

Federal Court



Cour fédérale

**Date: 20161025**

**Docket: T-1599-15**

**Citation: 2016 FC 1190**

**Ottawa, Ontario, October 25, 2016**

**PRESENT: The Honourable Mr. Justice O'Reilly**

**BETWEEN:**

**CANADIAN NATIONAL  
RAILWAY COMPANY**

**Applicant**

**and**

**LOUIS DREYFUS COMMODITIES  
CANADA LTD**

**Respondent**

**PUBLIC JUDGMENT AND REASONS**

**(Confidential Judgment and Reasons issued October 25, 2016)**

I. Overview

[1] The applicant, Canadian National Railway Company (CN), provides rail transportation services to the respondent, Louis Dreyfus Commodities Canada Ltd (LDC), a seller and shipper of grain. After the parties failed to agree on contractual terms for the 2015-2016 crop year, LDC

requested arbitration with the Canadian Transportation Agency; the Agency referred the matter to an arbitrator in 2015.

[2] The arbitrator concluded that CN was obliged to meet LDC's request for [REDACTED] rail cars a week at LDC's facilities in [REDACTED], [REDACTED], [REDACTED], [REDACTED]. He rejected CN's argument that it was entitled to ration the number of cars supplied during periods of peak demand and inclement winter weather.

[3] CN argues that the arbitrator's decision was unreasonable because it failed to abide by the requirements set out in the *Canada Transportation Act*, SC 1996, c 10 (ss 169.37, 169.38 – see Annex for provisions cited). In particular, CN says that the arbitrator omitted reference to factors he was required to consider, including the level of service that LDC actually required, CN's operational requirements and restrictions, and CN's obligations to other shippers. CN asks me to overturn the arbitrator's decision and refer the matter to another arbitrator.

[4] LDC defends the arbitrator's decision, noting that he based his conclusions on the evidence regarding LDC's requirements, the occasional need for short periods of rationing, and CN's ability to meet other shippers' needs by increasing its capacity. LDC submits, therefore, that the arbitrator's decision was reasonable and should be upheld.

[5] Having reviewed the arbitrator's decision and the evidence before him, I am satisfied that the decision was unreasonable as the arbitrator failed to take proper account of certain mandatory statutory requirements. I must, therefore, grant CN's application for judicial review.

## II. The Arbitrator's Decision

[6] The main issue before the arbitrator involved the appropriate terms of service owed by CN to LDC for the 2015-2016 crop year. He began by noting the statutory obligations in section 169.37 of the Act, which requires an arbitrator to take into account, among other things, the following factors:

- The traffic to which the service obligations relate;
- The service that the shipper requires with respect to the traffic;
- The railway company's service obligations to other shippers, as well as obligations to persons and companies;
- The railway company's and shipper's operational requirements and restrictions;
- The availability of alternative, effective, adequate, and competitive means available to the shipper for transporting the goods; and
- Any additional information the arbitrator considers relevant.

[7] LDC requested that CN provide at least ■■■ rail cars per week (except during the Christmas break). The arbitrator accepted that LDC is essentially captive to CN's services because, in this situation, CN is the sole service provider at LDC's facilities, trucking is not an economically viable alternative to rail, and interswitching with the Canadian Pacific Railway is infeasible.

[8] In response to CN's submission that LDC did not actually require ■■■ cars per week, the arbitrator found that LDC's past shipping rates were not representative of its current needs

because CN failed to supply the number of cars LDC had required in previous years. [REDACTED]

[REDACTED], [REDACTED], [REDACTED]

[REDACTED] ([REDACTED] [REDACTED]). The arbitrator found that LDC had invested in expanding capacity at its facilities, and concluded that CN's unwillingness to supply sufficient cars should not impair LDC's growth. In his view, LDC had sufficient capacity to move an amount of grain that would justify the number of cars it had requested.

[9] CN proposed to the arbitrator that LDC's request be subject to CN's rationing methodology, which involves allocating rail cars on a pro rata basis according to data from a portion of the 2012-2013 crop year. The arbitrator found that this approach was never representative of LDC's true historic share for the facilities and, in any case, was based on outdated evidence.

