

IN THE MATTER OF ORDER OF THE BOARD OF RAILWAY COMMISSIONERS NO. 41945 AUTHORIZING THE CANADIAN PACIFIC RAILWAY COMPANY TO OPEN FOR THE CARRIAGE OF TRAFFIC THAT PORTION OF ITS LINE FROM * * * WILLINGDON TO * * * STRATHCONA, BOTH IN THE PROVINCE OF ALBERTA.

1929
*Jan. 24.

THE CANADIAN NATIONAL RAILWAYS. APPELLANT;

AND

THE CANADIAN PACIFIC RAILWAY }
COMPANY } RESPONDENT.

ON APPEAL FROM THE BOARD OF RAILWAY COMMISSIONERS FOR
CANADA

Appeal—Leave to appeal—Jurisdiction—Order of the Board of Railway Commissioners—Leave of Board for operating railway—Jurisdiction of the Board—Railway Act, [1927], R.S.C., c. 170, ss. 52 (2), 276.

The Canadian National Railways applied for leave to appeal from an order of the Board of Railway Commissioners, made upon an application of the Canadian Pacific Railway Company under s. 276 of the *Railway Act*, by which that company was "authorized to open for the carriage of traffic that portion of its Swift Current north-westerly branch from * * * Willingdon to * * * Strathcona." Willingdon is the north-western terminus of the Cut Knife branch of the Canadian Pacific Railway Company, a branch constructed and operated under Parliamentary authority independently of that company's principal Act of 1881. In 1919, the respondent company secured the approval by the Minister of Railways for the construction of a branch line to be known as the Swift Current branch, extending from a point near Galihead, in a northerly direction to Willingdon and thence in a westerly direction to Strathcona. On the 30th of July, 1928, when the Board made an order approving of a revised general location of this route, parts only of the line had been constructed leaving extensive gaps where the building of the line had not yet proceeded. The points of jurisdiction raised by the Canadian National Railways are stated thus: the authority of the Canadian Pacific Railway Company to operate branch lines under the Act of 1881 is a single indivisible authority applying only to a branch line in its entirety, as defined by the approved route map and consequently section 276 of the *Railway Act* invests the Board with no jurisdiction to sanction the opening

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for traffic of a part of any such branch line; and, alternatively, the appellant contended that in effect the order of the Board will enable the respondent company to work that part of the Swift Current branch, from Willingdon to Strathcona, as an extension of the Cut Knife branch, this not being permissible under the *Railway Act*.

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Held, that leave to appeal should not be granted, as the intending appellant has not advanced any arguable objection to the jurisdiction of the Board of Railway Commissioners. (*Railway Act*, s. 52 (2)). As to the first of the alternative contentions: there is no doubt that, under the provisions of sections 4 and 15 of the schedule to the contract between the respondent company and the Parliament of Canada, that company stands in an exceptional position with regard to unspecified branches thereby authorized and it cannot be contended that the authority to operate, any more than the authority to construct, any part of the "line of railway" to be known as the Canadian Pacific Railway under the direction of section 15, is conditioned upon the working of the system as a whole or of any integral part thereof. Moreover, by section 17 of the schedule, the enactments of the *Consolidated Railway Act* of 1879 when applicable have been incorporated in the respondent's contract; and section 37 of that Act, which seems to be the parent of the present section 276, presupposes authority in the respondent company, in the absence of an order to the contrary under section 39, to proceed with the working of a portion only of the railway. As to the second alternative point: the Board has jurisdiction under section 276 to make orders authorizing the opening for traffic of part of a railway; this contemplates, as the sequence of such an order, subject to the control of the Board, the working of the particular part of the railway to which the order applies under no greater restrictions than those which would affect the operation of it if the branch were in operation as a whole.

APPLICATION for leave to appeal to this court under section 52 (2) of the *Railway Act* from an order of the Board of Railway Commissioners of the 21st day of December, 1928, made upon an application of the Canadian Pacific Railway Co. under section 276 of the *Railway Act*.

