Privy Council Appeal No. 136 *of* 1919.

Toronto Railway Company - - - - - *Appellants*

v.

The Corporation of the City of Toronto - - - - *Respondent*

FROM

THE APPELLATE DIVISION OF THE SUPREME COURT OF ONTARIO.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 20TH JANUARY, 1920.

Present at the Hearing:
VISCOUNT FINLAY.
VISCOUNT CAVE.
LORD SHAW.

[*Delivered by* VISCOUNT CAVE.]

This is an appeal from the judgment of the Appellate Division of the Supreme Court of Ontario dated the 20th December, 1918, confirming an order of the Ontario Railway and Municipal Board dated the 19th April, 1918, which ordered the appellants to pay to the respondents the sum of $24,000.

The appellants, the Toronto Railway Company, are the holders of an exclusive franchise to operate street railways in the city of Toronto for a period of thirty years from the 1st September, 1891. The franchise is held under an agreement made between the respondents, the Corporation of the City of Toronto, and the predecessors in title of the appellants, dated the 1st September, 1891, and confirmed by an Act of the Legislature of the Province of Ontario passed on the 14th April, 1892 (55 Vict. c. 99).

In the year 1911, the appellants' cars having become overcrowded, the respondents applied to the Railway and Municipal Board of Ontario for an order compelling the appellants to provide more cars; and on the 6th November, 1914, that Board made an order that the appellants should have in operation an additional fifty double truck motor cars not later than the 1st June, 1915.

These cars have been provided, although not within the period prescribed. Early in the year 1917 the Corporation renewed the application for more cars, and on the 27th February, 1917, the Board made an order " that the respondent (the Company) do place in operation on its system 100 additional double truck motor cars not later than the first day of January, 1918, and a further 100 double truck motor cars not later than the first day of January, 1919." Some doubt appears to have arisen as to whether this order was within the powers conferred upon the Board by the Railway Act and the Railway and Municipal Board Act; for on the 12th April, 1917, the Legislature of Ontario, on the petition of the Corporation, passed an Act (7 George V c. 92) whereby the order of the 27th February, 1917, was ratified and confirmed.

The order so made and confirmed was not carried out by the Company, and on the 1st January, 1918, no part of the additional 100 cars ordered to be provided by that date had in fact been provided or placed in operation; and accordingly, on the 30th January, 1918, the Company and the Corporation were summoned to appear before the Railway and Municipal Board. The notice or summons issued for this purpose is not forthcoming, and its terms must be inferred from the statement made by the Chairman of the Board at the commencement of the hearing, as follows :—

> " This is a hearing initiated by the Board on its own motion with the view of bringing together the City of Toronto and the Toronto Railway Company to determine what progress has been made in the execution of the order of the Board made on the 27th of February, 1917, directing the Railway Company to furnish 200 additional cars, 100 deliverable on the 1st of January this year and 100 on the 1st of January, 1919."

The Company and the Corporation accordingly attended by Counsel before the Board on the 30th January, 1918, when some arguments were heard and evidence taken. The " hearing " so instituted was continued on the 13th and 20th of February and the 5th and 18th of March, and on the last-mentioned date was further adjourned.

During the adjournment last referred to the Legislature of Ontario, on the petition of the Corporation, passed an Act (8 George V c. 30) whereby it was provided that the Ontario Railway Act should be amended by adding the following as Section 260A :—

> " 260A.—(1) The Board, for the purpose of enforcing compliance with any order heretofore or hereafter made by it, requiring any railway company, operating a railway or street railway in whole or in part upon or along a highway under an agreement with a municipal corporation, to furnish additional cars or equipment for its service, in addition to any other powers possessed by it, may order such company to pay to the corporation of the municipality in which the company so operates a penalty not exceeding $1,000 a day for non-compliance with any such order.
>
> " (2) An appeal from any such order or from the refusal by the Board to make an order, shall lie to the Appellate Division of the Supreme Court of Ontario at the instance of either the said corporation or the said company

as fully in all respects as from the judgment of a judge at the trial of an action in the Supreme Court; and the judgment of the said Appellate Division shall be final and binding, and no further appeal shall be allowed."

