TRANSPORTATION APPEAL TRIBUNAL OF CANADA

Citation: *Canadian National Railway Company v. Canada (Minister of Transport)*, 2022 TATCE 48 (Ruling)

TATC File No.: RQ-0069-41

Sector: Rail

BETWEEN:

Canadian National Railway Company, Applicant

- and -

Canada (Minister of Transport), Respondent

[Official English translation]

Heard by:	Written submissions on April 12 and 26 and May 3, 2022
Before:	George ‘Ron’ Ashley, Member
Rendered:	October 4, 2022

RULING AND REASONS

Held: The late application for a request for review is accepted. The Tribunal will schedule a case management conference to discuss the planning of the hearing.

I. BACKGROUND

[1] Transport Canada sent a Notice of Violation (Notice) dated January 28, 2022, to Canadian National Railway Company (CN) alleging that CN had contravened subsection 97(2) of the *Grade Crossings Regulations*. The Notice, sent to CN's legal department by e-mail on that same date, indicated that the violation carried with it an administrative monetary penalty of $125,332. The Notice advised CN that it had the right to contest the allegation by filing a request for review with the Transportation Appeal Tribunal of Canada (Tribunal) on or before March 2, 2022.

[2] On March 29, 2022, or 27 days after the deadline for filing any request for review, CN counsel asked the Tribunal to grant CN permission to request a review of the Notice.

[3] Upon receiving CN's request, the Tribunal advised both parties that, in accordance with its *Policy on Late Applications*, it would receive submissions on the question of granting an extension to file a request for a review. The applicant provided its submission in support on April 12, 2022. The representative for the Minister of Transport (Minister) filed submissions opposing the request on April 26, 2022, and on May 3, 2022, the applicant filed its final reply.

II. ANALYSIS

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

[4] Subsection 40.16(1) of the *Railway Safety Act* allows the recipient of a notice of violation to seek a review of the Minister's determination and, where the deadline for seeking that review has expired, to request the Tribunal's permission to exceed that deadline for the filing of their review application. Subsection 40.16(1) states the following:

> **Request for review of determination**
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> **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 Tribunal's *Policy on Late Applications* provides the framework to consider late applications. It provides, in part, that a request is generally accepted when it is received within four business days after the deadline. A request received five or more business days after the deadline requires submissions from the parties. The Tribunal will review those submissions and consider whether or not the applicant has established extenuating circumstances to justify their failure to apply for a review before the time deadline set out in the Notice.

B. Should the Tribunal grant the applicant's late application for a request for review?

[6] The applicant does not dispute that the deadline was missed or that it is beyond the four-business day grace period set out in the Tribunal's *Policy on Late Applications*. Rather, the applicant argues that there were extenuating circumstances and, in support, uses the

consideration criteria set out in a recent decision of the Federal Court. That decision, *Cyr v. Batchewana First Nation*, 2020 FC 1001 *(Cyr)*, sets out the following considerations when dealing with relevant filing deadlines under the *Federal Courts Act*:

> [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:
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> 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?
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> 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.
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> [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.

[7] The Minister's counsel also argues that this is the standard to be used by the Tribunal in deciding such requests.

[8] The Tribunal agrees. The Tribunal's *Policy on Late Applications* focuses on the existence of extenuating circumstances. Fundamentally, it is premised on the overriding consideration that, on balance, the interests of justice are served in the granting of an extension application. To assist in this ruling, the Tribunal adopts the four criteria set out in *Cyr*.

[9] The following assessment examines each of the factors in the order they are presented in *Cyr*. This is done, again, while keeping in mind that the fundamental question to be answered is whether the interests of justice are served in the granting of an extension request.

(1) Did the moving party have a continuing intention to pursue the application?

[10] The applicant argues that its intention to seek a review of the Notice was immediately communicated to the Minister upon first receiving it. That is, the applicant received the Notice in an e-mail dated January 28, 2022, and an intention to seek a review was communicated back to the Minister in an e-mail, also on that date.

[11] The applicant argues that the statement in that e-mail response was unequivocal, its intentions did not change over the ensuing time period, and that for reasons "beyond CN's control … CN was unable to meet the Deadline." As a result, there was no timely follow-up.

[12] It was at the time of receiving an e-mail inquiry from the Minister on March 23, 2022, or three weeks after the expiration of the deadline, that the applicant was reminded of the Notice and the deadline. The Minister's e-mail sought information regarding CN's payment of the administrative monetary penalty that was set out in the Notice.

