Federal Court of Appeal | Cour d'appel fédérale

Date: 20180504

Docket: A-437-16

Citation: 2018 FCA 87

CORAM: **GAUTHIER J.A.**
WEBB J.A.
NEAR J.A.

BETWEEN:

LOUIS DREYFUS COMMODITIES CANADA LTD.

Appellant

and

CANADIAN NATIONAL RAILWAY COMPANY

Respondent

Heard at Vancouver, British Columbia, on March 13, 2018.

Judgment delivered at Ottawa, Ontario, on May 4, 2018.

REASONS FOR JUDGMENT BY: NEAR J.A.

CONCURRED IN BY: GAUTHIER J.A.
WEBB J.A.

Federal Court of Appeal  Cour d'appel fédérale

Date: 20180504

Docket: A-437-16

Citation: 2018 FCA 87

CORAM: **GAUTHIER J.A.**
WEBB J.A.
NEAR J.A.

BETWEEN:

LOUIS DREYFUS COMMODITIES CANADA LTD.

Appellant

and

CANADIAN NATIONAL RAILWAY COMPANY

Respondent

REASONS FOR JUDGMENT

NEAR J.A.

I. Overview

[1] The appellant, Louis Dreyfus Commodities Canada Ltd. (LDC), appeals a judgment of the Federal Court of Canada (per Justice O'Reilly) dated October 25, 2016 (*Canadian National Railway Company v. Louis Dreyfus Commodities Canada Ltd.*, 2016 FC 1190 (Federal Court

Decision)). The Federal Court allowed the respondent's application for judicial review of an arbitrator's decision regarding a level of services agreement between the appellant and the respondent, Canadian National Railway Company (Arbitration Decision).

II. Background

[2] The appellant is a seller and shipper of grain. The respondent is a national railway and is the only service provider in the area where the appellant's facilities are located. The parties were unable to negotiate a contract for the 2015–2016 crop year and requested arbitration with the Canadian Transportation Agency (Agency) which referred the matter to an arbitrator pursuant to Part IV of the *Canada Transportation Act*, S.C. 1996, c.10 (Act).

III. Arbitration Decision

[3] The parties asked the arbitrator to establish a level of services agreement to govern their relationship for the 2015–2016 crop year. The arbitrator imposed terms on the parties including (1) future rail car supply for LDC's ongoing traffic requirements, (2) a performance standard, and (3) a force majeure clause.

[4] As regards future rail car supply for LDC's ongoing traffic requirements, the arbitrator imposed a term that requires the respondent to supply the appellant's facilities with no fewer than 250 cars per week with the exception of the one week Christmas break:

> With the exception of the one week Christmas break, CN is required to supply the Facilities with no fewer than 250 rail cars per week, in accordance with the orders LDC places with CN. CN will provide the rail cars to the Facilities specified in

> LDC's orders, up to one spot per week at each of Kegworth, Aberdeen and Dawson Creek.
>
> (Abitration Decision at page 8)

[5] In deciding on this term, the arbitrator found that the respondent's ability to ration the number of cars it provides to its customers during peak periods is not a mandatory part of a level of services agreement. The arbitrator "reject[ed] the proposition that car rationing needs to be a normal business practice of a railway", explaining that:

> CN's argument is, in essence, that section 169.37 requires me to maintain the status quo. I do not accept that section 169.37 limits me in this way. I also do not accept the proposition that my decision in this arbitration will cause CN to fail to meet its service obligations to other shippers.
>
> [emphasis in original]
>
> (Arbitration Decision at page 6)

[6] In particular, the arbitrator made a factual finding that "[g]iven this forecast, the demand for CN's rail cars should … be reduced" compared to previous years (Arbitration Decision at page 6). He explained: "… I am of the view that there should be sufficient cars available to CN to provide the Facilities with 250 cars each week during the term of my decision without impacting CN's obligations to other shippers" and found that this number of cars is commercially fair and reasonable to both parties (Arbitration Decision at pages 6–7).

