time had been given, leave to appeal should not be granted, as the intending appellant has not advanced any valid objection to the jurisdiction of the Board of Railway Commissioners. *Can. Nat. Rys. v. C.P.R. Co.* ([1929] S.C.R. 135). The Board did not misdirect itself by holding that it had jurisdiction to look at and use, as a basis for fixing the rates between Armstrong at the head of the lakes and Quebec City, the Crow's Nest Argeement from Calgary to Fort William and an agreement of July 29, 1903. Subsection 5 of section 325 of the *Railway Act* declares the powers of the Board under the Act to fix and determine just and reasonable rates shall not be limited or in any manner affected by the provisions of any Act of the Parliament of Canada, or by any agreement made or entered into pursuant thereto, save and except as to rates on grain and flour from points west of Fort William to Fort William and Port Arthur. The wording of this subsection should not be construed as a restriction upon the powers of the Board to fix the rates set out in the Order now in question. On the contrary it seems from the language used that Parliament contemplated that the Board would look at and consider the statutes and agreements relating to rates which had been in force or agreed upon, and desired to make it clear that, with the exception of the Crow's Nest Agreement, the Board was not to be bound by any such statute and agreement. What weight these statutes and agreements shall

*LAMONT J. in chambers.

have is left to the discretion of the Board; and, subject to certain conditions, the obligation rests upon the Board of fixing rates which are "fair and reasonable." In this case, the own conduct of the Canadian National Railways since the Order in question was made has been such as to justify the inference that, in their judgment, the rates were not unfair or unreasonable.

1929
In re BOARD
 OF RAILWAY
 COMMISSIONERS
 ORDER
 No. 448
 REGARDING
 RAILWAY
 FREIGHT
 RATES IN
 CANADA.

APPLICATION for an Order extending the time for applying for leave to appeal, and for leave to appeal to this court under section 52 (2) of the *Railway Act* from an Order of the Board of Railway Commissioners No. 448, dated 26th August, 1927, regarding the subject of railway freight rates in Canada.

Alistair Fraser K.C., *A. J. Thomson K.C.* and *Geo. F. Macdonnell K.C.* for the Canadian National Railways.

J. R. L. Starr K.C. for the Attorney-General for Ontario.

F. H. Chrysler K.C. for the Attorney-General for Manitoba.

A. J. Fraser for the Attorney-General for Saskatchewan.

A. C. Boyce K.C. and *H. P. Duchemin* for the Attorney-General for Nova Scotia.

E. Thériault for the city of Quebec.

J. L. St. Laurent K.C. and *André Taschereau* for the Quebec Harbour Commission.

E. C. Phinney for the citizens of Halifax.

C. J. Burchell K.C. for the Halifax Harbour Commission.

J. Preud'homme K.C. for the city of Winnipeg.

Cuthbert Scott for the Canadian Pacific Ry. Co.

LAMONT J.—This is an application on behalf of the Canadian National Railways for an order extending the time for applying for leave to appeal, and for leave to appeal to this Court from the Order of the Board of Railway Commissioners for Canada, known as "General Order No. 448." The ground upon which the application is based is that the Board exceeded its jurisdiction in making the Order in that it proceeded upon a wrong principle by taking into consideration in fixing the rate: (1) The agreement of July 29, 1903, made between the Government of Canada and the Grand Trunk Railway Company, scheduled in the Dominion Statutes of that year, in the Confirmatory Act, and

1929

In re BOARD
OF RAILWAY
COMMISSIONERS
ORDER
No. 448
REGARDING
RAILWAY
FREIGHT
RATES IN
CANADA.

Lamont J.

(2) The Crow's Nest rate from Calgary to Fort William. The application was opposed by (*inter alia*) the city of Quebec, the Quebec Harbour Commissioners, the province of Nova Scotia, the city of Halifax and the Halifax Harbour Commissioners.

The opposition to the application was based on two grounds,

(1) That the application was not made within one month from the making of the Order as required by s. 52, ss. 2, of the Railway Act, and that no special circumstances had been shewn which would justify the granting of an extension of time within which to apply for leave to appeal, and

(2) That in view of the action of the Canadian National Railways in putting into force and continuing for two years the rates fixed by the Order, it was not now fairly arguable that the rates fixed therein were unfair or unreasonable.

Section 52, subsecs. 2 and 3 of the *Railway Act* provide for an appeal from the Board to the Supreme Court of Canada (1) Upon a question of jurisdiction, if leave therefor is obtained from a judge of that court, and (2) Upon a question of law or jurisdiction or both, if leave therefor is obtained from the Board. The leave in either case is to be obtained within one month after the making of the Order sought to be appealed from, or, within such further time as the judge, under subsec. 2, or the Board, under subsec. 3, under special circumstances, shall allow.