[10] CN also urged the arbitrator to consider its obligations to other shippers, which sometimes requires CN to limit allocations to individual shipping companies in order to be fair to the overall market. However, the arbitrator rejected the idea that allocating cars was a "zero sum game" in which meeting one shipper's needs would result in limiting the needs of another. He noted that the rationing of cars occurs almost annually for most of the crop year, regardless of crop size, and rejected the proposition of treating rationing as a normal business practice. Rather, citing an earlier Canadian Transportation Agency decision, he found that rationing should be carried out only for short periods in exceptional circumstances.

[11] Finally, the arbitrator concluded that CN would not fail to meet service obligations to other shippers in order to satisfy LDC's needs. The forecast for the 2015-2016 crop year predicted a reduced yield of 60 million metric tonnes (MMT), down from 78 MMT in 2014-2015 and 84 MMT in 2013-2014. In that light, the arbitrator found that CN should have had sufficient inventory to provide LDC with its requested ■■■ cars per week without impinging on other shippers' requirements. He concluded that this outcome was commercially fair and reasonable to the parties, referring to section 169.38 of the Act.

[12] The arbitrator's sole concession to CN was in relation to the performance standard to which CN would be held: CN was required to deliver 90% of LDC's order within three weeks, and 100% within three months.

### III. Was the Arbitrator's Decision Unreasonable?

[13] The parties agree that I can overturn the arbitrator's decision only if it was unreasonable. As the arbitrator was dealing with a matter of "interest arbitration" rather than "rights arbitration", the decision merits considerable deference (*Public Service Alliance of Canada v NAV Canada*, 2015 ONSC 1407 (Div Ct)).

[14] LDC supports the arbitrator's decision and vehemently contests CN's arguments, characterizing CN's application as "vexatious" and "pernicious". LDC says that CN's position flouts the statutory arbitration scheme, which was meant to protect shippers against monopolistic abuses by the railway. LDC also contends that CN's submissions contradict CN's obligation to

supply shippers with sufficient cars, and points to CN's past conduct that was the subject of previous service complaints by LDC.

[15] LDC relies heavily on an Agency decision in relation to an earlier LDC service level complaint: *Louis Dreyfus Commodities Canada Ltd v Canadian National Railway Company* (Case No 14-02100, Oct 3, 2014) [LDC#1]. LDC contends that the arbitrator's decision conforms with the principles set out in LDC#1 and should be upheld.

[16] In my view, LDC#1 does not go as far as LDC maintains.

[17] In LDC#1, the Agency set out a number of broad principles relating to a railway company's obligation to provide an adequate level of service under the Act. It began by noting that the purpose of section 113 is to "counterbalance the monopoly or near monopoly power that a railway company may exert with respect to certain shippers in some circumstances" (at para 14). In keeping with that purpose, the Agency found that a railway company's service obligation to provide adequate and suitable accommodation to shippers is "unconditional, subject to a shipper meeting its correlative obligations" (at para 22). The railway company owes that duty to each individual shipper, and the railway company's compliance must be assessed according to the shipper's request for services, not according to the combined requests of other shippers or its own car allocation or rationing policies (at paras 23-24). When a shipper complains about the level of service it has received, the Agency will look to the railway company for evidence of the efforts it made to provide adequate service or a compelling explanation for its failure to do so (at para 31). The overarching principle is that the railway company must act reasonably: it is not

expected to do the impossible, but it must show that it could not reasonably have complied with the shipper's request (at paras 32, 34, referring to *Patchett & Sons Ltd v Pacific Great Eastern Railway Co*, [1959] SCR 271 at 274).

[18] The Agency also set out a framework for assessing individual complaints regarding level of service. The following questions arise in that assessment (at para 36):

- Is the shipper's request reasonable?
- Did the railway company fulfill it?
- If not, did the railway company have a reasonable justification for its failure?