E. Lafleur K.C., A. Fraser K.C. and Geo. F. Macdonnell K.C. for the application.

W. N. Tilley K.C. and E. P. Flintoft K.C. contra.

DUFF J.—The Canadian National Railways applies for leave to appeal from an order of the Board of Railway Commissioners of the 21st of December, 1928, made upon an application of the Canadian Pacific Railway Company under s. 276 of the *Railway Act*, by which the company was

authorized to open for the carriage of traffic that portion of its Swift Current north-westerly branch from mile 361·3 at Willingdon to mile 428·7 at Strathcona.

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The jurisdiction to grant leave to appeal vested in a judge of this court under s. 52 (2) of the *Railway Act*, is operative only for the purpose of enabling the intending appellant to arraign the order of the Board as exceeding the jurisdiction of that body.

The question of jurisdiction which the Canadian National Railway wishes to raise is put by counsel in two ways; and in order to make the point intelligible, it is necessary first to state briefly the cardinal facts. Willingdon is the north-western terminus of the Cut Knife branch of the Canadian Pacific Railway Company, a branch constructed and operated under Parliamentary authority independently of that company's principal Act of 1881 (44 Vic., c. 1). In 1919, the company secured the approval, under the *Railway Act* as it then stood, by the Minister of Railways, of a branch line referred to as the Swift Current branch, to be constructed under the authority of that Act. The route so approved extended from a point at or near Galihead, in a northerly direction to Willingdon, and thence in a westerly direction to Strathcona. On the 30th of July, 1928, when the Board made an order approving of a revised general location of this route, parts only of the line had been constructed; from Swift Current to Empress, from Coronation to Lorraine and from Willingdon to Strathcona, leaving extensive gaps on the route as approved, where the building of the line had not yet proceeded.

The parliamentary sanction for the Swift Current branch, as already mentioned, rests upon the provisions of the Canadian Pacific Railway Company's principal Act. The point of jurisdiction, which the Canadian National Railways ask leave to bring before the Supreme Court of Canada is stated thus: the authority of the company to operate branch lines under the Act of 1881 is a single indivisible authority applying only to a branch line in its entirety, as defined by the approved route map, and consequently, s. 276 of the *Railway Act* invests the Board

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with no jurisdiction to sanction the opening for traffic of a part of any such branch line. Alternatively, the intending appellants propose to contend that in effect the order of the Board will enable the Canadian Pacific Railway to work that part of the Swift Current branch (from Willingdon to Strathcona) which the order affects, as an extension of the Cut Knife branch, and this, they say, is not permissible under the *Railway Act*.

As to the first of the alternative contentions. The pertinent provisions of the contract and schedule are article 14 of the contract, and sections 4 and 15 of the schedule. The precise words of s. 2, in virtue of which the schedule has the force of law, are these

the Governor may grant to them (the persons whose names are mentioned in the contract) under the corporate name of the Canadian Pacific Railway Company, a charter conferring upon them the franchises, privileges and powers embodied in the schedule to the said contract, and to this Act appended, and such charter shall have force and effect as if it were an Act of the Parliament of Canada.

Sections 4 and 15 of the schedule are respectively as follows:

4. All the franchises and powers necessary or useful to the company to enable them to carry out, perform, enforce, use, and avail themselves of, every condition, stipulation, obligation, duty, right, remedy, privilege, and advantage agreed upon, contained or described in the said contract, are hereby conferred upon the company. And the enactment of the special provisions hereinafter contained shall not be held to impair or derogate from the generality of the franchises and power so hereby conferred upon them.