The Order in respect of which leave to appeal is sought was made on August 26, 1927. No application to a judge of this Court for leave to appeal was made within a month of the date of the Order, nor, in fact, until September of this year, two years after the Order was made. It is, therefore, necessary for the Canadian National Railways to obtain an Order extending the time for applying for leave to appeal. This can only be granted by a judge "under special circumstances."

The special circumstances alleged to exist are as follows:

(1) That the railways had within the proper time applied to the Board for an extension of the time within which they could apply to the Board for leave to appeal to the Supreme Court of Canada; that the Board had granted

the application and had subsequently renewed the extension given from time to time until June, 1929, when an application was made to the Board for leave to appeal, but the same was refused.

(2) That the Canadian National Railways had, in May of this year, received a notice from the Board calling upon them to shew cause why an Order should not be made directing a reduction of the rates fixed by General Order No. 448, in conformity with the principles laid down in that order.

(3) That applications were now being made to the Board to fix a rate to Halifax and St. John based upon the rates fixed by the Order from Armstrong to Quebec.

On the argument before me counsel for the Canadian National Railways very frankly stated that had no steps been taken to bring about a further reduction of the rates fixed in the Order sought to be appealed from and no application had been made to have rates fixed to Maritime ports based upon those fixed to Quebec, the Canadian National Railways would have been content not to seek leave to appeal as there was not a great deal of grain being transported to Quebec, and they did not consider that the rates fixed would injure them very much.

In my opinion the action of the Canadian National Railways in obtaining from the Board extensions of time covering a period of nearly two years within which to make application for leave to appeal, and then appealing for such leave only when a reduction of the rates fixed by the Order was threatened and an application had been made to obtain a rate to Maritime ports based on those rates, points strongly to the conclusion that the Canadian National Railways had no *bona fide* intention of appealing against the Order on account of any rates fixed therein. What the Canadian National Railways were seeking to accomplish, by getting numerous extensions of time within which they might apply for leave to appeal, was to hold the threat of an appeal over the heads of those who might contemplate applying to the Board to fix a rate to Maritime ports based upon the rates to Quebec. Under these circumstances I am unable to hold that the obtaining of the extensions to which I have referred, or the applications now being made

1929
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 RATES IN
 CANADA.
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to the Board, can be considered a special circumstance within the meaning of s. 52, ss. 2.

On the main ground upon which the application was based the Canadian National Railways, in my opinion, cannot succeed. As my brother Duff pointed out in *Canadian National Railways v. Canadian Pacific Railway Company* (1), it is the duty of a judge on an application for leave to appeal to consider whether the question which the applicants desire to raise is one in respect of which there can be said to be a fairly arguable controversy.

The Canadian National Railways desire to appeal from the Order fixing the rates from Armstrong to Quebec city. Their contention is that the Board misdirected itself by holding that it had jurisdiction to look at and use, as a basis for fixing the rates, the Crow's Nest agreement from Calgary to Fort William, and the agreement of July 29, 1903; and s. 325, ss. 5 of the *Railway Act* was cited in support thereof. That section declares that the powers of the Board under the Act to fix and determine just and reasonable rates shall not be limited or in any manner affected by the provisions of any Act of the Parliament of Canada, or by any agreement made or entered into pursuant thereto, save and except as to rates on grain and flour from points west of Fort William to Fort William and Port Arthur. The wording of this subsection, on any fair reading of it, is not capable, in my opinion, of being construed as a restriction upon the powers of the Board to fix the rates set out in the Order. On the contrary it seems to me from the language used that Parliament contemplated that the Board would look at and consider the statutes and agreements relating to rates which had been in force or agreed upon, and desired to make it clear that, with the exception of the Crow's Nest agreement, the Board was not to be bound by any such statute or agreement. The Board was, therefore, entitled to take into consideration the agreements to which objection was taken. Taking them into consideration, however, does not mean, as I indicated above, that the Board is under any obligation to adopt the rates fixed or agreed to therein. What weight they shall have is, in my opinion, left to the discretion of the Board subject to this, that after it has given full consideration to these agree-

ments as well as to the other matter to which reference was made so often on the argument, namely, the expenditure of three hundred and thirty million dollars by the Parliament of Canada in constructing or aiding the lines now forming the Canadian National Railways, and the desire of the Government, as expressed in the Order in Council, to encourage the movement of traffic through Canadian ports, the obligation still rests upon the Board of fixing rates which are "fair and reasonable" from the standpoint not only of the producer but also from the point of view of the Railways.

Has it been made to appear on this application that it is fairly arguable that the rates fixed by Order No. 448 are unfair or unreasonable? I am very clearly of opinion that it has not. Not only have the Canadian National Railways failed to shew that the Board misdirected itself, but their own conduct since the Order was made has been such as to justify the inference that, in their judgment, the rates were not unfair or unreasonable.

The application will be dismissed with costs.

Application refused with costs.

1929
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