[7] The arbitrator's level of services agreement also included a performance standard clause that required the respondent to deliver 90 percent of rail cars ordered by the appellant within 3 weeks and 100 percent of rail cars ordered within 3 months:

> CN is required to deliver to the Facilities 90% of rail cars ordered by LDC within 3 weeks of the day the rail cars are to be provided, and to deliver to the Facilities 100% of rail cars ordered by LDC within 3 months of the day the rail cars are to be provided.
>
> (Arbitration Decision at page 9)

[8] Finally, the arbitrator's level of services agreement included a force majeure clause that adopts the respondent's Tariff 9000 with two exceptions:

> CN and LDC's obligations shall be subject to the force majeure provision contained in CN Tariff 9000, effective April 1, 2015 with the exception of the following events which, for the purposes of this decision, do not constitute Force Majeure events:
>
> - Changes in equipment and personnel availability
> - Normal facility and equipment maintenance
>
> (Arbitration Decision at page 10)

[9] The respondent applied to the Federal Court for judicial review of the arbitrator's decision.

IV. Federal Court Decision

[10] The Federal Court allowed the application for judicial review and referred the matter back to another arbitrator. It found that the arbitrator's decision was unreasonable because he failed to take proper account of certain mandatory statutory requirements:

> [35] … 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.
>
> (Federal Court Decision at para. 35)

[11] The appellant filed a Notice of Appeal in this Court on November 22, 2016.

V. Issues

[12] I would characterize the issue under judicial review as follows:

1. Was the arbitrator's decision reasonable?

VI. Preliminary Issue: Mootness

[13] Before proceeding to the merits of this case, I will first address the preliminary matter of mootness. The level of services agreement at issue in this case was in effect during the 2015–2016 crop year and neither party alleges that there was a breach of the agreement. Thus, there is no live controversy (*Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342, 57 D.L.R. (4th) 231 (*Borowski*)).

[14] This Court may, however, exercise its discretion to consider this case on the merits despite the absence of a live controversy (*Borowski*). The issue arises in the context of an ongoing adversarial relationship and, in my view, is an appropriate use of judicial resources. The respondent enters into these level of services agreements with many shippers annually. Further, the arbitration on level of services regime was put in place recently in 2013 and there is little jurisprudence from the Federal Courts on the issue before us. Thus, in my view, it is appropriate for this Court to exercise its discretion to hear this case in order to provide guidance on this issue.

VII. Standard of Review

[15] When reviewing appeals from judicial reviews of the Federal Court, this Court must (1) decide whether the Federal Court identified the appropriate standard of review and (2) determine whether the Federal Court applied it correctly (*Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at para. 45, [2013] 2 S.C.R. 559; *Canada Revenue Agency v. Telfer*, 2009 FCA 23 at para. 18, 386 N.R. 212).

VIII. Analysis

A. *Did the Federal Court choose the appropriate standard of review?*

[16] The Federal Court applied the standard of review of reasonableness. Both parties agree that the appropriate standard of review is reasonableness, however, this Court must make its own determination on this issue.

[17] There is no jurisprudence establishing the appropriate standard of review for decisions of an arbitrator appointed by the Canada Transportation Agency under Part IV of the Act and so I must conduct a standard of review analysis.

[18] The standard of review for decisions of administrative decision makers is presumed to be reasonableness where a decision maker interprets its home statute (*Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61 at para. 39, [2011] 3 S.C.R. 654; *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.*, 2016 SCC 47

at paras. 22–23, [2016] 2 S.C.R. 293; *Mouvement laïque québécois v. Saguenay (City)*, 2015 SCC 16 at para. 46, [2015] 2 S.C.R. 3).

[19] Further, the four factors to consider when conducting a standard of review analysis established by the Supreme Court of Canada point to reasonableness as the appropriate standard of review (*Dunsmuir v. New Brunswick*, 2008 SCC 9 at para. 64, [2008] 1 S.C.R. 190). First, there is a privative clause in subsection 169.38(2) of the Act which states that the arbitrator's decision is final and binding:

Decision binding	**Décision définitive**
169.38 (2) The arbitrator's decision is final and binding on the parties and is deemed, for the purposes of Division IV of Part III and its enforceability between the parties, to be a confidential contract.	169.38 (2) La décision de l'arbitre est définitive et obligatoire. Elle est réputée, aux fins d'exécution et pour l'application de la section IV de la partie III, être un contrat confidentiel conclu entre les parties.

