Date: 20080403

Docket: A-220-07

Citation: 2008 FCA 123

CORAM: **DESJARDINS J.A.**
NOËL J.A.
TRUDEL J.A.

BETWEEN:

CANADIAN NATIONAL RAILWAY COMPANY

Appellant

and

CANADIAN TRANSPORTATION AGENCY

Respondent

Heard at Montréal, Quebec, on March 13, 2008.

Judgment delivered at Ottawa, Ontario, on April 3, 2008.

REASONS FOR JUDGMENT BY: NOËL J.A.

CONCURRED IN BY: DESJARDINS J.A.
TRUDEL J.A.

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REASONS FOR JUDGMENT

NOËL J.A.

[1] This is an appeal by the Canadian National Railway Company ("CN") from a decision of the Canadian Transportation Agency (the "Agency"), dated December 29, 2006 regarding CN's maximum grain revenue entitlement for the 2005-2006 crop year. Leave to appeal this decision was granted by this Court insofar as it relates to the portion of revenues which may reasonably be characterized as relating to demurrage (paragraph 150(3)(*b*) of *Canada Transportation Act*, S.C. 1996, c. 10 (the "CTA")) and the portion of intermodal revenues that properly relates to rail transport.

RELEVANT FACTS

[2] Prior to August 1, 2000, the movement of western grain, for export, from points in Western Canada to Thunder Bay and to Vancouver and Prince Rupert was regulated on the basis of maximum rates. On August 1, 2000 the rate regulation regime was replaced with the regulation of maximum annual revenues that prescribed railway companies can earn for the movement of western grain as set out in Division VI, Part III, sections 150 and 151 of the CTA.

[3] According to these provisions, the Agency must first determine the maximum revenue entitlement (the "Revenue Cap") for each prescribed railway company, from rail transportation of regulated grain for each year, ending July 31 (the "crop year"), according to the formula set out in section 151 of the CTA. The Agency must then compare the Revenue Cap to the prescribed railway company's actual revenues related to the rail transport of regulated western grain for the crop year (the "Western Grain Revenues"), taking into account allowable exclusions including that set out in respect of revenues from demurrage. If the Agency determines that a railway company's Western Grain Revenues exceed the company's Revenue Cap, the excess amounts, together with a related penalty, must be paid in accordance with the requirements set out in the *Railway Company Pay Out of Excess Revenue for the Movement of Grain Regulations*, SOR/2001-207 (the "Regulations").

[4] In this appeal, CN takes issue with the Agency's decision to decrease the amount of revenue attributable to demurrage, thereby increasing its Western Grain Revenues by a corresponding amount. CN also takes issue with the Agency's decision to increase the portion of

intermodal transport revenues attributed to rail transport – and decrease the portion attributable to road transport – thereby again increasing CN's Western Grain Revenues. The challenged increases represent in total $496,900 out of Western Grain Revenues which the Agency has established at $398,438,496 for the crop year in issue.

Demurrage

[5] While the CTA does not define "demurrage", its meaning was firmly ascertained in *Canadian Pacific Railway Company v. Canadian Transportation Agency and Canadian Wheat Board*, [2003] 4 F.C. 558 (C.A.) ("*C.P. Rail" or* "the demurrage decision"). At issue in that case was whether certain amounts charged by CP as demurrage could be held by the Agency as falling outside that description on the basis that the revenues attributable to demurrage were unreasonable (*C.P. Rail*, *supra*, para. 4). Rothstein J.A. (as he then was) identified the meaning of demurrage by referring to the following judicial statement (para. 7):

> As stated by Rand J. in *The North-West Line Elevators Association v. Canadian Pacific Railway Co.* ([1959] S.C.R. 239 at 244) demurrage charges "are concerned with the unreasonable detention of railway equipment." The parties have agreed, for the purposes of these proceedings, that demurrage could be defined as:
>
> > A charge made by the Railways for the detention of a freight car beyond the free time provided for by the applicable special arrangements tariffs and is intended as an inducement to promptly release the freight car, and alternatively, to compensate partially the Railways, should the freight car be detained beyond the free time allowance.

