Date: 20090218

Docket: A-335-08

Citation: 2009 FCA 46

CORAM: **NOËL J.A.**
NADON J.A.
PELLETIER J.A.

BETWEEN:

CANADIAN PACIFIC RAILWAY COMPANY

Appellant

and

CANADIAN TRANSPORTATION AGENCY and THE ATTORNEY GENERAL OF CANADA

Respondents

Heard at Calgary, Alberta, on February 9, 2009.

Judgment delivered at Ottawa, Ontario, on February 18, 2009.

REASONS FOR JUDGMENT BY: PELLETIER J.A.

CONCURRED IN BY: NOËL J.A.
NADON J.A.

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REASONS FOR JUDGMENT

PELLETIER J.A.

[1] In the 2006-2007 crop year, the appellant, Canadian Pacific Railway Limited (CP), granted shippers certain incentives if they shipped grain in multi-car blocks (MCBs) and imposed certain performance penalties if the cars in those MCBs were not unloaded and released within certain specified periods. In calculating CP's "Maximum Grain Revenue Entitlement" (revenue cap) for the 2006-2007 crop year, pursuant to section 150 of the *Canada Transportation Act*, S.C. 1996, c. 10 (the Act), the Canadian Transportation Agency (the Agency) decided that the amounts paid to CP as performance penalties could not be reasonably characterized as such, and concluded that they were,

in effect, simply a reduction in the incentives otherwise offered in relation to MCBs. As a result, these amounts were included in CP's revenue for the purposes of the revenue cap calculation; had the Agency agreed that they were performance penalties, they would have been excluded from revenue for the purposes of that calculation. CP appeals to this Court from that decision, which is reported as Decision No. 655-R-2007 [the Agency's decision].

FACTS

[2] The rates that a railway charges and the terms on which it carries goods are set out in tariffs, which are prepared and published by the railways. In this case, three of these tariffs are relevant. Tariff CPRS 4310-F sets out the rates payable for the transportation of goods, described in item 350 of the same tariff (grain), from certain locations in British Columbia to Thunder Bay, Ontario, or Vancouver, British Columbia. The rate table shows a rate per tonne for a single car, so that, for example, the rate to ship a single car of grain from Armstrong, British Columbia to Thunder Bay, Ontario is $56.85 per tonne, while the rate to ship from the same car from Armstrong to Vancouver, British Columbia is $19.58 per tonne. The tariff then indicates that certain rate reductions (incentives) are available for MCBs, as follows:

> A $4.00/tonne reduction on the published rate will apply on 56-car block shipments.
>
> A $7.00/tonne reduction on the published rate will apply on 112-car block shipments.
>
> A $7.50 /tonne reduction on the published rate will apply on 112-car block shipments loaded in 10 hours.
>
> [A.B., Tab 27, p. 1]

[3] The conditions that must be met in order to qualify for the incentives are described in Tariff CPRS 4311. There are restrictions on the number of shippers, the number of facilities to which the block is to be delivered, the handling of the cars at that facility, and other conditions of similar nature. Additionally, the shipper must obtain authorization to order multiple car blocks by contacting CP's "MaxTrax Coordinator" within the time specified in the tariff. The tariff also specifies that the cars must be loaded within 10 or 24 hours, as specified by the shipper. If the specified loading time cannot be met, then certain other conditions apply:

> Customers that cannot load within these time frames must apply for a delayed lift as per Tariff 4312 item 106 to protect their incentives.
>
> Failure to advise CP within the timeframe previously published in the delayed lift tariff …will result in loss of incentive, having the loads and empties pulled, and unfulfilled orders cancelled.
>
> [A.B., Tab 26, p. 3]

[4] The last relevant tariff is Tariff CPRS 4312, specifically item 130 of that tariff, which is reproduced in full below:

> PENALTIES
> DELAYED UNLOADING OF MULTI CAR BLOCKS
>
> If cars are shipped as "multiple car block" according to Tariff CPRS 4311 – Series item 20000 but the block is not unloaded and released empty within 24 hours of actual or constructive placements, as per paragraph L {I} & P of Tariff CPRS 4311 -Series item 20000, the shipper shall pay a penalty of
>
> -$180 per car on the whole block shipped for blocks of 50-99 cars
>
> -$180 per car on the whole block shipped for blocks of 100+ cars
>
> The empty release of the block will be based on the time the last car of the shipped block is released empty.
>
> [A.B., Tab 28, p. 1]

[5] The record discloses that 99 per cent of MCB shipments in the relevant period complied with the 24-hour deadline and that the penalties attributable to those which did not amounted to some $180,000.

[6] The Agency's decision notes that the "normal" time allowed for unloading a car in non-MCB situations is 60 hours, following which a performance penalty, called demurrage, is imposed.

[7] CP's position is that the tariffs must be read together as a coherent scheme. Where a shipper obtains CP's prior authorization to ship a MCB, and complies with all the other conditions found in Tariff CPRS 4311, then it is billed for the shipment in accordance with Tariff CPRS 4310-F. If, at the destination, the facility is unable to meet the 24-hour unloading condition, the shipper continues to obtain the benefit of the incentives set out in Tariff CPRS 4310-F, but it must pay the $180 per car penalty for the entire block, as provided in Tariff CPRS 4312. CP argues that the amount billed for freight, after allowance for the incentive, is to be included in the calculation of its revenue cap, but that the $180 per car penalty is to be excluded from the calculation on the basis that it is a performance penalty, within the meaning of paragraph 150(3)(*b*) of the Act.

LEGISLATION

[8] The relevant provisions of the Act are the following:

Maximum Grain Revenue Entitlement	*Revenu admissible maximal*
Ceiling	Plafond
150. (1) A prescribed railway company's revenues, as determined by the Agency, for	150. (1) Le revenu d'une compagnie de chemin de fer régie pour le mouvement du

the movement of grain in a crop year may not exceed the company's maximum revenue entitlement for that year as determined under subsection 151(1).	grain au cours d'une campagne agricole, calculé par l'Office, ne peut excéder son revenu admissible maximal, calculé conformément au paragraphe 151(1), pour cette campagne.
Payment of excess and penalty	Remboursement et pénalité en cas d'excédent
(2) If a prescribed railway company's revenues, as determined by the Agency, for the movement of grain in a crop year exceed the company's maximum revenue entitlement for that year as determined under subsection 151(1), the company shall pay out the excess amount, and any penalty that may be specified in the regulations, in accordance with the regulations.	(2) Si le revenu d'une compagnie de chemin de fer régie pour le mouvement du grain au cours d'une campagne agricole, calculé par l'Office, excède son revenu admissible maximal, calculé conformément au paragraphe 151(1), pour cette campagne, la compagnie verse l'excédent et toute pénalité réglementaire en conformité avec les règlements.
Items not included in revenue	Exclusion
(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	(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.

THE AGENCY'S DECISION

[9] The treatment of the $180 penalty is but one issue in a much larger decision in which the Agency determined CP's revenue cap. Prior to undertaking the revenue cap determination, the Agency issued a consultation paper asking for comments from interested parties. CP objects to the

content of that paper on the basis that it demonstrates that the Agency had pre-judged the performance penalty issue. As it turns out, nothing turns on this so that nothing more need be said about it.

[10] The Agency's reasoning is found in three paragraphs, which are reproduced below:

> [90] Accepting CP's argument that the entire MCB discount should be deducted from revenue is implicitly accepting that all of the conditions of the tariff have been met – which is not the case. …
>
> [92] There are two reasons, each sufficient by itself, to lead the Agency to conclude that the amounts collected under Tariff CPRS 4312 Item 130 cannot be reasonably characterized as being in respect of a performance penalty. The first reason stems from the finding that the failure by a shipper to meet the 24-hour MCB unloading condition reflects a failure to meet one of the conditions required to obtain its MCB incentive discount, rather than a failure to meet a less stringent performance standard of 60 hours. As such, it is not a performance penalty. In other words, if the shipper's operating behaviour is incented to greatly surpass industry norms, it is hard to see by any reasonable standard that its failure to meet that special threshold is really a performance penalty. Quite simply, it is only the loss of an incentive, which in this case relates to the approximate amount of $2 per tonne.
>
> [93] The second reason to lead the Agency to conclude that it is not reasonable for amounts collected under Tariff CPRS 4312 Item 130 to be reasonably characterized as being in respect of a performance penalty stems from the fact that allowing CP to declare amounts collected under Tariff CPRS 4312 Item 130 to be performance penalties, while at the same time allowing CP to deduct from revenue the full amount related to the MCB incentives, is clearly a contradiction in treatment, which would result in a double benefit to CP and therefore potentially twice the cost to farmers who pay for the movement of grain. This manner of imposing charges and assessing revenues indicates that the "penalty" revenue is not a penalty at all. Rather, again the approximate $2 per tonne represents the loss of an incentive.

ISSUE

[11] The issue in this appeal is whether the Agency fell into reversible error when it found that the amounts charged by CP, pursuant to Tariff CPRS 4312, could not be reasonably characterized as a performance penalty, within the meaning of paragraph 150(3)(*b*).

ANALYSIS

[12] As always, the first question to be resolved is the appropriate standard of review of the Agency's decision. The decision involves the interpretation to be given to paragraph 150(3)(*b*) of the Act, the Agency's home statute. The question is a question of law, as indeed it must be since section 41 of the Act only permits appeals on questions of law or jurisdiction, and no one has suggested that this question is one of jurisdiction.

[13] This same disposition, though not the same question, was considered in *Canadian Pacific Railway Company v. Canada (Canadian Transportation Agency)*, 2003 FCA 271, [2003] 4 F.C. 558 [*Canadian Pacific, 2003*], where Rothstein J.A. (as he then was), writing for the Court, conducted a pragmatic and functional analysis and concluded that the standard of review was correctness. The question in that case concerned the Agency's determination that certain demurrage charges imposed by CP were unreasonable.

[14] Since then, the Supreme Court of Canada has further refined the question of standard of review in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] S.C.J. No. 9 [*Dunsmuir*], where it reduced the number of possible standards of review by folding the standard of patent

unreasonableness into the standard of reasonableness. In discussing the application of the resulting two standards of review, correctness and reasonableness, the Court commented at paragraph 54:

> 54 Guidance with regard to the questions that will be reviewed on a reasonableness standard can be found in the existing case law. Deference will usually result where a tribunal is interpreting its own statute or statutes closely connected to its function, with which it will have particular familiarity: *Canadian Broadcasting Corp. v. Canada (Labour Relations Board)*, [1995] 1 S.C.R. 157, at para. 48; *Toronto (City) Board of Education v. O.S.S.T.F., District 15*, [1997] 1 S.C.R. 487, at para. 39…

[15] In *Canadian National Railway Co. v. Canada (Canadian Transportation Agency)*, 2008 FCA 363, [2008] F.C.J. No. 1643, this Court revisited the question of the standard of review of the Agency's decisions in light of *Dunsmuir*, and in light of the Supreme Court's decision in *Council of Canadians with Disabilities v. VIA Rail Canada Inc*., 2007 SCC 15, [2007] 1 S.C.R. 650. It concluded that when the Agency is interpreting the Act, its decision is entitled to be reviewed on the deferential standard of reasonableness: see para. 51.

[16] It is not necessary in this case to determine whether the question in issue should be reviewed on a standard of correctness or reasonableness, as the decision of the Agency cannot stand regardless of the standard.