[19] According to the Agency, if a shipper made a reasonable request for service and the railway company failed to meet it, the focus will turn to the reasonableness of the railway company's conduct in the circumstances. If the railway company cannot show that it took reasonable steps to respond to the shipper's request, the Agency will consider appropriate remedies.

[20] The Agency noted that the railway company must make reasonable arrangements to respond to shippers' requests, including adding staff or increasing capacity. The reasonableness of the railway company's conduct is a factual question that must be assessed according to the evidence available (at paras 51, 53); this includes circumstances beyond the railway company's control, such as weather, congestion, operational restrictions, and derailments (at para 59). However, car rationing by the railway would be appropriate only in exceptional circumstances and for short periods of time when demand exceeds car supply, such as during peak demand

periods (at para 60). Rationing would not be appropriate for lengthy periods when peak demands are “prolonged and predictable”, or when shortfalls simply become routine (at para 61).

[21] The Agency recognized that railway companies have to make business decisions about the size of their fleets and how they are distributed, but they cannot do so in a manner that contradicts their service obligations to shippers (at para 71). They cannot simply point to the limited size of their fleets as a justification for a failure to meet shippers’ needs (at para 72).

[22] On the facts of LDC’s complaint, the Agency found that CN had failed to meet LDC’s service requests. The Agency then considered whether there was a reasonable justification for CN’s conduct. CN had argued that its failure was a product of applying its car allocation policy during periods of extreme demand. However, CN did not provide evidence of how that policy actually operated so as to bring about the shortfall in the number of cars it provided to LDC, nor did it explain exactly what its policy was. The Agency accepted that CN could apply an allocation policy, but the policy had to be clearly defined and communicated to shippers. In addition, the policy could not violate shippers’ rights to service, such as providing a shipper no cars at all (at paras 156, 163).

[23] Recently, the Federal Court of Appeal upheld the Agency’s decision, finding that the Agency’s interpretation of the Act was reasonable (*Canadian National Railway Company v Dreyfus*, 2016 FCA 232). In particular, the Court affirmed the principle in *Patchett* that service obligations must be interpreted reasonably (at para 20).



[24] LDC also contends that other Agency decisions favour its position. I disagree. The Agency has, in fact, recognized the permissibility of CN's car allocation policy.

[25] In *Louis Dreyfus Commodities Canada Ltd v Canadian National Railway Company* (Case No 14-05609, March 12, 2015), LDC asked the Agency to order CN not to apply its car allocation policy to LDC's facilities. CN asked the Agency to dismiss LDC's application. The Agency agreed with CN that LDC's application did not disclose a reasonable cause of action because the question of whether application of the rationing policy would result in failure by CN to meet its obligation to provide proper service was a factual one that could not be decided in the abstract. The Agency did not interpret its decision in LDC#1 as a prohibition on rationing; rather, the Agency concluded that CN's car allocation policy must not be inconsistent with its service obligations.

[26] In *Louis Dreyfus Commodities Canada Ltd v Canadian National Railway Company* (Case No 14-05341, June 18, 2015), LDC complained that CN had breached its level of service obligations for the 2013-2014 crop year. The Agency applied its approach from LDC#1. It found that LDC's demand for rail cars was reasonable, even though it exceeded historical demands. CN was able to provide only about 83% of the requested cars during the relevant period and, therefore, had failed to meet LDC's reasonable requests. In terms of whether CN had a valid reason for not providing the cars requested, the Agency considered the size of the 2013-2014 crop, CN's efforts to acquire additional cars, the upward shift in LDC's demands, the harsh winter weather that year, CN's need to implement its car allocation policy, and the lack of lead time available to CN to respond to the prevailing circumstances. The Agency concluded that CN

had provided a reasonable explanation for its inability to meet all of LDC's requests: the two main factors – crop size and weather – were out of CN's control.

[27] LDC also refers to two other Agency decisions that it says favours its position. Again, I disagree.

