



TRANSPORTATION APPEAL TRIBUNAL OF CANADA

Citation: *Canadian National Railway Company v. Canada (Minister of Transport)*,
2021 TATCE 29 (Ruling)

TATC File No.: RQ-0054-41

Sector: Rail

BETWEEN:

Canadian National Railway Company, Applicant

- and -

Canada (Minister of Transport), Respondent

[Official English translation]

Heard by: Written submissions on June 10, 17 and 22, 2021

Before: Jennifer Webster, Member

Rendered: September 28, 2021

RULING AND REASONS

Held: The Tribunal allows the applicant's request to extend the deadline for the submission of its request for review under subsection 40.16(1) of the *Railway Safety Act*. The applicant may file a written request for review of the notice of violation 4004-16-9-106849 with the Tribunal on or before October 8, 2021.

I. BACKGROUND

[1] On March 25, 2021, the Minister of Transport (Minister) served a notice of violation on the Canadian National Railway Company (CN). In the notice of violation, the Minister assessed administrative monetary penalties in the total amount of \$237,498 in relation to three alleged violations by CN of railway safety rules and regulations. The notice stated that CN must either pay the penalties or request a review of the Minister's decision by the Transportation Appeal Tribunal of Canada (Tribunal) on or before April 26, 2021.

[2] CN sent an email to the Tribunal registrar on June 1, 2021, to request an extension of the deadline for the submission of its request for review. The registrar established a schedule for written submissions from the parties in relation to CN's request.

[3] CN provided its submissions on June 10, 2021. The Minister made submission opposing the request for an extension on June 17, 2021. CN replied to those submissions on June 22, 2021.

II. ANALYSIS

A. The Tribunal's discretion to extend the deadline for a request for review

[4] The issue before the Tribunal is whether to extend CN's deadline to request a review of the notice of violation issued on March 25, 2021. Subsection 40.16(1) of the *Railway Safety Act (Act)* provides the timeframe for the submission of a request for review of a notice of violation and outlines the Tribunal's power to extend the timeframe as follows:

40.16 (1) A person served with a notice of violation that wishes to have the facts of the alleged contravention or the amount of the penalty reviewed shall, on or before the date specified in the notice — or within any further time that the Tribunal on application may allow — file a written request for a review with the Tribunal.

[5] The deadline specified in the notice of violation for CN to request a review was April 26, 2021. CN contacted the Tribunal on June 1, 2021, to request that the Tribunal allow a further deadline as permitted in subsection 40.16(1) of the *Act*.

B. The positions of the parties

[6] CN argues that the Tribunal should exercise its discretion to extend the deadline for filing a written review request taking into consideration all the circumstances. CN requests that the Tribunal grant an extension of the deadline to ten (10) days following the issuance of this ruling.

[7] CN highlights that subsection 40.16(1) of the *Act* does not provide criteria for the Tribunal's consideration of an application to extend the timeline. It submits that, in the absence of specified criteria, the Tribunal may be guided by the four-part test that the Federal Court has adopted to guide the exercise of its discretion to extend the deadline for filing an application for judicial review. Subsection 18.1(2) of the *Federal Courts Act* requires an applicant to file for judicial review within 30 days after the time the decision or order was first communicated to the party "or within any further time that a judge of the Federal Court may fix or allow before or

after the expiration of those 30 days.” Recently, the Federal Court described the four-part test developed by the Federal Court of Appeal and its application in *Cyr v. Batchewana First Nation*, 2020 FC 1001, in the following paragraphs:

[41] Extensions of time under subs. 18.1(2) are discretionary and are granted when they are in the interests of justice. Where an application for judicial review is brought by one or more individual applicants, four questions guide the Court’s inquiry in the exercise of its discretion:

- (1) Did the moving party have a continuing intention to pursue the application?
- (2) Is there some potential merit to the application?
- (3) Has the respondent been prejudiced from the delay?
- (4) Does the moving party have a reasonable explanation for the delay?

See *Thompson v. Canada (Attorney General)*, 2018 FCA 212, at para 5; *Wenham v. Canada (Attorney General)*, 2018 FCA 199, at para 42; *Canada (Attorney General) v. Larkman*, 2012 FCA 204, at para. 61.

[42] The importance of each of these four questions depends upon the circumstances of each case. In addition, not all of these four questions need be resolved in the moving party’s favour. Strength in one factor may make up for weakness in another. The overriding consideration is that the interests of justice be served: *Larkman*, at para 63; *Thompson*, at para 9.

[8] CN argues that a consideration of the four questions outlined by the Federal Court supports its request for the Tribunal to extend the deadline in the circumstances of the notice of violation at issue in this case.

[9] With respect to the question of a continuing intention to pursue the application, CN identifies that the issues raised in the notice of violation were the subject of ongoing discussions between CN and Transport Canada starting in May 2020. CN submits that it demonstrated throughout these discussions in an unequivocal manner that it did not agree with Transport Canada’s interpretation and application of the railway safety regulations in relation to its decision to remove Garneau Yard as a designated safety inspection location. It argues that it always intended to challenge Transport Canada’s allegation of violations of the regulations.