[13] The applicant argues that missing the deadline was due to the elevated volume of files being managed by its internal legal team and that on becoming aware of the matter, CN counsel immediately contacted an outside law firm to assist. CN referred the handling of all of its active cases to Dentons Canada on March 24, 2022, whereupon the law firm advised the Tribunal that an extension would be requested. This was done in an e-mail from Dentons Canada counsel dated March 29, 2022.

[14] The applicant admits that there was no other communication with the Minister in the intervening period. An inference can nevertheless be drawn, according to the applicant, regarding the non-payment of the penalty during the intervening period. That is, the applicant argues that the intention to seek a review of the Notice was manifest by the non-payment of the penalty during that period.

[15] Counsel for the Minister disagrees, arguing that there was neither a *bona fide* nor manifest intention to seek a review during the relevant period. Counsel argues that a simple e-mail sent to the Minister consisting of a few lines that was authored by a paralegal in CN's legal department and sent four hours after having first received the Notice does not demonstrate either.

[16] Counsel for the Minister also argues there is no *prima facie* case in favour of the applicant's contentions. In particular, non-payment of the penalty does not allow any inference of an ongoing intention to seek a review. To the contrary, it simply demonstrates that the applicant forgot about the Notice and the penalty.

[17] The Tribunal finds that while there was a stated initial intention to seek a review, authored by an informed and authorized CN representative (CN's e-mail to Transport Canada dated January 28, 2022), things were simply overlooked by CN's legal department until Transport Canada sent a follow-up inquiry on March 23, 2022. Even then, it took until March 29, 2022, for CN's appointed counsel to confirm the intention to seek a review of the Notice.

[18] Non-payment of the penalty in that period is as consistent with a lack of oversight as it is with a continuing intention to seek a review. I do not see this as evidencing a manifest or real intention, one way or the other. Certainly, the lack of oversight in this case does not convincingly point to there being a continuing intention to seek a review in the period following the initial statement on January 28, 2022.

(2) Is there some potential merit to the application?

[19] The applicant indicates that its defence to the Notice of Violation is real and substantial, and that it will establish that it was duly diligent in maintaining compliance with the requirements set out under subsection 97(2) of the *Grade Crossings Regulations*.

[20] Based on the alleged facts of this case and the overall circumstances, the defence, according to the applicant, will establish that CN maintains an overarching attention to railway safety and to the training of its employees. In particular, this alleged infraction, CN counsel argues, involves rail safety at a level crossing which is based upon assertions of railway fault. Those claims run directly against CN's fundamental value of safety and, as such, they must be and will be countered through CN's defence.

[21] In addition, and if the merits of the defence do not meet the threshold for valid debate in a review before the Tribunal, the amount of the penalty does. Here, the applicant finds that the amount is severely and grossly exaggerated.

[22] Counsel for the Minister disagrees, stating that CN's due diligence assertions are general, vague and unsubstantiated. These fail to meet the *prima facie* threshold required under the law of showing there is even a possible basis to the defence.

[23] Basically, the Minister argues that more specific evidence is required at this stage in support of showing that CN was duly diligent, and that the absence of this evidence makes it impossible for the Tribunal to comprehend whether there is a real and substantial defence to the Notice. As there are more questions than answers in this extension application, the grounds presented by CN do not, according to the Minister, clearly point to there being sufficient merit to the case.

[24] The applicant contests this latter point, claiming that the time and place for presenting detailed due diligence evidence is at the review hearing. At the interlocutory stage, the Tribunal is concerned with whether an extension of time (to file a review application) is warranted, as opposed to undertaking a full assessment on the merits of the defence which is a task left to the Tribunal when hearing the review application.

[25] I find that the applicant's assertions regarding its overall safety culture relative to crossing safety and employee training and the evidence it intends to present showing how this culture translates to a credible due diligence defence warrant that this matter be allowed to be heard in a review hearing.

[26] I do not believe that at this interlocutory stage it is necessary for the applicant to establish on a *prima facie* basis that it was duly diligent. The matters raised by the applicant in this application, while broad in nature, show that the intended defence is not a frivolous one. It points to a substantial and debatable issue being raised.

(3) Has the respondent been prejudiced from the delay?

[27] The applicant argues that if an extension is granted, the Minister is in the same position it would have been had the deadline been met in the first place. As such, there is no loss of benefit or any disadvantage to the Minister that arises from an extension. Simply, the applicant says being able to exercise its fundamental rights under the law (in a review hearing) does not prejudice the Minister.