The Agency also defined demurrage in Decision No. 114-R-2001, rendered on March 16, 2001, which dealt with the interpretation of the new Revenue Cap regulations:

> Demurrage: is a charge to freight cars, applicable to the shipper, which typically occurs when established time limits are exceeded for the loading or unloading of the cars. It is a penalty which is intended to penalize inefficient activities beyond the carrier's control.

[6] According to paragraph 150(3)(*b*) of the CTA, revenues from demurrage are not included in the calculation of Western Grain Revenues in a given crop year:

150 (3) For the purposes of this section, a prescribed railway company's revenue for the movement of grain in a crop year shall not include	150 (3) Pour l'application du présent article, sont exclus du revenu d'une compagnie de chemin de fer régie pour le mouvement du grain au cours d'une campagne agricole :
(*a*) incentives, rebates or any similar reductions paid or allowed by the company;	*a*) les incitatifs, rabais ou réductions semblables versés ou accordés par la compagnie;
(*b*) any amount that is earned by the company and that the Agency determines is reasonable to characterize as a performance penalty or as being in respect of demurrage or for the storage of railway cars loaded with grain; or	*b*) les recettes attribuables aux amendes pour non-exécution, aux droits de stationnement et aux droits de stockage des wagons chargés de grain que l'Office estime justifié de considérer comme telles;
(*c*) compensation for running rights.	*c*) les indemnités pour les droits de circulation.

[My emphasis]

Pursuant to this provision, the Agency was called upon to determine, in the course of auditing CN's Western Grain Revenues for the crop year ending July 31, 2006, whether amounts collected by CN pursuant to a new demurrage policy implemented effective April 1, 2006 could reasonably be characterized "as being in respect of demurrage".

[7] These new demurrage charges were computed on a per car per day basis when a car was held longer than the free time allowed for unloading (a straight plan) rather than CN's previous method of using an averaging system that allowed shippers to gain credits for early unloads, which could be accumulated to offset instances where more than the free time was otherwise used. The new rules also allowed for dwell time as the demurrage "clock" did not begin to count free time until midnight (00:01) on the day after the car was made available (in contrast to the old rules whereby the demurrage clock started immediately, at the time of actual or constructive placement) but reduced the number of free days that shippers were allowed for each car unloaded from two to one. Finally, the demurrage charge per car per day for a car held after the expiry of the free time was reduced from $75 to $60.

[8] After reviewing these rules, the Agency, relying on paragraph 150(3)(*b*) of the CTA, held that a portion of the revenues collected by CN as demurrage, pursuant to this new policy, was to be included in the computation of CN's Western Grain Revenues.

Intermodal Transportation

[9] The Revenue Cap regime only applies to those revenues that relate to the movement of grain over a railway line (section 147 of the CTA). Consequently, in the case of intermodal customers (customers that require grain to be transported both by truck and train from their point of origin to their point of destination) who are charged a composite amount for the entire transport, the Agency had to determine the proportion of revenues that properly related to the rail portion of the transport (Reasons, para. 36).

[10] In order to determine the rail revenues, the Agency focused on the portion of CN's costs that arise from trucking. CN used a tariff-based methodology that estimates what CN's payments to truckers would be for the truck portion of intermodal movements. Agency staff tested this methodology and concluded that CN's estimations exceeded trucker invoiced amounts by 26.9% (Reasons, para. 38). The Agency adjusted the revenues allocated to rail transport accordingly. This had the effect of raising CN's Western Grain Revenues by an amount of $380,000 (Reasons, para. 46).