Second, the purpose of the arbitration on level of services regime is to assist railway companies and shippers to reach agreements regarding their level of services obligations (Act, ss. 169.31(1)). This process is conducted quickly (within 45 or 65 days) (Act, ss. 169.38(3)) and the arbitrator imposes a confidential contract that is "… commercially fair and reasonable to the parties" (Act, para. 169.38(1)(c)). In my view, each of these features demonstrates that Parliament intended for arbitrators to resolve disputes quickly and conclusively. Third, the nature of the question at issue—the appropriate number of cars to grant to a shipper and the methodology by which a railway company allocates its cars—is a specific factual and legal determination that should be reviewed with a high degree of deference. Level of services agreements are neither questions of law of importance to the legal system as a whole nor questions outside of the decision maker's area of expertise and so they do not attract correctness

review. Indeed, fourth and finally, the arbitrator is an expert appointed by the Agency because of her or his expertise (Act, ss. 169.42(2)). In my view, each of these four factors indicates that reasonableness is the appropriate standard of review in this case.

B. *Was the arbitrator's decision reasonable?*

[20] The issue at the heart of this appeal is whether it was reasonable for the arbitrator not to include the respondent's proposed rationing methodology in the level of services agreement.

[21] The arbitration on level of services regime allows a railway company and a shipper to define its service obligations under section 113 of the Act with the assistance of an arbitrator (ss. 169.31(1)). Section 113 of the Act sets out the obligations of railway companies in broad terms applicable to all railway companies and shippers and the arbitrator's level of services agreement specifies the terms between a particular railway company and shipper. Should a complaint arise, the terms of this level of services agreement are binding on the Agency in making its determination (Act, ss. 116(2); see also *Canadian National Railway Co. v. Viterra Inc.*, 2017 FCA 6 at para. 65, 410 D.L.R. (4th) 128).

[22] Section 169.37 and subsection 169.38(1) require the arbitrator to consider each of the factors enumerated in section 169.37 and create an agreement that is "… commercially fair and reasonable to the parties" in accordance with subsection 169.38(1) of the Act. Section 169.37 of the Act sets out the factors to which the arbitrator "must have regard" in reaching her or his decision:

Arbitrator's decision	**Décision de l'arbitre**
169.37 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:	169.37 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 :
(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;	a) 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 submission;	c) de tout engagement visé à l'alinéa 169.32(1)c) qui est contenu dans la demande d'arbitrage;
(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;	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) the railway company's obligations, if any, with respect to a public passenger service provider;	e) des obligations que peut avoir la compagnie de chemin de fer envers une société de transport publique;
(f) the railway company's and the shipper's operational requirements and restrictions;	f) des besoins et des contraintes de l'expéditeur et de la compagnie de chemin de fer en matière d'exploitation;
(g) the question of whether there is available to the shipper an alternative, effective, adequate and competitive means of transporting the goods to	g) de la possibilité pour l'expéditeur de faire appel à un autre mode de transport efficace, bien adapté et concurrentiel des marchandises en

which the service obligations relate; and	cause;
(h) any information that the arbitrator considers relevant.	h) de tout renseignement qu'il estime pertinent.
[emphasis added]	[nos soulignements]

Subsection 169.38(1) of the Act requires the decision to be "commercially fair and reasonable":

Requirements of decision	**Caractéristiques de la décision**
169.38(1) The arbitrator's decision must	169.38(1) La décision de l'arbitre est :
(a) be made in writing;	a) rendue par écrit;
(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 the parties agree otherwise; and	a) rendue de manière à être applicable aux parties pendant un an à compter de sa date, sauf accord entre elles à l'effet contraire;
(c) be commercially fair and reasonable to the parties.	c) commercialement équitable et raisonnable pour les parties.
[emphasis added]	[nos soulignements]

[23] The respondent argues that, in not adopting its proposed rationing methodology, the arbitrator did not have regard to (1) its obligations to other shippers (paragraph 169.37(d)) and (2) both parties' operational requirements and restrictions (paragraph 169.37(f)).

[24] I disagree. The arbitrator considered paragraphs 169.37(d) and (f) at page 6 of his decision:

> CN indicates that I should not accept LDC's proposal regarding future car orders in consideration of section 169.37 of the CTA, which requires me to, in making my decision, have regard to matters including "the railway company's service obligations under section 113 to other shippers…" [para. 169.37(d)] and "… the

> railway company's and shipper's operational requirements and restrictions" [para 169.37(f)].

