Federal Court of Appeal

Cour d'appel fédérale

**Date: 20120919**

**Docket: A-476-11**

**Citation: 2012 FCA 240**

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

**BETWEEN:**

**CANADIAN NATIONAL RAILWAY COMPANY**

**Appellant**

**and**

**CANADIAN TRANSPORTATION AGENCY and CANADIAN PACIFIC RAILWAY COMPANY**

**Respondents**

Heard at Montréal, Quebec, on September 18, 2012.

Judgment delivered at Montréal, Quebec, on September 19, 2012.

REASONS FOR JUDGMENT BY: PELLETIER J.A.

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

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## REASONS FOR JUDGMENT

**PELLETIER J.A.**

[1] The appellant, Canadian National Railways (CN) appeals from a decision of the Canadian Transportation Agency (the Agency) pursuant to s. 41 of *Canada Transportation Act*, S.C. 1996 c. 10 (the Act) which provides for appeals from decisions of the Agency on questions of law and jurisdiction with leave of the Court. The issues raised in this appeal are matters of procedural fairness which are reviewed on a standard of correctness.

[2] Over the course of a number of years and many decisions, the Agency has developed a process for administering the revenue cap scheme set out at s. 150 of the Act. In the course of doing so, it has adopted certain criteria for determining the allocation of revenue, tonnage and mileage between prescribed railways in a number of contexts, including interswitching and exchange switching (collectively "interswitching"), both of which have to do with the movement of one railway's cars by the other for a fee. In response to the Agency's request for submissions, CN proposed that the latter reconsider its treatment of interswitching revenues, tonnage and mileage on the basis that, contrary to the Agency's expectations at the time it adopted these procedures in its Decision No.114-R-2001 (the 2001 decision), the revenue from interswitching is not evenly balanced between the railways, thus disadvantaging CN in the determination of its revenue entitlement. CN submitted an accounting (in the form of a table) of the volume of interswitching revenue between itself and the Canadian Pacific Railway Company (CP) from the inception of the program to the date of the last revenue cap determination by the Agency. On its face, this table shows that CN consistently derives more revenue from interswitching than does CP: see Appeal Book, p. 105. CN made two proposals by which the apparent imbalance which it identified might be corrected.

[3] The Agency responded to CN's submissions without directly addressing the issue of the apparent imbalance in the amount of interswitching revenue. Instead, it responded to the CN's two proposals and explained why it was not prepared to pursue either of them further. With respect to CN's first proposal, that there be no allocation of interswitching revenue as between the switching carrier and the linehaul carrier, the Agency noted that it had not been provided with any new

reasons that justified reviewing the Agency's 2001 decision to the effect that interswitching revenue be included in the switching carrier's revenue and deducted from the linehaul carrier's revenue.

[4] CN's second proposal was that the mileage and tonnage for interswitched traffic be included in the calculation of tonnage and average length of haul in the formula set out at s. 151 of the Act on the basis that these operations constitute a free standing movement of grain according to the Agency's own 2001 decision. The Agency dealt with this proposal by pointing out that it had not in fact decided that each individual segment within a movement of grain from shipper to port constituted a grain movement but rather that a grain movement consisted of the sum of the eligible segments that make up the grain movement. The 2001 decision decided that the movement of grain during interswitching was an eligible segment of a grain movement, and not a free standing grain movement. Thus the premise underlying CN's proposal was inaccurate.

[5] CN alleges that the Agency's response to its submissions breached its right to procedural fairness on two grounds. First, it says, the Agency's reasons are inadequate because they do not address the substance of CN's submission, that is, the apparent imbalance between CN and CP's interswitching revenue. Secondly, CN argues that the Agency declined to pursue further consultation on the basis of an argument not previously raised and not disclosed to it prior to the decision, namely the definition of a grain movement.

[6] While CN's notice of appeal does refer to the Agency having committed an error of law, its Memorandum of Fact and Law makes it clear that this error is alleged in support of its procedural fairness argument. Indeed, no relief was sought in that respect, except for the request that "directives

be given to the Agency in the event that the matter is returned to it on grounds of procedural fairness": see CN's Memorandum of Fact and Law, at paragraph 83.

[7] As for the issue of procedural fairness, the decision under review arises in the course of an ongoing consultation process. It is not an adjudicative decision which affects the rights of the parties. Had the Agency found merit in CN's proposals, it would then have initiated a broader consultation process involving other stakeholders at the conclusion of which it would have made a policy decision which would not necessarily have incorporated CN's proposals. The nature of this process is such that the duty of procedural fairness is relatively limited. Having solicited proposals for further consultation, the Agency was required to consider those proposals. It is clear from the Agency's decision that it did so.

[8] The reasons which the Agency gave for not pursuing CN's proposals are rational and intelligible, and allow CN to understand why its proposals were not pursued further. While the Agency did not specifically address the apparent imbalance in interswitching revenue between carriers, it is apparent that it concluded that the statistics which CN provided were not a sufficient reason to review the determination of this issue which it made in its 2001 decision. That said, the determination of the revenue cap and of each railway's revenue from the movement of western grain is an annual affair. As circumstances evolve, any such decision may give rise to a remedy. Furthermore, now that the Agency has adopted materiality guidelines, CN is free to raise the issue again if it can show that the current method of allocation raises a material issue for further consultation.

[9] As for the issue of the definition of a grain movement, it was first raised by CN when it referred to the Agency's 2001 decision to support its contention that interswitching movements are grain movements for the purposes of the revenue cap formula. The Agency's response simply made the point that the determination that a particular segment of grain movement comes within the statutory definition does not amount to saying that the segment taken alone constitutes a grain movement, a term which is defined at s. 147 of the Act. There is no basis for saying that the Agency decided against further consultation on a basis not previously raised by the parties.

[10] There has been no breach of procedural fairness and as a result there is no reason for this court to intervene. Having regard to CN's failure to fully canvas the Agency's alleged error of law in its Memorandum of Fact and Law, I would leave that question to be decided in proceedings in which it is fully argued in the presence of all interested parties.

[11] As a result, the appeal will be dismissed but without costs.

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

"I agree.
Marc Noël J.A."

"I agree.
Johanne Gauthier J.A."

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

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| **DOCKET:** | A-476-11 |
| **STYLE OF CAUSE:** | Canadian National Railway Company v. Canadian Transportation Agency et al |
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| **DATED:** | September 19, 2012 |

**APPEARANCES:**

| | |
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