AGENCY DECISION

[11] The Agency begins its analysis by setting out the applicable provisions and the principles enunciated by this Court in *C.P. Rail, supra*, (Reasons, para. 57). In particular, it highlights the statement made by Rothstein J.A. to the effect that it may not be reasonable to characterize extreme charges as being in relation to demurrage (Reasons, para. 58). The Agency stresses in particular the fact that the "elimination of free days" would take a demurrage policy outside what can be reasonably characterized as one (Reasons, para. 68).

[12] The Agency then embarked upon an analysis of the reasonableness of CN's demurrage policy. While the Agency finds that CN's new demurrage rules are significantly stricter than CN's policies in previous years as well as those of Canadian Pacific Railway (see the comparison table at paragraph 68 of the Reasons), the Agency only takes issue with the reduction of free days from two to one, combined with the change in time at which the clock starts running. The Agency finds that the reduced free time renders CN's demurrage policy "unreasonable" (Reasons, para. 68).

[13] The Agency goes on to conclude that revenues collected pursuant to the new policy, which exceed those that would have been gathered pursuant to the prior policy, were to be added under the Revenue Cap Regime:

> [72] The Agency finds that the amounts that CN collected as grain port demurrage for crop year 2005-2006 cannot all reasonably be characterized as being in respect of demurrage pursuant to paragraph 150(3)(*b*) of the CTA. Accordingly, a portion of CN's grain port demurrage receipts will constitute revenue under the Revenue Cap Regime. That portion will be an amount equal to the difference between what CN billed shippers under its new rules less what would have been generated under the rules using the previous tariff allowance of two and one half days of total free time at port.
>
> [My emphasis]

As a result, an amount of $116,900 was added to CN's Western Grain Revenues for the crop year 2005-2006.

[14] With respect to the allocation of intermodal transport revenues, the Agency explains that in order to determine the amount of revenue that properly relates to rail transport, certain charges such as trucking charges, pick up and delivery, lifting charges, container maintenance costs, and ownership costs for CN owned containers, must be quantified and subtracted from the composite amount (Reasons, para. 36).

[15] The Agency focused its attention on pick up and delivery trucking charges (Reasons, para. 37). After conducting an audit of a sample of CN's invoices (paid by CN to Truckers) involving 55 movements and 97 truck pick up and delivery charges (Reasons, para. 38), the Agency concluded that CN's methodology for calculating revenues related to trucking exceeded invoiced amounts by 26.9%; this in contrast to the previous year's 9.5% overstatement (Reasons, para. 45). In response

to CN's explanation for this overstatement, the Agency recognized that additional amounts for empty pick up and delivery charges for the placement of containers (Reasons, para. 40) as well as fuel subsidies (Reasons, para. 42) fell outside the scope of Western Grain Revenues. However, it did not accede to CN's request that certain overhead costs related to trucking also be considered as falling outside that description (Reasons, para. 44).

POSITIONS OF THE PARTIES

[16] At the hearing of the appeal, both parties relied on the decision of the Supreme Court in *Dunsmuir v. New Brunswick*, 2008 SCC 9 ("*Dunsmuir*") – released a few days prior to the hearing – to support their respective view as to the applicable standard of review. CN argued that the applicable standard with respect to both issues remains correctness, as had been argued in its Memorandum, whereas the Agency took the position that it is entitled to the deference which the revised standard of reasonableness now imposes on a reviewing court.

[17] Applying a standard of correctness, CN asks this Court to undertake its own analysis of the demurrage issue based on its contention that the Agency wholly misconstrued the decision of this Court in *C.P. Rail, supra*. Specifically, CN contends that the Agency erred in focusing its analysis on whether CN's demurrage policy was reasonable in order to determine whether revenues were reasonably characterized as relating to demurrage (Appellant's Memorandum, paras 57, 58). This amounts to rate-regulation, a practice which, according to *C.P. Rail, supra*, is no longer authorized. Instead, CN submits that the Agency should have focused on whether the rules established a charge for the detention of a freight car beyond the free time provided for and whether the rules were

intended to induce prompt release the freight car (Appellant's Memorandum, para. 75). Had it done so, it would have concluded that the demurrage policy falls squarely within this definition.