[25] Indeed, the arbitrator explicitly found that as a matter of fact, his decision would not cause the respondent to fail to meet its service obligations to other shippers and would not require it to provide more cars than its operational requirements and restrictions allow. He explained: "I … do not accept the proposition that my decision in this arbitration will cause CN to fail to meet its service obligations to other shippers" (Arbitration Decision at page 6) and that "[t]he evidence indicates that CN is capable of providing service when required to do so by Agency or government order" (Arbitration Decision at page 7).

[26] Further, nothing in Part IV obligates the arbitrator to adopt the respondent's rationing policy and, in my view, it was reasonable for the arbitrator to account for the respondent's obligations to other shippers and operational requirements and restrictions without adopting its proposed rationing policy. Indeed, in this case, the arbitrator found as facts that:

> … the evidence indicates that the manner of determining the allocations under CN's car rationing methodology was never representative of LDC's true historic share for the Facilities. Further, it is my view that CN's methodology is out of date for the purposes of determining car allocation in the current 2015-2016 crop year.
>
> (Arbitration Decision at page 6)

[27] As the appellant argues, the arbitrator's decision did not completely remove the respondent's ability to ration cars. The arbitrator included a performance standard clause that allows the respondent to adjust the respondent's supply of cars as long as all of the cars are delivered within the prescribed timelines and a force majeure clause that relieves the respondent

of its obligations in the case of unforeseeable circumstances beyond the control of the parties.

Both clauses are cited above at paragraph 7 but I repeat them here for convenience. The

performance standards clause reads as follows:

> CN is required to deliver to the Facilities 90% of rail cars ordered by LDC within 3 weeks of the day the rail cars are to be provided, and to deliver to the Facilities 100% of rail cars ordered by LDC within 3 months of the day the rail cars are to be provided.
>
> (Arbitration Decision at page 9)

The force majeure clause reads as follows:

> CN and LDC's obligations shall be subject to the force majeure provision contained in CN Tariff 9000, effective April 1, 2015 with the exception of the following events which, for the purposes of this decision, do not constitute Force Majeure events:
>
> - Changes in equipment and personnel availability
>
> - Normal facility and equipment maintenance
>
> (Arbitration Decision at page 10)

Tariff 9000, incorporated into the force majeure clause, includes:

> … Acts of God…, act of public enemy, war, insurrection, terrorism, embargo, fire or explosion, lock-out, strike or other labour dispute, derailment, or an unforeseeable circumstance beyond the control of the parties against which it would be unreasonable for the affected party to take precautions and which the affected party cannot avoid even by using its best efforts.

Tariff 9000 confirms that "[n]either [party] shall be liable for any failure to perform any of their respective obligations while such performance is prevented or delayed by any cause or condition of Force Majeure."

[28] The two exclusions referred to above resulted from the arbitrator accepting that the respondent has control over changes in equipment and personnel availability, as well as control over normal facility and equipment maintenance (Arbitration Decision at page 9).

[29] The performance standards clause and the force majeure clause both provide flexibility to the respondent to adjust the number of cars that it will provide to the appellant. It was reasonable for the arbitrator to consider that these clauses were sufficient to account for the respondent's obligations to other shippers and the parties' operational requirements and restrictions, particularly given his factual finding that the demand for rail cars would be less than in previous years.

[30] At the hearing before us, the respondent explained the difference between its proposed rationing methodology and the performance standard imposed by the arbitrator. The respondent explained that, under its proposed rationing methodology, orders in excess of its supply are never filled and the shippers re-order the total number of cars they require the following week whereas, under the performance standard imposed by the arbitrator, orders in excess of its supply are provided over the following weeks or months in addition to subsequent orders. In my view, both policies have regard to the respondent's obligations to other shippers and its operational requirements and restrictions. Indeed, both policies achieve a similar result—both give the respondent flexibility in filling its rail car orders—and it was open on the record before him and in the particular circumstances of this case for the arbitrator to choose one over the other.