[17] The Agency gave two reasons for its conclusion that the amounts charged by CP under Tariff CPRS 4312 were not performance penalties. The first is:

> The first reason stems from the finding that the failure by a shipper to meet the 24-hour MCB unloading condition reflects a failure to meet one of the conditions required to obtain its MCB incentive discount, rather than a failure to meet a less stringent performance standard of 60 hours. As such, it is not a performance penalty. In other words, if the shipper's operating behaviour is incented to greatly surpass industry norms, it is hard to see by any reasonable standard that its failure to meet that special threshold is

> really a performance penalty. Quite simply, it is only the loss of an incentive, which in this case relates to the approximate amount of $2 per tonne.
>
> [A.B., Tab 2, at para. 92]

[18] The Agency's reasoning is not entirely clear, but it appears to suggest that the $180 per car penalty cannot be a performance penalty because the 24-hour requirement is so far in excess of the "industry standard" of 60 hours for unloading cars. The Agency may have had in mind the comments of Rosthstein J.A. in *Canadian Pacific, 2003* at para. 39 that:

> 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.

[19] In the same way, the Agency might well be in a position to intervene if the railway, in an attempt to artificially withdraw revenue from the revenue cap calculation, imposed performance penalties based on performance standards so high that shippers had no reasonable prospect of meeting them. But that is not the case here; the evidence is that 99 per cent of shippers were able to meet the 24-hour unloading standard.

[20] There is nothing in the record to support the conclusion that the industry norm for unloading MCBs is 60 hours. It may be that 60 hours is normally allowed for the unloading of cars subject to the single car rate, but that does not convert 60 hours into an industry standard for MCBs. By tying its analysis of the question of performance penalty to an unsupported, and therefore unreasonable, assessment of the relevant standard, the Agency came to an unreasonable conclusion which cannot stand.

[21] As this Court indicated in *Canadian Pacific Railway Company v. Canada (Canadian Transportation Agency)*, 2007 FCA 240, [2007] F.C.J. No. 878, at para. 5, "a performance penalty relates to a failure to complete an obligation". The obligation in this case was to complete the unloading of the cars in the MCB within 24 hours. Ninety-nine per cent of shippers were able to do so. It is unreasonable to attempt to undermine the legitimacy of the obligation imposed on shippers, and the penalty imposed for the failure to comply, by reference to a standard whose relevance was simply not supported by the evidence.

[22] The second ground given by the Agency for re-characterizing the amounts which CP claimed as performance penalties was that recognizing those amounts as performance penalties involved contradictory treatment, resulting in a double benefit. The double benefit was the inclusion in revenue of an amount less than the amount actually received by CP (freight plus the performance penalty) coupled with the withdrawal of the amount received as a penalty from revenue on the ground that it is a performance penalty.

[23] This is a single benefit. The amount of CP's revenue is reduced by the amount of the performance penalty. If the performance penalty is a legitimate performance penalty, the legislation gives CP the right to exclude that amount from its revenue. By doing so, CP is not surreptitiously obtaining an advantage to which it is not entitled. It is simply doing what paragraph 150(3)(*b*) allows it to do.

[24] The Act does not oblige CP to arrange its affairs so as to maximize its revenues for purposes of the revenue cap calculation. Parliament has put in place a scheme under which the railways have certain obligations and certain rights. The fact that CP could receive revenue on two accounts – one of which is to be included in the revenue cap calculation, and one which is not – does not mean that it must choose to structure its affairs so that all revenue is included in the revenue cap calculation. In this case, it is clear that the Agency regarded the scheme contained in the three relevant tariffs as a graduated incentive scheme. CP may well have been able to obtain the efficiencies it sought by structuring its incentive program to provide for graduated incentives. Instead, it chose to seek those efficiencies by resorting to a combination of incentives and penalties. The fact that CP could have proceeded by way of a graduated incentive scheme is not a reason for concluding, contrary to the legal form and effect of the relevant tariffs, that it did so.

[25] I would therefore allow the appeal, set aside the decision of the Agency insofar as it relates to the performance penalties and remit the matter to the Agency for re-determination on the basis that no part of the performance penalties is to be included in the calculation of CP's revenue cap. CP is entitled to its costs against the Canadian Transportation Agency.

"J.D. Denis Pelletier"
J.A.

"I agree.
Marc Noël J.A."

"I agree.
M. Nadon J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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