[28] Further, the applicant argues that the onus is on the Minister to establish the allegations set out in a Notice and this is done in a review hearing. If there is no such hearing, the applicant will be denied the opportunity to be heard and this violates the legal principle of *audi alteram partem*. This rule is a fundamental aspect of natural justice, and it cannot be abrogated in favour of what the applicant terms as "procedural shortcuts" arising out of a missed deadline for filing a review application.

[29] Basically, the applicant finds that extensions are expressly provided under subsection 40.16(1) of the *Railway Safety Act*, and there is nothing untoward in it seeking recourse under the

provision. As well, the balance of time favours the applicant here who was 27 days late in its filing of an extension request. This, says the applicant, and by way of comparison, contrasts with the delay inherent in the Notice itself where 10 months passed between the existence of the alleged infraction and the date when the Notice was ultimately issued to CN.

[30] The Minister counters this assertion stating, in part, that it will suffer serious prejudice if the extension request is granted. Here, the Minister refers to the established 30-day deadline for review requests and the certainty of justice or "finality of decisions" that arises from its imposition. This, according to the Minister, is fundamental, and brings to the forefront questions of administrative justice, finality, fairness and efficiency under the *Railway Safety Act.*

[31] The Minister argues that it must be accorded the premise of certainty or finality that arises when deadlines are missed and notices sustained. It is, therefore, not a mere "administrative inconvenience" for an extension to be granted. Basically, the Minister states that the automatic granting of extensions, without more, offends the stability of administrative decision-making and the deference to be given to those decisions. Those decisions rely on specified timelines and criteria that the law specifies and by implication supports the proper administration of justice.

[32] The granting of the late application request in this case, and having regard to the timelines associated with the issuance of the Notice, does not prejudice the Minister who retains the opportunity to prove the alleged violation at a hearing.

(4) Does the moving party have a reasonable explanation for the delay?

[33] The applicant asserts that the omission of the deadline was due to events that were beyond its control, notably the human resource challenges brought on by the continuing COVID-19 pandemic in early 2021. CN refers to a reduction in its workforce at the time due to the pandemic, a growing workload in the internal law department and the uncertainties of operating during the pandemic which made file management too difficult. Ultimately, on March 24, 2022, it sought assistance by delegating to an outside law firm the management of ongoing active files in the province of Quebec.

[34] The importance of doing this was triggered, according to counsel, by CN having received the Minister's letter of March 23, 2022, inquiring about payment of the monetary penalty set out in the Notice. At this point counsel argued that CN realized its omission and proceeded to take immediate corrective action.

[35] CN counsel states that the omission, simply put, arose out of an administrative error at the time in the "management of e-mails."

[36] The Minister counters by arguing that the omission was due to a lack of diligence on CN's part. CN's failure here, according to the Minister, contrasts with that of the many other rail, air and marine carriers who, in spite of the pandemic and constraints imposed, have been able to meet similar deadlines in their respective domains.

[37] Relative to the omission in this case, the Minister also observes that there is no specific information on why the omission took place or other insight on internal systems in place to prevent this kind of error.

[38] To this point, inferring a system defect, the Minister refers to a separate and recent extension request from CN, *Canadian National Railway Company v. Canada (Minister of Transport)*, 2021 TATCE 29 (Ruling), where a similar deadline was missed by three weeks.

[39] The Minister argues that the onus is on the applicant to show the existence of extenuating circumstances which, and based upon CN's explanation of the events, it has failed to do.

[40] I find that the ongoing pandemic at the time and the administration obstacles it presented to CN's legal department points to the exercise of Tribunal discretion.

[41] CN's explanations demonstrate that the constraints imposed upon its legal department as a result of the pandemic were serious, disruptive and protracted.

[42] Overall, my assessment of the evidence and arguments relative to the above four criteria points to the exercise of discretion in this case and in the granting of this application. On the one hand, it is not clear from the evidence that CN had a continuing intention to seek a review of the Notice. There was simply no review-related communication with the Minister or the Tribunal between January 28, 2022, and March 29, 2022. Nevertheless, the merits of the debate touch upon CN's overall due diligence relative to operating safety. Evidence and argument on this warrants that it be heard at a review hearing. In so doing, the Minister is not being prejudiced relative to its rights to present and prove the allegations. Finally, the explanation for missing the deadline, i.e. the constraints created by the ongoing pandemic, is a reasonable one. On balance, and in light of my findings, above, I find that the interests of justice are served in the Tribunal's hearing of the review.

III. RULING

[43] The late application for a request for review is accepted. The Tribunal will schedule a case management conference to discuss the planning of the hearing.

October 4, 2022

(Original signed)

George 'Ron' Ashley

Member

Representations

For the Minister:	Éric Villemure
For the Applicant:	Pierre D. Grenier