Federal Court of Appeal | Cour d'appel fédérale

Date: 20160916

Docket: A-140-15

Citation: 2016 FCA 232

CORAM: **PELLETIER J.A.**
WEBB J.A.
DE MONTIGNY J.A.

BETWEEN:

CANADIAN NATIONAL RAILWAY COMPANY

Appellant

and

LOUIS DREYFUS COMMODITIES CANADA LTD. and CANADIAN TRANSPORTATION AGENCY

Respondents

Heard at Edmonton, Alberta, on May 10, 2016.

Judgment delivered at Ottawa, Ontario, on September 16, 2016.

REASONS FOR JUDGMENT BY: WEBB J.A.

CONCURRED IN BY: PELLETIER J.A.
DE MONTIGNY J.A.

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REASONS FOR JUDGMENT

WEBB J.A.

[1] This is an appeal from the decision of the Canadian Transportation Agency (Case No. 14-02100) dated October 3, 2014. Since the full decision contained confidential information, a redacted public version was released with the citation 2014-10-03. In that decision, the Agency found that the Canadian National Railway Company (CN) had breached its level of service

obligations to Louis Dreyfus Commodities Canada Ltd. (LDC) for several weeks during the 2013/2014 Crop Year.

[2] CN sought and was granted leave to appeal this decision under subsection 41(1) of the *Canada Transportation Act*, S.C. 1996, c. 10 (*CTA*).

[3] For the reasons that follow I would dismiss this appeal. Since the full decision contains confidential information, certain parts have been redacted for this public version.

I. Background

[4] As part of LDC's Canadian operations, LDC operates grain elevator facilities in:

- Glenavon and Aberdeen, Saskatchewan; and
- Joffre and Lyalta, Alberta.

[5] LDC handles and ships canola and wheat at each of these four facilities. Prior to the construction of these facilities LDC entered into a confidential contract with CN in 1999 (the Confidential Contract).

[6] The 2013 grain crop was a very large crop. CN noted in its memorandum that "[t]he average Canadian crop over the previous five years had been 57.2 million tonnes; the 2013 crop was 77 million tonnes". The winter of 2013/2014 was also harsh with extremely cold temperatures. The combination of the extra-large crop and harsh winter led to an Order-in-

Council which came into force on March 7, 2014 (SOR/2014-55). This Order in Council provided as follows:

> **2** Subject to volume demand and corridor capacity, the Canadian National Railway Company and the Canadian Pacific Railway Company must each move the following minimum amounts of grain:
>
> **(a)** during the first full crop week after the day on which this Order comes into force, a minimum of 250,000 t;
>
> **(b)** during the second full crop week after the day on which this Order comes into force, a minimum of 312,500 t;
>
> **(c)** during the third full crop week after the day on which this Order comes into force, a minimum of 375,000 t;
>
> **(d)** during the fourth full crop week after the day on which this Order comes into force, a minimum of 437,500 t; and
>
> **(e)** during any subsequent full crop week after the day on which this Order comes into force, a minimum of 500,000 t.

[7] For several weeks during the 2013/2014 Crop Year LDC did not receive all of the railcars that it had ordered. The most serious discrepancies occurred in weeks 30 to 35. No cars were delivered by CN for any of these six weeks to any these four facilities. For three of the facilities, LDC had ordered at least 104 cars for each week for each facility. For the fourth facility, LDC had ordered 104 cars for each week except week 34, when no cars were ordered. Therefore,

collectively for all four facilities, in total 2,392 cars were ordered for weeks 30 to 35, yet no cars were delivered for any of these weeks. For week 34 for the facility in Aberdeen, LDC had ordered 208 cars but since the total capacity of this facility is 104 cars, the number used by the Agency for the discrepancy for this week was 104 cars.

II. Decision of the Agency

[8] The Agency set out a three step process to determine if CN had met its level of service obligations to LDC:

Step 1: Is the shipper's request reasonable?

Step 2: Did the railway company fulfill this request?

Step 3: If not, are there reasons that could justify the service failure?

[9] The Agency noted in paragraph 43 of its reasons that a shipper and a railway company may enter into a confidential contract that determines the level of service that will be provided by the railway company. To the extent that a railway company has agreed to provide a certain level of service, the Agency determined that it did not need to determine the reasonableness of any request for service within the limits imposed by such agreement. The railway company would be bound to provide the level of service that it had agreed to provide.

[10] In paragraph 88 of its reasons the Agency stated that:

> [88] Section 7.1C of the Confidential Contract outlines [redacted]:
>
> [redacted]

[11] The specific number of railcars that would comprise a [redacted] was not set out in the Confidential Contract. In paragraph 124 of its reasons, the Agency set out its finding in relation to the meaning of a [redacted] with respect to the number of cars that were to be delivered:

> [124] The Agency therefore finds that [redacted]. The agency further finds that the number of cars ordered in a [redacted] may vary, and the number of cars actually delivered may be reduced in accordance with [redacted].