[31] I recognize that the force majeure clause does not address foreseen peak periods that occur each year. The performance standard clause, however, does allow the respondent to adjust its supply of rail cars to the appellant to the extent provided for in that clause. It may be helpful for arbitrators in the future to specify more clearly what should be done to address extraordinary situations beyond the formula provided in this decision during these periods of peak demand. However, in my view, the performance standard and force majeure clause are adequate in this case given the arbitrator's factual finding that it was forecast that demand for rail cars would be less than in previous years. Even the respondent agreed that the supply would be at the lowest levels seen since 2003–2004 (Arbitration Decision at page 6).

[32] The respondent also argues that the arbitrator's decision is not "… commercially fair and reasonable to the parties" as required by subsection 169.38(1) of the Act because it does not include its proposed rationing policy. In my view, a fair reading of the arbitration decision shows that the arbitrator considered whether the decision is commercially fair and reasonable:

> I am of the view that it is commercially fair and reasonable for both parties that I require CN to provide LDC with 250 cars each week, except the Christmas week, over the period that my decision will be in force.
>
> (Arbitration Decision at page 7)

[33] Put another way, the arbitrator did not accept that the concept of rationing should be accepted as the norm in determining what the level of service obligations should be in a given level of service agreement for a particular crop year. This is hardly a startling proposition given that the Agency has indicated that rationing is only to be used in exceptional circumstances and for brief periods of time (*Louis Dreyfus Commodities Canada Ltd. v. Canadian National Railway Company*, 3 October, 2014, Letter Decision No. 2014-10-03, Case No. 14-02100 at

paras. 60–61). Rather, the arbitrator reviewed the evidence before him and crafted a performance standard that, in his view, was commercially fair and reasonable to both parties and could be achieved with respect to the crop year in question. The arbitrator contemplated unforeseen circumstances through the inclusion of the force majeure clause. Further, the arbitrator included a performance standard that contemplated some slippage on the part of the respondent in the delivery of the number of cars provided for in the agreement and prescribed when these undelivered cars were subsequently to be delivered to the appellant. It appears to me that the arbitrator adopted a more nuanced approach to the possibility that cars may not be delivered on time and in the numbers set out in the agreement and simply did not accept the respondent's proposed rationing methodology for this agreement and the crop year in question. These conclusions were based on the evidence preferred by the arbitrator and, in my view, were open to him and fell squarely within the task assigned to him by Parliament.

[34] Overall, the arbitrator considered each of the enumerated factors in section 169.37 and imposed terms that he considered commercially fair and reasonable for the parties. He was not obligated to adopt the rationing methodology proposed by the respondent and, in my view, it was reasonable for him to allow for flexibility through the performance standard and force majeure clauses.

IX. Conclusion

[35] I would allow the appeal with costs. I would set aside the decision of the Federal Court and, rendering the decision that should have been made, I would dismiss the application for judicial review with costs.

[36] The parties agreed that the appropriate amount for both the costs of the appeal and the costs of the judicial review application should be $14,000.00, all inclusive. I propose to grant costs on that basis.

"David G. Near"
J.A.

“I agree.
Johanne Gauthier J.A.”

“I agree.
Wyman W. Webb J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

AN APPEAL FROM THE ORDER OF THE HONOURABLE MR. JUSTICE O'REILLY OF THE FEDERAL COURT, DATED OCTOBER 25, 2016, DOCKET NUMBER T-1599-15.

DOCKET:	A-437-16
STYLE OF CAUSE:	LOUIS DREYFUS COMMODITIES CANADA LTD. v. CNR COMPANY
PLACE OF HEARING:	VANCOUVER, BC
DATE OF HEARING:	MARCH 13, 2018
REASONS FOR JUDGMENT BY:	NEAR J.A.
CONCURRED IN BY:	GAUTHIER J.A. WEBB J.A.
DATED:	MAY 3, 2018

APPEARANCES:

Forrest Hume Alex Hudson	FOR THE APPELLANT
Douglas C. Hodson Q.C. Kirsten MacDonald	FOR THE RESPONDENT

SOLICITORS OF RECORD:

DLA Piper (Canada) LLP Vancouver, British Columbia	FOR THE APPELLANT
MacPherson Leslie & Tyerman LLP Saskatoon, Saskatchewan	FOR THE RESPONDENT