[18] For its part, the Agency submits that its interpretation and application of paragraph 150(3)(*b*) of the CTA is reasonable. The Agency recognized the limits on its mandate, which were spelled out in *C.P. Rail, supra,* and noted that any demurrage policy that resulted in the imposition of extreme charges may fall outside of what constitutes a reasonable policy as would any demurrage policy that eliminated free days. In this case, the Agency concluded that the change relating to the number of free days was so pervasive in its impact upon shippers (effectively removed any free days) that it was not "reasonable to characterize" these revenues as being in respect of demurrage (Respondent's Memorandum, paras 56, 57).

[19] With respect to the Agency's allocation of intermodal revenues, CN submits that the Agency erred in adopting a method based on costs rather than revenues (Appellant's Memorandum, paras 99-103). According to CN, the cost method used by the Agency to segregate trucking revenues from rail revenues is not mandated by the CTA (Appellant's Memorandum, para. 107).

[20] In response, the Agency submits that it is CN that developed the methodology that would allow for "netting out" from CN's composite revenue the amounts relating to the trucking portion of the movements and advocated that the Agency accept this methodology. CN cannot now take the position that this method, which the Agency used as a proxy for actual trucker payments, ought not to form any part of the Revenue Cap determination (Respondent's Memorandum, para. 70).

ANALYSIS AND DECISION

Standard of review

[21] The crux of the demurrage issue turns on the proper construction of paragraph 150(3)(*b*) of the CTA. The question raised is the same as that which was addressed by this Court in *C.P. Rail, supra*, where it was held that the Agency's construction of paragraph 150(3)(*b*) of the CTA is subject to the standard of correctness (*C.P. Rail, supra*, paras 14-21). Subsequently, in *Council of Canadians with Disabilities v. Via Rail Canada Inc.*, 2007 SCC 15, [2007] 1 S.C.R. 650 (paras 98-100) ("*Via Rail*"), Abella J., writing for the majority of the Supreme Court Judges held that reasonableness was the appropriate standard on appeal from a decision of the Agency on a question which, although different from the one here in issue, also turned on the interpretation of the Agency's governing statute. The approach used by Abella J. in *Via Rail, supra* in order to identify the appropriate standard as well as the standard which she identified were recently applied by this Court in *Canadian Pacific Railway Company v. Canada (Canadian Transportation Agency)*, 2008 FCA 42, [2008] F.C.J. No. 175 (para. 14), a decision dealing with the Agency's interpretation of the expression "utility crossing" under section 100 of the CTA.

[22] As mentioned earlier, in a decision rendered a few days before the hearing of this appeal (*Dunsmuir, supra*), the Supreme Court revised the framework of analysis to be used by a reviewing court in identifying the standard of review. There are henceforth two standards, correctness and reasonableness. Significantly for our purposes the Supreme Court has indicated that it is not necessary to conduct an exhaustive analysis where the appropriate standard has already been determined in a satisfactory manner in a prior decision (*Dunsmuir, supra*, para. 57). At the same

time, the Supreme Court has reiterated that deference may be owed to an administrative tribunal in interpreting its own statute by reason of its particular familiarity with this legislation (*Dunsmuir, supra*, para. 54).

[23] There is no need to revisit the analysis conducted by this Court in *C.P. Rail, supra,* in order to determine the standard of review applicable to the demurrage issue. The only question which arises with respect to demurrage – as the submissions of the parties and the reasons of the Agency demonstrate – is whether the Agency properly understood and applied the reasoning set out in that case. In my respectful view, this Court is better positioned than the Agency to construe its own jurisprudence and I therefore propose to apply a standard of correctness in reviewing this aspect of the Agency's decision.