[12] [redacted]

[13] As a result of the Agency's interpretation of [redacted], the Agency determined that CN had agreed to provide that number of railcars ordered by LDC that was within the limits as set out in paragraph 124 of its reasons. The Agency also concluded that CN did not deliver all of the cars as properly ordered by LDC. In particular, as noted above, there was a period of six weeks beginning with week 30 of the 2013/2014 crop year in which no cars were delivered by CN to LDC's facilities even though a large number of cars were ordered by LDC for these weeks.

[14] With respect to CN's car allocation policies, the Agency noted in paragraph 154 that:

> … CN has provided no evidence or explanation to establish that, for the service weeks where it failed to supply the number of cars requested by LDC, it did so because it was observing a car allocation policy in a manner consistent with [redacted]. Specifically, CN did not demonstrate how, under its car allocation policy, the number of cars delivered to LDC was determined, nor how many cars this would have represented for each service week. Moreover, CN did not demonstrate that any such car allocation policy was respected when comparing the weekly car allocation against the actual number of cars delivered.

[15] The Agency also reviewed section 14 of the Confidential Contract, which provides [redacted]. However, as noted by the Agency, in order to invoke this clause CN would have had to give notice that it was doing so and CN did not provide this notice. Therefore, the Agency found that CN could not rely on [redacted] event in this case.

[16] As a result, the Agency concluded that CN had breached its level of service obligations to LDC during the 2013/2014 crop year.

III. Issues

[17] CN, in its memorandum of fact and law, stated that the following were the "points in issue":

> 35. The Agency made several errors of law or jurisdiction, including:
>
> (a) erring in the application of sections 113 to 116 of the CTA as interpreted in [*A.L. Patchett & Sons Ltd. v. Pacific Great Eastern Railway Co.*, [1959] S.C.R. 271, 17 D.L.R. (2d) 449 (*Patchett*)];
>
> (b) unilaterally developing and applying a new three step "Evaluation Approach" that places an absolute obligation on railway companies to service all requests of all shippers at all times, regardless of the prevailing circumstances;
>
> (c) through the Evaluation Approach, wrongfully imposing on railway companies a "reverse onus" of proof in defending the level of service complaints, requiring a railway company to justify or demonstrate why it should not be found in breach if the carrier fails to meet all of the shipper's demands;
>
> (d) refusing to consider, or properly take into account, significant factors that impacted rail service in 2013/14; namely:

(i) the exceptional and unpredictable size of the grain crop during the 2013/14 crop year;

(ii) the exceptional weather conditions encountered during the 2013/14 winter and the incontrovertible and deleterious impact such weather had on rail operations;

(iii) the total demand on the railway system and the collective requests of all shippers; and

(e) failing to afford CN procedural fairness and natural justice through the imposition of a previously undisclosed test and by making findings of fact they were not raised or commented upon by either party in their respective pleadings.

(emphasis in original)

IV. Standard of Review

[18] Under subsection 41(1) of the *CTA*, an appeal to this Court from a decision of the Agency, if leave is granted, may only be brought in relation to a question of law or jurisdiction. Therefore any factual findings made by the Agency are not subject to review in this appeal.

[19] Although CN referred to the identified errors as errors of law or jurisdiction, none of the alleged errors relate to the jurisdiction of the Agency. Therefore, the only standard of review that is applicable in this appeal is the standard of review for questions of law. In *Canadian National Railway Company v. Canadian Transportation Agency*, 2010 FCA 65, [2011] 3 F.C.R. 264, this Court confirmed that the Agency is entitled to deference in its interpretation of the *CTA* and therefore the standard of review for questions of law will be reasonableness.

V. Analysis

[20] The first issue identified by CN above is that the Agency erred in applying sections 113 to 116 of the *CTA* as interpreted by the Supreme Court of Canada in *Patchett*. The general proposition that is to be extracted from *Patchett* is that "the duty of a railway company to fulfil its service obligations is 'permeated with reasonableness in all aspects of what is undertaken' (except in relation to its special responsibility as an insurer of goods…)" (*Canadian National Railway Company v. Northgate Terminals Ltd.*, 2010 FCA 147, [2011] 4 F.C.R. 228, at paragraph 35).

[21] In particular, CN's allegation is that the Agency did not address whether LDC's requests for railcars were reasonable.

[22] I do not agree that the Agency erred in its application of sections 113 to 116 of the *CTA*.