[10] CN further argues that there is merit to its application on the basis that there is a genuine dispute between it and Transport Canada as to the interpretation and application of the regulations. CN submits it is committed to safety as a fundamental value and that it believes that it had complied with all safety regulations. CN argues that there is no evidence of any prejudice to the Minister if an extension were granted. CN identifies that the Minister would be able to present its evidence and witnesses even if its request for review was delayed.

[11] Finally, CN provides an explanation for the delay which it submits is a reasonable explanation. CN accepts that the notice of violation was validly served on March 25, 2021. It explains that the current situation related to the COVID-19 pandemic has complicated the exchange of information in its legal department and increased the demands. In addition, CN advises that there has been a decrease in the number of lawyers in the department that responds to notices of violations. CN explains that the notice of violation was accepted by a paralegal who then forwarded it to two counsel. Through a good faith mistake, each lawyer believed that the other was taking responsibility for responding to the notice and neither took the necessary steps until June 1, 2021. CN accepts responsibility for its error and oversight and submits that this was

an inadvertent error caused by the pandemic and the reduction in legal staffing. In all these circumstances and taking into account the questions outlined by the Federal Court, CN submits that the Tribunal should grant its request for an extension.

[12] The Minister accepts that the legal test is the four-part test argued by CN, but it opposes the request for an extension on the basis that CN has not provided a reasonable explanation to justify the delay. It argues that, where a party asks a tribunal to exercise its discretion to extend a deadline, the party must demonstrate that there are legitimate and serious reasons for its failure to meet the deadline and that it exercised due diligence in the circumstances. The Minister submits that CN has not satisfied the fundamental criteria to justify an extension in that it has not provided a reasonable explanation for the delay in filing the request for review.

[13] The Minister argues that CN's explanation for the delay is not plausible because it has submitted timely requests for review in relation to four earlier notices of violation that had been served after the declaration of the pandemic in March 2020. In addition, the Minister argues that it would be prejudiced by an extension because it should be able to rely on the finality of the decision in the notice of violation once the statutory deadline has passed. For all these reasons, the Minister submits that it is not in the interest of justice to permit CN to file a late request for review, and it asks that the Tribunal deny CN's request.

C. Should the Tribunal grant CN's request for an extension?

[14] The Tribunal has developed a *Policy on Late Applications* that is made publicly available on its website and describes the Tribunal's approach to the exercise of its discretion to allow extensions of deadlines on late applications. The policy sets out that a request that is late by five days or more will not be accepted unless there are extenuating circumstances to justify the applicant's failure to apply for a review within the statutory deadline.

[15] The Tribunal finds that CN has outlined extenuating reasons for its delay in requesting review of the notice of violation. CN failed to file a timely application due to an inadvertent oversight related to the public health restrictions enacted due to the COVID-19 pandemic. Although the Minister argues that CN's explanation is not reasonable, the Tribunal concludes that, based on a consideration and weighing of all the relevant factors, there are compelling reasons to grant CN's extension request.

[16] The Tribunal accepts CN's explanation that the COVID-19 public health restrictions have affected the functioning of its legal department. The Tribunal recognizes that the normal functions may not be continuing as they did prior to the pandemic. The Tribunal finds that the impact of the public health restrictions and the change in work patterns are extenuating circumstances that explain and justify CN's delay in applying for a review. In addition, the Tribunal notes that CN has diligently pursued this request for review upon recognizing that it had missed the deadline of April 26, 2021, and it has accepted responsibility for its error in not more appropriately managing its internal communication.

[17] The Minister challenges the credibility of CN's explanation for the delay on the basis that CN has submitted timely requests in response to four other notices of violation. The Tribunal notes, however, that in *Canadian National Railway Company v. Canada (Minister of Transport)*,

2020 TATCE 19 (Ruling), the Minister did not oppose CN's late request for review in November 2020. The Tribunal decided to grant CN's request when it had missed the statutory deadline by nine days through oversight on the part of CN's counsel. Although Tribunal decisions are not binding, it is persuasive that the Tribunal exercised its discretion to extend the deadline in similar circumstances to the present request. In the circumstances of this request, the Tribunal accepts that CN has established extenuating circumstances related to the functioning of its legal department due to the pandemic and that it has demonstrated legitimate reasons for the delay.

[18] In addition, the Tribunal considers the issues in this dispute as compelling factors in favour of CN's request to extend. The documents filed by CN show that CN and Transport Canada have engaged in a series of discussions about their disagreement about the interpretation of the railway safety regulations in the context of the removal of Garneau Yard as a designated safety inspection location. The notice of violation raises serious and disputed issues between the parties, a fact that is amplified by the magnitude of the administrative monetary penalties assessed in the notice.

[19] Having considered all the circumstances, the Tribunal find that there are extenuating circumstances to justify the late application and it grants CN's request for an extension to the deadline for submitting its request for review under section 46.01 of the *Act*.

III. RULING

[20] The Tribunal allows the applicant's request to extend the deadline for the submission of its request for review under subsection 40.16(1) of the *Railway Safety Act*. The applicant may file a written request for review of the notice of violation 4004-16-9-106849 with the Tribunal on or before October 8, 2021.

September 28, 2021

(Original signed)

Jennifer Webster
Member

Appearances

For the Minister: Éric Villemure

For the Applicant: Eric Harvey