The Royal Assent was given to this statute on the 26th March, 1918.

The "hearing" or inquiry above referred to was resumed before the Board on the 19th April, 1918, on which date, after a short conversation on some recent efforts on the part of the Company to procure the cars required, and notwithstanding a request by Counsel for the Company that he might be allowed to submit evidence on the point, the Chairman of the Board proceeded to give judgment. He said that the Board had come to the conclusion that it was the duty of the Company to have placed orders for the 100 cars, and that if contracts had been promptly placed the cars might have been obtained; that the Board did not propose that their orders should be treated lightly; and that the Board proposed to use the powers conferred upon them by the recent Act in the hope that the Company having experienced the disposition of the Board to insist on performance, would act with greater diligence and promptitude and with a real intention to carry out the orders of the Board in future. An order was accordingly made in the following terms:—

"The Ontario Railway and Municipal Board.

"D. M. McIntyre, Esq., K.C., Chairman, and "A. B. Ingram, Esq., Vice-Chairman. } Friday, the 19th day of April, 1918.

"Between:—

"The Corporation and the City of Toronto,

Applicant.

and

"The Toronto Railway Company,

Respondent.

"The Board having called upon the above-named respondent to show cause why the order herein of the Board dated the 27th day of February, 1917, requiring the respondent, a street railway company operating a railway or street railway upon or along certain highways under an agreement with the applicant, a municipal corporation, to furnish additional cars for its service, had not been complied with, and upon hearing the evidence adduced and upon hearing counsel for the applicant and the respondent.

"And it appearing that the said respondent had not complied with the said order of the 27th day of February, 1917, and that in the opinion of the Board there had not been proper excuse or justification for such non-compliance by the respondent.

"And it appearing that, for the purpose of enforcing compliance with the said order, the Board should order the respondent to pay to the applicant a penalty for non-compliance with the said order.

"1. This Board doth order that the respondent do forthwith pay to the applicant a penalty of $1,000 per day from the 27th day of March, 1918, to the date hereof, both days inclusive, being the sum of $24,000·00 in all.

"D. M. McIntyre,

(Seal) "*Chairman.*"

An appeal from the above order to the Appellate Division of the Supreme Court of Ontario was dismissed, and thereupon the

Company applied for and obtained special leave to appeal from the decision of the Supreme Court to this Board.

On the argument of the appeal before this Board four points were taken on behalf of the appellants.

First it was contended that the Act of 1918 (8 George V c. 30), if it is to be construed as authorizing the imposition of a penalty for a past offence, deals with a criminal matter and was therefore beyond the powers of the Provincial Legislature, exclusive legislative authority in relation to the criminal law (including the procedure in criminal matters) having been reserved by Section 91 (27) of the British North America Act, 1867, to the Parliament of Canada. In their lordships' opinion this contention should not prevail. It is true that in a series of cases, commencing with *Hearne* v. *Garton* (2 E. & E. 66) and ending with *Ex parte Schofield* (L.R. 1891 2 Q.B. 428) it has been held that the imposition of a fine or penalty (not being by way of reimbursement) for the breach of an order of a public authority is matter of criminal and not civil procedure. But in construing the British North America Act it is necessary to read sections 91 and 92 together ; and regard must be had to the fact that paragraph (15) of the latter section gives to a Provincial Legislature exclusive power to make laws in relation to the imposition of punishment by fine, penalty or imprisonment for enforcing any law of the Province made within the scope of its powers. It appears to their Lordships that the Act now in question falls within the latter provision and was therefore within the powers of the Legislature of Ontario.

Secondly it was contended that, as under the order of the 27th February, 1917, the first 100 additional cars were to be placed in operation not later than the 1st January, 1918, there was a complete breach of the order on that date, and accordingly there could not after that date be such a non-compliance with the order as to subject the company to the penalties authorized by the Act. Their Lordships are unable to agree with this contention. The substance of the thing to be done was, as pointed out by Meredith, C.J., in giving the reasons for the decision of the Supreme Court, that the additional cars should be put in service. The limit of time was a further and subsidiary provision, and notwithstanding the breach of this latter provision, the direction to provide the cars remained in force.