[24] The opposite conclusion is warranted with respect to the Agency's allocation of CN's intermodal revenues. CN has identified the underlying question as one involving the use by the Agency of a method of allocation that is not authorized under the CTA. However, when regard is had to the record, it becomes apparent that CN never took issue with the method used by the Agency to allocate intermodal revenues. Rather, the issue throughout has been whether according to this method, certain costs should or should not be deducted (Reasons, paras 36-47). In my view, this question is essentially factual and would call for the application of the more deferential standard henceforth identified as reasonableness.

The demurrage issue

[25] The ratio of the demurrage decision is set out in the following passage by Rothstein J.A., which the Agency quotes at paragraph 57 of its reasons:

> [t]he Agency may consider the level of charges and the revenues earned from imposition of those charges. However, its mandate is not to determine the reasonableness of the charges or revenues. It is to determine if the level of charges or the manner of imposing the charges indicates that any part of the revenues arising there from is not reasonable to be characterized as being in respect of demurrage.
>
> [My emphasis]

[26] This statement is unambiguous. The Agency is authorized to review the level of the charges or the manner of imposing them to determine if any part of the revenues arising from these charges cannot reasonably be characterized as demurrage. However, to the extent that the Agency is satisfied that it is dealing with a charge that comes within the accepted definition of demurrage (see definition of demurrage quoted at paragraph 5 of these reasons), it is not empowered to inquire into its reasonableness.

[27] Accordingly, the Agency cannot interfere with CN's calculation of revenues related to demurrage unless it finds that the charges levied by CN as demurrage are not aimed at promoting the efficient release of cars or that the charges otherwise fall outside the accepted meaning of the term demurrage. As the Court in *C.P. Rail, supra,* writes at paragraph 25:

> According to the definition of demurrage adopted by this Court, if the Agency determines that it is reasonable to characterize revenues as resulting from charges made by a railway company to induce a shipper or consignee to promptly release cars and to compensate the railway company for the detention of cars beyond the allowed free time, its jurisdiction is exhausted.

[28] The Court in the demurrage decision went on to explain by way of example the circumstances in which the Agency may properly invoke paragraph 150(3)(*b*) of the CTA. It notes, for instance, that an attempt by a prescribed railway company to impose "extreme charges" could result in revenues not reasonably characterized as demurrage (*C.P. Rail, supra,* para. 39):

> One purpose of demurrage charges is to compensate the railway company for the investment in the car, i.e. for the lost opportunity to earn revenue if the car had been promptly released. I accept that if a railway company attempted to impose extreme charges for detention of cars, it would be open to the Agency to determine that all the revenues arising from the charges could not reasonably be characterized as being in respect of demurrage.
>
> [My emphasis]

A charge could accordingly be challenged if it bore no relationship to the lost revenues which it is intended to compensate. An extreme charge would be one which can be shown to overshoot this target. As I read the decision of the Agency no such issue arises here (Reasons, para. 61 b)).

[29] The Court also endorsed by way of a further example the finding of a dissenting Member of the Agency in the decision which was under appeal to the effect that demurrage is not demurrage simply because a railway labels it as such. The dissenting member referred to the situation where free time would be eliminated altogether (*C.P. Rail, supra,* para. 26):

> I think member Keith Penner had the correct appreciation of the Agency's role in his dissenting reasons. Mr. Penner:
>
> > …
> >
> > 5. determined that demurrage is not demurrage simply because a railway labels it as such; and

> 6. provided an example of charges that could not reasonably be characterized as demurrage -- charges arising from the elimination by a railway company of free time for loading or unloading, i.e. giving the shipper or consignee no free time.
>
> [My emphasis]

[30] In justifying its intervention in the present case, the Agency placed considerable reliance on these statements with emphasis on this last example (Reasons, para. 58). According to the Agency, CN's overall reduction in free days is "tantamount to the "elimination of free days" " (Reasons, para. 68) and such an elimination takes the demurrage policy beyond what can be reasonably characterized as one (Reasons, para. 69).

