

company to pay forthwith to the Corporation of the City of Toronto, the respondent, a penalty of \$1,000 per day from the 27th March, 1918, to the 19th April, 1918, being \$24,000 in all, for non-compliance, without proper excuse or justification, with an order of the Board, dated the 27th February, 1917, which required the appellant company to furnish and place in operation 100 additional cars not later than the 1st January, 1918, and 100 more not later than the 1st January, 1919.

The appeal was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, HODGINS, and FERGUSON, JJ.A.

J. W. Bain, K.C., and Christopher C. Robinson, for the appellant company.

Irving S. Fairty and C. M. Colquhoun, for the respondent city corporation.

MEREDITH, C.J.O., read a judgment in which he said that it was admitted that the appellant company did not comply with the directions of the order of the 27th February, 1917; but it was contended that the company, in good faith, made all possible efforts to comply with it, but was unable to comply, owing to the impossibility, because of war and other conditions, of getting the cars built for it, or obtaining the steel and labour necessary for the building of them if that work had been undertaken by the appellant company itself.

It was, no doubt, shewn that these difficulties existed to some extent, and were sufficient to have rendered the putting in service of 100 cars by the 1st January, 1918, difficult; but it was undoubted also that the company took no proper steps to obtain contracts for the supply of cars to be delivered at the earliest date at which car-builders would have been willing to have delivered them; and it was clear from the statement of the company's general manager that, if it had been practicable to have obtained the cars in time, the company would not have bought them because of the very large sum which the purchase of them would require. The company had not done all that it could and should have done to ensure the putting in service of these cars at the earliest practicable moment.

The company made no application, under sec. 25 or sec. 42 of the Ontario Railway and Municipal Board Act, to rescind or vary the order of February, 1917, or to extend the time; nor was an application made after the order was confirmed by an Act respecting the City of Toronto, 7 Geo. V. ch. 92, sec. 17, although by that section it was provided that nothing in it should interfere with the powers of the Board under sec. 25 above.

So long as the order of the 25th February, 1917, stood, what