[28] Subsequent to LDC#1, the Agency released *Richardson International Limited v Canadian National Railway Company* (Letter Decision No 2014-12-18, December 18, 2014) and *Viterra Inc v Canadian National Railway Company* (Letter Decision No 2014-12-18, December 18, 2014). These decisions are essentially identical, so I need refer only to *Richardson*.

[29] *Richardson* dealt with a level of service complaint based on CN failing to supply the quantity of cars to which the shipper was entitled under CN's car allocation policy. In addition, CN reduced Richardson's allocation by a further 300 cars during certain weeks of the 2013-2014 crop year.

[30] Naturally, the Agency relied heavily on LDC#1 in analyzing Richardson's complaint, summarizing that decision by saying that "a railway company's fundamental service obligation. . . is to provide adequate and suitable accommodation for 'all traffic offered for carriage' unless it is not reasonably possible to do so" (at para 53). For the 2013-2014 crop year, it was not reasonably possible for CN to meet all demands. The question then was whether CN's car allocation policy was a reasonable response to the circumstances. According to the Agency, generally railways should rely on rationing only in temporary situations where they cannot

provide full service; it should not be a routine means “to smooth out the seasonality of the demand for Canadian grain shipping” (at para 54).

[31] As for the rationing policies themselves, the Agency stated that they must be “clear, transparent, fair, temporary and consistently executable in the short term” and “preferably, be the product of consultation and industry input” (at para 58). Richardson did not actually question the validity or soundness of CN’s car allocation policy, which was based on the neutral criterion of historical market-share data for grain shippers; rather, Richardson’s complaint was directed at CN’s failure to abide by its own policy.

[32] The Agency found that it was reasonable for Richardson to expect to receive the number of cars to which it was entitled under CN’s car allocation policy. The Agency went on to find that CN had failed to comply with Richardson’s reasonable request, even recognizing that railway companies must be given some measure of flexibility. Although the Agency appreciated that railways sometimes resort to rationing as a means to ensure that “all shippers would be treated fairly and equitably in receiving a portion of their actual service demand” (at para 175), that is not a justification for failing to apply the policy fairly and consistently.

[33] In its conclusion, the Agency stated that the key criteria for a fair rationing methodology are consistency in reporting the total available car supply and communication to shippers of the precise number of cars they can expect to receive. The Agency also set out some general governing principles about car rationing, including (at para 187):

- Rationing should be a last resort for dealing with unexpected demand surges;

- Rationing should be temporary, for as short a period as possible, with normal service returning as soon reasonably possible; and
- Rationing must be fair, consistent, and transparent.

[34] These decisions, including that of the Federal Court of Appeal, all reflect the principles stated by the Supreme Court of Canada in *Patchett*, above. Justice Rand, as he then was, stated for the majority that a rail carrier's duty "is permeated with reasonableness in all aspects of what is undertaken . . ." (at p 274). Therefore, a railway "is not bound to furnish cars at all times sufficient to meet all demands"; rather, reasonableness is a factual inquiry and "how each situation is to be met depends upon its total circumstances" (at p 275).

[35] Bearing these principles in mind, I find that the arbitrator's decision was unreasonable. By effectively eliminating the possibility of rationing cars in appropriate circumstances, the arbitrator ignored CN's obligations to other shippers and its operational restrictions, both of which are mandatory statutory considerations.

[36] While there is ample support for the proposition that car allocation policies should be invoked infrequently and only for limited periods, that they cannot override shippers' legitimate and reasonable demands, and that they should be based on fair and transparent criteria, I see no justification for the arbitrator's conclusion that CN's service obligation to LDC should not take account of the possibility of rationing. The arbitrator's approach essentially eliminates the possibility of adapting to a harsh Canadian winter, a patently unrealistic scenario.

[37] Since reasonableness of service is a factual question, an arbitrator assessing a prospective arrangement between a railway company and a shipper should take account of the possibility that unforeseeable circumstances may arise. Not all the pertinent facts are known at the commencement of the crop year, so an arbitrator has to contemplate and accommodate various factors that may affect the delivery of cars. The arbitrator did not do so here.