[31] In assessing the propriety of the Agency's intervention, it is important to focus on the "no free day" example adopted by this Court in the demurrage decision. A so called "demurrage charge" levied with no free days would not be a charge in respect of demurrage because demurrage is defined as a charge to freight cars, applicable to the shipper, which is triggered when specified time limits for the loading or unloading of the cars are exceeded. However one might describe a charge that applies without a time limit, it is not "demurrage" within the accepted definition. Properly understood, the discussion of the Court on this point is not an invitation to the Agency to inquire into the reasonableness of a demurrage charge which comes within the accepted definition, but an example of a charge that would fall outside this definition regardless of the label placed on it by a railway company.

[32] In this case, the charges levied by CN pursuant to its new demurrage policy are contingent on cars remaining on CN's tracks beyond a specified time period. In particular CN's policy allows shippers one full day to unload, which period is extended to one day and a half when regard is had to the dwell time (Reasons, paras 62, 63). Significantly the Agency finds, as a fact, that 87% of CN's grain traffic is unloaded within this time frame (Reasons, para. 69).

[33] The Agency nevertheless questions whether the efficient unloading of the cars which this percentage illustrates can be attributed to CN's new demurrage policy (Reasons, para. 68):

> [68] The most recent changes to CN's demurrage rules become manifestly a total elimination of free days because, apart from multi-car block incentives, in the ordinary course it will become extremely difficult if not impossible for grain shippers to unload within the allotted "free day" - there are just too many variables in the transportation chain for export grains on the way to and at port that are beyond their control. Basically, it has become an incentive for unloading efficiencies at port that cannot serve its purpose because it has become so narrow in application.
>
> [My emphasis]

It further writes:

> [71] CN also suggests that quicker unload times at port are needed in order to avoid growing congestion there. In this respect, CN's unload volume of grain at Vancouver where most demurrage charges occur was 6.1 million tonnes for the 2005-2006 crop year. In 2000-2001, when the free time allowance fell to two days - from five and one half days for the previous crop year CN's volume at Vancouver was greater, at 6.5 million tonnes. CN's volumes or tariff policies, therefore, do not appear to be the sole source of congestion. In fact, it is generally accepted in the industry - by shippers, the CWB, grain elevators and other industry participants - that one of the most significant issues relating to logistical problems at port relate to car "bunching" wherein more than one train arrives at a terminal within a short time period. The Agency finds that a tightening of a demurrage policy will have little if any impact on car "bunching".
>
> [My emphasis]

[34] It is evident from these passages that the Agency is questioning the effectiveness of CN's change in policy. However, the Agency does not take issue with the fact that the policy's sole purpose is to induce the prompt release of freight cars by imposing a charge on shippers who do not load or unload cars within the allotted time.

[35] In order to justify its intervention, the Agency had to find that the charge, although labelled as a demurrage was not a demurrage. It fell short of making this finding since the evidence showed that all the elements of a demurrage were present. Rather the Agency second guessed CN's decision to alter its demurrage policy, and held that the portion of the revenues generated by the new policy was to be excluded in the computation of CN's demurrage revenues (Reasons, para. 72). In disregarding revenues which come within the four corners of the accepted definition of demurrage, based on its assessment of the effectiveness of the charges, the Agency embarked on the type of exercise which this Court held as falling outside the Agency's mandate under the current railway legislation (*C.P. Rail, supra*, paras 27-31):