15. The company may lay out, construct, acquire, equip, maintain and work a continuous line of railway, of the gauge of four feet eight and one-half inches; which railway shall extend from the terminus of the Canada Central Railway near Lake Nipissing, known as Callander Station, to Port Moody in the province of British Columbia; and also, a branch line of railway from some point on the main line of railway to Fort William on Thunder Bay; and also the existing branch line of railway from Selkirk, in the province of Manitoba, to Pembina in the said province; and also other branches to be located by the company from time to time as provided by the said contract,—the said branches to be of the gauge aforesaid; and the said main line of railway, and the said branch lines of railway, shall be commenced and completed as provided by the said contract; and together with such other branch lines as shall be hereafter constructed by the said company, and any extension of the said main line of railway that shall hereafter be constructed or acquired by the company, shall constitute the line of railway hereinafter called The Canadian Pacific Railway.

It will be observed that the powers of the company under s. 15, touching the construction and working of the unspecified branch lines, are bestowed by the self same words as its powers in relation to the main line and the specified branches; while s. 4 plainly manifests the intention of Parliament that this language shall receive the most liberal construction in order to effectuate the purposes of the contract and in particular of articles 13 and 14.

My duty on this application is to consider whether the question which the Canadian National Railways desire to raise is one in respect of which there can be said to be a fairly arguable controversy. I am quite unable to discern any possible ground for doubt upon the question whether under these provisions the Canadian Pacific Railway Company stands in an exceptional position with regard to unspecified branches thereby authorized. I can discover nothing giving any substance to the contention that the authority to operate, any more than the authority to construct, any part of the "line of railway" to be known as the Canadian Pacific Railway, under the direction of s. 15, is conditioned upon the working of the system as a whole or of any integral part thereof. Moreover, by sec. 17 of the schedule, the enactments of the *Consolidated Railway Act* of 1879, in so far as applicable to the undertaking of the company, and if not inconsistent with, or contrary to the provisions of the schedule, are incorporated therewith. Section 37 of that Act (s. 200 of the statute of 1888), which seems to be the parent of the present s. 276, obviously presupposes authority in the company, in the absence of an order to the contrary under s. 39 (s. 202 of the statute of 1888), to proceed with the working of a portion only of the railway; and it is of course not disputed that this view has dictated the practice of the railways, of the Railway Committee of the Privy Council, and of the Board of Railway Commissioners in respect of railways generally; and as a rule the Special Acts governing railway construction and operation do not in any relevant respect differ materially in their cardinal provisions as to construction and operation from the provisions of s. 15. The objection now sought to be raised appears to be without foundation in the lan-

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guage of the statutes, and to give effect to it would involve a startling departure from the settled opinion as to the meaning of these statutes and from the long settled practice thereunder.

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As to the second alternative, I am constrained to the conclusion that it is not a point of substance. The Board has jurisdiction under sec. 276 to make orders authorizing the opening for traffic of part of a railway. This seems to contemplate as the consequence of such an order, subject to such control as the Board is entitled to exercise in execution of its powers under the Act, the working of the particular part of the railway, to which the order applies, under no greater restrictions than those which would affect the operation of it if the branch were in operation as a whole; and it is not suggested that the Canadian Pacific Railway Company contemplates a use of this particular part of its Swift Current branch in a manner which would not be permissible in such circumstances. Some expressions let fall by the Chairman of the Board of Railway Commissioners in dealing with the application of the 25th of July, 1928, were relied upon. The words used by the learned Chairman are these:

It is proposed to practically extend the Cut Knife branch from Willingdon to Edmonton.

As a famous judge once observed, the adverb "practically" has the force of a negative. It is not to be supposed that the learned Chairman was treating the piece of railway with which he was concerned as such an extension, which, as he fully recognizes, it in law could not be; and what was meant, no doubt, was that the Canadian Pacific Railway Company would take advantage of its line from Willingdon to Strathcona to reap as far as possible the economic benefits which might be derived from such an extension. I can discover no arguable ground for a contention that such a course is not entirely within the rights of that company.

For the reasons I have thus outlined, I have come to the conclusion that this is not a proper case for leave, because I entertain no doubt that no arguable objection to the jurisdiction of the Board has been advanced.

The application is dismissed with costs.

Application refused with costs.