IV. Conclusion and Disposition

[38] The arbitrator overlooked important mandatory statutory factors when he concluded, in effect, that CN was prohibited from rationing its supply of cars to LDC, even in exigent circumstances. I find that the arbitrator's approach was unreasonable; I must, therefore, overturn his decision and refer the matter to another arbitrator, with costs to CN.

**JUDGMENT in T-1599-15**

**THIS COURT'S JUDGMENT is that** the application for judicial review is allowed,  
and the matter is being referred to another arbitrator, with costs to CN.

“James W. O’Reilly”

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Judge

## ANNEX

*Canada Transportation Act, SC 1996, c 10*      *Loi sur les transports au Canada, LC 1996, ch 10*

## Accommodation for traffic

**113** (1) A railway company shall, according to its powers, in respect of a railway owned or operated by it,

(a) furnish, at the point of origin, at the point of junction of the railway with another railway, and at all points of stopping established for that purpose, adequate and suitable accommodation for the receiving and loading of all traffic offered for carriage on the railway;

(b) furnish adequate and suitable accommodation for the carriage, unloading and delivering of the traffic;

(c) without delay, and with due care and diligence, receive, carry and deliver the traffic;

(d) furnish and use all proper appliances, accommodation and means necessary for receiving, loading, carrying, unloading and delivering the traffic; and

## Acheminement du trafic

**113** (1) Chaque compagnie de chemin de fer, dans le cadre de ses attributions, relativement au chemin de fer qui lui appartient ou qu'elle exploite :

a) fournit, au point d'origine de son chemin de fer et au point de raccordement avec d'autres, et à tous les points d'arrêt établis à cette fin, des installations convenables pour la réception et le chargement des marchandises à transporter par chemin de fer;

b) fournit les installations convenables pour le transport, le déchargement et la livraison des marchandises;

c) reçoit, transporte et livre ces marchandises sans délai et avec le soin et la diligence voulus;

d) fournit et utilise tous les appareils, toutes les installations et tous les moyens nécessaires à la réception, au chargement, au transport, au déchargement et à la livraison de ces marchandises;

(e) furnish any other service incidental to transportation that is customary or usual in connection with the business of a railway company.

e) fournit les autres services normalement liés à l'exploitation d'un service de transport par une compagnie de chemin de fer.

#### Carriage on payment of rates

#### Paiement du prix

(2) Traffic must be taken, carried to and from, and delivered at the points referred to in paragraph (1)(a) on the payment of the lawfully payable rate.

(2) Les marchandises sont reçues, transportées et livrées aux points visés à l'alinéa (1)a) sur paiement du prix licitement exigible pour ces services.

#### Carriage on payment of levy

#### Paiement de la contribution

(2.1) If a railway company is to carry traffic in respect of which there is a levy under section 155.3 or 155.5, the traffic must be carried from a point referred to in paragraph (1)(a) by the railway company on the payment to the company of the levy, by the shipper, if the company is the first railway company to carry, at a rate other than an interswitching rate, the traffic after its loading.

(2.1) Lorsque le transport de marchandises par une compagnie de chemin de fer est associé à une contribution prévue aux articles 155.3 ou 155.5, celles-ci sont transportées par la compagnie de chemin de fer aux points visés à l'alinéa (1)a) sur paiement de la contribution par l'expéditeur à cette compagnie si elle est la première compagnie de chemin de fer à transporter les marchandises après leur chargement pour un prix autre qu'un prix fixé en application de l'alinéa 128(1)b).