> [27] Determining whether demurrage revenues are reasonable is an entirely different function. That function would require the Agency to engage in a broad assessment of whether demurrage charges or increases in demurrage charges can be justified by market and/or railway cost considerations and the effect on shippers and consignees. That type of intensive freight rate regulation is no longer applicable under current railway legislation. Even in the case of the movement of western grain by rail, where regulation is more pervasive than for other commodities or regions, the regulation of a railway company's revenues is not based on reasonableness but rather on application of a formula taking into account changes from base year figures in volume, length of haul and relevant inflation.
>
> [28] An interpretation of paragraph 150(3)(*b*) that would confer on the Agency intensive regulatory control over the reasonableness of a railway company's demurrage revenues is not in keeping with Parliament's intent to minimize regulation as expressed in

> paragraph 5(*c*) of the *Canada Transportation Act* (National Transportation Policy): (citation omitted) …
>
> [29] The regulation of rates charged by railway companies is not unknown to Parliament. Historically, during the period of intensive regulation of railway companies, the Board of Transport Commissioners for Canada was empowered to "disallow any tariff or any portion thereof that it considers to be unjust or unreasonable". See *Railway Act*, R.S.C. 1952, c. 234, s. 328. While railway companies today operate in a much more deregulated environment and the Agency does not have pervasive power to control railway rates, it is apparent that the terminology to control rates, if it intended to do so, was not unknown to Parliament. Indeed, under the current legislation, section 112, which applies to a limited number of rates established by the Agency, requires that the "rate ... be commercially fair and reasonable". While section 112 is not applicable to demurrage revenues or charges, it further indicates the type of terminology that Parliament uses when it intends there to be regulatory control over the reasonableness of a railway company's rates or revenues.
>
> [30] Had it been Parliament's intention that a railway company's demurrage charges or demurrage revenues should be subject to a reasonableness test, Parliament would have adopted well known terminology to effect that purpose. It did not do so. Rather, it adopted quite a unique word formula "... any amount ... that the Agency determines is reasonable to characterize ... as being in respect of demurrage ...". The necessary implication is that Parliament's intention was not to make demurrage charges or revenues subject to a reasonableness test.
>
> [31] Read in its ordinary and grammatical sense and in context, paragraph 150(3)(*b*) empowers the Agency to characterize amounts as being, or not being, in respect of demurrage. <u>But it does not grant the Agency the authority to determine the reasonableness of demurrage revenues.</u>
>
> [My emphasis]

[36] In my respectful view this is precisely what the Agency did in this case. Absent a finding that the demurrage charges did not come within the accepted meaning of that term or that the

charges were excessive, it was not open to the Agency to conclude that a portion of the demurrage revenues generated by CN could be disregarded pursuant to paragraph 150(3)(*b*) of the CTA.

Intermodal revenues

[37] The second issue on appeal is whether the Agency erred in calculating the portion of intermodal transportation revenues that are appropriately attributed to rail. In obtaining leave to appeal, CN framed the question on this aspect of the appeal as whether the selection by the Agency of a method of allocation based on costs rather than revenues was authorized under the CTA (specifically sections 150 and 151). However as noted earlier, CN never took issue with the method used by the Agency to segregate intermodal revenues in this case with the result that this is not an issue that was considered or addressed by the Agency in the course of its decision. In these circumstances, it was not open to CN to raise this argument on appeal. Nothing prevents CN from taking issue with the Agency's allocation method in a subsequent crop year.

[38] The remaining issue as between CN and the Agency is whether certain costs should or should not be deducted in applying the method used by the Agency to segregate intermodal revenues. This question falls outside the jurisdiction of this Court when regard is had to section 41 of the CTA which provides for a right of appeal on questions of jurisdiction and law only. It follows that CN cannot succeed with respect to this aspect of its appeal.

[39] I would therefore allow the appeal in part, set aside the decision of the Agency insofar as it relates to the demurrage charges, and remit the matter to the Agency for re-determination on the basis that no part of the demurrage charges recorded by CN according to its new demurrage policy is to be included in CN's Western Grain Revenues for the 2005-2006 crop year.

"Marc Noël"

J.A.

"I concur,
Alice Desjardins J.A."

« I agree,
Johanne Trudel J.A. »

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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