[23] In this case, the Agency noted that the Supreme Court of Canada had found in *Patchett* that the service obligations of a railway company are "permeated with reasonableness". The Agency then stated that the first step in its analysis is to determine whether the request for service was reasonable. However, the Agency also determined that the requirement to determine whether the service request is reasonable could be replaced by a contract between the shipper and the railway company that provided for a certain level of service obligations.

[24] It is important to note that the service obligations to which the Supreme Court of Canada were referring in *Patchett* are the service obligations imposed by the applicable statute. In this case those obligations would be imposed by the *CTA*.

[25] Subsection 113(4) of the *CTA* provides that:

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.	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.

[26] The *CTA* contemplates that a shipper and a railway company may enter into an agreement that would set out the manner in which the service obligations of the railway company may be fulfilled. If the parties have entered into such an agreement, the service obligations of the railway company will be determined based on what the railway company agreed to provide, not on whether any particular order is considered to be reasonable.

[27] The Agency reviewed the Confidential Contract and found that CN had agreed, under this contract, that it would deliver the number of cars ordered by LDC provided that the number was within the range as set out in paragraph 124 of its reasons.

[28] Since the Agency found that CN had agreed to supply the number of cars ordered by LDC (within the limits identified by the Agency), CN cannot now complain that such orders were unreasonable. CN is simply bound by the agreement that it reached with LDC. In my view, the Agency did not commit any error of law in reaching this conclusion.

[29] CN argued during the hearing that the Confidential Contract was not a contract as contemplated by subsection 113(4) of the *CTA*. However, whether this Confidential Contract was a confidential contract as contemplated by subsection 113(4) of the *CTA* will depend on the interpretation of this contract. In *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633, the Supreme Court of Canada determined that the interpretation of a contract was a question of mixed fact and law. The Supreme Court also noted that:

> 54. However, courts should be cautious in identifying extricable questions of law in disputes over contractual interpretation. Given the statutory requirement to identify a question of law in a leave application pursuant to s. 31(2) of the *AA*, the applicant for leave and its counsel will seek to frame any alleged errors as questions of law. The legislature has sought to restrict such appeals, however, and courts must be careful to ensure that the proposed ground of appeal has been properly characterized. The warning expressed in *Housen* to exercise caution in attempting to extricate a question of law is relevant here:
>
> > Appellate courts must be cautious, however, in finding that a trial judge erred in law in his or her determination of negligence, as it is often difficult to extricate the legal questions from the factual. It is for this reason that these matters are referred to as questions of "mixed law and fact". Where the legal principle is not readily extricable, then the matter is one of "mixed law and fact" ... . [para. 36]
>
> 55. Although that caution was expressed in the context of a negligence case, it applies, in my opinion, to contractual interpretation as well. As mentioned above, the goal of contractual interpretation, to ascertain the objective intentions of the parties, is inherently fact specific. The close relationship between the selection and application of principles of contractual interpretation and the construction ultimately given to the instrument means that the circumstances in which a question of law can be extricated from the interpretation process will be rare. In the absence of a legal error of the type described above, no appeal lies under the *AA* from an arbitrator's interpretation of a contract.

[30] Therefore, whether this Confidential Contract was a confidential contract for the purposes of subsection 113(4) of the *CTA* is not a matter that can be appealed under the *CTA*.

[31] CN also argued that the Agency did not interpret “Service Unit” as used in this Confidential Contract correctly. However, the Agency’s interpretation of “Service Unit” as used in the Confidential Contract is not an extricable question of law and therefore no appeal lies under the *CTA* from the Agency’s interpretation of this term as used in the contract.

[32] The second issue raised by CN is based on the premise that the Evaluation Approach adopted by the agency would place “an absolute obligation on railway companies to service all requests of all shippers at all times, regardless of the prevailing circumstances”. However a fair reading of the reasons of the Agency does not support this allegation. The Agency found that to the extent that the requests by LDC for railcars were within the limits as contemplated by the Confidential Contract, CN had agreed to supply such railcars. This finding was based on its interpretation of the Confidential Contract that was applicable in this case. There was no finding by the Agency that there is “an absolute obligation on railway companies to service all requests of all shippers at all times, regardless of the prevailing circumstances”.

[33] The third issue referred to above assumes that the Agency imposed on all railway companies a “reverse onus” of proof. However, again, a fair reading of the reasons of the Agency does not support this conclusion. The failure to satisfy the level of service obligations in this case arose because of the specific Confidential Contract that was entered into between CN and LDC. There was no general finding that the Agency imposed on all railway companies a reverse onus of proof in all level of service complaints. This issue simply does not arise in this case.

[34] The fourth issue listed above is whether the Agency failed to take into account certain factors that, according to CN, impacted its ability to supply railcars. However, the relevance of these factors is dependent on the interpretation of the Confidential Contract, which as noted above, cannot be the subject of an appeal to this Court.