#### Compensation for provision of rolling stock

#### Indemnité de matériel roulant

(3) Where a shipper provides rolling stock for the carriage by the railway company of the shipper's traffic, the company shall, at the request of the shipper, establish specific reasonable

(3) Dans les cas où l'expéditeur fournit du matériel roulant pour le transport des marchandises par la compagnie, celle-ci prévoit dans un tarif, sur demande de l'expéditeur, une compensation



compensation to the shipper in a tariff for the provision of the rolling stock.	spécifique raisonnable en faveur de celui-ci pour la fourniture de ce matériel.
Confidential contract between company and shipper	Contrat confidentiel
(4) A shipper and a railway company may, by means of a confidential contract or other written agreement, agree on the manner in which the obligations under this section are to be fulfilled by the company.	(4) Un expéditeur et une compagnie peuvent s'entendre, par contrat confidentiel ou autre accord écrit, sur les moyens à prendre par la compagnie pour s'acquitter de ses obligations.
Arbitrator's decision	Décision de l'arbitre
<p><b>169.37</b> The arbitrator's decision must establish any operational term described in paragraph 169.31(1)(a), (b) or (c), any term for the provision of a service described in paragraph 169.31(1)(d) or any term with respect to the application of a charge described in paragraph 169.31(1)(e), or any combination of those terms, that the arbitrator considers necessary to resolve the matters that are referred to him or her for arbitration. In making his or her decision, the arbitrator must have regard to the following:</p>	<p><b>169.37</b> Dans sa décision, l'arbitre établit les conditions d'exploitation visées aux alinéas 169.31(1)a, b) ou c), les modalités de fourniture des services visés à l'alinéa 169.31(1)d) ou les modalités concernant l'imposition des frais visés à l'alinéa 169.31(1)e), ou prend n'importe lesquelles de ces mesures, selon ce qu'il estime nécessaire pour régler les questions qui lui sont renvoyées. Pour rendre sa décision, il tient compte :</p>
(a) the traffic to which the service obligations relate;	a) du transport en cause;
(b) the service that the shipper requires with respect to the traffic;	b) des services dont l'expéditeur a besoin pour le transport en cause;
(c) any undertaking described in paragraph 169.32(1)(c) that is contained in the shipper's	c) de tout engagement visé à l'alinéa 169.32(1)c) qui est contenu dans la demande d'arbitrage;

submission;

(d) the railway company's service obligations under section 113 to other shippers and the railway company's obligations to persons and other companies under section 114;

(e) the railway company's obligations, if any, with respect to a public passenger service provider;

(f) the railway company's and the shipper's operational requirements and restrictions;

(g) the question of whether there is available to the shipper an alternative, effective, adequate and competitive means of transporting the goods to which the service obligations relate; and

(h) any information that the arbitrator considers relevant.

d) des obligations qu'a la compagnie de chemin de fer envers d'autres expéditeurs aux termes de l'article 113, et de celles qu'elle a envers les personnes et autres compagnies aux termes de l'article 114;

e) des obligations que peut avoir la compagnie de chemin de fer envers une société de transport publique;

f) des besoins et des contraintes de l'expéditeur et de la compagnie de chemin de fer en matière d'exploitation;

g) de la possibilité pour l'expéditeur de faire appel à un autre mode de transport efficace, bien adapté et concurrentiel des marchandises en cause;

h) de tout renseignement qu'il estime pertinent.

#### Requirements of decision

**169.38** (1) The arbitrator's decision must

(a) be made in writing;

(b) be made so as to apply to the parties for a period of one year as of the date of his or her decision, unless

#### Caractéristiques de la décision

**169.38** (1) La décision de l'arbitre est :

a) rendue par écrit;

b) rendue de manière à être applicable aux parties pendant un an à compter de sa date, sauf accord

the parties agree otherwise;  
and

(c) be commercially fair  
and reasonable to the  
parties.

entre elles à l'effet  
contraire;

c) commercialement  
équitable et raisonnable  
pour les parties.

**FEDERAL COURT**

**SOLICITORS OF RECORD**

**DOCKET:** T-1599-15

**STYLE OF CAUSE:** CANADIAN NATIONAL RAILWAY COMPANY v  
LOUIS DREYFUS COMMODITIES CANADA LTD

**PLACE OF HEARING:** OTTAWA, ONTARIO

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REASONS:** O'REILLY J.

**DATED:** OCTOBER 25, 2016

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