But, thirdly, it was argued on behalf of the appellants that the order of the 19th April, 1918, was not authorised by the Act of 1918, as it was an order not for enforcing compliance with the order of the 27th February, 1917, but for punishing a past breach of the order ; or, in other words, that the only order contemplated by the Act of 1918 was an order fixing a period within which some existing or future order should be complied with and imposing a penalty for every day of default after that period had elapsed. In their Lordships' opinion this is the true construction of the Act of 1918. The Board are authorised by Section 260A to impose penalties for non-compliance with their orders, but subject to the condition that such penalties must be

imposed " for the purpose of enforcing compliance " with those orders ; and this expression points, not to the summary imposition of a penalty for a past breach without previous warning, but to the imposition of a penalty in advance and for the purpose of procuring by means of such an inducement obedience to the order. The word " enforce " is ambiguous, and may according to its context refer either to the imposition of a fine or damages or to some process for procuring specific performance ; but the expression " enforcing compliance " is more readily susceptible of the latter meaning (cf. *re* Royle, 50 L.J., Q.B. 656, where the expression was " enforce obedience "). Further, it is plain that the Act of 1918, although general in its terms, was passed with special reference to the liabilities of the Toronto Railway Company under the order of the 27th February, 1917 ; and it cannot be supposed that the Legislature of Ontario, knowing that a breach of that order had occurred and could not be remedied without some further allowance of time, intended to authorise the imposition of a daily penalty commencing from the day following that on which the Act became law. The Act, if construed so as to have that effect, would bear too great a resemblance to *ex post facto* legislation. In their Lordships' opinion it was not the intention of the Legislature that the Board should be authorised to impose penalties except after giving to the Railway Company a warning that after a specified period penalties would be imposed and an opportunity of avoiding them by compliance, within that period, with the requirements of the Board, and accordingly the order of the 19th April, 1918, was not authorised by the Act.

Apart from the above considerations, the procedure adopted by the Railway Board in making the order under appeal is open to question. The Railway Company appeared before the Board on the 19th April, 1918, for the purpose of pursuing the inquiry instituted by the Board on the 30th January, and for no other purpose. No claim had been made by the Corporation for penalties under the recent Act, no notice or summons had been given or issued by the Board which indicated that the question of penalties would come under consideration, nor was this question even referred to at any time before judgment was delivered. Their Lordships accept the view of the Railway Board that the Company were not prevented by war conditions from supplying the cars and were therefore gravely in default ; but even so they were entitled, before being subjected to a heavy penalty, to have notice of the claim and an opportunity of meeting it. Whatever view, therefore, might be taken as to the construction of the Act, it seems doubtful whether the present order could stand.

The fourth point raised on behalf of the appellants was that, having regard to the powers conferred by statute on the Railway and Municipal Board, that body must be regarded as a " Superior Court " within the meaning of Section 96 of the British North America Act, and accordingly that the members of the Board should have been appointed by the Governor-General and not (as provided by Section 5 of the Railway and Municipal Board

Act of Ontario) by the Lieutenant Governor in Council. This question was fully considered by the Supreme Court and was decided by that Court against the appellants. But in consequence of the view taken by their Lordships on other points in the case it became unnecessary for them to consider it; and accordingly the point was not argued before the Board, and their Lordships express no opinion upon it.

For the above reasons their Lordships will humbly advise His Majesty that this appeal should be allowed, and that the order of the Railway Board dated the 19th April, 1918, and the order of the Supreme Court affirming that order should be set aside. The respondents will pay the costs of the appeal to the Supreme Court and of this appeal.

In the Privy Council.

TORONTO RAILWAY COMPANY

v.

THE CORPORATION OF THE CITY OF TORONTO.

DELIVERED BY VISCOUNT CAVE.

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