[35] Although the effect that the large crop size and the harsh winter would have had on CN's ability to supply rail cars is a question of fact, since CN spent a significant amount of time during the hearing of the appeal on the harsh winter, it does warrant a few comments.

[36] Counsel noted during the hearing that in cold temperatures the length of trains must be reduced. In particular, when the temperature is between -25 and -30C, the maximum length of a train is 8,000 ft and when the temperature is below -35C, the maximum length is 4,500 ft. Counsel referred, in particular, to the very cold conditions in December 2013. Counsel stated that since the train length was reduced during that time, service had to be reduced and suggested that this would account for the discrepancies between the cars ordered and the cars delivered to LDC.

[37] However, as noted above, the most significant discrepancies started in week 30. During the hearing, counsel for CN stated that week 30 would be around the first of March 2014. This would be after the period of low temperatures when CN would be restricted in the length of the trains that it could operate.

[38] Counsel for CN then suggested that because CN had encountered severe winter conditions in the preceding months that it would take time for CN to be able to recover from

those periods. However, this suggestion is inconsistent with the submissions that were made by CN to the Agency:

> 146. However, once winter finally relented around the first week of March, CN again quickly ramped up its grain capacity. Just as it had done back in Week 6, CN began shipping close to 4,500 cars for the first few weeks of March, and is now shipping in excess of 5,000 cars per week again.
>
> (emphasis added)

[39] These submissions are dated May 12, 2014 and therefore the reference to "now shipping in excess of 5,000 cars per week" would be a reference to mid-May.

[40] During weeks 30 to 35, no cars were delivered by CN to any of LDC's facilities. Since week 30 was around the first of March, this would be for the period from the first of March to mid-April. CN submitted to the agency that it "quickly ramped up its grain capacity" "after winter relented around the first week of March", therefore, it is difficult to understand how the harsh winter could be a justification for not delivering any cars to LDC during weeks 30 to 35.

[41] CN also referred to the burden imposed on CN by the Order-in-Council dated March 7, 2014. In its Memorandum, CN stated that it had to "carry a minimum of 500,000 metric tonnes of grain. To comply with the Order in Council, CN had to move between 5,000 to 5,500 grain cars each week, notwithstanding that moving 5,000 cars per week on such a sustained basis had never been achieved before" (emphasis in original).

[42] However, the Order in Council provided for an incremental increase in railcar shipments with the requirement for the first week (which would be around the second week of March) only

being one-half of the final minimum amount. In the same paragraph of its submissions to the Agency referred to above, CN also noted that:

> 146. …CN shipped an average of 4,550 grain cars during the month of March, which is 15% more grain than average during that period. In April, CN transported an average of 5,300 cars per week and 5,500 the first week of May, graphically evidencing CN's major efforts and engagement towards the recovery.
>
> (emphasis in original)

[43] Assuming that the reference in its Memorandum to moving 5,000 to 5,500 grain cars each week is to the number of railcars required to reach the minimum requirement of 500,000 metric tonnes (which is the only quantity referred to in this paragraph), then CN would have had to move 2,500 to 2,750 railcars during the first week after the Order in Council was in force since the minimum requirement for that week was 250,000 t. Since CN moved an average of 4,550 railcars per week during the month of March and 5,300 per week during the month of April, during weeks 31 to 35 (approximately the second week of March to mid-April), when the minimum quantities were being implemented on a graduated basis, CN would have shipped more grain that it was obligated to ship under the Order in Council. It is very difficult to reconcile CN's very significant movements of grain during March – April 2014 with its failure to deliver any railcars to LDC's facilities during weeks 30 – 35.

[44] The last issue listed above is also related to the test applied by the Agency and CN's argument that the Agency applied a new test. In my view, the test applied by the Agency is not inconsistent with the principle as set out in *Patchett* as *Patchett* did not address the level of service requirements when a railway company has entered into an agreement to provide rail

service. The analysis of the Agency simply took into account the agreement that CN had entered into with LDC. There is no merit in CN's argument that it was denied procedural fairness.

[45] CN also raised an issue with respect to the findings of fact made by the Agency. However, as noted above, only questions of law can be appealed under the *CTA* and therefore there is no appeal in relation to any findings of fact.

[46] As a result I would dismiss this appeal with costs.

"Wyman W. Webb"
J.A.

"I agree.
J.D. Denis Pelletier J.A."

"I agree.
Yves de Montigny J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-140-15
(APPEAL FROM THE DECISION OF THE CANADIAN TRANSPORTATION AGENCY (CASE NO. 14-02100) DATED OCTOBER 3, 2014)	
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CONCURRED IN BY:	(PELLETIER, DE MONTIGNY JJ.A.)
DATED:	SEPTEMBER 16, 2016

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